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National Constitution: The Legal Reckoning
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1945

No. 2022-01

<https://ssrn.com/abstract=4001540>

ISSN 2699-0903 · FRANKFURT AM MAIN

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Caught between International Law and National Constitution:

The Legal Reckoning with Foreign War Criminals in Norway after 1945*

Lars-Erik Vaale[⊗] and Baard Herman Borge[⊕]

Abstract

This article examines the preparation of the much-debated War Criminals Decree (WCD) of 4 May 1945 by the Norwegian exile government in London and the courts' later use of the law as the legal foundation for the reckoning with German war criminals. More specifically, we show how two central clauses in the Norwegian Constitution of 1814 were challenged by this decree, which combined national and international law in a hitherto unknown manner, and its use: The principle of legality (§ 96) and the prohibition of retroactivity (§ 97). Our article, based on unpublished documents from the Justice Department's (JD) archives, argues that the government's view 1942–1945 changed from defending these clauses to undermining them, by lowering the judicial bar for the passing of death sentences. It is however also argued that the courts, even if they did not challenge the WCD legally, nevertheless through their conscientious treatment of war crimes cases 1945–1949 drastically reduced the law's intended harshening effect on sentences and thus also the significance of its controversial constitutional aspects.

Keywords: Transitional justice, constitutional law, German War Criminals, Hersch Lauterpacht, Norway.

* We are grateful to Mr. DAVID BRITTAINE for his linguistic advice and to the research group at ARKIVET Peace and Human Rights Centre in Kristiansand for their academic suggestions when preparing this article.

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Introduction

During its exile in war-time London, the Norwegian government under Prime Minister Johan Nygaardsvold (1879–1952) drafted and passed, while Norway was occupied by Germany, several provisional statutes meant for the future judicial reckoning with native collaborators and foreign war criminals following a German defeat. The decrees were all signed by King Haakon VII (1872–1957), who also had fled Norway.¹ Unlike the numerous statutes on the improper collaboration of nationals, often prepared in cooperation with the resistance movement at home, the statute on war crimes was solely the government's responsibility, albeit formulated with the allies' common view on German war criminals in mind.² While all the extraordinary penal provisions from London have been criticised on constitutional grounds, none of them have been as legally controversial as the War Criminals Decree (WCD) of 4 May 1945.³

Ever since its inception, which took place only three days before Germany's formal surrender, critical jurists both within and outside of Norway have found the WCD and the death sentences based on it to be constitutionally problematic. They argue that the decree as well as the verdicts conflict with two main paragraphs in the Constitution of 1814, namely §§ 96 ("No sentence without a law") and 97 ("No law must be given retroactive effect").⁴

Dualism was the prevailing norm within legal theory in Norway before 1940, requiring an implementation of international law to be a binding part of Norwegian law, as opposed to monism, where international law could be applied directly by the national courts. The logical implication of this norm, particularly strong in the field of criminal law, was that domestic rules had to be interpreted in accordance with international rules and that the latter could not be applied in contravention with the first. This was also formally acknowledged by the Norwegian government, when it signed the declarations on human rights in 1951–1952, issued by the United Nations (UDHR) and the European Council (EDHR). The

¹ BORGE, BAARD HERMAN and LARS-ERIK VAALE, "Stretching the Rule of Law: How the Norwegian resistance movement influenced the provisional treason decrees of the exile government, 1944–1945," in *Scandinavian Journal of History* 46, no. 1, 2021, 105.

² BORGE, BAARD HERMAN and LARS-ERIK VAALE, *Grunnlovens største prøve: Rettsoppgjøret etter 1945*, Oslo, Scandinavian Academic Press 2018, 26, 52–53.

³ DAHL, HANS FREDRIK, "Dødsstraffen i Norge," in *Krig og moral: Kriminalitet og samfunn i Norden under andre verdenskrig*, edited by HANNU TAKALA and HENRIK THAM, Oslo, Universitetsforlaget 1987, 216; SANDMO, ERLING, *Siste ord: Høyesterett i norsk historie 1905–1965*, Oslo, Cappelen 2005, 355.

⁴ ROSS, ALF, "Klinge-sagen," in *Ugeskrift for Retsvæsen* 80, 1946; HAMBRO, EDVARD, "Some Remarks about the Relations between Municipal Law and International Law in Norway," in *Nordisk Tidsskrift for International Ret* 19, no. 3, 1949; SMITH, CARSTEN, "Folkerettens stilling ved norske domstoler," in *Tidsskrift for Rettsvitenskap*, 77, 1964; HELGESEN, JAN ERIK, *Teorier om "Folkerettens stilling i Norsk rett"*, Oslo, Aschehoug 1982; SMITH, CARSTEN and LUCY SMITH, *Norsk rett og folkeretten*, 2. ed., Oslo, Universitetsforlaget 1982; LUND, KETIL, "Kontroll av staten i statens egne organer," in *Lov og rett* 26, no. 4, 1987; AALL, JØRGEN, *Rettergang og menneskerettigheter: Den europeiske menneskerettighetskonvensjons artikkel 6 og norsk straffeprosess*, Oslo, Universitetsforlaget 1995; ANDENÆS, JOHS., *Det vanskelige oppgjøret: Rettsoppgjøret etter okkupasjonen*, 2. ed., Oslo, Tano-Aschehoug 1998.

EDHR equated international and domestic law and prohibited retroactive legislation when dealing with criminal justice. But, as we will discuss in the following, the war crimes processes in Norway 1946–1949 combined a dualist and monist approach in a way that challenged the Constitutional principles of legality and non-retroactivity.⁵

The making of the WCD must be seen in the light of the international rules for warfare found in the Hague Conventions of 29 July 1899 and 18 October 1907, as well as the German occupation regime in Norway and the Allies' joint commitment to the prosecution of German war crimes.⁶

The rules for warfare regulate the relationship between occupant and occupier and draw the boundaries between legitimate and illegitimate acts of war. Illegitimate ones, also called war crimes, include illegal hostage-taking, torture, murder, unfounded ravages, and the destruction of foreign powers' property.⁷ These were specified in a list prepared for the Versailles negotiations in 1919, in connection with the trials after World War I.⁸ Under the Land Warfare Rules in the 1907 Convention, on the other hand, an occupying power has a legitimate right to protect its interests against attacks by a person or group that seeks to harm those interests. In principle, international law hence gave the German occupiers the right to prosecute and punish members of the Norwegian resistance movement, provided that the measures chosen were in accordance with the rules and principles of international law. The German Commander-in-Chief, General Nikolaus von Falkenhorst (1885–1968), announced shortly after 9 April 1940, that the German military forces in Norway would follow the Land Warfare regulations. The German Sicherheitspolizei (Sipo) in particular, nevertheless used methods contrary to international law such as hostage-taking and torture to fight Norwegian resistance groups.⁹

During World War II, a strict post-war reckoning with German war criminals early became an important goal for the Allies. The first initiative for a future settlement with representa-

⁵ CASTBERG, FREDE, "Den norske grunnlov og rettsoppjøret," in *Juristen* 30, 1948, 121–122; HAMBRO, EDVARD, "Noen betraktninger om forholdet mellom grunnlov og folkerett," in *Lov og Rett* 3, no. 5, 1964, 224–230; LIPPMAN, MATTHEW, "Prosecution Of Nazi War Criminals Before Post-World War II Domestic Tribunals," in *University of Miami International and Comparative Law Review* 8, no. 1, 2000, 7–10; AALL 2004, 80–82, 105–106; SANDMO 2005, 329–339; FRØBERG, THOMAS, "Kan den strafferettslige klassifikasjonen av en handling gi tilbakevirkende kraft?" in *Lov og Rett* 47, nos. 5–6, 2008, 351–355; FRØBERG, THOMAS, *Rettslig prinsippargumentasjon*, Oslo, Gyldendal 2014, 116–117, 264–266, 285–288; HELMERSEN, SONDRE TORP, "Dualismen i norsk rett som konstitusjonell norm," in *Kritisk Juss* 41, no. 3, 2015, 162–165, 175–178; BORGE and VAALE 2018, 237–248.

