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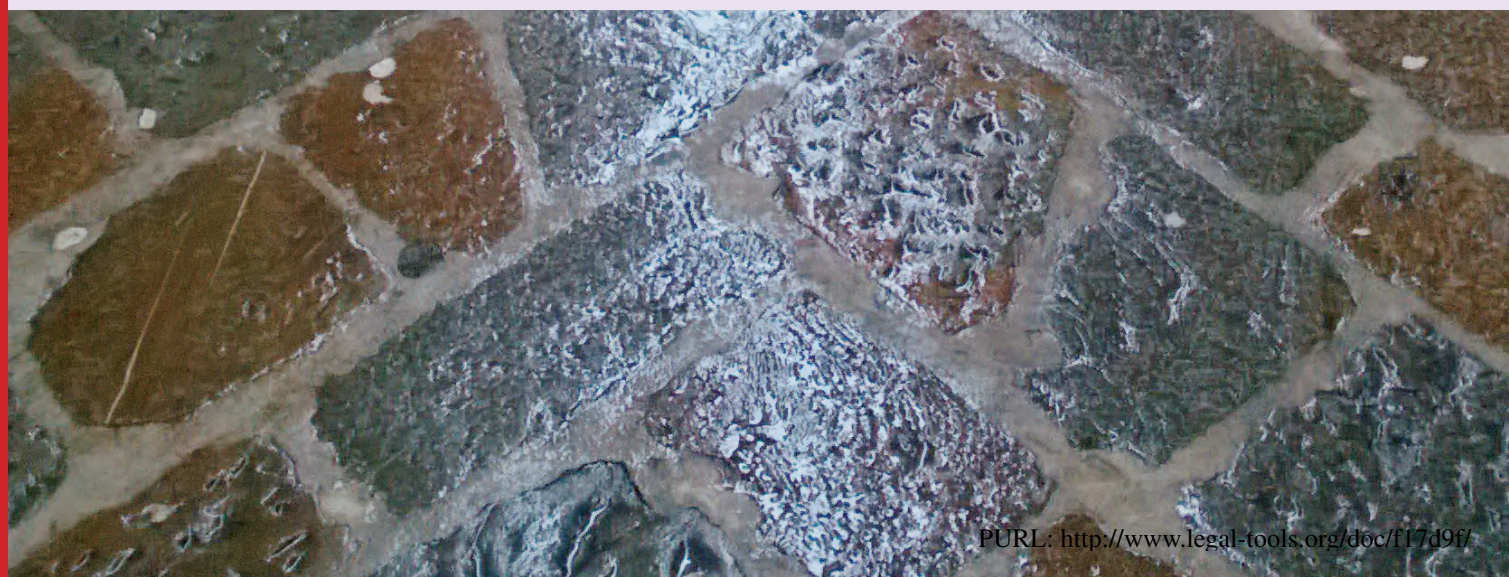

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An "Indispensable Component of the Elimination of Fascism": War Crimes Trials and International Criminal Law in the German Democratic Republic

Moritz Vormbaum*

33.1. Introduction

The prosecution of crimes committed under the National Socialist ('Nazi') regime was a matter of great importance for the political leadership of the German Democratic Republic ('GDR' or 'East Germany'). During the time of occupation by the Soviet Union, and in the years that followed the foundation of the GDR in particular, a large number of trials for war crimes and other mass crimes committed in the Third Reich were held. These trials saw the application of international criminal law by the East German courts. In the legislative arena, the GDR had already in the 1950s referred to international law as a source when creating new regulations in the field of criminal law. In 1968, when the GDR enacted a new penal code, it even included a whole chapter on international crimes. In this regard, the attitude of the political leadership in the GDR was completely different from the attitude in the Federal Republic of Germany, where the government for a long time had no intention to prosecute Nazi atrocities or to enact special regulations for the prosecution of international crimes. Of course, in the GDR both the prosecution of crimes committed during the Nazi regime and the creation of laws on international crimes also played an important political role. In addition, it must not be forgotten that human rights violations were systematically committed in the GDR but were not prosecuted by the East German judiciary (at least not until after the fall of the Berlin Wall). This chapter gives an overview of the trials in the GDR for Nazi crimes as well as the laws on international crimes that were enacted by the East German government, it analyses the link between these trials and the persecution of political opponents, and it highlights the political importance of both the trials and rules on international crimes in the GDR.

33.2. Prosecution of National Socialist Atrocities during the Soviet Occupation (1945–1949)

33.2.1. Historical Background

After representatives of the German *Wehrmacht* (armed forces) had signed the declaration of unconditional surrender on 8 May 1945, the victorious Allied Powers assumed "supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any State, municipal, or local government or authority".[1] A few weeks later, at the Potsdam Conference,[2] it was agreed that the highest executive powers for Germany as a whole should be assigned to the Allied Control Council. At the same time, the former German Reich was reduced in size and the remaining territory was split up into four occupational zones. For each of these zones, one occupational power had the highest administrative authority. However, as the Allied Control Council could only take decisions unanimously (and was *de facto* dissolved on 20 March 1948 when the Soviets left it in order to protest against the London Six-Powers Conference), the most important legislative and executive competences were with the occupational power of each zone. In the eastern zone, the Soviet Military Administration for Germany (Sowjetische Militäradministration in Deutschland, 'SMAD') was the highest-ranking institution. It administered its zone through so-called SMAD Orders which had the status of law and which could not be contested by the German authorities. The structure and organisation of the SMAD was unclear and complicated;[3] however, there is no doubt that it

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1 Declaration Regarding the Defeat of Germany and the Assumption of Supreme Authority with Respect to Germany by the Governments of the United States of America, the Union of Soviet Socialist Republics, the United Kingdom and the Provisional Government of the French Republic, 5 June 1945, Amtsblatt des Kontrollrats in Deutschland 1946, Supplement No. 1, pp. 7 ff.

2 This conference took place from 17 July to 2 August 1945 at Cecilienhof in Potsdam, Germany.

3 On the SMAD, see Jan Foitzik, *Sowjetische Militäradministration in Deutschland (SMAD) 1945–1949*, Akademie Verlag, Berlin, 1999.

was controlled by the political leadership of the Communist Party of the Soviet Union in Moscow. In order to implement an effective administrative system, the SMAD also established German administrative institutions in various political areas (the economy, justice, interior, etc.). From April 1946 the new Socialist Unity Party of Germany (Sozialistische Einheitspartei Deutschlands, 'SED'), a forced merger of the former Communist Party of Germany (Kommunistische Partei Deutschlands, 'KPD') and the Social Democratic Party of Germany (Sozialdemokratische Partei Deutschlands, 'SPD'), gradually took over political control in East Germany – always in consultation, of course, with the "big brother" in Moscow.

In this period shortly after the war, the prosecution of "Nazi criminals" and "war criminals"[4] was of particular ideological significance for both the Soviets and the SED. Now that the Nazi regime was defeated, the political leadership proclaimed a two-phase model to establish a new society: the anti-fascist democratic transformation of German society was the first phase, and the systematic build-up of socialism was the second. The consistent punishment of crimes committed under the old regime was seen as an important feature of the first phase – in the criminal law manual of the GDR, it was retrospectively described as "an indispensable component of the elimination of fascism and a guarantee that it never arises again".[5]

33.2.2. The Allied Legal Framework for the Prosecution

The Allied Powers had declared their intent to prosecute crimes committed under the Nazi regime during the Second World War and had developed basic principles for the punishment of the perpetrators.[6] After the Second World War, in Article III No. 5 of the Potsdam Agreement,[7] it was laid down that "war criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment". In

4 The terminology (in German, "*Nazi- und Kriegsverbrecher*") was undifferentiated, i.e. no distinction was made between "Nazi crimes" on the one hand and "war crimes" on the other, cf. Christian Dirks, *Die Verbrechen der anderen*, Ferdinand Schöningh Verlag, Paderborn, 2006, p. 28.

