ANNEX B

Annex B contains English translations of three decisions issued in 1948 and 1949 by the Criminal Division of the German Supreme Court of the British Occupied Zone (*P and Others*, *R Case*, and *H Case*) and one decision issued in 1950 by the Dutch Special Court of Cassation (*In re Pilz*). These cases involve charges of crimes against humanity in which the alleged victims were members of the military.

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P and Others
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[217] **52. 1. The Nazi control of the justice system could have triggered crimes against humanity committed in accordance with the rules governing judicial process. The Nazi discipline of terror within the German Armed Forces could have had the same effect. Even acts of aggression within the German Armed Forces can be crimes against humanity. The inhumane content of a terrorist punishment or disciplinary action within the German Armed Forces.**

2. Criminal judges can commit a crime against humanity through their judgment-rendering actions, even if they consider their judgment to be the law, in which case there is no wilful perversion of justice according to Art. 336 of the German Criminal Code.

3. Only those judges who voted for a terror penalty as part of a panel can be considered as having acted causally. Causation by representatives of the prosecution and advisors in a court martial ratification procedure is an issue of fact.

4. If the confidentiality of deliberation has already been violated by another co-accused judge who gave a statement to the investigating judge, he can be questioned as a witness about it. The underlying principle of Article 252 of the Code of Criminal Procedure does not prohibit it.

5. Regarding the internal (subjective) elements of a crime against humanity. Even a perpetrator who failed to recognise the injustice and immorality of his act is always responsible because he could have and should have recognised it.

Allied Control Council Act 10 II 1c; German Criminal Code Art. 336; Judiciary Act Art. 193; Code of Criminal Procedure Art. 252.

Criminal Division Judgment of 7 December 1948 g. P. u. a. StS 11/48.

I. Jury Court Hamburg.

[218] Statement of Reasons:

On 8 May 1945, in Geltinger Bay, court martial proceedings of a motor torpedo boat *Schnellbootwaffe* took place on board of the Buea torpedo boat convoying ship against four marine soldiers aged between 20 and 23 charged with desertion. On the night from 5 to 6 May 1945, the four soldiers secretly left their unit in order to cross the nearby Danish-German border without permission and reach their homeland from there. However, they were captured by the Danes in the early morning of the 6th of May and taken back to their unit. Three of the four soldiers were sentenced to death during a court martial. The death penalties were carried out on board of the Buea on 10 May 1945 by a firing squad.

The accused P., H., B., F. and von D. participated in the proceedings. As the leader of the motor torpedo boat and the supreme judge of the court martial, P. ordered the convening of the court martial, upheld the verdict and ordered the execution. H. was the presiding judge

of the court martial; B. and F. participated as associate judges, von D. as a representative of the prosecution. The five accused were charged with committing a crime against humanity through their participation in court martial proceedings (Art. II 1c of the Allied Control Council Act no. 10). The same charges were brought against the accused H. and B. and also against Sch. and S. because they influenced P. to uphold the death sentences and have them be carried out.

The Jury Court sentenced the accused H. and S. to two years in prison for crimes against humanity, H. only for the second one of the charges raised against him, while acquitting the rest of the accused.

Both accused filed an appeal against this judgment, as did the Public Prosecutor's Office against the entire judgment except with regard to the accused S. The appeal claims violations of material criminal law.

I.

The contested judgment not only misunderstands the elements of the crime against humanity in various aspects, it also misses the actual degrading content of what the three executes marines were accused of.

During the Nazi time, the highest principle for the formation and application of the law, i.e., the criminal code, was the thesis that the law was something that benefits the German nation, whereby the well-being of the nation was interpreted in nationalist-racist terms as well as in terms of party politics and military imperialism. The protection of power through deterrence was the highest purpose of punishment. [218-219] In this sense the party and the state controlled the practice of criminal law, which was supposed to manifest itself primarily in a strict determination of sentences whenever the political power of the national socialist state demanded it. The national socialist state regarded the armed forces as one of the most vital tools of its power, especially after the start of the war, since its existence was dependant on the victory of German weapons. Special importance was placed on developing military trust and discipline in national socialist terms. The jury court most likely had to establish due to its official capacity and could determine that the control of the justice system by the Nazis with the goal of merciless punishment extended to court martials as well; p. 132 of this act includes a secret order of the High Command of the Navy dated 5 December 1944 regarding disobedience and false reporting that points in this direction; also the request of the Public Prosecutor's Office at the main trial to question the former navy court martial justice Dr. K. about the practice of navy court martials, especially at the end of the war—in itself only a request for evidence discovery—must have reminded the jury court of its o f f i c i a l d u t y to determine the truth.

What happened to the three marines c a n fall within the framework of this Nazi ideology and practice of punishment. They left their unit in Denmark on the night from 5 to 6 May 1945 to return home, help their families there and avoid becoming prisoners of war. The partial capitulation, which took effect on the morning of 5 May 1945 and applied to their unit as well, was announced shortly before. Even though concluded only with the British supreme commander and at first referring only to a spatially determined part of the German Armed Forces, for the affected formations the capitulation still meant an unconditional and final laying down of arms. With that act, those formations lost their role as units of the German Armed Forces forever, even though some German leaders continued to toy with the idea of alternative wartime use. But this did not mean that the disciplinary power and the power of punishment of military superiors on the one hand and the duty to obey of soldiers on the other hand expired as a result. One could even claim that the material and formal wartime criminal law was still in effect until those relations could be clarified. On the other hand, the jury court

obviously failed to take into consideration the possibility that in terms of civil law capitulation can also signify the end of the state of war. [219-220] Whether one can then talk about desertion in the sense of Art. 69 of the Military Criminal Code, especially one committed "on the battlefield" (Art. 70 p. 2, 9, item 1 of the Military Criminal Code) in case of departure from the unit, was highly questionable, even with regard to the objective elements of crime; for these formations the war was practically over, they could no longer serve the German military for the protection of which the law made desertion punishable. In addition, Art. 69 of the Military Criminal Code demands that the internal (subjective) elements of crime include, among other things, the intention to avoid defence duty permanently or avoid military duty for the duration of the war. That kind of intention assumes that the perpetrator believed himself to be subject to military duty for some time to come. It is highly unlikely that in those circumstances the soldiers had that belief. At most, this case was strictly borderline as far as the legal elements of crime are concerned; furthermore, the individual elements of guilt as desertion were extremely limited, a fact that does not required further elaboration. However, the sentence imposed for this act situated at the outermost limit of the elements of crime and at the lowest level of guilt was not one of the mildest sentences available within the framework of sentences, but the maximum sentence available under the law, i.e., the death sentence. Furthermore, the sentence was carried out at once and only after the Reich war flag was taken down and after full capitulation came into effect, i.e., on 10 May 1945, which made the wrongful conviction irreparable despite the fact that a completely different interpretation of circumstances and the law was soon to be expected. All of this was done to preserve discipline in the unit and prevent other unauthorised departures after this apparently first incident.

The entire course of action bears characteristics of Nazi-controlled terror justice. To achieve the highest possible deterrence the maximum possible sentence was rendered for a small crime in the first arbitrary instance of breaking out of the established order, although the disproportion between guilt and punishment is already unsupportable. Such practice of rendering sentences represents an attack on human dignity of the victims. To be convicted of a felony by the state, not because you deserved that punishment through your own guilt but because the state found in you the best possible tool to deter others from committing the same offence through an example of merciless treatment, is intolerable degradation of the victim to a mere means to an end and therefore a depersonalisation, objectification of a human being. If this happens with grave consequences for the victim and as a result of an existing tyranny, it also represents an attack on the non-personal worth of *humanitas* and humanity itself as its bearers and protectors, which means that the objective elements of the crime against humanity according to the Allied Control Council Act 10 have been fulfilled. If deterrence itself is to serve a purpose which in itself can be approved of, regarded as indifferent or disapproved of, can be important for the punishment deserved for crimes against humanity, but is not necessarily significant for the elements of the crime itself. [220-221] The means used to this end—in this case the conviction of three only mildly responsible people to death and the execution of this sentence—are what make the offence inhumane.