⁶ VAALE, LARS-ERIK, *Dommen til døden: Dødsstraffen i Norge 1945–50*, Oslo, Pax 2004, 35–36.

⁷ CASTBERG, FREDE, "Norges statsrett under krigen med Tyskland," in *Statsvetenskaplig Tidsskrift* 49, no. 3, 1946, 243–245.

⁸ The 1919 list of war crimes is printed in UNITED NATIONS WAR CRIMES COMMISSION, *Law Reports of Trials of War Criminals. Vol. V*, London, His Majesty's Stationary Office 1949, 93–94.

⁹ JÄGERSKIÖLD, STIG, "Den lagliga regeringen och befolkningen på ockuperat område: Några anteckningar om den norska rättsuppställningen," in *Förvaltningsrättslig Tidsskrift* 21, 1958, 290–291, 298–299; DAVIES, NORMAN, *Europe at War 1939–1945: No Simple Victory*, London, Pan Books 2007, 64–71; CROWE, DAVID M., *War Crimes, Genocide and Justice: A Global History*, New York, Palgrave Macmillan 2014, 94–101; BORGE and VAALE 2018, 52–54.

tives of the German occupying forces in Europe was taken by the French in exile in London in October 1941, in the form of an inquiry sent to the eight other exile governments in the city. There it was proposed to draw up a joint declaration that German war criminals would be held accountable for their misdeeds when the war was eventually over. The immediate background for the French initiative was the German hostage-taking of civilians, which followed the German invasion of the Soviet Union on 22 June 1941. All nine governments in exile attended several meetings of the Polish Ministry of Exile in London in November 1941. These meetings led to the Allied Declaration of St. James of 13 January 1942. Punishment for war crimes was made an Allied main war target. In his speech at this meeting, the Norwegian Minister of Justice Terje Wold (1899–1972) emphasized that in the future it would be impossible to maintain a society based on freedom for the individual and respect for the law if the war criminals did not face their fate and received the punishment they deserved.¹⁰

National War Crimes Processes in Western Europe

The Moscow Declaration, signed by USA, Great Britain and the Soviet Union 30 October 1943, stated that Germans responsible for atrocities, massacres, or executions would be returned to the countries where these crimes had been committed. Judgment and punishment were to be administered in accordance with the laws of the nation concerned, which of course gave different outcomes in the countries involved.¹¹ Major war criminals, whose crimes affected several nations, would be punished by an allied International Military Court (IMT) at Nuremberg.¹²

Leaving the IMT aside, the actual dealing with war criminals before national courts both in Norway and other formerly German-occupied countries in Western Europe, namely Denmark, France, Belgium and The Netherlands, came to be fraught with problems. In all these countries, several practical conditions hampered the judicial reckoning with foreign citizens.

¹⁰ VON LINGEN, KERSTIN, “Setting the Path for the UNWCC: The Representation of European Exile Governments on the London International Assembly and the Commission for Penal Reconstruction and Development, 1941–1944,” in *Criminal Law Forum* 25, 2014, 53–66; BERGE and VAALE 2018, 52–54; KOLSRUD, OLE, “Eksil-Norge og jødene under 2. verdenskrig,” in *Historisk Tidsskrift* 73, no. 3, 1994, 301–302; KOLSRUD, OLE, “De norske eksilmyndighetene, jødeforfølgelsene og Krigsforbryterkommisjonen: Antisemittisme i den norske ledelsen?,” in *Historie og moral: Nazismen, jødene og hjemmefronten*, edited by ØYSTEIN SØRENSEN and KJETIL BRAUT SIMONSEN, Oslo, Dreyer 2020, 196–197; ÅMARK, KLAS, *Främlingar på tog: Sverige och Förintelsen*, Stockholm, Kaunitz-Olsson 2021, 72–80.

¹¹ UNITED NATIONS WAR CRIMES COMMISSION, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, His Majesty’s Stationary Office 1948, 107–108.

¹² KOCHAVI, ARIEH J., “The Moscow Declaration, the Kharkov Trial, and the Question of a Policy on Major War Criminals in the Second World War,” in *History* 76, no. 248, 1991, 401–417; BASS, GARY JONATHAN, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, Princeton, Princeton University Press 2000, 149–150; CROWE 2014, 152–160; DAHL, HANS FREDRIK, *Krigen som aldri tar slutt: Én krig – mange fortellinger*, Oslo, Aschehoug 2017, 69–87.

Firstly, investigations proved difficult because of the language barrier, the complexity of German command chains as well as the constant German personnel transfers during the war. Secondly, suspects evaded capture by escaping, hiding amongst regular Wehrmacht soldiers, or committing suicide. Thirdly, the war crimes settlement everywhere was downgraded in favour of treason trials against the countries' own residents. Fourthly, jurisdiction issues with the allies regarding responsibility for the specific cases arose.¹³

In addition, trialing foreign nationals posed severe legal challenges. One of them was the problem of jurisdiction, which was discussed in all the countries after the war. The key question here was whether the existing penal code could suffice for a prosecution of German war criminals or if a new special law, possibly with retroactive effect, was needed. In either case, references to international laws on warfare could be relevant, whether it be to justify a verdict based on national law or to provide judges with the legal jurisdiction for giving a certain penalty.¹⁴

However, judiciaries and courts often lacked experience in using international law.¹⁵ Besides, none of the five countries had previously carried out a war criminal settlement in which the relationship between international law and national law in the assessment of such crimes had been clarified. A related problem was that vaguely formulated rules found in relevant parts of international law opened up a considerable latitude for interpretation, especially regarding what an occupying power lawfully could do to protect itself against resistance, as described in Hague Convention no. 4 of 18 July 1907.¹⁶

¹³ TAMM, DITLEV, *Retsoppgøret efter besættelsen*, København, Jurist- og økonomforbundets Forlag 1984, 626–627; ANDENÆS, 1998, 231; LIPPMAN 2000, 112; NØKLEBY, BERIT, *Krigsforbrytelser: Brudd på krigens lov i Norge 1940–45*, Oslo, PAX 2004, 18–37, 52–56, 69–71; LAGROU, PIETER, “Eine Frage der moralischen Überlegenheit? Die Ahndung deutsche Kriegsverbrechen in Belgien,” in *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg*, edited by NORBERT FREI, Göttingen, Wallstein Verlag 2006, 332; DE MILDT, DICK and JOGGLI MEIHUIZEN, “Unser Land muß tief gesunken sein... Die Aburteilung deutscher Kriegsverbrecher in den Niederlanden,” in *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg*, edited by NORBERT FREI, Göttingen, Wallstein Verlag 2006, 283.