5 John Lekschas *et al*., *Strafrecht der DDR, Lehrbuch*, Zentralverlag, East Berlin, 1988, p. 87.

6 Especially in the declarations of the Moscow Conference agreed upon on 30 October 1943.

7 Reports of the Potsdam Conference (Potsdam Agreement) of 2 August 1945.

addition, leaders, supporters and high-ranking officials of the National Socialist movement, as well as "any other persons dangerous to the occupation or its objectives" should be "arrested and interned". Sometime later, the London Charter established the International Military Tribunal ('IMT') and created with its Statute – which contained the regulations on the international core crimes – the legal framework for the Nuremberg Trials against the major war criminals.[8] Finally, on 20 December 1945, Control Council Law No. 10 ('Law No. 10') was enacted,[9] which adopted and further developed the basic principles of the Nuremberg Statute in order to prosecute those perpetrators who had not been tried before the IMT.

Alongside these norms, the Allied Control Council enacted, by way of Control Council Directive No. 24 ('Directive No. 24') and Control Council Directive No. 38 ('Directive No. 38), important regulations regarding the "denazification" of German society. While Directive No. 24 was mainly concerned with purging the public sector of supporters of the National Socialist Party, Directive No. 38 allowed for the punishment of "activists" and "supporters" of the old regime and for administrative sanctions against its "followers". According to Directive No. 38, persons who had not been involved in atrocities committed between 1933 and 1945 but who were still considered to "endanger the peace of the German people or of the world, through advocating National Socialism or militarism or inventing or disseminating malicious rumours" also qualified as "activists" and were accordingly subject to punishment.[10] Although both directives contained provisions on criminal sanctions, their lack of a precise description of the criminal acts and the possibility for the executive organs to take preventive measures meant that they had the character of administrative regulations.[11]

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[8] Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, reprinted in *American Journal of International Law*, 1945, vol. 39, Supplement, p. 257.

[9] Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945 ("Law No. 10").

[10] Control Council Directive No. 38, The Arrest and Punishment of War Criminals, Nazis, and Militarists and the Internment, Control, and Surveillance of Potentially Dangerous Germans, 12 October 1946.

[11] Klaus Marxen, "Die Bestrafung von NS-Unrecht in Ostdeutschland", in Klaus Marxen, Koichi Miyazawa and Gerhard Werle (eds.), *Der Umgang mit Kriegs- und Besatzungsunrecht in Japan und Deutschland*, Berliner Wissenschaftsverlag, Berlin, 2001,

33.2.3. Trials by the Soviets in the Eastern Zone

The above-mentioned laws and directives were part of the laws of the occupying forces and could therefore, at least at the beginning, only be applied by their authorities. In the eastern zone, war crimes trials initially took place before military tribunals of the Red Army that applied both Allied and Soviet laws.[12] The individuals who were accused before these tribunals had often been kept in Soviet mass detention camps for which the premises of former National Socialist concentration camps had been used. It is estimated that up to one third of the detainees died due to poor living conditions in these camps before a trial could be initiated against them.[13] Against those who were tried, the courts frequently imposed the death penalty[14] or sentences of 15 to 20 years' imprisonment. A considerable number of the convicted, in fact, were not held liable for crimes committed in the Third Reich but were instead seen by the Soviets as political opponents and accordingly were convicted for counter-revolutionary crimes on the basis of Article 58 of the Russian Criminal Code.[15] The Soviet tribunals were in effect until 1953, although the number of perpetrators tried before these courts decreased over time.

pp. 167 ff.; Christian Meyer-Seitz, *Die Verfolgung von NS-Straftaten in der Sowjetischen Besatzungszone*, Berliner Wissenschaftsverlag, Berlin, 1998, p. 159; Günther Wieland, "Ahndung von NS-Verbrechen in Ostdeutschland 1945 bis 1990", in *Neue Justiz*, 2003, vol. 57, no. 3, p. 114; Günther Wieland, "Die Ahndung von NS-Verbrechen in Ostdeutschland 1945–1990", in Christiaan Rüter (ed.), *DDR-Justiz und NS-Verbrechen*, Amsterdam University Press and K.G. Saur Verlag, Amsterdam and Munich, 2010, pp. 13, 29.

12 Dirks, 2006, p. 33, see *supra* note 4; Wieland, 2010, pp. 13, 29, see *supra* note 11.

13 Klaus Dieter Müller, "Bürokratischer Terror", in Roger Engelmann and Clemens Vollnhals (eds.), *Justiz im Dienste der Parteiherrschaft*, Ch. Links Verlag, Berlin, 1999, pp. 59, 62. On the Soviet detention camps in East Germany, cf. Karl Wilhelm Fricke, *Politik und Justiz in der DDR*, 2nd ed., Verlag Wissenschaft und Politik, Cologne, 1990, pp. 69 ff.; Michael Klonovsky and Jan Flocken, *Stalins Lager in Deutschland 1945-1950*, Ullstein, Berlin, 1991.

14 According to Marxen, 2001, p. 162, see *supra* note 11, and Meyer-Seitz, 1998, p. 36, see *supra* note 11, 776 persons in total were punished with the death penalty by Soviet military tribunals.

15 Dirks, 2006, pp. 35 ff., see *supra* note 4; Fricke, 1990, pp. 106 ff., see *supra* note 13; Marxen, 2001, pp. 159, 162, see *supra* note 11. According to Müller, 1999, pp. 59, 87, see *supra* note 13, of the judgments rendered by Soviet military tribunals in Germany between 1945 and 1953, 29.6 per cent related to war crimes and mistreatment of civilians, 47.7 per cent to "violent anti-Soviet resistance" and 22.7 per cent to "non-violent anti-Soviet resistance".

33.2.4. Trials before East German Courts

The first trials before East German courts for crimes committed under the National Socialist dictatorship were initiated shortly after the end of the Second World War and at the same time as the trials that took place before Soviet military tribunals. As a legal basis, the courts mainly relied on the Criminal Code of the German Reich, which the Allied Control Council had earlier purged of the worst elements of Nazi legislation introduced during the Hitler regime.[16] In addition, German courts also had the competence to apply Law No. 10 in cases in which crimes were allegedly committed by German perpetrators against German victims and when the competent occupying authorities had authorised the German courts to do so.[17] However, in reality, the cases referred to the German courts by the Soviets also included those in which crimes were committed by Germans against foreigners. In this regard, the practice of referral to German courts was inconsistent and sometimes reflected a contradictory attitude on the part of the Soviets.

The first big trial before an East German court for crimes committed in the Third Reich took place in Dresden on 25–28 September 1945. Several of the judges in this trial were experienced lawyers while others were so-called "people's judges" (*Volksrichter*). The latter were, in fact, not lawyers by training but had rather been trained in courses lasting only a few months before they were put on the bench.[18] This enabled the SED leadership to attempt to compensate for the lack of anti-fascist judges in the East German judiciary after the Second World War, as, indeed, a considerable number of German lawyers had more or less closely co-operated with the National Socialist regime.[19] The accused in the Dresden trial were two members of the Gestapo and three policemen who allegedly had participated in the killings of forced labourers from, *inter alia*, Poland, the Czech Republic, Serbia and Italy. The regional administrative authorities of the Federal State of Saxony, where the trial

16 See Control Council Law No. 1, Repealing of Nazi Laws, 20 September 1945, Amtsblatt des Kontrollrats 1945, p. 6.

17 Cf. Article III section 1 subsection (d) of Law No. 10, see *supra* note 9.

18 Of course, during these short training courses, the new judges acquired insufficient basic legal knowledge, especially as the focus was more on communicating the communist ideology to the new judges and less on providing sound judicial knowledge.