But the jury court should have also investigated in more detail the purpose in pursuit of which the accused acted, namely to maintain discipline. Having an army and waging a war is unthinkable without discipline. Even after partial capitulation and especially after total capitulation German military leaders were required to maintain order and obedience within their units. The jury court should have clarified how the accused came about doing something for this purpose that was absurd and a crime if we deny those circumstances. On the motor torpedo boat discipline was not significantly compromised, commanders had their soldiers firmly under control. The fact that a few soldiers wanted to go home in violation of the order, had nothing to do with the strictly prohibited self-sinking of vessels. Their desertion failed

immediately and of itself. There was no need to intervene with the strictest punishment available. Sacrificing a human life to prevent a possible risk to discipline was even more senseless because the people whose order was at the centre of this case, still and now again had value outside the military, for their families, at their workplace and in the peacetime rebuilding of the country, as individuals and as members of the peacetime community.

It would be easy to look for an explanation of what happened within the Nazi system, primarily in its obedience mechanism created by terror. In such a system, the individual, his thinking, feelings and values, his life and his ideals did not mean anything. All of those things had significance only within a misunderstood concept of a state and community, for the purpose of which each individual had to be fully formed. If opposing forces which did not succumb to seduction were at work within an individual, they were to be "brought in line" or "eradicated" with terror and violence.

The German army with its overemphasis on discipline and esprit de corps was clearly particularly susceptible to such a system. Once it fell victim to it, soldiers became mere ordnance at the disposal of their leadership just like all other ordnance. The same way that weapons that were no longer functioning were exploited or melted into raw material for new weapons, soldiers whose opposition to order was dangerous for the "spirit" of the unit could also be "eradicated" to restore discipline within the unit. A person with his skills and his life was reduced to an object that has served its very last purpose. This was the meaning and the essence of the Nazi discipline of terror. [221-222] If there were officers who treated the soldiers in this manner, it was not necessarily because they were Nazis based on their beliefs, but because they were mere intermediaries in the command system of the Nazis.

Even if it is true that in this case injustice occurred as a result of the Nazi system, that does not say anything about the fact that Hitler was already dead by then and that the Nazi state was on its last legs. When the accused S. announced to his soldiers on 5 May 1945 that the idea of national socialism would continue to exist he was right to the extent that it could have still been effective at the time of the offence...

II.

The inhumane treatment endured by the three soldiers thus has its actual centre not in the initiation of court martial proceedings, nor in the highly lacking conduct of the actual trial that decided about a human life—as important as this is for determining the subjective elements of the crime—and also not in the desertion conviction itself; the centre is in the fact of the rendered and executed death sentence. For external elements of the crime is thus crucial which of the accused jointly caused this outcome with his offensive behaviour. Although the Allied Control Council Act 10 II 2 expanded the circle of participants in crimes against humanity, the law will clearly not punish anyone who has not at least jointly caused the inhumane treatment.

As for the judges of the court martial, i.e., the accused H., B. and F., only those among them contributed to the proceedings up to the rendering of the verdict who voted for at least one death sentence. Since at least two of the three judges had to be in favour of the death penalty in each case, only one judge can be eliminated in each case as not having acted causally at all, as long as he voted against the death penalty for the men sentenced to death each time. Significant indications for this are the statements given by H. and B. after the rendering of the judgment against the supreme judge P., in which H. said that the verdict has to be upheld and carried out, B. declared that he believed the death sentence to be appropriate for two of the accused, but not the third. There were no objections to evaluating facts at a new trial that the accused would produce themselves about the consultations and the

vote they held at the time. In military criminal proceedings, the process of consulting and voting by everyone in attendance must be kept confidential, as in any other legal proceedings (see Art. 193 of the Judiciary Act). This has double importance. [222-223] Each decision, even the one rendered by a panel of judges, must be seen as the decision of the court in its entirety, and not be undermined by the fact that the outvoted minority possibly had a different opinion. Confidentiality of deliberation is an important tool for protecting the independence of judges in cases of consultation and voting within a panel of judges. These principles can take a step back in the more important interest of justice when a crime was committed t h r o u g h consulting and voting, and when it needs to be clarified which member of the panel made himself culpable in this way. The question whether a judge is entitled or even required to disclosure in such a case, and whether he should afterwards be questioned as an accused, co-accused or a witness, does not have to be decided here. But if he d i d disclose details, that means that the confidentiality of deliberation has already been breached and no longer needs to be protected, which also means it cannot be used to halt the course of justice. If at a new trial one of the accused wanted to plead to the confidentiality of deliberation in connection with his previous statements before the investigating judge, this would not prevent the evaluation of his previous statements; the legal principle of Art. 252 of the Code of Criminal Procedure is already eliminated because it only refers to witnesses at the main trial.

Whether or not von D., the representative of the prosecution at the court martial, contributed to the rendering of the death sentence by demanding the death sentence, is an issue of fact. What is crucial is whether or not he brought at least one of the judges who later voted for the death penalty to the conclusion, participated in bringing him to the conclusion, made it easier for him to reach the conclusion or encouraged him in that conclusion through his presentation of facts and his filing of criminal charges.

That the accused P. was jointly responsible for the killing of three marines by upholding the verdict and ordering the execution of the sentence in his capacity as the supreme judge, requires no further elaboration. But also t h o s e accused who either formed this decision in him, encouraged him or made it easier for him to reach this decision, became jointly responsible for the killing. The jury court established that P. would have acted differently if he had received different counsel. H. advised him to uphold and carry out the sentence and contrary to his duty failed to point out the shortcomings of the procedure, other objections to the verdict or the human aspect of desertion. This can mean concurrent causation. According to the findings of the jury court, P. had special trust in the accused B.. The fact that when consulted, B. declared that he considered two of the three death sentences justified, makes it illogical and legally erroneous to deny the causality of this statement for P's decision on the grounds of B. saying nothing about upholding the verdict; this circumstance does not exclude causality; for the issue of objective causality the will to cause something is insignificant. [223-224] With regard to the accused Sch. however, the judgment of the jury court confirms in a legally appropriate manner the contributing effect of the statements he made after the judgment had been rendered when he was consulted about the status of discipline on the motor torpedo boat and the necessity of intervention. The determination of contribution by S. is also legally beyond reproach.

III.

With regard to the subjective elements of the crime against humanity, there must first of all exist a wilful intent to commit an offence, which consists of the recognition and the will to contribute to the killing of at least one marine. It is self-evident that wilful intent existed in each judge who voted for o n e death penalty, in P. and in those accused he consulted who

advised him to uphold and execute the verdict. The fact that H. and S. supposedly only negligently failed to express reservations about the proceedings and the verdict, this can be eliminated for the purpose of the elements of the crime. Whether the representative of the prosecution, von D., and those accused who did not explicitly advise upholding and executing the judgment when P. consulted them, also showed sufficient wilful intent is an issue of fact. As the Supreme Court already ruled multiple times, conditional intent is enough for a wilful intent to cause harm. It is thus enough if the accused in question counted on the possibility and was in agreement with the fact that his conduct could contribute to the killing being successful. One will have to examine with special care whether or not wilful intent to cause harm was also present in case of the accused Sch., since according to the present knowledge, he was neither present during the court martial nor had seen the written justification of the verdict and the disputed verdict says nothing about whether his statement about his view of the condition of discipline had anything to do with the incidents of desertion.