¹⁴ ANDENÆS 1998, 231–233; LAMMERS, KARL CHRISTIAN, “Späte Prozesse und milde Strafen: Die Kriegsverbrecherprozesse gegen Deutsche in Dänemark,” in *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg*, edited by NORBERT FREI, Göttingen, Wallstein Verlag 2006, 352; DE MILDT and MEIHUIZEN 2006, 290, 293–298; MOISEL, CLAUDIA, “Résistance und Repressalien: Die Kriegsverbrecherprozesse in der französischen Zone und in Frankreich,” in *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg*, edited by NORBERT FREI, Göttingen, Wallstein Verlag 2006, 273–275.

¹⁵ LIPPMAN 2000, 113.

¹⁶ TAMM 1984, 631; BOHN, ROBERT, “Schuld und Sühne: Die norwegische Abrechnung mit den deutschen Besatzern,” in *Deutschland, Europa und der Norden*, edited by ROBERT BOHN, Stuttgart, Franz Steiner Verlag 1993, 111; BOHN, ROBERT, “Die Strafrechtliche Abrechnung mit den deutschen Besatzern in Dänemark und Norwegen im Vergleich,” in *Kriegsende im Norden: Vom heißen zum kalten Krieg*, edited by ROBERT BOHN and JÜRGEN ELVERT, Stuttgart, Franz Steiner Verlag 1995, 144; ANDENÆS 1998, 232; DE MILDT and MEIHUIZEN 2006, 323; LAGROU 2006, 337.

As shown in table 1, the countries all supplemented their criminal law by adding new provisions in connection with the war crimes processes, incorporating the Hague and subsequent conventions:

Table 1: Legislation on War Crimes in Western Europe 1942–1948¹⁷

Norway	Decree 22.01.1942	Decree 04.05.1945	Law 13.12.1946
France	Decree 30.08.1944	Law 15.09.1948	-
Netherlands	Law 10.07.1947	-	-
Belgium	Law 20.06.1947	-	-
Denmark	Law 12.07.1946	-	-

The prosecution of foreign war criminals turned out differently in these five countries, both quantitatively and qualitatively, due to variations in local conditions, national law, interpretation of international law and historical experience, cf. table 2.¹⁸

Table 2: War Crimes Trials in Western Europe 1945–1952¹⁹

	Total	Executions
Norway	74	12 (16 %)
France	1,031	54 (5 %)
Netherlands	237	5 (2 %)
Belgium	83	2 (2 %)
Denmark	80	0 (0 %)

¹⁷ MOISEL 2006, 271–273; LARSEN, STEIN UGELVIK, “Ahndung des Unvorsehbareren: Die strafrechtliche Aufarbeitung deutscher Kriegsverbrechen in Norwegen,” in *Transnationale Vergangenheitspolitik: Der Umgang mit deutschen Kriegsverbrechern in Europa nach dem Zweiten Weltkrieg*, edited by NORBERT FREI, Göttingen, Wallstein Verlag 2006, 390–396; LAMMERS 2006, 352–359; LAGROU 2006, 335–339; DE MILDT and MEIHUIZEN 2006, 290–299.

¹⁸ TAMM, DITLEV, “Prosecution of War Criminals in the North: Danish and Norwegian Experiences after the Second World War,” in *Historical Origins of International Criminal Law: Volume 2*, edited by MORTEN BERGSMO, WUI LING CHEAH and PING YI, Brussels, Torkel Opsahl Academic EPublisher 2014, 471. For instance: Torture was not considered contrary to international law by the prosecuting authority in 1947, when the Belgian war crimes law of 1947 came into force. LAGROU 2006, 337.

¹⁹ MOISEL, CLAUDIA, “Les Procès pour Crimes de guerre allemands en France après la Seconde Guerre mondiale,” in *Bulletin de l’Institut d’histoire du Temps Présent* 80, 2002, 90–101; NØKLEBY 2004, 74–76; DE MILDT and MEIHUIZEN 2006, 283–284, 310–311, 322–323; LAGROU 2006, 327–328, 339–343; LARSEN 2006, 370, 382–383; ROUSSO, HENRI, “The Purge in France: An Incomplete Story,” in *Retribution and Reparation in the Transition to Democracy*, edited by JON ELSTER, Cambridge, Cambridge University Press 2006, 104–106, 108; TAMM 2014, 471, 480–481, 485. National definitions of war criminals may vary. In the case of Norway, we have only included those who were prosecuted according to the WCD.

In contrast, the reckoning with collaborators had a much wider scope. The largest legal settlement in relative terms with compatriots took place in Norway, where 1,400 per 100,000 inhabitants were punished.²⁰ In Belgium, which punished the second most, it was 963 per 100,000 and in the Netherlands 700.²¹ In Denmark and France, the corresponding figure was 300.²² The latter two settlements were thus somewhat less extensive, although they also had an enormous scope. Based on the figures from the two forms of settlement, it is difficult to see any direct connection between them in the individual country. Since they took place under different circumstances, not least from a legal point of view, they should probably be analyzed separately.

Historiography

Despite that between 1944 and 2018, an extensive body of literature on the war crimes processes in Norway has emerged, the questions we discuss in this article have until now either not been raised or only superficially dealt with. Many of the authors have been jurists but in more recent years, from the 1990s onwards, some historians and social scientists have also published academic studies on the topic.²³ However, in most of the relevant books and

²⁰ BORGE, BAARD HERMAN, *I rettsoppgjørets lange skygger: Andre generasjons problemer i lys av moderne transisjonsteori*, PhD dissertation in comparative politics, University of Bergen 2012, 18; SEEMANN, ANIKA, *Law and Politics in the Norwegian 'Treason Trials' 1941–1964*, DPhil dissertation in history, University of Cambridge 2019, 2–8, 17–18.

²¹ HUYSE 2000, 161; ROMIJN, PETER and GERHARD HIRSCHFELD, “Die Ahndung der Kollaboration in den Niederlanden,” in *Politische Säuberung in Europa: Die Abrechnung mit Faschismus und Kollaboration nach dem Zweiten Weltkrieg*, edited by KLAUS-DIETMAR HENKE and HANS WOLLER, München, dtv 1991, 295.

²² TAMM 1984, 726; HUYSE 2000, 161.