19 On the affiliation of German lawyers with the Nazi regime, see Ingo Müller, *Furchtbare Juristen*, Kindler Verlag, Munich, 1985, p. 35 ff.

took place, had created an Act for the punishment of Nazi criminals especially for the purpose of this trial.[20] The trial ended with two death sentences, one sentence of life imprisonment and two sentences of six and three years of imprisonment respectively. The judgment was not open for appeal.[21] The Act was not applied again following this trial.

Despite these efforts by the East German judiciary, the majority of the trials for crimes committed under the Nazi regime were tried before Soviet tribunals. This situation changed considerably with the promulgation of SMAD Order No. 201 ('Order No. 201') on 16 August 1947.[22] This order gave the German authorities the competence to take over cases in which Directive No. 24 and Directive No. 38 were applicable. This included the imposition of sanctions contained in Directive No. 38. Therefore, Order No. 201 constituted a link between the denazification regulations of the Allied Powers and the German prosecutorial authorities.

As regards the procedure introduced by Order No. 201 (and especially by its Executive Regulation No. 3), the order declared that the "Organs of the Ministry of Interior" should be the authorities primarily responsible for the investigation procedure. This meant that the investigations were controlled by the police and not by the public prosecution service, as had been the case according to traditional German criminal law. The police investigations were led by the so-called K5-Divisions – the fifth divisions of the police forces. These divisions were notorious for their brutal methods and were integrated into the Ministry for State Security ('Stasi') when it was founded in 1950.[23] According to the new procedural rules, an investigation would be triggered by the registration of a suspect. Grounds for registration were a confession, a complaint by a citizen or a public servant, as well as documents from which it could be derived that the suspect was to be categorised into one of the groups in Directive No. 38. After registration, the case would be investigated by the police and once the investigation was complete, the

[20] The text of the statute is reprinted in the brochure *Die Haltung der beiden deutschen Staaten zu den Nazi- und Kriegsverbrechen*, Staatsverlag, Berlin, 1965, pp. 130 ff., which was published by the Prosecutor General and the Ministry of Justice of the GDR.

[21] See in the named statute.

[22] Zentrales Verordnungsblatt, 16 August 1947, pp. 185 ff.

[23] Dirks, 2006, pp. 44 ff., see *supra* note 4; Fricke, 1990, p. 40, see *supra* note 13; Wieland, 2003, p. 114, see *supra* note 11.

case files would be submitted to the prosecutor. The police, however, would remain as the main protagonist of the proceedings and would be responsible for filing arrest warrants as well as the final indictment. The main task assigned to the prosecutor was to approve of the police's work and this was, ultimately, a mere formality. The courts did not take part in the investigative procedure; instead, the local organs of the Soviet military administration had to be kept informed about the investigation.[24] During the main proceedings the accused person theoretically had the right to consult legal counsel. (According to Order No. 201, legal representation could be allowed "on application of the accused or at the discretion of the court".[25]) However, as the case files were submitted to the accused's counsel only once the main proceedings were opened, it was *de facto* impossible for the accused to consult legal counsel during the investigative procedure.[26] In addition, the order emphasised that the investigations should be closed "in as little time as possible" and that the courts should pronounce their verdicts "swiftly".[27] At the Regional Courts, deviating from the rules of the German Judicature Act, special judicial chambers (so-called 201 chambers) were created. On the bench of these chambers sat two judges and three laypersons. The laypersons were normally selected from SED members and the party's mass organisations.[28] A convicted person had the right to appeal against a judgment within seven days before the Higher Regional Court.

The assignment of the prosecution of crimes committed under the National Socialist regime to the East German authorities was a crucial test for the judiciary with its new anti-fascist staff, especially for the people's judges. It was subsequently stated by GDR lawyers that these trials were "important training for the investigative organs, prosecutors and judges of the people in confronting the class enemy".[29] For this confrontation with

24 Marxen, 2001, p. 167, see *supra* note 11.

25 Executive Regulation No. 3 to SMAD Order No. 201, Section 17 ("Regulation No. 3").

26 Hermann Wentker, *Justiz in der SBZ/DDR 1945-1949*, Oldenbourg Verlag, Munich, 2001, p. 405.

27 Regulation No. 3, Section 10, see *supra* note 25.

28 *Ibid.*, Section 16(a).

29 Hilde Benjamin, Max Becker, Karl Görner and Wolfgang Schriewer, "Zwanzig Jahre DDR. Von der Entstehung der Macht des werktätigen Volkes. Der Entwicklungsprozess zum sozialistischen Strafrecht in der DDR", in *Staat und Recht*, 1969, vol. 18, no. 7, pp. 1112, 1119.

the class enemy, Order No. 201 had introduced considerable changes to the traditional German law of criminal procedure which were to have a negative impact on the rights of the accused. Although the order did not formally alter the Code of Criminal Procedure, the changes it introduced for the "201 cases" were only initially restricted to the prosecution of crimes committed during the Third Reich. In 1952 they were made part of the general provisions of the new Code of Criminal Procedure in the GDR.

33.3. Between Coming to Terms with the Past and Oppressing Political Opponents (1950s)

After tensions between the Soviet Union and the Western bloc had grown drastically in the late 1940s, the GDR was officially founded on 7 October 1949 with the enactment of its Constitution.[30] "Anti-fascism" remained an important key word in the political propaganda and was used to legitimise the new state[31] and its policies.[32] In consequence, while the trials for crimes committed under the National Socialist regime continued, these efforts began to increasingly merge with the oppression of political opponents.

33.3.1. Legal Terror: The Waldheim Trials

The prosecution of atrocities committed in the Third Reich reached its peak with the so-called Waldheim trials. This was a set of trials against alleged Nazi perpetrators conducted in the small town of Waldheim in Saxony in the spring of 1950.[33] The background to these trials was the

[30] Verfassung der Deutschen Demokratischen Republik vom 7. Oktober 1949, Gesetzblatt der DDR 1949, pp. 5 ff.

[31] The preamble to the GDR Constitution of 1968, for instance, stated that the citizens of the GDR had given themselves this Constitution "firmly based on the accomplishments of the anti-fascist democratic and socialist revolution of the social order". On the concept of anti-fascism as legitimation of the GDR, cf. Sigrid Meuschel, *Legitimation und Parteiherrschaft in der DDR*, Suhrkamp Verlag, Frankfurt, 1992, pp. 29 ff.; Herfield Münkler, "Antifaschismus als Gründungsmythos der DDR", in Manfred Agethen, Eckhard Jesse and Ehrhart Neubert (eds.), *Der missbrauchte Antifaschismus*, Verlag Herder, Freiburg, 2002, pp. 79 ff.

[32] The best example of this is the "anti-fascist bulwark" – as the Berlin Wall was called in the official language of the SED.

[33] On the Waldheim trials, see Wolfgang Eisert, *Die Waldheimer Prozesse*, *Der stalinistische Terror 1950*, Bechtle Verlag, Munich, 1993; Norbert Haase and Bert Pampel (eds.), *Die*

decision of the Soviets to dissolve the remaining three former National Socialist concentration camps which, since the end of the Second World War, had been used as detention camps for alleged war criminals (these were the camps of Bautzen, Buchenwald and Sachsenhausen). The political leadership of the GDR was very supportive of this endeavour as, in their view, the maintenance of these camps would sooner or later have led to resentment in the population towards the new party regime, which would have undermined the efforts of the political leadership to consolidate its power. However, before the camps could be dissolved, the last inmates, 3,422 persons altogether, had to be put on trial. In this regard it turned out to be problematic that the Soviets had never conducted serious investigations into the alleged involvement of detainees in these camps in Nazi crimes. As the political leadership of the GDR was pushing to close this unpleasant chapter as soon as possible – according to an order from a high-ranking party official the trials had to be finished within six weeks[34] – further investigations were not carried out by the German authorities either.