For the internal elements of crime to be met it is further necessary that the wilful intent to cause harm includes the fact that the harm is connected with a system of despotism and violence. In this regard conditional intent is also sufficient. As shown, in this case this system can have the form of a criminal justice system unaffected by ethical considerations and completely determined by the purpose of deterrence, as it was endorsed and partly systematically practiced during the Nazi rule. An accused who was jointly responsible for the killing of a marine is thus guilty of a crime against humanity if he knew or considered possible and approved of the death penalty being declared in this case, although it was not justified in the slightest, given the limited extent of personal culpability, and this happened for the sake of deterrence as a principle and in keeping with the diabolic system of the time. When the representative of the prosecution erroneously believed that the death penalty was prescribed by law, this does not eliminate him from being jointly responsible because the inhumanity of the act is based on brutal sentencing without the legal necessity. [225] But even if the legality of what was being imposed on the victims was unknown to one or the other accused, the internal elements of the crime can still be met if the wilful intent to cause harm included the factor that because of a system of discipline of terror, i.e. because it was ordered or common, people should be sacrificed to preserve the spirit of order in the unit in a similar manner as one exploits a thing for a goal. In this context, the jointly responsible individual did not have to know that this kind of treatment was inhumane and therefore unjust for the victims, that it proceeded from Nazi ideology and was part of the Nazi rule of violence and that he himself was acting unjustly. In his mind the perpetrator did not have to be a national socialist or a monster. As important as this can be for sentencing, it is insignificant for the legal elements of the crime. The Supreme Court has declared over and over again that it is not necessary for the perpetrator to consider his doing and its consequences as unjust, it is sufficient for him to be familiar with this kind of value judgement, a prerequisite that is met as a rule. When it comes to causality of an inhumane act, nobody can exculpate himself by saying that he did not realise it, that he was blind to it. He must answer for such blindness because for another human being he attacked and for humanity itself it involved the highest and the deepest individual and human values which were considered nothing by a system that existed at the time the crime was committed.

The trial judge had to check if these prerequisites of the internal elements of the crime were met for each of the accused who meet the objective requirements of the crime and who acted with wilful intent to cause harm. With regard to the individuals involved in the court martial, this did not happen for reasons that required further investigation. The reasons for denying P's guilt are legally wrong. It had to be investigated whether he was familiar with the

circumstances that made the solution of the case inhumane at the time when he upheld the verdict and ordered the execution of the sentence. Careful evaluation and consultation of others do not absolve him of guilt but point to the fact that he freely chose the outcome and must therefore be held accountable. Inhumane mindset and inhumane motives are not necessary for the internal elements of the crime to be met. P. is not free of guilt because he believed that discipline in his unit was significantly compromised and that because of that he had to intervene and was otherwise a beloved, exemplary and caring soldier and leader who showed understanding and mildness in his capacity as a supreme judge and who internally rejected national socialism. [225-226] All of this does not exclude the fact that in this case he knowingly sacrificed people who were minimally guilty to terrorist functional justice or military discipline, even if behind the purpose of deterrence there was a justifiable thought of meeting the requirements of capitulation and sparing the civilian population the bad consequences.

The jury court mainly denied P's guilt because he was not up to the task due to his lack of human maturity and wisdom because of this he erred frivolously out of human inadequacy about something that moral law required of him in those circumstances. This involves the following misconceptions:

1. With regard to the facts: Nobody and nothing—not even the conditions of the capitulation or the warnings of Admiral Dönitz—demanded of P. to preserve discipline with inhumane acts. The inhumanity of the death sentence was plainly obvious. P. was 40 years old, which means that he was fully responsible under criminal law since the age of 22, he had a high position in command, had been a supreme judge for years and acted within the framework of his official capacity as a supreme judge. The other co-accused are all younger than him, 7-15 years younger, they were under his orders and subordinated to him, and yet the jury court did not give them credit of being humanly inadequate, especially not H. and S. who were convicted for mere advice-giving while P. decided that they were responsible.

2. With regard to legality: Notwithstanding the fact that the factual basis for acquitting P. is questionable, the jury court also erroneously believed that as a rule being wrong about moral law does not absolve perpetrators of crimes against humanity. If the jury court means that the reason for P.'s erroneous decision was that he "failed to realise what moral law required of him in the given circumstances," in the context of reasons for the judgment, their conclusion can only be understood to the extent that the denial of his guilt was carried by reasoning that P. was not up to the task due to his lacking human maturity and wisdom and that he made a mistake about what moral law dictates due to his human inadequacy. This mistake was not made frivolously and is therefore not reproachable in terms of criminal law. But it is precisely this kind of mistake that can absolve someone the least under criminal law; still the idea of how unremarkable a criminal law error is finds its justification precisely in the fact that the criminal code as a rule encompasses only such offences that already run against moral law, and that everyone is expected to follow those principles in their conduct. Everyone must be familiar with the principles of moral law. Those who cross its boundaries in error are not without guilt under criminal law.

The denial of guilt of B. and Sch. is also based on the erroneous interpretation of subjective elements of the crime against humanity. [226-227] In their case, however, the guilt for advising the supreme judge is confirmed with reasons that do not meet the aforementioned internal elements of crime. In the case of the accused H., the conclusion that he wanted to exempt himself as quickly as possible from what he felt was an unpleasant duty is not enough. And in the case of the accused S., the conclusion that he made snappy and insensitive statements, that he was a typical representative of national socialism and that he

neglected his humane duty out of a callous heart, are also insufficient. It is possible that in both of those cases the right thing was meant but not expressed.

IV.

The jury court decided that a criminal judge cannot commit a crime against humanity by rendering a cruel verdict with a maximum penalty because in the interest of independence and personal inviolability of a judge, his prosecution under criminal law under Art. 336 of the German Criminal Code is limited to cases of premeditated perversion of justice, and there can be no statutory perversion of justice when the imposed sentence falls within the legal framework of sentences. If we said yes to this issue, that would mean the end of all independent administration of justice. This standpoint is legally amiss.

The idea of safeguarding the independence of criminal justice during Nazi rule, especially its independence from Nazi ideology and Nazi control of the justice system by allowing the inhumanity of a judgment born of this system to go unpunished, is completely indefensible. On the contrary, such a punishment is likely to restore and ensure the administration of justice that makes decisions only on the basis of the law and justice, independent of any influence by political leaders and in this way justifies the necessary public trust in the independence of judges.

The question whether at the time premeditated perversion of justice could have been committed by rendering an excessive punishment w i t h i n the framework of the law, was not even an issue to be decided since the jury court established, in a legally irreproachable manner, that there was no such premeditation on the part of the judges. Because of that, the judges who voted for the death penalty, must have considered their doing to be the law.

The actual degrading content of what the judges did to their victims according to the charges does not consist of them n e g l i g e n t l y perverting the course of justice but in deliberately using the law for the purpose of o b j e c t i v e inhumane treatment of the victims. If they failed to see the inhumanity and injustice of their doing in a culpable manner, this does not affect the premeditated character of the offence. [227-228] It is not because of the n e g l i g e n t l y erroneous application of the law that the judges have to be punished—there are definitely objections to this that have been pointed out by the jury court—they should be punished because of the p r e m e d i t a t e d inhumane act under the culpable misjudgement of the law. The misjudgement of the degrading character of the act is what misled the jury court. There can be no discussion of a judge having to expect punishment in the future every time he negligently applies the law the wrong way, which would make him uncertain and hesitant in doing his job; the only thing we can approve of would be of a judge having to expect punishment today if he committed a crime against humanity by passing a criminal judgment by misjudging the law in a culpable way. For a judge performing his duty faithfully in a country where the rule of law is intact this is a very distant possibility.

When judges misused their power to commit inhumane acts during a period when public life was dominated by violence and despotism in the spirit of or in keeping with the order of that system, that is one of the most dangerous and insupportable forms of this type of crime. It would make no sense to exempt precisely those judges from the identification and punishment of perpetrators of crimes against humanity because they were judges and thus required to render their judgment independently. This kind of exemption is nowhere to be found in the Allied Control Council Act 10. There is not a single instance of the courts of occupying powers interpreting the law in such a way; quite the opposite, during the Nuremberg Justice Trial the accused Rothaug was convicted of precisely those kinds of crimes against humanity that he committed by passing judgments as a criminal judge.

If there are no legal objections to punishing judges for crimes against humanity, this is especially true of representatives of the prosecution. The fact that the jury court failed to convict, i.e., that it acquitted the accused H., B., F. and von D. of all responsibility for what they did during court martial proceedings on the basis of such objections was therefore legally wrong.

V.