²³ The jurists are BRIERLY, JAMES LESLIE, “The Nature of War Crimes Jurisdiction,” in *The Norseman* 2, no. 2, 1944; ROSS 1946; SUND, HARALD, “Krigsforbryterne i Norge og oppgjøret med dem,” in *Tidsskrift for Rettsvitenskap* 59, no. 1, 1946; TORGENSEN, ROLF NORMANN, “Klinge-saken i Norges Høyesterett,” in *Ugeskrift for Retsvesen* 80, 1946; HAMBRO 1949; SMITH 1964; FLEISCHER, CARL AUGUST, “Grunnlovens § 97,” in *Jussens Venner* 10, nos. 5–6, 1975; ANDENÆS, JOHNS., *Det vanskelige oppgjøret: Rettsoppgjøret etter okkupasjonen*, 1. ed., Oslo, Tanum Norli 1979; ANDENÆS 1998; RUUD, MORTEN, *Innføring i krigens folkerett*, Oslo, Tanum-Norli 1980; HELGESEN 1982; SMITH and SMITH 1982; LUND 1987; AALL 1995; STRANDBAKKEN, ASBJØRN, “Grunnloven § 96,” in *Jussens Venner* 39, nos. 3-4, 2004; HØGBERG, BENEDIKTE MOLTUMYR, *Forbud mot tilbakevirken-de lover*, Oslo, Universitetsforlaget 2010; HØGBERG, BENEDIKTE MOLTUMYR, *Statsrett kort forklart*, Oslo, Universitetsforlaget 2013a; GRAVER, HANS PETTER, “Okkupasjon, folkerett og dødsdommen mot Klinge,” in *Lov og Rett* 54, no. 4, 2013. Other contributions, mostly from historians or political scientists, are GREVE, TIM, *Verdenskrig*, vol. 3 in *Norge i krig: Fremmedåk og frihetskamp 1940–1945*, edited by MAGNE SKODVIN, Oslo, Aschehoug 1985; DAHL 1987; DAHL, HANS FREDRIK, “Dealing with the Past in Scandinavia: Legal Purges and Popular Memories of Nazism and World War II in Norway and Denmark after 1945,” in *Retribution and Reparation in the Transition to Democracy*, edited by JON ELSTER, Cambridge, Cambridge University Press 2006; BOHN 1993, 1995; NØKLEBY, BERIT, *Skutt blir den... Tysk bruk av dødsstraff i Norge 1940–1945*, Oslo, Gyldendal 1996; NØKLEBY, BERIT, *Gestapo: Tysk politi i Norge 1940–45*, Oslo, Aschehoug 2003; NØKLEBY 2004; VAALE 2004; VAALE, LARS-ERIK, “Rettsoppgjøret og dødsstraffen i Norge 1945–50,”

articles, the legal prosecution of war criminals is a side theme dealt with in passing. Only a few contributions, of which merely one is written by a jurist, deal with the entire course of events from the first London decree on war crimes committed against Norwegian citizens was passed on 22 January 1942 (the Death Penalty Decree, hereafter DPD), to the last verdict over a German war criminal fell in the Supreme Court in Oslo more than seven years later.²⁴

Out of the numerous jurists among the authors, nearly all limit themselves to debating legal aspects of the first Supreme Court ruling based on the WCD: The death sentence handed down on the 27 February 1946, in the model case against German national Karl-Hans Hermann Klinge (1908–1946). The Klinge judgment not only set a precedent for the handling of war criminal cases, but also became more controversial, mainly from a constitutional point of view, than any other Supreme Court decision made in the 20th century. Up until today it has been a natural focal point for legal scholars in connection with the war crimes processes.²⁵ Consequently, the numerous rulings that followed in 1946–1949 both in the Supreme Court and lower courts have received far less attention from jurists. Also because they often, like the majority of historians, implicitly take for granted that the Klinge verdict set a standard for harsh war crime sentences. While most of the jurists have criticized the court's decision in the Klinge case, a few have also defended it as legally justifiable.²⁶

When dealing with war crimes as a scientific subject, legal academics face the challenge of losing history and historians and social scientists of not finding the law. Traditionally, but certainly with exceptions, the first group of scientists have often focused on the internal norms and practice of and continuity in the legal systems, while the latter have been interested in how these are continually influenced by external societal forces, sometimes also producing legal discontinuities. Methodologically, we try to combine the two perspectives, by applying the contemporary legal terminology to this field and analyzing how it was interpreted by lawyers, politicians, civil servants and the public in the 1930s and 1940s. To fully comprehend the dynamics of transitional justice in Europe after 1945, we deem it necessary to be analytically aware of and systematically discuss the interrelations between law, politics and society.²⁷

in *Danske tilstander. Norske tilstander. Forskjeller og likheter under tysk okkupasjon 1940–45*, edited by HANS FREDRIK DAHL, HANS KIRCHHOFF, JOACHIM LUND and LARS-ERIK VAALE, Oslo, Press 2010; SANDMO 2005; LARSEN 2006.

²⁴ ANDENÆS 1979, 1998; BOHN 1993, 1995; NØKLEBY 2003, 2004; LARSEN 2006.

²⁵ SANDMO 2005, 355.

²⁶ The latter group consists of four authors: SUND 1946; TORGENSEN 1946; FLEISCHER 1975; GRAVER 2013. Interestingly, two of the three non-jurists who analyze the war crimes process as a whole tend to defend the Klinge verdict while criticizing some of the later court sentences against war criminals for being too mild: NØKLEBY 2004; LARSEN 2006.

²⁷ DE FIGUEIREDO, IVO, "Et rettfærdig oppgjør? Etterkrigsoppgjøret som rettslig og historisk problem," in *Et rettfærdig oppgjør? Rettsoppgjøret i Norge etter 1945*, edited by HANS FREDRIK DAHL and ØYSTEIN SØRENSEN, Oslo, Pax 2004, 31–41; 50–51; KIERULF, ANINE and RUNE SLAGSTAD, "Historikerens fortellinger om juss," in *Tidsskrift for Rettsvitenskap* 125, no. 4, 421–422, 454–457; HØGBERG, BENEDIKTE MOLTUMYR, "Hvordan samfunnet har påvirket tolkningen av Grunnloven §§ 97 og 105," in *Tolkingar av Grunnlova: Om forfatningsutviklinga 1814–2014*, edited by EIRIK HOLMØYVIK, Oslo, Pax 2013b, 368–370; PRIEMEL,

Even though archival sources produced by the Norwegian exile authorities are available, little light has been shed on the specifics of the decision process that in 1944–1945 took place within the government and its department of justice, eventually leading to the formulation of a both harsh and legally controversial special law on war crimes passed only four days before the liberation of Norway, replacing its forerunner of 1942. So, neither the reasons for starting the process towards a second provisional statute on war crimes nor the identity of the initiators and other participants have been investigated. Similarly, little has been revealed about the exchange of legal and political arguments among Norwegian jurists in London prior to the passing of the WCD.²⁸ Consequently, the motives and considerations behind the final wording of the law have not been fully understood.

Irrespective of their educational and professional background, none of the authors in question have tried to compare the 74 significant court decisions with the expected outcomes under the DPD of 1942 to determine the extent to which the introduction of the WCD fulfilled its original objectives. In that connection, a systematic review of the legal argumentation of participating judges in the court cases, especially regarding the judges' interpretation and use of international law, is also lacking. To sum up, the current literature on Norway's reckoning with foreign war criminals has several shortcomings. In this article we will address some of the more pressing ones.