The trials started on 26 April 1950. The political leadership's guidelines for the judges included the provision that the trials should be "just, but at the same time strict", which meant that it was expected that the verdicts would lead to sanctions of at least ten years' imprisonment.[35] The hearings generally took place *in camera*; the public was allowed to participate in very few sessions. The accused were generally not allowed to have a defence counsel, nor were they able to call witnesses in their favour. In many cases, not even the prosecution called witnesses. Correspondingly, the evidence in the trials was very thin and basically comprised a small amount of documents that were forwarded to the judges by the Soviets as well as questionnaires which the accused persons had to complete before the trials started. The establishment of individual guilt was not required; proof of membership in the National Socialist Party was seen as sufficient. Each trial normally took no longer than a few minutes – a fact from which one may easily draw the conclusion that the verdicts had been agreed upon among the judges and the political leadership before the start of oral proceedings.

Waldheimer "Prozesse" – fünfzig Jahre danach, Nomos, Baden-Baden, 2001; Wieland, 2010, pp. 53–60, see *supra* note 11.

34 Wieland, 2010, p. 55, see *supra* note 11.

35 *Ibid*.

In total, 33 death sentences were handed down in Waldheim, of which 24 were executed. The verdicts also included 146 life sentences, 1,901 sentences of between 15 and 25 years' imprisonment, 947 sentences of between 10 and 14 years' imprisonment, 290 sentences of between five and nine years' imprisonment as well as four sentences of less than five years' imprisonment. Of the 1,317 applications for appeal, in 159 cases new trials were initiated which led in 154 cases to higher sanctions, and only in five cases was a death sentence converted into prison sentence.[36]

From a present-day point of view, the Waldheim trials clearly were not in line with the basic principles of the rule of law and due process. In the GDR, these trials were later regarded as a national stain and remained almost unmentioned in the political propaganda of the party, despite the fact that Nazi trials in the GDR were normally accompanied by huge media publicity.[37] Even today the significance of the Waldheim trials in the context of denazification in East Germany is a topic of lively debate among legal historians. The basic question centres on the issue of whether these trials were an exceptional case of "judicial excess" or whether they must rather be seen as an integral part of the development of the prosecution of former Nazis and political opponents in the GDR.[38] This question cannot be dealt with in detail in this chapter. However, it is difficult to differentiate retrospectively between judicial measures taken by the GDR leadership, especially as they were all carried out by the same judiciary.[39] It is thus more convincing to see continuity between the Waldheim trials and other trials against Nazi perpetrators and political

[36] *Ibid.*, pp. 55, 56; Annette Weinke, "Die Waldheimer 'Prozesse' im Kontext der strafrechtlichen Aufarbeitung der NS-Diktatur in der SBZ/DDR", in Norbert Haase and Bert Pampel (eds.), *Die Waldheimer "Prozesse" – fünfzig Jahre danach*, Nomos, Baden-Baden, 2001, p. 30. See also the data in the annex to this chapter.

[37] In the SED-controlled newspaper *Neues Deutschland* only very few short articles were published on the outcome of the trials. The only article in a GDR law journal is a one-page report: Hildegard Heinze, "Kriegsverbrecherprozesse in Waldheim", in *Neue Justiz*, 1950, vol. 4, no. 7, p. 250.

[38] On this issue, see Meyer-Seitz, 1998, p. 36, *supra* note 11; Weinke, 2001, p. 32, *supra* note 36; Falco Werkentin, *Politische Strafjustiz in der Ära Ulbricht*, 2nd ed., Ch. Links Verlag, Berlin, 1997, pp. 161 ff.

[39] With regard to a "unity interpretation" of the legal order of dictatorial regimes, see Wolfgang Naucke, *Über die Zerbrechlichkeit des rechtsstaatlichen Strafrechts*, Berliner Wissenschaftsverlag, Berlin, 2000, pp. 301 ff.

opponents in the GDR, although the Waldheim trials were certainly the most extreme form of dealing with the past in the GDR.[40]

33.3.2. Continuation of Trials for Atrocities Committed in the Third Reich

The Waldheim trials were the peak but not the end of the prosecution of Nazi crimes, despite this having been the intention of the political leadership of the GDR before their commencement.[41] Although after the Waldheim trials, the period in which each and every former member of the National Socialist Party who resided in the GDR ran the risk of being put on trial was history, the sheer number of grave crimes committed under the Nazi regime was so huge that in the early 1950s the GDR was still far from having prosecuted all of them. Therefore, in the years to follow, crimes committed by supporters of the National Socialist movement continued to be investigated and perpetrators punished.

From a legal point of view, however, the problem that arose in the mid-1950s was that the Soviets repealed a number of laws that had been enacted by the occupational powers and which had served as a legal basis for the trials for crimes committed by National Socialists (especially Law No. 10 and Directive No. 38). As the GDR had not enacted special provisions for the prosecution of Nazi crimes themselves, the courts turned to the traditional provisions of the Criminal Code of the German Reich (especially those on murder, manslaughter, assault, etc.).

3.3.3. Oppression of Political Opponents on the Basis of Constitutional Law

Alongside the prosecution of Nazi crimes, the early 1950s saw a development of the law relating to political offences which further blurred the line between the prosecution of Nazi crimes and of political opponents. The new main tool in this context was Article 6 of the new GDR Constitution, a regulation that had the character of a criminal law

[40] See Falco Werkentin, "Die Waldheimer 'Prozesse' – ein Experimentierfeld für die künftige Scheinjustiz der SED?", in Norbert Haase and Bert Pampel (eds.), *Die Waldheimer "Prozesse" – fünfzig Jahre danach*, Nomos, Baden-Baden, 2001, pp. 6 ff.

[41] Wieland, 2010, p. 59, see *supra* note 11, which states that the expectation that the prosecution of former National Socialists would stop after the Waldheim trials was unrealistic from the start.

provision despite being in the Constitution. This provision contained the prohibition of certain types of "propaganda" and "agitation", terms without clear meaning and previously unknown to German criminal law.[42] On the basis of Article 6, almost any act or expression which was not in line with the politics of the party regime could easily be declared as criminal and be prosecuted. Especially in the early years of the GDR, and in particular up until the death of Stalin in 1953, this provision was the main legal tool for the relentless oppression of people with different political opinions through the judicial system.

With the promulgation of Article 6 of the Constitution, the line between the prosecution of Nazi crimes and the prosecution of acts of political opponents became increasingly indistinct. Article 6 was frequently applied together with Order No. 201 and Directive No. 38 (for as long as they were not repealed by the Soviets). As Directive No. 38 provided that a person who made propaganda for the National Socialist ideology was a criminal activist, the Supreme Court of the GDR applied this provision alongside Article 6 of the Constitution. The Directive alone was normally applied in minor cases as it was seen as the more lenient law in comparison with Article 6.[43]

33.3.4. The Peace Protection Act

A new instrument for the oppression of political opponents which made reference to international law was the Act for the Protection of Peace of 15 December 1950 ('Peace Protection Act'),[44] the first Act of purely criminal law character enacted in the GDR. The political leadership

[42] The wording of Article 6 can be translated as follows: "Boycott agitation [*Boykotthetze*] against democratic institutions and organizations, murder agitation [*Mordhetze*] against democratic politicians, expressions of hatred against faith, races or nations, military propaganda and war agitation and all other acts directed against the equality of human beings are crimes under the Criminal Code".

[43] See, for example, the judgment of the Supreme Court of the GDR of 4 October 1950, in *Neue Justiz*, 1950, vol. 4, no. 11, pp. 452, 455; the judgment of 3 December 1953, in *Entscheidungen des Obersten Gerichts der DDR in Strafsachen*, vol. 3, pp. 27, 53; the judgment of 21 December 1953, in *Neue Justiz*, 1954, vol. 8, no. 1, pp. 26, 30; the judgment of 20 January 1954, in *Entscheidungen des Obersten Gerichts der DDR in Strafsachen*, vol. 3, pp. 105 ff. See also Fricke, 1990, pp. 261 ff., *supra* note 13, with further examples of cases decided by the judiciary of the GDR.