Individual explanations in the appeal arguments for H. and S. also give cause to the following observations. What they did clearly does not represent "an act against civilian population" in the sense of Art. 1c of the Allied Control Council Act 10 II. However, anyone who considers the explicitly stated model character of the legal precedent and of groups of precedents, cannot at all believe that actions among soldiers cannot represent crimes against humanity. An isolated one-time excessive act would not be a crime against humanity according to the legal definition of the term. It has already been explained that the criminal offence in question c a n belong to the system and the massive number of crimes committed during Nazi rule. As for the elements of the crime, it is unimportant whether the act supported or helped maintain the Nazi rule of terror, or whether the premeditation of perpetrators went along with it. [228-229] We do not have to figure out which form of participation conforms to joint responsibility for a crime against humanity according to German law since pursuant to Art. II 2 of the law e v e r y form of joint responsibility means that anyone guilty of a crime against humanity should be punished per se.

R Case
27 July 1948
Decisions in Criminal Cases
of the Supreme Court for the British Zone,
Vol. 1 (W de Gruyter, Berlin, 1949), 45-49

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[45] **12. 1. In case of denunciations, the requirements of the internal (subjective) elements of the crime against humanity are only met when the denunciator at least recognises the possibility and approves of the fact (conditional intent) that on the basis of the report the victim will be treated arbitrarily rather than in accordance with the rule of law.**

2. The Control Council Act 10 II 1c must in itself be interpreted. Possible consequences related to a crimes against humanity conviction in denazification proceedings are irrelevant for the rule of law interpretation.

3. According to the Control Council Act 10 II 1c, a criminal offence must always be described as a crime in the verdict, using the wording of the law. It is not a crime in the technical sense of Art. 1 of the German Criminal Code.

4. The three-part division of Art. 1 of the German Criminal Code is ruled out for the application of the Control Council Act 10.

Allied Control Council Act 10 II 1c, Art. 1 of the German Criminal Code.

Criminal Division Judgment of 27 July 1948 against R. StS 19/48.

I. Hamburg Regional Court.
II. Hamburg Higher Regional Court.

[46] Statement of Reasons:

The accused, 40 years of age, independent master glazier from Hamburg, married, two children, no previous convictions, party member since 1937, NSKK [National Socialised Motorised Corps]. Member since September 1939, in the end Under Field Sergeant, during the war until February 1945 non-commissioned officer's rank, otherwise without political office, in March 1944 in Hamburg during a tram ride he reprimanded drunken witness W. who was cursing loudly in front of other passengers while wearing a uniform of a non-commissioned officer and among other things said the following: "If you hear the noise of the engines above Germany, they are German aircraft, but if enemy aircraft ever come, my name will be Meier. Now his name is Meier, the name of this pig-idiot." "Just go to this D. (District leader of the NSDAP [National Socialist German Workers' Party] party in Hamburg), you will see sausages and hams over there. There is no leadership any more, only thugs and pigs." He also used such swearwords as "thugs" and "dogs" on the same occasion. When reprimanded, W. turned on the accused, called him a skiver and lazybones and declared that when he, the accused, was conscripted he would destroy him. He became more and more furious, finally stood up and pulled out his bayonet. At a later tram stop he unsuccessfully attempted to drag the accused off the tram. As established by the judgment, W. was himself a party member and a member of the Nazi stormtroops since 1932. Because of this, the accused knew him from sight. Two days after the incident he learned W's name and described the

incident to his NSKK storm leader, who reminded him of his right to file a complaint. After that the accused reported the aforementioned statements in writing to the District Leader D. and asked him to confront W. with it. As a result of this report, W. was arrested in mid-April 1944 on the Eastern Front, brought back to Germany and charged with and convicted of undermining the military strength of the country on 2 September 1944 in Berlin. The verdict was not upheld by the supreme judge because it was too mild, there was a new trial and in January 1945 W. was sentenced by the Army Central Court to five years in jail and the loss of five civil rights. He notes that this judgment was also reversed as being too mild and that finally a "military summary court" in Bernau asked for a death penalty for him, which could no longer be imposed due to the Russian occupation. When he tried to escape from Bernau he was beaten and hit by metal rods and has still not recovered from the injuries sustained in this way. The accused was twice questioned as a witness against W. and has made a statement against him, at the latest in Berlin, in which he described him as being drunk at the time of the offence.

Based on these findings, the accused was sentenced to a fine of 6,000 RM [Reichsmark] for a misdemeanour against humanity or alternatively to 60 days in prison.

[46-47] ..... An appeal of this decision rightfully claims insufficient findings regarding the internal (subjective) side of the crime. In this respect in the case of denunciations no specific perpetrator type or an inhumane disposition of the perpetrator is required. What is necessary and sufficient is that the offensive behaviour of the perpetrator occurred consciously and willingly, or at least in agreement with someone else, and furthermore, that the perpetrator, through his actions, wanted to deliver the victim to forces that do not observe the rule of law or that he at least accepted that (see StS 3/48 and 5/48). In this regard, the contested judgment establishes that the accused wanted satisfaction for the insult, but also had the conditional intent "to harm W. politically." Furthermore, the accused knew "that D. would not take these statements peacefully given the situation in Germany at the time." With this the mens rea requirements are not fully met. The judgment does not show what the criminal division thought about the aforementioned two findings—the only one about the subjective elements of the crime. There is no doubt that the report and the witness statements of the accused were conscious and deliberate. It remains unclear, however, which consequences he caused with those in the opinion of the criminal division. The appeal claims that as a party member who had an argument with another party member, the accused was only supposed to contact party organisations and exclude courts. That is the only thing he did and only to receive satisfaction. In contrast, the criminal division established that in addition to that the accused also wanted to politically harm party member W. However, this only meets the mens rea requirements if it is supposed to mean that the accused delivered the witness to the uncontrollable power mechanism of the party and the state, and at least with the conditional intent that he would be treated arbitrarily. If, however, the criminal division only wanted to show that the accused only caused party action against W. in order to compromise his position within the NSDAP or its organisations, then the requirements of mens rea in keeping with the Control Council Act 10 II 1c are not met. An internal party conflict between party members vying for rank and reputation within the NSDAP is unremarkable for the elements of the crime of this provision, as long as it remains limited to a party conflict. It can become objectively and subjectively relevant if it gives rise to the consequences which meet the requirements of the objective elements of the crime according to the Control Council Act 10 II 1c, and if the perpetrator—at least conditionally—also desired or accepted this further consequence beyond the party action. Negligence however is not enough (see StS 15/48).

The contested judgment is therefore not tenable. The criminal division will have to establish more details about the subjective elements of the crime and further investigate whether and to what extent the actions of the accused also violate German criminal law (see StS 6/48 of 4 May 1948).

[47-48] The appeal filed by the office of the Public Prosecutor claims a violation of the Controlled Council Act 10 II 1c and Art. 1 of the German Criminal Code based on the abstract approach to the three-part division of the offences. Referring to the adjudication of the Higher Regional Court of Hamburg and Niethammer's deliberations (German Law Journal 1947 p. 100) it feels aggrieved by the fact that the accused was not convicted of a crime, as the upper limit of punishment under the Control Council Act 10 would require, but according to the imposed sentence, of a misdemeanour against humanity. The appeal is admissible and as a result, justified.

The Control Council Act 10 II 1c is a criminal law. The legal consequence frequently used in crimes against humanity convictions must therefore be eliminated as the angle of interpretation, namely that the those convicted in denazification proceedings pursuant to the Control Council directive 38 and MRVO No. 79 were considered or could be considered the main culprits. This legal consequence of conviction is not a punishment in the sense of the Control Council Act 10 II 1c. It is based on the aforementioned provisions outside the criminal law, which cannot be considered in the interpretation of the Control Council Act 10. This could unmistakably cause hardships. As a rule, only stark injustice justifies acceptance of a crime against humanity (see the objective elements of crime of the supra-individual effects of the offence). The extent of participation in such an offence can have a more limited injustice content in an individual case, as the broad punishment framework of the Control Council Act 10 II 1c shows, even such a limited content that it seems unreasonable to regard someone who was convicted in such a way per see, that is above the group of lesser offenders and offenders, as the main culprit. However, the Senate was not able to consider this consequence in interpreting the elements of the crime under the Control Council Act 10 II 1c, only point out those possible hardships. In addition, the interpretation that a criminal offence could also be a misdemeanour according to the Control Council Act 10 II 1c, would also not exclude the interpretation of the VO no. 79 that all those perpetrators who meet the elements of the crime under the Control Council Act 10 II 1c through their culpability, either in the form of a crime or a misdemeanour, are also subject to category I series no. 5 of the VO no. 79. The principle of equality before the law does not oppose this interpretation because it only requires the same consequences under criminal law for the same culpable conduct, while any legal consequences that fall outside the criminal law can always be considered when determining a sentence.