The DPD of 22 January 1942

In the autumn of 1941, secret reports from Norway, often based on testimonies from fugitives in Sweden, informed the Nygaardsvold government about how the German Sipo and its Norwegian aides not only maltreated members of the resistance but also used brutal interrogation techniques against them.²⁹ The latter practice, so-called “verschärfte Vernehmung,” sharpened interrogation, which already was a standard police procedure in Germany, had

KIM CHRISTIAN, “Consigning Justice to History: Transitional Trials after the Second World War,” in *The Historical Journal* 56, no. 2, 2013, 553–556.

²⁸ As we have pointed out in BERGE and VAALE 2021, 108, two of the three monographs on the Norwegian government-in-exile does not mention the preparation of the postwar legal trials at all. The remaining one, by Ole Kolsrud, mentions the preparations and the WCD, but refrains from analyzing the National Archives (Riksarkivet) material referred to in the monograph in further detail, cf. KOLSRUD, OLE, *En splintret stat: Regjeringskontorene 1940–1945*, Oslo, Universitetsforlaget 2004, 321–340.

²⁹ AAB/ARK-1354/D/Da/L0014/0004, Letter from Trygve Lie to Johan Nygaardsvold, 11 December 1941. In this letter to the prime minister, the foreign secretary Lie refers to a report from the Norwegian chargé d'affaires in Stockholm, Jens Bull (1886–1956), 19 November 1941 about the conditions in German and Norwegian prisons and camps at home. According to Bull, “there can be no doubt that torture is being inflicted on prisoners to confess or perhaps rather denounce accomplices.” Bull concluded that the common sense of law itself demanded persecution and punishment of persons “guilty of such barbarity.” DAHL 1987, 198; DAHL, HANS FREDRIK, “*Dette er London*”: *NRK i krig 1940–1945*, Oslo, Cappelen 1999, 235–236.

only shortly before, in part as a reaction to increased resistance activity, been officially sanctioned by Berlin as an employable tool by the Sipo also in Norway.³⁰

Horried by the news, the exile government instructed its jurists to prepare a provisional statute as a legal basis for imposing the death penalty on German war criminals, resulting in a decree of 22 January 1942. In the act's preparatory work, the Ministry of Justice (Justice Department, JD) stated that the "outrageous rawness" demonstrated by war criminals in Norway would necessitate radical reactions. Therefore, punishments adapted to a civilized society were no longer adequate.³¹ Technically, the new law realized its goal by providing the courts with an opportunity to impose the death penalty for several crimes, primarily bodily harm and murder, that under the Civil Penal Code of 1902 could lead to life imprisonment.

Like all the provisional penal laws passed in London, the DPD of 1942 was legally contentious since the government's right to enact penalties on its own from abroad was not overtly authorized by the constitution's § 17.³² However, since the decree came at an early stage of the occupation while German brutality gradually increased later on, most of the relevant war crimes undoubtedly were committed after the law's inception. So, its post-war use would seldom be retroactive in violation of the constitution's § 97. In fact, the wish to avoid retroactivity was one of the reasons why the government wanted to pass the decree as soon as possible.³³ Also because of its early commencement, the act would have provided formal statutory authority for the judicial reckoning with war criminals, fulfilling the requirement set in § 96 of the constitution, whereby any verdict must be based on a law.³⁴

The WCD of 4 May 1945

In most of the literature where the enactment of the WCD is mentioned, the law is rather benevolently described as "necessary" without further discussion. Nonetheless, it was evidently not a matter of course that a second special law on foreign war criminals had to be passed so late in the war, nor that it should take a both novel and controversial form. Accepting the London government's own version of the origination of the decree without further ado also implies that the role of influential individual actors becomes invisible. Based on archival

³⁰ AULIE, ANDREAS, "Registrering av landssvikforbrytelsene med gjerningsbeskrivelse og statistikk," in *Om landssvikoppgjøret*, published by Justis- og Politidepartementet, Gjøvik, Mariendal 1962, 262–264; BOHN 1993, 116; BURLEIGH, MICHAEL, *The Third Reich: A New History*, New York, Hill and Wang 2000, 175–176, 178–194.

³¹ ANDENÆS 1998, 199.

³² BORGE and VAALE 2021, 113.

³³ VAALE 2004, 28; DAHL 2006, 154.

³⁴ STRANDBAKKEN 2004, 190, 194; JACOBSEN, JØRN, "§ 96," in *Grunnloven: Historisk kommentarutgave 1814–2020*, edited by OLA MESTAD and DAG MICHALSEN, Oslo, Universitetsforlaget 2021, 113.

sources, it emerges that an informal network of exiled Norwegian jurists both within and outside of the JD, particularly one enterprising bureaucrat, exerted decisive influence.³⁵

In the archives of the Ministry's Legal Section (Lovavdelingen), the earliest documented mention of an alleged need for a revised law is a memo dated 7 July 1944. In the note, addressed to Minister of Justice Terje Wold and commissioned by the section's bureau chief Finn Hiorthøy (1903–1991), secretary, jurist and political scientist Edvard Hambro (1911–1977) of the Foreign Ministry referred to the JD's current position on the war crime problem. According to that view, the courts at home could only judge on the basis of Norwegian criminal law, which already covered most of the war crimes that had been committed. Interestingly, the Ministry was at that time apparently not inclined to recommend a new decree.³⁶ JD's position was in line with Oxford law professor James Leslie Brierly (1881–1955) who recommended that the government should build as much as possible on Norwegian, not international, law in the settlement with war criminals.³⁷

It was only later, in the winter of 1944–1945, that Wold, influenced by Hiorthøy, changed his opinion.³⁸ Even though Hambro in his memo supported the JD's line he feared that consequently, several German war criminals would have to be acquitted for technical reasons, an outcome contrary to the Norwegians' sense of justice.³⁹

Should one not try to find a solution so that war criminals could be punished even if their actions were not explicitly covered by the national penal code, or when internal law could not be used against foreign residents, he asked rhetorically. Hambro then suggested a wide but concise retroactive penal provision with reference to the rules of international law on war and occupation, i.e. a new war crimes decree under which violation of the rules would be punishable by death or imprisonment for life. While he realized that his proposal might be met with "legalistic" criticism, he justified it by stating that neither the penal code nor the Constitution had been written with extraordinary circumstances in mind. Therefore, the new decree would, despite its backdating effect, in his opinion not run counter to the spirit of the Constitution. However, if his suggestion were to be considered unacceptable, an alternative would be to add some provisions on war crimes to the ordinary criminal law.⁴⁰

The next exile jurist to engage in the discussion was Finn Palmstrøm (1903–1987), who worked for the National Chief of Police (Rikspolisjefen). In two minutes sent to the JD, of 7 August and 2 October 1944, he referred to, and commented on Hambro's memo. In the first one, Palmstrøm stated that German war criminals should be punished according to penal provisions based on international law, provided that their actions already, when committed were in violation of the relevant regulations. That view, also voiced by Hambro, was contrary

³⁵ ROGNLIEN, STEIN, "London-tiden 1940–1945," in *Festskrift. Lovavdelingen 100 år: 1885–1985*, edited by HELGE OLAV BUGGE, KIRSTI COWARD and STEIN ROGNLIEN, Oslo, Universitetsforlaget 1986, 28–30.