[44] Gesetz zum Schutz des Friedens vom 15. Dezember 1950, Gesetzblatt der DDR 1950, p. 1199 ("Peace Protection Act").

pointed out that the creation of the Peace Protection Act was a response to recommendations of the Second World Peace Conference, held on 16–22 November 1950 in Warsaw and to the Korean War, which broke out shortly before the conference took place.[45]

According to the preamble of the Peace Protection Act, "war propaganda, no matter under which circumstances carried out […] represents one of the worst crimes against humanity". The offences covered by the Act included different kinds of war propaganda and "agitation" (in this regard, the Peace Protection Act and Article 6 of the Constitution covered the same conduct). The provisions for punishment in the Act included imprisonment and, where the offence was committed under aggravating circumstances, hard labour (*Zuchthaus*). Under especially aggravating circumstances, in particular when the offence was committed carrying out an order of another state, the punishment was hard labour for not less than five years, life imprisonment or the death penalty.[46] The Act also covered the attempt to commit the offence as well as preparatory measures.[47] As supplementary punishment the Act included provisions on fines and forfeiture – in the case of a sentence of more than five years of hard labour, the forfeiture of all property belonging to the convicted person was mandatory.[48] A provocative provision with a view to the Federal Republic of Germany provided that the courts of the GDR were also competent "in cases where the offence of a German citizen was not committed on the territory of the GDR, and the offender was not resident in the GDR".[49]

In the view of criminal lawyers in the GDR, the Peace Protection Act was "the most important piece of criminal law legislation in the first years after the GDR was founded".[50] However, the Act was not significant in a practical sense as, unlike the above-mentioned Article 6 of

[45] Gerhard Stiller, *Die Staatsverbrechen*, Zentralverlag, Berlin, 1959, pp. 9, 36; Wolfgang Weiß, "Das Gesetz zum Schutze des Friedens", in *Neue Justiz*, 1951, vol. 5, no. 1, p. 12.

[46] Peace Protection Act, Section 6, see *supra* note 44.

[47] *Ibid.*, Section 7.

[48] *Ibid.*, Section 8.

[49] *Ibid.*, Section 10(3).

[50] John Lekschas *et al.*, *Strafrecht Allgemeiner Teil*, 2nd ed., Staatsverlag, Berlin, 1978, p. 101.

the Constitution, it was only applied in very few cases.[51] It was important in the field of legal propaganda, however, as it proved, at least in the view of the political leadership, the efforts of the GDR for peace in the time of the Cold War. According to Hilde Benjamin, Vice President of the Supreme Court and subsequently the Minister of Justice, with the enactment of the Peace Protection Act, the GDR acknowledged the London Agreement of 8 August 1945 as well as general principles of international law. In her view, this "contributed significantly to increase the reputation of the GDR with all peace-loving powers in the world".[52] However, in reality, the preamble of the Peace Protection Act was in its wording everything but peaceful – "martial" would have been a better description.[53] The same is true for the crimes included in the Act with their severe provisions relating to punishment and their ideologically influenced offences which were a precursor for a set of Stalinist laws that were enacted shortly thereafter (that, however, cannot be dealt with in this chapter).

This strategy of the political leadership – presenting severe laws against political opponents as being an expression of principles of international law – was a typical feature of the legislative work in criminal matters of the party regime until the end of the GDR.

33.4. Prosecution of National Socialist Crimes and the Inner-German Conflict (1960s)

Over the years, the number of trials that were initiated in the GDR for crimes committed under the Hitler dictatorship decreased as most of the

[51] In the early 1950s only one judgment was handed down on the basis of the Peace Protection Act; see the judgment of the Supreme Court of the GDR of 1 May 1952, in *Entscheidungen des Obersten Gerichts der DDR in Strafsachen*, vol. 2, pp. 14 ff. A second judgment in which the Act was applied was delivered in 1962; see the judgment of the Supreme Court of the GDR of 29 December 1962, in *Neue Justiz*, 1963, vol. 17, no 2, pp. 36 ff.

[52] See Benjamin, Becker, Görner and Schriewer, 1969, p. 1126, *supra* note 29.

[53] There, it was said, *inter alia*, that the politics of the Western powers were directed towards a "new world massacre" and a "deadly war of brothers". See in this context also the comment by a judge of the Supreme Court in the judgment of the Supreme Court of the GDR of 1 May 1952, *supra* note 51, which included a blatant threat towards the Western bloc: "If our enemies get serious with the threatening of the peace, we will get serious with applying the Peace Protection Act". The quote is taken from Hilde Benjamin, "Das Oberste Gericht der Deutschen Demokratischen Republik im Kampf gegen Spionage und Sabotage", in *Neue Justiz*, 1952, vol. 6, no. 6, p. 245.

perpetrators had in the interim either died, had already been convicted or had escaped to West Germany.[54] However, despite the fact that the political leadership proclaimed that it had successfully eliminated fascism in the GDR, the prosecution of Nazi crimes as well as the creation of laws relating to international crimes remained politically relevant.

33.4.1. Show Trials Against West German Politicians

Beginning in the early 1960s the political leadership of the GDR invested considerable effort in taking political advantage of the reluctance of the West German government to elaborate on its own dark past. This was a strategically well-thought-out tactic as the GDR itself had prosecuted a large number of National Socialist perpetrators and had thoroughly purged the public sector of supporters of the former regime. West Germany, in contrast, only started in the course of the 1960s – and even then only very reluctantly – to conduct prosecutions for Nazi crimes on a broader basis. In addition, there were a considerable number of former high-ranking members of the National Socialist Party who still held important positions in the judiciary and even in the government of West Germany.[55] This created opportunities for GDR propaganda campaigns in which the political leadership published incriminating documents about the Nazi past of high-ranking officials of the West German government which they had received through their secret service (the Stasi) and the governments of allied countries in the Communist bloc.

The GDR judiciary played a pivotal role in these campaigns. At the beginning of the 1960s the propaganda department of the party organised several huge show trials and among the accused were Theodor Oberländer, a member of parliament for the conservative party, and Hans Globke, Secretary of State in the then government of Chancellor Konrad Adenauer. Both Oberländer and Globke were sentenced *in absentia* to lengthy prison sanctions (which they never served as they remained in West Germany). Whereas in the trial against Oberländer the Supreme Court based its judgment on the provisions of the German Criminal

[54] For statistics, see the data in the annex to this chapter.

[55] See Müller, 1985, pp. 211 ff., *supra* note 19; Gerhard Werle and Thomas Wandres, *Auschwitz vor Gericht*, Beck Verlag, Munich, 1995, pp. 20 ff.

Code,[56] in the Globke trial it took a remarkable turn and applied Article 6 of the Nuremberg Statute.[57] From that trial on, this provision was the legal basis for all GDR prosecutions for crimes committed under the National Socialist regime. This reference to the Nuremberg Statute by the courts was in principle a suitable approach for dealing with these crimes, especially in comparison with West Germany where the judiciary had serious difficulties in basing convictions for Nazi crimes on the domestic criminal law.[58] However, for the political leadership of the GDR, the enormous political and propagandistic potential which the direct application of the Nuremberg Statute entailed also played a significant role in this shift. It was set out that "in each and every war crimes trial militarism is in the dock", and that these trials "also and not least must lay bare the economic, political and ideological roots of militarism".[59] As the Communist bloc was classified by the GDR as being genuinely peaceful this meant, in other words, that in war crimes trials the capitalistic monopolies and their interests were being accused. With the application of the Nuremberg Statute, the leadership of the GDR tried to discredit the class enemy by using recognised norms of international law. In this way, the Nuremberg Trials against the major war criminals were even qualified as "anti-fascist", "anti-imperialistic" and "anti-monopolistic", as they were said to have uncovered "the connection between fascism, imperialism and monopolies".[60]

33.4.2. The Auschwitz Trial in the GDR

In addition to the campaigns and show trials against West German politicians a further spectacular trial for atrocities under the National Socialist dictatorship has to be mentioned: the trial against Horst Fischer. Fischer had served as medical doctor in Auschwitz from 1942 to 1944 at

[56] See the judgment against Oberländer that was published as a special supplement to *Neue Justiz*, 1960, vol. 10.