A criminal offence under the Control Council Act 10 II 1c must always be described as a crime using the wording of the law, albeit as a crime in a non-technical sense. [48-49] In the fundamental ruling StS 1/48 of 20 May 1948, the Senate explained that the elements of crime of the Control Council Act 10 II 1c are defined through terms crimes against humanity, atrocities and offences, which constitute its material basis and which themselves are further defined through other legal examples that are not exhaustive. The Senate used this legal foundation, as required by the general version of the principles of those elements of crime, to work out significant objective elements of the crime against humanity in the aforementioned ruling and in other judgments (see StS 3/48 and 8/48): the necessary correlation between the offence and the tyranny of national socialist rule, the further circumstance that the offence hurt the victim badly, and finally the supra-individual effects of the offence (see in this connection StS 26/48). If in accordance with this the concept of a crime against humanity belongs to the foundations of the legal elements of the crime, it becomes clear that an inhumane act as a rule involves grave injustice, even though the broad framework of

punishments and the special definition of a perpetrator of the Control Council Act 10 II 1c show that not all crimes against humanity should be punished with equally strict punishments.

This does not mean that an offence against the Control Council Act 10 II 1c is a crime in the technical sense of the law according to Art. 1 of the German Criminal Code (see StS 1/48). In this context the expression "crime" is a completely non-technical term that constitutes the basis of the developed elements of crime of the Control Council Act 10 II 1c. The three-part division of Art. 1 of the German Criminal Code cannot be applied to Control Council Act 10 II 1c. This makes the previous adjudication of the Senat consistent with the definition of attempt and perpetrator under the Control Council Act 10 (see StS 3/48, 5/48, 15/48). According to this, under Control Council Act 10 II 1c, every criminal offence must be described as a crime in the verdict, both in the guilty verdict and in the statement of reasons (= crime = criminal offence).

H Case
18 October 1949
Decisions in Criminal Cases
of the Supreme Court for the British Zone,
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[231] **45. 1. Art. 103 p. 2 of the Federal Constitution does not oppose the application of the Control Council Law no. 10.**

2. A crime against humanity does not have the character of a crime punishable by international law if it is committed by Germans against Germans.

3. When applying the Control Council Law no. 10 only the principles that can be inferred from the law itself are valid. The principles of natural law, however, provide a moral and legal justification for the Control Council Law no. 10.

4. A degradation of adequate gravity in the sense of Art. II 1c of the Control Council Law no. 10 has a supra-individual effect that affects humanity as a whole if it is based on a connection with the national socialist system of despotism and violence, i.e., on a violation of basic principles of human co-existence. A "humanitarian intervention" is not a necessary prerequisite.

5. On external (objective) and internal (subjective) elements of a crime against humanity committed by the sentencing activities of judges.

Federal Constitution Art. 103, p. 2; Control Council Law no. 10 Art. II 1c.

Judgment of the Criminal Division of 18 October 1949 against H. StS 309/49.

I. Kiel Jury Court.

[232] Statement of reasons:

The prosecution acquitted the accused of a crime against humanity. The appeal filed by the Public Prosecutor's Office is justified.

On 26 January 1944, a U-boat naval court-martial sentenced Sub-Lieutenant K to death for continued undermining of the war effort and to a year in jail for wiretapping foreign radio senders. The sentence was carried out on 12 May 1944. On 28 March 1944 another court-martial imposed a death sentence, a prison term and a fine on a Lieutenant Commander d. R. Dr. G. for activities undermining the war effort, disobedience on the battlefield and a currency offence. In an act of mercy Hitler commuted his death sentence and prison term to 10 years in jail and assigned G. to a probation battalion while suspending the execution of his sentence; he survived the war in that battalion. The accused participated in both sentencing procedures as the chief judge and voted for the death sentence.

During the legal evaluation of the facts of this case the Jury Court examined whether Art. II 1c of the Control Council Law no. 10 applies to this case and rightly assumed that that the prohibition of ex post facto laws contained in former Art. 2 of the Criminal Code and in Art. 116 of the Weimar Constitution, which was restored during national socialist times after

the breakthrough of occupying powers and confirmed with Art. 103, p. 2 of the Federal Constitution, does not oppose it. The Jury Court finds the justification of this standpoint in the fact that crimes against humanity represent a violation of the laws of nature and of international laws, which have always been "prohibited and punishable" and "given only a threat of punishment" in the Control Council Law no. 10. This characterisation of the crime against humanity as a crime under international law that deviates from the legal practice of the OGH [Supreme Court] could have led to the incorrect interpretation of the Control Council Law no. 10 that must be further elaborated. Because of this we need to refer to the Supreme Court decision OGHSt. Vol. 1, pages 1 and 4, in this context. [232-233] What the Control Council Law no. 10 makes punishable as a crime against humanity was already punishable at the time the crime was committed in the opinion of all moral people but remained unpunished because the national socialist state allowed even such crimes to be committed by its bodies and supporters. Already at that time, punishing this injustice was a constitutional duty. A later attempt to remedy this neglect of duty through retroactive punishment complies with a commandment of justice and legal security. A German judge serves justice and legal security if he applies the Control Council Law no. 10 which is constitutionally binding for him.

We can agree with the starting point of the Jury Court insofar as it claims that the principles of natural law only provide the legal and moral justification for the Control Council Law no. 10. With regard to the rest, when applying this law, only those principles can be considered valid that can be inferred from the law itself, as the Supreme Court has recognised in all of its rulings. Because of this it counters the objection, along with the Jury Court, that as long as we are dealing with the crimes committed by Germans against Germans, we should oppose the view of the Control Council Law no. 10 referring to moral and international law with a so-called positivist view.

The elements of a crime against humanity are present if the perpetrator violated a person's human right in a manner that affects the foundations of human co-existence through his conscious and intentional offensive behaviour connected to the national socialist rule of violence and despotism. The Jury Court deviates from these requirements of the crime against humanity only by demanding that the prosecution be for p o l i t i c a l reasons instead of asking for the offensive behaviour to be connected to the national socialist rule of violence and despotism. In this way it misunderstands that such a prosecution only represents a s u b - c a s e of the aforementioned offence developed by the Supreme Court in the course of its legal practice, and that the m o t i v e of the perpetrator does not matter (see OGH rulings, Vol. 1, pp. 17, 189, 225 and 262).

Furthermore, the Jury Court takes the s u p r a - i n d i v i d u a l e f f e c t of the harm required by the Supreme Court for granted only when human conscience is appalled in the sense of "humanitarian intervention," as discussed in professional literature. On the one hand, this requires too much, on the other, too little. [233-234] Whether an act provokes world conscience and sparks an intervention, depends primarily on educating nations about such incidents and in itself says nothing about the degree of unlawfulness. A further requirement for such an intervention would be the will to intervene, which also does not need to be influenced by the gravity of the offence to be effective. In most cases, these requirements will not be met. It is nonetheless conceivable that even individual offences that violate principles of human co-existence can meet these requirements due to their extraordinary reprehensibility, even if the governments of countries where they are committed did not make the prosecution of dissenters into a program. The Control Council Law no. 10 will obviously not apply in such cases. According to its sense and purpose, it is more directed against the planned oppression and prosecution committed arbitrarily and violently by the national socialist state against everybody they did not like for whatever reason, especially if they did

not blindly follow its goals as compliant instruments. If such reprehensible goals and methods are elevated to a system of state policy, as was the case in the Third Reich, this alone challenges world opinion and thus touches humanity without it being much dependent on individual cases within the overall system of prosecution. Their correlation with the described national socialist system of violence and despotism already has this supra-individual effect in cases of adequate gravity of offence, because it is based on a violation of important principles of human co-existence. In other words, the supra-individual effect is not dependent on "humanitarian intervention" whose initiation or omission is determined by random circumstances, rather than the offence and its consequences.