³⁶ RA/S-3212/D/De/L0309/0001, P.M. from Edvard Hambro to Terje Wold, 7 July 1944.

³⁷ BRIERLY 1944, 172.

³⁸ RA/S-3212/D/De/L0309/0001, P.M. from Finn Hiorthøy to Terje Wold, 20 February 1945.

³⁹ P.M. from Edvard Hambro to Terje Wold, 7 July 1944.

⁴⁰ RA/S-3212/D/De/L0309/0001, P.M. from Edvard Hambro to Terje Wold, 25 July 1944.

to legal practice in Norway, where international law at that time was not automatically valid. In Palmstrøm's second note, he emphasized the need for increased penalties in several areas, so that the courts could sentence more war criminals to death or life imprisonment.⁴¹

By far the most comprehensive contribution to the debate was a 30-page long memo of 28 October 1944, to Wold, from jurist John Lyng (1905–1978) of the JD. Unlike Hambro and Palmstrøm, Lyng did not recommend or even mention the use of international law. Instead, he discussed whether the penal code of 1902, supplemented by the decree of 22 January 1942 (DPD), sufficiently covered the various abuses committed by foreign war criminals. His first concern was that defendants might claim that they had acted on orders from their superiors and be acquitted unless the prosecution could prove that the allegation was wrong. However, the memo's main theme was the overall level of punishment, which in Lyng's opinion was too low. First and foremost, the courts' right to impose death penalties should be extended.⁴²

At present, even attempted premeditated murder did not suffice to hand down a death sentence, nor did torture unless with death as a result, or performed with particularly dangerous tools resulting in significant bodily injuries. So, in war crime cases where the "natural reaction" would be the death penalty but the conditions for imposing it were not present, one could only impose a custodial sentence, at the most 13 ½ years. Against that backdrop, Lyng went through specific chapters of both the civilian and military penal code and discussed how to arrange for harsher punishments, preferably the death penalty but also life imprisonment (21 years), for several relevant crimes.⁴³

To achieve that goal by means of existing Norwegian criminal law, he then suggested two different solutions. One could either, in cases where it was "obviously needed," extend the interpretation of the current levels of punishment, allowing the courts to give more war criminals a death sentence, or change the level of punishment in certain sections of the penal code. On the last page, Lyng added that an "extension of the law at this time naturally will not have full effect," apparently taking for granted that the measures he recommends should not be given a retroactive effect.⁴⁴

Also, on that note, his views differ from those of Hambro and Palmstrøm, which again shows that in late 1944 there was no consensus among exile jurists in London as to if and how the legal basis for the coming reckoning with German war criminals should be revised. The next jurist to engage in the discussion was Erik Andreas Colban (1876–1953), the Norwegian ambassador to Great Britain. In a letter to the JD of 17 November 1944, Colban, commenting on Lyng's memo, wrote that he personally felt that the courts, when they "finally got to deal with the criminals" should not be limited by the law's standard rules for determining penalties. While changing the penal code therefore in his opinion was not necessary to achieve tougher sentences, Colban nevertheless thought it "maybe a natural thing to do," as

⁴¹ RA/S-3212/D/De/L0309/0001, Letters from Finn Palmstrøm to Terje Wold, 7 August and 2 October 1944.

⁴² RA/S-3212/D/De/L0309/0001, P.M. from John Lyng to Terje Wold, 26 October 1944.

⁴³ P.M. from John Lyng to Terje Wold, 26 October 1944.

⁴⁴ P.M. from John Lyng to Terje Wold, 26 October 1944.

it would remove any doubt.⁴⁵ As Norway's representative in the United Nations War Crimes Commission (UNWCC) until December 1944, he maintained that since no international penal system for war crimes existed at that time they could only be securely prosecuted if the legal foundation was national.⁴⁶

On 13 January 1945 the JD received a short letter from "private lawyer Blom", a pseudonym for lawyer and economist Wilhelm L. Thagaard (1890–1970).⁴⁷ He was a senior civil servant who before his escape to London in 1941 had been a leading member of the resistance.⁴⁸ In his letter he did not relate to and seemingly did not even know of the exchange of opinions about the legal prosecution of war crimes between other jurists since the previous summer. Instead, he pointed out that as it now had been clarified that foreign war criminals would be trialed in Norway under Norwegian law, the Ministry ought to consider a review of criminal and procedural provisions "to see if they are suitable" for the crimes in question. Thagaard's letter, which makes no reference to international law, once again suggests that far from all exile jurists even in early 1945 saw a pressing need for the enactment of a second war crime decree.⁴⁹

About a month later, on 20 February 1945, bureau chief Hiorthøy of the Legal Section, concluded the discussion with reference both to Thagaard's recent inquiry and Lyng's "in-depth report" from 28 October 1944. One should now make legislative changes to provide "an unequivocal legal basis" for extended use of the death penalty and life imprisonment. So far, he agreed with Lyng, but "to avoid doubt and unnecessary procedure" Hiorthøy would prefer to anchor the changes in an entirely new war crimes decree instead of just revising the penal code. He added, almost certainly inspired by Hambro's note from 7 July 1944, that the consideration of § 97 of the Constitution "should not be given excessive weight" since the acts at issue already before the war had been criminalized by international law.⁵⁰

At the end of his letter, Hiorthøy presented his proposal for a new special law on war crimes. The bill, largely identical to the final WCD of 4 May 1945, sharpened penalties by considering what Lyng in his memo had identified as weaknesses in existing legislation. From a legal point of view, the bill's most controversial provision was § 1. By stipulating that offenses committed by foreign citizens were to be punished under Norwegian penal code when they were "in conflict with the laws and customs of the war," this made possible a retroactive use of the bill. Thus, for the first time Norwegian national penal law would take up international law in itself, but only on this one point. Hiorthøy admitted that the bill

⁴⁵ RA/S-3212/D/De/L0309/0001, Letter from Erik Colban to Finn Hiorthøy, 17 November 1944.

⁴⁶ COLBAN, ERIK, *Femti år*, Oslo, Aschehoug 1952, 200–202.

⁴⁷ RA/S-3212/D/De/L0309/0001, Letter from Anton Blom (Wilhelm Thagaard) to Terje Wold, 13 January 1945.

⁴⁸ ROGNLIEN 1986, 31; KILI, TERJE, *Den borgerlige sosialisten – Wilhelm Thagaard 1917–1970*, Oslo, TMV-senteret, University of Oslo 1996, 160–161.

⁴⁹ Letter from Anton Blom (Wilhelm Thagaard) to Terje Wold, 13 January 1945.

⁵⁰ P.M. from Finn Hiorthøy to Terje Wold, 20 February 1945.