[57] See the judgment in the Globke case that was published in its entirety in *Neue Justiz*, 1963, vol. 17, no 15, pp. 449 ff.

[58] See Gerhard Werle, "Völkerstrafrecht und geltendes deutsches Strafrecht", in *Juristenzeitung*, 2000 vol. 55, no. 15, p. 756.

[59] Michael Kohl, "Zu einigen aktuellen Fragen der Ahndung von Kriegsverbrechen", in *Neue Justiz*, 1961, vol. 15, no. 14, p. 477.

[60] Wassili Wassiljewitsch Kulikow, "Aktuelle Lehren des Nürnberger Prozesses", in *Neue Justiz*, 1976, vol. 30, no. 24, p. 731.

the same time as Josef Mengele, infamous for his inhumane experiments with inmates of the concentration camp. Although he had been in personal contact with Mengele in Auschwitz, Fischer himself had not acted in such a cruel way as his colleague. However, there is no doubt that Fischer was part of the extermination machinery of Auschwitz and had, for example, selected the prisoners arriving on the trains who would either work until their death or who would be immediately killed in the gas chambers. After the end of the Second World War, Fischer had lived and worked unrecognised for 20 years in a small town in East Germany until the Stasi finally identified and detained him. His trial took place at around the same time as the West German Auschwitz trials in Frankfurt. Just as the political leadership and the judiciary had agreed upon before the trial, Fischer received the death sentence[61] and was executed on 8 July 1966.[62] This sanction was imposed on him not least to create a counterbalance to the rather mild sanctions which were imposed on the defendants in the Frankfurt Auschwitz trials and which were harshly criticised in the GDR.[63]

33.4.3. Statute of Limitation

An important issue that arose in the 1960s in both East and West Germany with regard to the prosecution of crimes committed between 1933 and 1945 was the question of the applicability of the statute of limitation for these crimes. On 1 September 1964 the GDR enacted the Act on the Non-Applicability of the Statute of Limitation for Nazi and War Crimes.[64] In this Act, it was stated that "persons who had committed, ordered or abetted between 30 January 1933 and 8 May 1945 crimes against peace, crimes against humanity or war crimes" were to be prosecuted and punished "in line with the duties under international law". In addition, the "regulations on the application of the statute of limitation" were declared "not applicable to these crimes".

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61 See the judgment of the Supreme Court of the GDR of 25 March 1966 against Fischer in *Neue Justiz*, 1966, vol. 20, no. 7, pp. 193 ff.

62 On the *Fischer* trial, see Dirks, 2006, *supra* note 4, pp. 188 ff.

63 Dirks, 2006, p. 301, see *supra* note 4. On the West German Auschwitz trial, see in detail Werle and Wandres, 1995, pp. 41 ff., *supra* note 55.

64 Gesetz über die Nichtverjährung von Nazi- und Kriegsverbrechen vom 1. September 1964, Gesetzblatt der DDR 1964 I, p. 127.

In contrast, West Germany had shown serious attempts to prosecute Nazi crimes only very late and had initiated trials exclusively on the basis of domestic criminal law. Therefore, questions regarding the applicability of the statute of limitation inevitably became a looming problem for the prosecutorial authorities. After long debates and after the government introduced special regulations on two occasions so that the worst crimes would not fall under the statute of limitation,[65] in 1979 the West German legislator declared the rules of the German Criminal Code on the statute of limitation inapplicable for the crime of murder. This created the possibility of continuing to prosecute at least those cases in which the crimes in question were to be regarded as murder according to Section 211 of the German Criminal Code. However, a large number of perpetrators of crimes under the Nazi regime had by then already benefited from the short time limits.[66]

In contrast to the West German legislator's hesitant approach, the GDR had 15 years earlier already taken legislative measures to ensure the continuation of prosecutions. This was another political victory for the regime that once again cultivated its image as the more progressive German state when it came to the confrontation of crimes of the Nazi regime.

33.5. Codification of International Crimes (1968

In the course of the 1960s the GDR also increased its efforts with regard to the creation of rules on international crimes. In 1963 the State Council (*Staatsrat*)[67] convened a legislative commission to draft a completely new Criminal Code.[68] When the commission started its work it was undisputed that the new Code should include a chapter on international crimes.[69]

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65 First, by way of postponing the application of the statute of limitation, then by extending the period of time in which crimes of murder prescribed to 30 years.

66 On this issue see Müller, 1985, pp. 245 ff., *supra* note 19; Werle and Wandres, 1995, pp. 25 ff., *supra* note 55.

67 The State Council was the official head of state of the GDR from 1960 to 1990. It was put in place after the former President of the GDR, Wilhelm Pieck, had passed away.

68 Until then, the Criminal Code of the former German Reich of 1871 had remained the basic legal document of criminal law in the GDR, although it had been considerably amended.

69 See the "working conception" paper of 30 August 1963 by the subcommittee whose task was to draft "provisions for the protection of peace and humanity", BA DY 30/IVA2/13/184, Federal Archive Berlin ('FAB')

While drafting the new regulations, the commission referred to Article 6 of the Nuremberg Statute, Law No. 10 and the UN Genocide Convention as examples.[70] That the political leadership of the GDR also aimed for political goals with its implementation of regulations on international crimes is evidenced, for example, by a statement of Prosecutor General Josef Streit according to whom these "provisions as well as the sanctions included […] are necessary as the main powers of imperialism in the last years, though not having grown stronger, have become more aggressive".[71] Therefore, it was no surprise that the chapter on international crimes in the new Criminal Code – which was located at the beginning of a Special Part in order to demonstrate its importance – not only included provisions that were, at least to a certain extent, in line with recognised principles of international criminal law, but also GDR-specific, i.e. alleged international crimes which were designed to fight the political enemy.

33.5.1. Provisions on the Basis of Acknowledged International Criminal Law

Chapter One of the Special Part of the Criminal Code of the GDR contained provisions on aggression, crimes against humanity and war crimes. With regard to the crime of aggression, Section 85 criminalised the announcement, planning, preparation and waging of a war of aggression. This provision followed up on the elements of Article 6(a) of the Nuremberg Statute, except with respect to an announcement of a war of aggression that had not been included in the Statute. In addition, Section 86 defined "acts of aggression". It was argued by criminal lawyers in the GDR that the definition of aggressive acts, which the Soviet Union had submitted to the UN in 1953, had been a role model for this provision which also defined indirect, economic and ideological acts as acts of aggression.[72] While the role these provisions played in judicial practice was not particularly significant, their political importance for the leadership of the GDR cannot be underestimated. First, military

[70] See the grounds for the draft presented by sub-committee on 30 November 1963 ("Grounds for the Draft"), BA DY 30/IVA2/13/184, p. 8 (FAB).

[71] Josef Streit, "Der Schutz der Souveränität der DDR, des Friedens, der Menschlichkeit und der Menschenrechte im neuen Strafrecht", in *Neue Justiz*, 1967, vol. 21, no. 6, p. 170.