Because of these legally incorrect considerations the Jury Court evaluated the established facts of the case partly incorrectly, and partly neglected to thoroughly clarify and examine the case. Because of that the contested judgment must be repealed.

[235] With regard to K case: According to the findings of the Jury Court, in March 1943, when taking over a U-boat, K, an outstandingly evaluated and successful U-boat commander, ordered the removal of a Fuhrer's picture from the wall of the mess using the following words: "Take this down, we are not practicing idolatry here!" On two war patrols later on, he frequently made derogatory remarks about the government and the National Socialist German Workers' Party; declared that only the fall of Hitler and his party could bring peace and cultural uplifting to the German nation; described the dissolution of the Fuhrer state under Hitler by a military dictatorship as necessary and soon to be expected; noted that he no longer believed in the final victory due to the technical superiority of enemy forces; called Hitler an insane utopian who had provoked the war; disparagingly criticised national socialist propaganda and expressed other opinions of a similar nature. Because of these essentially accurate statements K was sentenced to death by a naval court-martial for undermining the war effort under Art. 5 p. 1 of the KSSVO [Wartime Special Penal Code].

This death sentence caused criminal harm to K in the sense of Art. II 1c of the Control Council Law no. 10 because it is unbearably severe considering all purposes of the punishment and unthinkable as a normal case under the conditions of the rule of law. After the fall of Stalingrad, Germany's military situation was hopeless. Every person not brainwashed by wartime propaganda was able to recognise this. As the Jury Court established, from this moment on even the accused had doubts about the victory. The devastating defeats that the German army had to endure after 1943 in all theatres of war, the failure of U-boats caused by the technical superiority of enemy forces, the constantly increasing material strength of the Allies all made the upcoming military collapse of the Third Reich more and more imminent. Because of this, it seems highly unlikely that when the judgment was rendered at the end of January 1944, the so-called defeatist remarks could have still been relevant for the outcome of the war given the hopeless war situation. [235-236] Despite of that the Senate believed that in the opinion of the accused, Commander K's conduct fulfilled the requirements of the elements of crime under Art. 5 of the KSSVO. The court martial still should not have sent him to death. His guilt and the dangers of his actions, if they even existed at the time, were far from being sufficient for that. As it has been established, K was a flawless officer and particularly aware of his responsibility for the lives of the crew on his vessel. His actions were neither dishonourable nor reprehensible. He was discussing issues that deeply affected the fate of each individual and about which every spiritually alert person was thinking at the time, and he did so in a small circle of friends. He expressed political views that were in line with his convictions and factually partly accurate. By doing so he was exercising his right of free speech that everyone is entitled to. As the Jury Court points out, the pressure that U-boat crews were exposed to at that time bordered on unbearable. If K expressed accurate ideas about the leadership of the country and the

outcome of the war in that kind of situation, that is humanely understandable. According to the findings of the Jury Court, the court martial also believed that K did not do this to undermine the war effort and established only conditional intent. Because of that, based on the outcome of the main trial, the representative of the prosecution only asked for a prison sentence. That alone should have been enough for the court martial to avoid the death sentence, even when considering the national socialist conditions of the time. That was necessary for another reason as well. As the Jury Court established on the basis of extensive evidence examination, at the time the judgment was rendered, despite numerous attempts by the "leadership," the national socialist system of terror did not yet generally seize control of the naval justice system. In cases of minor gravity, naval court-martials as a rule imposed prison sentences for acts undermining the war effort. A typical case demanded the existence of direct intent to undermine the war effort. The death sentence was only imposed in particularly serious cases. [236-237] According to this general practice, K's case with its conditional intent was even less serious than a typical case. If the more serious typical cases led only to a prison sentence, a particularly mild prison sentence should have been imposed on K, possibly a prison sentence that is only permissible under Art. 5 of the KSSVO. The fact that the court martial sentenced him to death despite these circumstances means that he was a victim of an obviously grave injustice which fulfils the requirements of criminal harm.

The Jury Court also recognised this accurately; in this context it concluded as follows: "It would have definitely been an unbearable neglect of human dignity and human rights if K. was sentenced to death only for his political statements, especially his attacks on Hitler." However, it believed the case should not be considered "only from this angle." Through his political controversy, K fully undermined his authority as a commanding officer and thereby endangered the operational readiness of his vessel during patrol activities and the lives of the entire crew. In those circumstances, the court was unable to conclude that the imposition of the death sentence was inhumane in the sense of the Control Council Law no. 10.

That conclusion of the Jury Court does not do justice to the facts of the case. The Senate must assume that according to the findings of the Jury Court K's statements must have had some consequences that indicate a troublesome loss of discipline. K's conduct supposedly undermined the operational preparedness of the U-boat and in this way endangered the lives of the entire crew. However, it was legally wrong for the trial judge to blame these consequences on K's statements because evidence shows that the crew stood by their commander while the officers refused to carry out his orders. K may have acted unwise and impractically when exercising his right of free speech during his U-boat's patrol trips. [237-238] But it made more sense to hold his officers responsible for the order disruption if they refused the necessary subordination to their superior due to their national socialist beliefs. But that remains to be seen. However, despite the general risk to the U-boat and the crew, which K's conduct brought about in the opinion of the Jury Court, nothing bad actually occurred. Because of this, the passing of the death sentence remains intolerably severe given what K did, even when viewed from the angle of the Jury Court. As a result, it represents criminal harm in the sense of the Control Council Law no. 10.

It was inflicted on K objectively, as well as in connection with the national socialist rule of violence and despotism. In this context the Jury Court only examined whether the accused allowed himself to be guided by political considerations and found this not to be the case.is standpoint is legally wrong; because, as noted at the beginning, the motive that made the accused act the way he did is not relevant, only whether the offensive behaviour that the judgment brings into correlation with the national socialist system actually had its place in that despotic system. The findings of the Jury Court leave no doubt about this being the case objectively.

According to them, witness Dr. N. who, as a member of the army, participated in the 2nd patrol trip for scientific reasons, tried to describe the military confusion on the U-boat during the court martial while bypassing political disagreements. As the chief judge the accused decided not to discuss this and instead questioned the witness about K's political statements. The Jury Court finds it to be self-evident that the accused did not want to examine witness Dr. N. about the military situation because as a medical officer and a member of the army he was a lay person in the navy. The issue whether there is discipline within a unit or not can be answered by any lay person of average talent. [238-239] This was even more true of a medical officer of the army who was discussing a situation in the navy. Because military discipline, which mainly consists of acting in keeping with the orders, was the same in all branches of the Germany army. In any case, if the accused did not consider Dr. N an expert, he could have asked expert officers he had just examined about it, if he wanted to attach importance to it. That the officers themselves had every reason not to talk about it, which is the opinion of the Jury Court, may be true. But this did not absolve the accused of his duty to obtain more information if he believed the issue to be important. The fact that the accused deliberately chose not to investigate the military side of the matter, makes us believe that the political content of K's criticism, i.e., the rejection of national socialism, was most important for the court martial. The written reasons for the decision confirm this, because to deny that the case involves a minor offence and thus to justify the death sentence, the accused stated in those reasons that in K's case his liberal tendencies nurtured in German Youth surfaced again due to the setbacks of the year 1943, and that his statements "which he could not refrain from even in front of the image of the Fuhrer" "partly had a character of high treason." Because of this, only a connection with the despotic system could have provided the necessary amplitude for the death sentence.
(Will be explained in more detail)

With regard to Case G.: The Jury Court assumed that despite his limited personal guilt G was sentenced to death only for reasons of deterrence, found in that an unjustified depersonalisation and debasement of the victim and because of it described the judgment as inhumanly severe. As the context of the statement of reasons shows, the trial judge had the right opinion about this. Only his formulation is confusing. The criminal harm done to the victim does not need to be inhumane; Art. II 1c of the Control Council Law no. 10 speaks only of inhumane actions, not of such an effect on the victim, even though in most cases both are present. [239-240] Inhumanity, which the aforementioned rule wants to define, is not only predicated on the severity of consequences of a certain behaviour but primarily on the fact that that behaviour stood in correlation with the national socialist rule of terror and that the perpetrator was aware of it. Criminal harm exists already when the imposed sentence is unbearably high considering all objects of punishment and unthinkable as a normal case in a country with a rule of law under the same circumstances.