“certainly could be improved,” but he saw little reason to dwell on details. The important thing was “to hit, and hit hard, those who are guilty of atrocities and wanton destruction.”⁵¹

Under the WCD, the penal code’s custodial sentences could be extended up to double (§ 3) and an attempted crime was to be punished just as severely as one executed (§ 4). Further, having acted on orders could not be invoked as a ground for impunity, but the court could regard it as a mitigating circumstance (§ 5). Finally, the courts were given ample discretion to hand down the death penalty or life imprisonment (§ 3). The two harshest penalties could “always” be applied when one or more of a wide range of more or less generally formulated conditions were met in the indictment, most notably significant bodily harm, significant suffering, prolonged deprivation of liberty and extensive destruction of property (§ 3, a–d).⁵²

Already the same day, 20 February 1945, the bureau chief sent his draft law, marked “Urgent,” out for consultation. A handwritten comment by Hiorthøy states that the draft has been “set up after a conference with the Minister,” indicating that also Wold now was convinced of the need for a new decree.⁵³ In a reaction to the draft law but also referring to Lyng’s memo, ambassador Colban 28 February 1945 wrote to Wold that national courts did not need to be bound by standard penalties when dealing with foreign citizens. Nonetheless, since the JD would probably not accept such a solution a decree with “approximately the content” of the proposed bill “could be useful”, although the courts might question its constitutional validity.⁵⁴ To summarize, there is no doubt that both the origin and the form of the WCD chiefly was due to Hiorthøy’s personal commitment.⁵⁵ In hindsight, the former bureaucrat and judge, in 1979 still defended the WCD’s combination of international and national law, that had been introduced by the JD and acknowledged by the majority in the Supreme Court.⁵⁶

Regarding the main driving force behind the law, the correspondence referred to above clearly points to the personal realization of Hiorthøy and some other civil servants in 1944–1945 that the decree of 1942 would not result in penalties they felt were hard enough.⁵⁷

In a confidential note of 18 May 1945, Hiorthøy wrote, rather cryptically, that the new law would “prompt certain measures” from the JD, “especially instruction (communication) in

⁵¹ P.M. from Finn Hiorthøy to Terje Wold, 20 February 1945.

⁵² RA/S-3212/D/De/L0309/0001, Provisional Decree on the Punishment of Foreign War Criminals, 4 May 1945.

⁵³ RA/S-3212/D/De/L0309/0001, Preparatory Draft on the Punishment of Foreign War Criminals from Finn Hiorthøy to Terje Wold, 20 February 1945. Wold confirmed that he had read Hiorthøys draft 21 February 1945, by adding his own handwritten initials T.W. By then he also expected “not few executions, but at least several hundred” (ikke faa henrettelser, i hvert fald flere hundrede”) during the postwar reckoning, including German war criminals. Wold had voiced this opinion in a conversation with Danish law professor Stephan Hurwitz (1902–1981) in London 17 January 1945, cf. GARDE, PETER, *Stephan Hurwitz: Professor. Kriminalist. Ombudsmand*, Aarhus, Aarhus Universitetsforlag 2018, 236–237.

⁵⁴ RA/S-3212/D/De/L0309/0001, Letter from Erik Colban to Terje Wold, 28 February 1945.

⁵⁵ BORGE and VAALE 2018, 58.

⁵⁶ HIORTHØY, FINN, “Carsten Smith. Statsliv og rettsteori (book review),” in *Lov og Rett* 19, no. 4, 1979, 326.

⁵⁷ BORGE and VAALE 2018, 54–55.

relation to the prosecuting authority.”⁵⁸ However, whether such communication took place or what it led to is uncertain. Hiorthøy, who both held a key position and apparently had a strong motivation to replace the DPD, was known as productive, diligent, and professionally skilled. The National Chief of Police Andreas Aulie (1897–1990) was certain that Hiorthøy had given “every Norwegian jurist in London a helping hand on one or several occasions.”⁵⁹ However, the sources tell little about Hiorthøy’s personal motives in connection with the WCD.⁶⁰

The WCD in the Parliament 1945–1946

In theory, the Parliament could have challenged the constitutionality of the exile government’s provisional decrees, issued 1941–1945, but chose not to do so in practice after the liberation in 1945. Had it not been for the initiative of President of the Storting, conservative (Høyre) Carl Joachim Hambro (1885–1964), the decrees might not even have found their way through the Storting before ending up in the Supreme Court. He was especially concerned about carrying out executions of traitors and war criminals solely based on governmental decrees, and not parliamentary laws. The representatives were allowed to consider the decrees by the government, who, nonetheless, signalled that their immediate influence would be limited. Formally, the DPD and WCD were valid until the next Parliament decided otherwise, but politically, they would be “dressed in the highest form of state will” for the future, should the politicians agree to confirm them in the form of a law, according to the JD proposal 20 June 1945.⁶¹

On 29 June 1945, the Judiciary Committee received a letter from the two law professors Frede Castberg (1893–1977) and Johs. Andenæs (1912–2003). They argued that the WDC, issued 4 May the same year, conflicted with the constitutional prohibition against retroactive laws (§ 97). According to these leading legal scholars, no emergency situation existed in Norway that justified such a breach of this central principle of international and national jurisprudence. They also characterized it as a breach of basic legal principles that no war criminal could escape punishment by invoking the plea of superior order. Should the Parliament choose to confirm the provisional decree in the form of a formal law, it would therefore cast an eternal shadow over the purges, argued Castberg and Andenæs.⁶² In a personal recollection

⁵⁸ RA/S-3212/D/De/L0309/0001, Note from Finn Hiorthøy to the Administrative Section, The Ministry of Justice, 18 May 1945.

⁵⁹ NBO, Manuscript collection, Ms. 4° 3976, ANDREAS AULIE, *Brev til etterslekten*, Bergen, 17 November 1974, 109.

⁶⁰ ROGNLIEN 1986, 28–29.

⁶¹ St. forh., 1945/1946, 90, 3a, 1-2. VAALE 2004, 57-64; BORGE and VAALE 2018, 73–75, 81, 83–85, 89–90.

⁶² RA/S-3212/D/De/L0309/0001, Letter from Frede Castberg and Johs. Andenæs to the Judiciary Committee in STORTINGET, 29 June 1945.

tion from 1987, the latter claimed that their pre-emptive initiative caused some stir among the politicians in the national assembly, though not preventing them from passing the law.⁶³

In the parliamentary debate about the reintroduction and use of the death penalty 29 June 1945, chairman of the Judiciary Committee, Olaf Fjalstad (1888–1971), a former district attorney and district judge from the Conservative Party (Høyre) was the first speaker. He received the Andenæs-Castberg-letter earlier the same day and distributed it to his fellow committee members. Acknowledging, as the professors did, that the constitutionality of the WCD was disputable, Fjalstad nonetheless left it to the Supreme Court to consider this legal question. The Parliament was only responsible for addressing the political issue about using the capital punishment, he concluded.⁶⁴

Christian L. Stray (1894–1981), a Supreme Court attorney from the Liberal Party (Venstre) was also a committee member. He had no hesitations about using the DPD of 22 January 1942 for punishing war crimes, with the death penalty as the ultimate option. Not so with the WCD, where the question of retroactivity arose, as pointed out by the two law professors. Considering their initiative and in disagreement with Fjalstad, Stray therefore suggested that the committee was given the opportunity to address this important question by reviewing the WCD once more. He maintained that § 97 (non-retroactivity) was one of several clauses in the Constitution, serving as important guarantees against “shifting moods” in the Norwegian politico-legal systems, and advised against challenging them in the emotionally up heated situation after the liberation. Legal scholars and courts in Norway had previously agreed about not giving criminal laws retroactive effect, but the WCD introduced “a quite new constitutional understanding” of § 97, not to be taken lightly by politicians or judges. The German occupant had often broken the rule of law during the occupation, by issuing retroactive laws. If legitimate Norwegian authorities succumbed to the same practice now, the country would soon be heading into “nazi legal conditions,” Stray feared.⁶⁵