[72] Hans Heilbronn *et al*., *Strafrecht der DDR, Lehrkommentar*, vol. II, Staatsverlag der DDR, Berlin, 1970, p. 16.

interventions by Western forces – for example, the war of the US in Vietnam, and the alleged support of West German politicians for this war – could be defined as a war of aggression and a crime under GDR law.[73] Second, and more importantly, due to the rather broad scope of the provisions, various actions by the West German government or individuals opposed to the GDR – for instance, decisions on economic sanctions (especially the so-called Hallstein Doctrine) or individual attacks against the Berlin Wall – fell under the definition of aggression.[74] This was in line with earlier political accusations against the Federal Republic – for instance, in 1961, when the sealing of the borders with West Germany and the erection of the wall in Berlin were proclaimed as a protective measure against alleged plans of the Western powers to start a war of aggression against the GDR.[75]

The provision on crimes against humanity, Section 91 of the Criminal Code, included the persecution, displacement, extermination (in whole or in part) or other inhumane treatment of a "national, ethnic, racial or religious group". A nexus between crimes against humanity and a war was not required; in this regard, the provision in the GDR Criminal Code was quite progressive.[76] With regard to the protected groups, the provision on crimes against humanity followed up on Article II of the Genocide Convention; a provision on genocide was not included in the Criminal Code, at least not under this name. The main difference in comparison to the provision on crimes against humanity in the Nuremberg Statute was that Section 91 of the GDR Criminal Code did not include the protection of political groups. This was surprising as earlier drafts of the Criminal Code had, in fact, included such groups.[77] At that time, the main

[73] Streit, 1967, p. 170, see *supra* note 71. On the invasions by the Soviets of, for example, the Czech Republic, the voices in the GDR, of course, remained silent.

[74] On "acts of aggression against the borders of the GDR", see Michael Kohl's article in *Neue Justiz*, 1962, vol. 16, no. 19, p. 585 ff. On the Hallstein Doctrine, see Heilbronn *et al*., 1970, p. 18, *supra* note 72.

[75] Peter Przybylski, "Zum Charakter der Aggressionshandlungen gegen die Staatsgrenzen der DDR", in *Neue Justiz*, 1964, vol. 18, no. 4, p. 97.

[76] The non-requirement of a nexus to war was at that time not yet general opinion, see Antonio Cassese, *International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, p. 90; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2014, marginal no. 871 ff.

[77] See the sub-committee's draft of the chapter on crimes against peace and humanity, 10 December 1963, BA DY 30/IVA2/13/184, p. 6 (back page) ("Draft Chapter") (FAB).

argument for the *inclusion* of political groups had been to create the possibility of defining discriminative actions taken against communist activists and GDR citizens by the West German government as crimes against humanity.[78] One can only speculate as to why political groups were in the end excluded. The most plausible explanation is that a provision that protected political groups would have inevitably also covered oppressive acts of the political leadership of the GDR against its own citizens. This could have been used by the West German government or civil rights groups to attack the political leadership of the GDR. In order to avoid, on the one hand, a situation in which the regime could have come under political attack and, on the other hand, to fill the gap with regard to acts against communists and GDR citizens in West Germany, political groups were not mentioned in the provision on crimes against humanity but special provisions – Section 89 on "persecution of supporters of peace movement" and Section 90 on "persecution of citizens of the GDR in breach of international law" – were created.

As a third international core crime, the Criminal Code criminalised war crimes in Section 93. It reflected in its elements various treaties which the GDR had previously signed and ratified – for instance, the Geneva Convention of 1949.[79] However, with Section 93, similar to the creation of the provision on crimes against humanity, the political leadership's main purpose was to capture actions taken by the imperialists. In the grounds that were internally provided to explain the draft of the provision, it was stated:

> The significance of the creation of a provision for war crimes is that imperialists and fascists, for whom the commission of such crimes is part of their general politics, may clearly and emphatically be warned.[80]

In the course of the internal discussions about the draft provision on war crimes, it was even debated whether it should be indicated that war crimes could only be punished when being committed by the party that had initiated the war. With this, it was argued, it could be demonstrated that war crimes *de facto* only could be committed by the capitalist bloc, as the

78 *Ibid.*, p. 7, see *supra* note 77.

79 The GDR had become a member of the Geneva Conventions already on 30 August 1956. See Gesetzblatt der DDR 1956, p. 365.

80 Grounds for the Draft, 1963, p. 3, see *supra* note 70.

socialist bloc *per se* was considered to be peaceful.[81] However, in the end this plan was not realised as it was feared that this provision could have been seen as a breach of international law.[82]

In addition to the regulations that captured the international core crimes, the Criminal Code made provision for the exclusion of the statute of limitation for international crimes in Section 84.[83] Moreover, according to Section 95, the commission of an international crime could not be justified with the argument that the perpetrator had acted on superior orders. These provisions were in line with acknowledged principles of international criminal law.

33.5.2. GDR-specific International Criminal Law Provisions

Apart from the provisions that basically reflected principles of international criminal law (even though partly configured according to the needs of the political leadership) the chapter on international crimes included a number of regulations that followed the line of the provisions that had been used by the political leadership since the 1950s to suppress political opposition. In the Criminal Code these provisions appeared alternately with the Nuremberg Statute's provisions. With this the legislator continued with its strategy of creating regulations against political opponents while trying to make them look on the surface like a reflection of recognised principles of international law.

In this regard, Sections 87 ("recruitment for imperialistic military services"), 89 ("war agitation and propaganda") and 92 ("fascist propaganda and propaganda against nations and races") made various

81 In the subcommittee that drafted the chapter on international crimes it was even said that a soldier of the socialist forces was genuinely unable to commit a war crime. As a member of the committee argued: "My two sons have received a good training and ideological education as conscripted soldiers in the National People's Army of the GDR. They would vigorously dissent if they were to be regarded as potential perpetrators of war crimes. It is completely unthinkable that the socialist armies could commit any war crimes". See the protocol on questions regarding international law of the draft of the Criminal Code, 9 June 1967, BA DO 1/11283, p. 18 ("Protocol on Questions") (FAB).

82 In this regard, another member of the sub-committee said: "I am afraid we will get into international trouble if we express that only the aggressor may commit war crimes". See Protocol on Questions, 1967, p. 18, *supra* note 81.

83 This provision repeated the content of the Act on the Non-Applicability of the Statute of Limitation for Nazi and War Crimes of 1964, see above Section 33.4.3.

crimes included in the Peace Protection Act of 1950[84] part of the Criminal Code. The Peace Protection Act, despite having hardly been applied in practice, remained in effect, which had the strange effect that some of its core provisions from then on existed *de facto* in two different Acts. In addition, as seen above, the crime of "persecution of citizens of the GDR in breach of international law" in Section 90 filled the gap which had been generated by not including political groups in the section on crimes against humanity. According to Section 90, it was a crime to persecute GDR citizens for the exercise of their civil rights. The provision was meant to cover acts such as body searches, the initiation of investigations or expulsion of GDR citizens by West German authorities.[85] In contrast, the crime of "participation in acts of suppression" in Section 88 was directed towards GDR citizens. The practical relevance of this crime was insignificant. Its purpose was rather to show that acts of suppression were incompatible with the socialist social order.[86]

33.6. Prosecution of National Socialist Crimes until the Fall of the Berlin Wall (1970s and 1980s)

The prosecution of crimes committed in the Third Reich continued to play an important role in the last two decades of the GDR's existence. In as late as 1985 the Prosecutor General characterised the prosecution of these crimes as an "urgent imperative",[87] while the political leadership stressed that it was determined to "chase Nazi criminals to their last hiding place and punish them".[88] Despite the fact that the number of cases was low, the prosecutorial authorities continued their work almost right up until the fall of the Berlin Wall – the last registered trial for Nazi crimes took place on

84 On this Act, see above Section 33.3.4.

85 Heilbronn *et al*., 1970, p. 27, see *supra* note 72.

86 *Ibid*., 1970, p. 21. That the provision came into force almost at the same time as the bloody oppression of the "Prague Spring" can be seen as fatal coincidence.