There is no doubt that these requirements were met in the case in question, as it has already been established and as the Jury Court correctly concluded. In 1943, G, who had been a member of a high naval staff in Paris since 1942, obtained two ID cards from a French government agency in Vichy through a Belgium called W, whom he befriended and who worked for the SD and posed as a Rexist and a representative of a Flemish - National Socialist newspaper. G paid him 1,000 RM for the cards. The cards were supposed to be for himself and for his wife who worked for the DAF in Paris. G's defence that the Jury Court obtained from the judgment of the court martial, consisted of claims that he intended to use the cards to escape possible imprisonment or be reunited with his family once all opportunities for military engagement had ceased; he wanted to disappear in the masses if the German cause lost in France due to a Communist rebellion. In the statement of reasons he

wrote the accused does not say whether the court martial believed G's defence. In any case, the court martial did n o t find that G obtained the cards to prepare for desertion.

G was sentenced to death on 28 March 1944 for obtaining the cards and the accused presided over the hearing applying Art. 5, p. 1 of the KSSVO. [240-241] The accused explained the undermining of the war effort as follows: "G had to... take into account and took into account that W would not keep quiet about the IDs but would talk about it to his acquaintances and family members. It further had to be understood that German soldiers and civilians would learn about this matter in an indirect way. G was also aware of this danger but did not let himself be dissuaded from his plan by that."

In connection with the conclusions of the court martial, the Jury Court rightly points out that G's "act" b a r e l y meets the m i n i m u m requirements of the elements of the crime. The possibility that other Germans would find out about the procurement of ID cards, was very limited; because both G. and W. had every reason to keep the matter secret so as not to put themselves in danger. It is even less likely that G accepted the possibility as part of his intent that Germans could also find out about the matter from W. As a matter of fact, Germans found out about the procurement of ID cards only in the course of the proceedings initiated against G."

The Jury Court further notes that according to the statement of reasons and the defence of the accused the court martial rendered the death sentence in the present trial for reasons of d e t e r r e n c e and concludes that as a matter of fact the danger of other officers and crews obtaining French identification documents h a r d l y existed.

The fact that under the described circumstances the Jury Court found that criminal harm was inflicted on the victim in the sense of Art. II 1c of the Control Council Law no. 10 by the rendering of the death sentence must be approved without reservations.

However, this still does not mean the accused is guilty of a crime against humanity. The elements of that crime are only present if the vote of the accused in favour of the death sentence was, to his knowledge, connected to the national socialist rule of violence and despotism. His other activities, his beliefs and his entire personality are only clues in this sense. The same is true of the general position of the naval justice system at the time, which the Jury Court investigated in detail. [241-242] It is highly possible that a judge would decide in keeping with Nazi ideology in one case although he was otherwise beyond reproach in this respect. Conversely, the accused could have been free of such thoughts when making the decision about G. Because of this, each individual case must be carefully examined. The Jury Court must examine the facts of the case once again as the previous examination remained incomplete due to the fact that the starting point of the Jury Court, as shown at the beginning, was legally incorrectly conceived. Because of that the Jury Court will have to discuss the following:

Before the accused dealt with G's matter, another court martial had to rule on the same criminal complaint. It found that there was no undermining of the war effort and only established disobedience on the battlefield, or rather a violation of a "Fuhrer's order" according to which interaction of officers with foreign citizens was undesirable. This court martial sentenced G to four months and two weeks in prison for the same f a c t s , albeit from a different standpoint, including a currency offence, although f o r m a l l y the death sentence would also have been permissible for disobedience on the battlefield. Since the Supreme Judge did not confirm this judgment, the matter came up for another trial before the accused. Already the application of the KSSVO, which was only possible in a very broad, at the time repeatedly deprecated interpretation of the characteristic "public" in the sense of "substitute public," an interpretation that made allowances for the "bringing forward" of culpability in the sense of a failed moral criminal law desired by national socialism, can point to the correlation between the passing of the judgment and the rule of terror of the times. This is

especially true of the unusual difference between the imposed sentences. The comment of the Jury Court that the first court martial was sympathetic towards G does not explain the stark opposition in the judgment of the same act by two different court martials, if both of them only wanted to deal with the m i l i t a r y facts of the case. [242-243] The Jury Court will have to thoroughly examine which m i l i t a r y views led to this much stricter opinion in the accused and explain it in detail. In this context, in its statement of reasons, the Jury Court points to a comment by the accused that G's conduct had an "unsurpassable discipline- and mood-harming effect on every unprejudiced German." In this way the court obviously wanted to state the military view that led the accused to impose a death sentence. But it is not enough.

On the one hand, the inaccuracy of this comment by the accused is obvious; the possibility that other Germans would find out about the procurement of identity cards hardly existed, as the Jury Court already established. No severe punishment, let alone a death sentence, was necessary for reasons of military d i s c i p l i n e . Even though no military reasons for a death sentence existed, it is very likely that it was determined by the national socialist lines of thinking.

In this context the following needs to be pointed out: A judgment that contains an intolerably severe punishment, can be explained by a mere surge in male discipline and does n o t have to represent an act of national socialist despotism. Disciplinary excesses happen in all armies of the world; they are after all unavoidable. They were also conceivable in the German army of Hitler's time, without n e c e s s a r i l y having to be rooted in national socialist lines of thinking. It is therefore incorrect for the appeal of the StA to try to deduce a correlation with the national socialist system already from the fact that the German army, particularly during the war, served the purpose of helping this regime remain in power. The police and the military are instruments of power in every state. A minimum of discipline is necessary for every military formation. This is true of all states, even the national socialist ones. Preservation of discipline, in some cases even with rigorous methods, is therefore still not necessarily an outgrowth of national socialist terror. [243-244] Only a planned and systematic heightening of standards of male discipline to an excessive level and a related use of soldiers as mere ordnance, their degradation into an object important for the war is one of the essential features of national socialism. The standpoint of deterrence that the accused consciously placed into the foreground cannot justify the passing of the death sentence, even in the opinion of the Jury Court. In this context it would have made sense to check whether a correlation with the despotic rule could have already been established, especially since the trial judge himself noticed the striking disproportion between guilt and punishment. Whether deterrence should fulfil a purpose that is in itself worth condoning is unimportant for the elements of the crime itself. In this case, however, the victim received a punishment, not because he deserved it for his guilt, but because others had to be deterred from the f a r - f e t c h e d possibility of doing the same through an example of merciless treatment. The complete depersonalisation of the victim in particular suggests the necessary connection. When it tries to determine the m i l i t a r y views for the passing of the death sentence through the accused at a new trial, the Jury Court will still have to examine whether the excess as described so far could have still been influenced by national socialism.

In G's case only a prison sentence was possible according to the general practice of naval court-martials. The Jury Court will therefore have to clarify why the accused deviated from that practice.

According to the findings of the Jury Court, when trying to deny that the case involved a minor offence in the statement of reasons, the accused stated the following in addition to making a comment about the "unsurpassable discipline- and mood-changing effect:" "By obtaining ID cards G i n t e r n a l l y violated the oath of loyalty he made to his

Fuhrer and his people. As long as he believed in final victory, he was prepared to engage militarily. But when he became doubtful in his beliefs, he began looking for a good way to jump the ship." [244-245] This interpretation of G's actions fails to consider the limited amount of guilt and gravity of the offence and with its zealous and exaggerated expression points to a punishment for an opinion and thus to an application of principles inherent to national socialism. It is this that indicates the acceptance of a connection between the death sentence and the national socialist system in particular. On the other hand, the accused convincingly explained how he came to the decision that an officer whose record of service was beyond reproach could be sentenced to death on the basis of facts as established at the time also because he had "internally broken the oath of loyalty to his Fuhrer." It is precisely the attempt to make a person's internal position the subject of criminal proceedings what signifies national socialism, which did not even recognise the freedom of thought.

When evaluating the circumstances within the naval system of justice at the time the Jury Court came to a conclusion that most naval judges were guided in their decisions by military arguments, adding that court martial judge M often stated during proceedings that he observes the people to see if they give the impression of being the "revolutionary type" and eradicates those. The judgment further states that "the accused also must have been guided by similar thoughts when he imposed a death sentence on G." The form of this sentence does not clearly say whether the Jury Court believed that the accused was guided by such thoughts or whether it only wanted to express an assumption that it was. In case of the former the connection between the death sentence and the national socialist despotic rule is established. This would no longer be a surge in military discipline which the Jury Court believed to be possible; because G, against whom these deliberation were directed, had no intention to violate male discipline. In that case the accused could only have expected him to participate in a political overthrow, although there was no factual basis for this according to what has been established so far. [245-246] Destruction of people because the only seem suspicious, because they perhaps turned against the national socialist rule once without ever having done anything in this context, in other words "extermination" for the sake of opposing political "beliefs" is a particular characteristic of national socialist attitudes. If the accused voted for the death sentence out of this belief then there is no doubt that a connection between the judgment and the national socialist system existed. Because of this the Jury Court must make a firm decision about this.

Because the accused jointly caused serious adversity for G by voting in favour of the death sentence with others and because he did so consciously and willingly, for the internal (subjective) elements of crime to be met it is further necessary that he was aware of the connection between the death sentence and the system of violence and tyranny. This would have been the case if he knew or believed it to be possible and agreed that a death sentence should be imposed in this case although it was in no way deserved due to the limited amount of personal guilt, and that this was to happen for the sake of deterrence based on the principles and in keeping with the system and the evil spirit of the times (see OGHSt, Vol. 1, pp. 217 and 224).

Should the Jury Court establish at a new trial on the basis of examining these circumstances that the death sentence was connected to the rule of tyranny of national socialism, there can be no doubt that the accused was aware of this fact. As a legally educated chief judge he must have been aware of the facts that form this connection, since they pertain to the attitude of the court martial and thereby also the accused himself in this case. This is especially true of the statement of reasons he wrote. But it is up to the appeals judge to establish these facts.

The decision corresponds to Attorney General's request.

In re Pilz

No. 681

SPECIAL COURT OF CASSATION,

5 July 1950 (Mrs. Prof. Dr. Verzijl, Veegens,

Prof. Kernkamp, Mouton; Vice-Adm. Vos), 1209-1211

[1209]

Can a Dutch soldier commit a war crime or a crime against humanity against a soldier in the Dutch military (and against an underage Dutch youth who did not lose his Dutch citizenship when he joined the German Army)? Inapplicability of the L.O.R. and the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick.

(B.B.S. Art. 27a)

Following the appeal of O. van J. of The Hague Court, Special Criminal Division, *the appellant* of Cassation against the judgement of The Hague Court, Special Criminal Division, of 21 December 1949, whereby the Court in respect of the initiated prosecution of Fritz Georg Hermann Pilz, doctor, resident of Hildesheim (Germany), decided that it did not have jurisdiction in the case.

Special Court of Cassation, etc.:

Regarding the means of cassation of the *appellant*, proposed in writing, reads as follows:

According to this judgment, Art. 6 of the Charter associated with the London Agreement of 8 August 1945 has been violated or misapplied;

Apart from the otherwise important question whether there are sufficient grounds to believe that an individual against whom a war crime or a crime against humanity was committed, is a Dutchman who is serving or has been serving in the German 'Weermacht', it is clear that the person referred to—considering his age—has not lost his Dutch nationality, which means that the protection provided to occupiers by international laws also applied to him.

Furthermore, an even more extensive issue can be raised whether or not also a person who lost his original nationality without becoming a German, should be granted the same protection.

Moreover, the most common question arises whether this supra-national protection should also apply to compatriots of an occupier, at least insofar as they violate international rules outside their own territory with respect to their compatriots. [1209-1210]

In my view, the concept of civilian population, referred to in Art. 5 under b and c of the Charter associated with the London Agreement of 8 August 1945 has been interpreted too narrowly by the Special Criminal Division in the verdict of 21 December, as the individual in question kept his Dutch nationality although he was considered a German soldier and therefore continued to belong to Dutch civilian population.

According to their opinion, anyone who does not count directly as a member of the war-waging or occupying power, belongs to the civilian population, thus also the people who have chosen the side of the enemy, unless they voluntarily acquire the citizenship of the enemy.

Once important international legal provisions are applied to an usurping war-wager or occupier, the content and form of those protective provisions must be interpreted as completely as possible and extended as widely as possible, whereby in my opinion, the limit of that protection should be the question whether the person for whose benefit the supranational law has been violated, belongs to the nation waging the war or the occupier.

In addition it can be said—very generally—that if the occupier deliberately withholds possible medical assistance from a person who has been wounded by the occupier, as a result of which he/she dies, this constitutes a crime against humanity. This crime is just as much present if a person who has been wounded by the occupier for good reason is intentionally killed, without any reasonably acceptable reason.

In my opinion, the judgment should be annulled and the matter sent back to the Special Criminal Division, since it has jurisdiction in this case;

The acting A.-F. has been heard on behalf of P.-F. in his claim for the annulment of the summons, subs. under appeal of *the appellant* to set aside the judgement and to return the case to the Special Criminal Division of The Hague Court.

With regard to the introductory subpoena for the *appelant* Pilz, the following has been established: That in the period from May 1940 – May 1945, when the Netherlands was at war with Germany, having the rank of Hauptsturmführer or at least some rank, and being a physician in the German army, he acted in violation of the laws and customs of war and in violation of humanity;

1e. has prevented medical and/or other aid or assistance provided by a doctor and a medical orderly, to a person who has been wounded by a firearm of the occupier;

2e. has ordered or commissioned a subordinate, thereby abusing his authority as a superior, to kill a person who has been wounded by a firearm of the occupier. Because of this order or commission, this subordinate, who was in German military service, acted in violation of the laws and customs of war and in violation of humanity and fired from a firearm in the direction of the person in question, as a result of which that person was hit and wounded in such a way that he died, or has at least as a superior allowed his subordinate to kill a person who has been wounded by the firearms of the occupier, whereby this subordinate acted in violation of the laws and customs of war and in violation of humanity in his presence without him doing anything to prevent that, and used a firearm to fire in the direction of the person in question, thereby hitting him and wounding him in such a way that he died as a result.

With regard to the remedies for den O. van J:

Together with the Court, the Council considers that Dutch judges would have jurisdiction in this case if *the appelant,* who was in military service of the enemy, committed a war crime;

Therefore it is necessary to ascertain whether the indictment includes a war crime, or, in other words, whether the laws of war were violated by the acts of *the appellant.*

The WOL are not violated since the 3rd section of the regulations includes rules concerning military authority in the territory of the enemy state. Art. 146 in particular contains a standard norm that provides international legal protection to persons who were supposed to receive protection under the laws of war, i.e., the inhabitants of a territory occupied by the enemy. Without this provision these inhabitants would be at the mercy of the occupier's whim.

This protection does not extend to members of the occupying forces whose legal status is not subject to an international agreement but is governed by the internal laws of the occupying power.

In this case, the Court has determined that the wounded person belonged to the army of an occupying power and his nationality was therefore irrelevant as by entering into the military service of the occupying power he has withdrawn from the protection of international law and placed himself under the laws of the occupying power.

Also, the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of 27 July 1929, which does not protect those who were in the armies in the field, does not apply as this agreement only provides protection to members of enemy armed forces.

[1210-1211] Withholding medical aid and letting a physician kill a wounded person, if proven, are horrific crimes that violate all humanitarian principles and the calling of a physician. However, in this case, the crimes are not war crimes, but rather crimes within the internal domain of German jurisdiction.

Also, the acts do not constitute crimes against humanity, since the victim was not part of the civilian population in occupied territory. The acts can also not be regarded as forming a part of a system of persecution based on political beliefs, race or religion.

Therefore, the Dutch judges have no jurisdiction;

The appeal of the prosecutor is rejected.