87 Günther Wieland, "Verfolgung von Verbrechen der Nazijustiz – ein dringendes Gebot" [Prosecution of Crimes of the Nazi Judiciary – An Urgent Imperative], in *Neue Justiz*, 1985, vol. 39, no. 1, p. 14.

88 See the comment on a judgment by the Regional Court of East Berlin by Deputy Prosecutor General of East Berlin Rolf Beinarowitz, in *Neue Justiz*, 1982, vol. 36, no. 1, p. 40, in which the author adds that this had been "the repeatedly articulated will of our socialist State".

12–25 September 1989, just a few weeks before the borders to West Germany were opened.[89]

The trials which dealt with crimes that dated back decades were made possible through the good relationships that the GDR enjoyed with the countries in Eastern Europe, where, in fact, most of the victims of the Nazi regime came from.[90] The legal basis in these trials continued to be the Nuremberg Statute. This was formally confirmed by Section 1 paragraph 6 of the Introductory Act to the Criminal Code, according to which the prosecution of "crimes against peace, crimes against humanity and war crimes which were committed before the coming into force of the Criminal Code" should take place "on the basis of international law". Thus, the new regulations on international crimes which the Criminal Code had brought about did not play a decisive role in the prosecution of Nazi crimes. In this context the new provisions were only applied with regard to sanctions and this also only because Article 6 of the Nuremberg Statute did not contain related regulations.[91]

The propagandistic and ideological potential that the trials for crimes committed during the Third Reich entailed continued to play an important role for the political leadership even though the inner-German conflict was no longer as harsh as it had been in the 1960s.[92] Although show trials against West German politicians were no longer initiated, the political leadership of the GDR found new ways to point to the deficiencies of the Federal Republic of Germany. When the political leadership of the GDR received incriminating documents from allied countries in the Eastern bloc concerning perpetrators living in West

[89] In this trial, the Regional Court of Rostock convicted a 79-year-old man for crimes against humanity and war crimes and sentenced him to life imprisonment. According to the judgment, the defendant had worked as a guard in an arms factory in Poland; his tasks included ensuring that the forced labourers that were used in the factory would not escape. When three young Polish workers tried to flee, the accused was said to have shot them. See the wording of the judgment in Christiaan Rüter, *DDR-Justiz und NS-Verbrechen*, vol. 1, Amsterdam University Press and K.G. Saur Verlag, Amsterdam and Munich, 2002, pp. 3 ff.

[90] Wieland, 2010, p. 79, see *supra* note 11.

[91] This was expressly stated in Section 1 para. 6, sentence 2 of the Introductory Act to the Criminal Code.

[92] Among the main reasons for this were the change of politics under Social Democratic Chancellor Willy Brandt and the fact that the GDR was increasingly dependent on credits from West Germany.

Germany, it forwarded them to the West German authorities with the demand that they start an investigation. In the event that a procedure was initiated, the leadership of the party took efforts to accredit a GDR advocate (in most cases, this was the famous GDR counsel Friedrich Karl Kaul) as a party in cases in which the victims were residents of the GDR or Eastern European countries.[93] In this way, the East German counsel was able to denounce the reluctant attitude of the West German state with regard to the prosecution of crimes committed under the Hitler dictatorship in court and before the international media.

Finally, further evidence that the general attitude of the GDR leadership towards Nazi criminals did not change until the party regime broke down was that during the general amnesty of 1987 – the biggest amnesty in the history of the GDR – Nazi criminals and war criminals were explicitly excluded.[94]

33.7. Conclusion

The GDR prosecution of crimes committed under the National Socialist rule and the role that international criminal law played in this context is a multifaceted topic which has to be evaluated carefully. In general, one must clearly acknowledge as positive the fact that prosecutions for the mass crimes committed in the Third Reich were carried out in the GDR on a larger scale. The same is true with regard to the application of rules on international crimes in these trials – for example, Article 6 of the Nuremberg Statute, and with regard to the implementation of regulations on international crimes into the domestic legal order. This is particularly true if one compares the efforts of the GDR with the reluctant attitude of the Federal Republic's government towards both the prosecution of Nazi crimes and the implementation of international criminal law.

However, if one analyses the measures taken by the GDR more thoroughly, a number of negative aspects come to the surface. The prosecution of crimes committed by the National Socialists must also be

93 See, for example, the reprint of the final arguments of Friedrich Karl Kaul in a trial against former members of the SS in Cologne, in *Neue Justiz*, 1980, vol. 34, no. 4, pp. 173 ff.

94 See Festlegung des Vorsitzenden des Staatsrates der Deutschen Demokratischen Republik zur Durchführung des Beschlusses des Staatsrates über eine allgemeine Amnestie aus Anlass des 38. Jahrestages der Gründung der Deutschen Demokratischen Republik, Gesetzblatt der DDR 1987 I, p. 192.

seen as the starting point of the establishment of a criminal law against political enemies which departed from the basic principles of traditional German criminal law as they related to the protection of the rights of the accused (an escalation in this development was seen in the Waldheim trials). This development was driven by the general politicisation of the prosecution of Nazi crimes. In the GDR, "anti-fascism" was a key word that was used to legitimise the state and its policies – the elimination of fascism consequently played a fundamental role. Although a thorough "de-fascistisation" of East German society after the Second World War cannot be criticised in principle (one would have wished that the government in West Germany had taken more effort in purging the public sector of supporters of the old regime), the importance of these trials had the effect that basic principles of the rule of law were seen by the political leadership as an impediment in reaching its political-ideological aims and were accordingly suspended. At the same time, the line between a thorough prosecution of National Socialist mass crimes and the oppression of political opponents was blurred – the punishment of fascists and of neo-fascists (who were frequently punished only for being against the socialist ideology) in the GDR were closely related.

This also led to an amalgamation of the rules against international crimes and the rules for the oppression of political enemies. As laid down in a Stasi manual, the basic understanding in the GDR of international crimes was that they were "a typical expression of imperialism in its general aggravating crisis" while they were seen as "foreign to socialism".[95] With this understanding, the political leadership declared the rules on international crimes to be inapplicable to everyone who followed the "correct" ideology and added another weapon to its arsenal of instruments against political opponents.

[95] See the manual of the Stasi academy in Potsdam, Strafrecht, Besonderer Teil, vol. 1, 1986, p. 14, MfS/JHS/40/86/I, Archive of the Stasi Records Office Berlin.

Annex 1: Convictions for Nazi Crimes in the East German Courts[96]

Year	Death penalty	Prison sentence				Total
		Life	More than 10 years	3–10 years	Less than 3 years	
1945	2	1		2	1	6
1945	9	3	22	35	58	127
1947	8	6	22	130	578	744
1948	10	12	62	709	3,756	4,549
1949	13	11	70	401	2,138	2,633
1950	49	160	2,914	384	585	4,092
1951	8	9	30	112	173	332
1952	2	6	17	53	61	139
1953	1	7	18	44	15	85
1954	2	2	7	20	5	36
1955	4	4	5	8	2	23
1956			1			1
1957				1		1
1958		1		1		2
1959	1	1	1	3		6
1960	4	4		2		10
1961	2			4		6
1962	3	2		5		10
1963	1	4	3	3		11
1964		2				2
1965		2		1		3
1966	1	6		2		9
1967		1				1
1968	1	2				3
1969	1					1
1970		1	3			4
1971	1	1	1			3
1972	2					2
1973	1		2	1		4
1974	1	6		1		8

[96] The figures rely on Wieland, 2010, pp. 97 ff., see *supra* note 11.

1975		3	2	1		6
1976	1	1	1			3
1977	1	1	2			4
1978		3	2			5
1979		1				1
1980			1			1
1981		2	1			3
1982			1			1
1983		4		1		5
1984						0
1985		1				1
1986		2				2
1987		1	2			3
1988		1				1
1989			1			1
Total	129	274	3,191	1924	7,372	12,890

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Historical Origins of International Criminal Law: Volume 2

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

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

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

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

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