The Minister of Justice, the conservative but party-less lawyer Johan Cappelen (1889–1947), emphasized that Norway was expected, by the USA, the Soviet Union, Great Britain and France, to use the death penalty towards the most serious traitors and war criminals in the post-war reckoning. In fact, he went somewhat further, by implying that it was a “tacit precondition” for the allied entrustment of Norwegian law enforcement against foreign war crimes committed in our country. An abolishment of the access to capital punishment would, in this regard, make “a less favourable impression” on these four great powers. Among the war goals of the allies, which Norway had supported, was a fair and strict legal purge against all war criminals, referring implicitly to the Moscow Declaration of 30 October 1943. Cappelen rejected the contention from some MPs, that the WCD of 4 May 1945 was in direct conflict with § 97 in the Constitution, prohibiting retroactive laws. He argued that most of

⁶³ ANDENÆS, JOHS., *Et liv blant paragrafer: Juridiske stridsspørsmål slik jeg så dem*, Oslo, Gyldendal 1987, 77.

⁶⁴ St. forh., 1945/1946, 90, 8 I, 14–15 (Fjalstad). HAFNER, VILHELM, *Stortinget og statsrådet 1915–1945. Bd. 1: Biografier*, Oslo, Aschehoug 1949, 227–228; STORTINGET, *Møter for lukkede dører: Stortinget 1939–1945*, Oslo, Stortinget 1995, 478.

⁶⁵ St. forh., 1945/1946, 90, 8 I, 16–17, 29–30 (Stray). HAFNER 1949, 227–228; STORTINGET 1995, 478.

the foreign defendants would be punishable until death for war crimes, according to the DPD of 22 January 1942, specifically aimed at them. Interestingly, that argument ran counter to the standard justification of the WCD as a necessary means to achieve sufficiently harsh sentences.⁶⁶

The Andenæs-Castberg initiative had no political impact, as an overwhelming majority (140 to 10 votes) in the Storting supported the reintroduction of the death penalty and opposed further constitutional debate about its use against foreign war criminals before codifying the WCD 6 July 1945.⁶⁷ This also left the Supreme Court without a clear guiding line from the politicians when dealing with the question on constitutionality in the first principal case some months later.⁶⁸ The Storting unanimously and without any discussion passed a law on the punishment of war criminals 13 December 1946, which was essentially identical to the WCD.⁶⁹ 64 years later this law was abolished by the Parliament, in connection with a revision of the penal legislation.⁷⁰

The Klinge Case in the Supreme Court 1945–1946

Initially, about 380 persons were registered by UNWCC in May 1945 for war crimes committed in Norway during the German occupation.⁷¹ Shortly after the liberation, aforementioned Finn Palmstrøm, the Norwegian representative in this commission, publicly stated that “a considerable number of German war criminals” would very soon be brought to court for sentencing. He mentioned approximately 300 indictments in that regard.⁷² These did not include three high-ranking officials, who had escaped justice by committing suicide: Reichskommissar Josef Terboven (1900–1945), head of the SS and police Wilhelm Redies (1900–1945) and leader of the Sipo Heinrich Fehlis (1906–1945). The successive Wehrmacht commanders Nikolaus von Falkenhorst, Lothar Rendulic (1887–1971) and Franz Böhme (1885–1947) were responsible for the killing of Norwegian, British, and Yugoslav prisoners, but tried by allied courts in Germany and Yugoslavia. Falkenhorst and Rendulic got 20 years

⁶⁶ St. forh., 1945/1946, 90, 8 I, 21–22 (Cappelen). HAFFNER 1949, 175–176; STORTINGET 1995, 477.

⁶⁷ St. forh., 1945/1946, 90, 8 I, 34–35, 8 II, 4. VAALE 2004, 58–64; DAHL 2006, 155; VAALE 2010, 369–371; BORGE and VAALE 2018, 77, 83–84, 89–90, 92, 118.

⁶⁸ BORGE and VAALE 2018, 123.

⁶⁹ St. forh., 1945/1946, 90, 3a, 1–10, 6a, 351–352, 377–378, 8 I, 730–734, 8 II, 231.

⁷⁰ SELMAN-AYETEV, JULIA, “Universal Jurisdiction: Conflict and Controversy in Norway,” in *The Hidden Histories of War Crimes Trials*, edited by KEVIN JON HELLER and GERRY SIMPSON, Oxford, Oxford University Press 2013, 269–271.

⁷¹ AULIE 1962, 258–259; ANDENÆS 1998, 230–231.

⁷² “Over 300 tyskere innregistrert som krigsforbrytere i Norge,” in *Aftenposten*, 3 July 1945. ERIK ANDREAS COLBAN resigned from UNWCC 20 December 1944 and was succeeded by Palmstrøm 20 June 1945. KOLSRUD 1994, 308 (n. 21).

in prison, while Böhme killed himself when incarcerated. None of them were held responsible for the scorched earth tactic in Finnmark and Troms 1944–1945.⁷³

Only suspects whose actions were already punishable by Norwegian law would be prosecuted, maintained Harald Sund (1912–2003), in September 1945. As the recently appointed head of section for war crimes at the Public Prosecutor's Office in Oslo, he nonetheless conceded that the old civil penal code of 22 May 1902 might prove inadequate when confronted with torturers in the Gestapo. If these persons, who had crippled or killed their victims during interrogations, were sent to prison instead of death, this would certainly have a "less satisfactory" effect on public opinion. The WCD secured the capital punishment, in Sund's mind.⁷⁴ In a memorandum to the JD 30 January 1946, he anticipated that 75–80 %, around 240, of the estimated 300 war crimes cases would end with a death sentence.⁷⁵

Legally, the prerequisite for all the war criminal verdicts was a principle judgment in the Supreme Court, where the decree's constitutionality was confirmed, even if by a divided court (9–4).⁷⁶ Former Gestapo employee in Oslo, Karl-Hans Hermann Klinge, was sentenced to death in a plenary session 27 February 1946. Hence, the previous verdict of the Court of Appeal, which also had applied the WCD, was upheld. The defendant's use of torture during interrogation were serious crimes, but would, using the DPD from 1942, lead to a maximum of 13 ½ years in prison.⁷⁷ While preparing the indictment, the prosecution originally also wanted to charge Klinge with murder, as one of the victims of his ill-treatment, Carl Oddvar Erichsen (1911–1945) died shortly after a violent interrogation. However, as the consulting medical expert, professor dr. med. Georg Waaler (1895–1983), could not establish with certainty that Klinge's mistreatment had led to Erichsen's death, even though he found a causal relationship likely, the murder charge was abandoned.⁷⁸

Klinge's defence counsel in the final court case, Supreme Court Attorney Adam Hiorth (1896–1961), claimed that the WCD contravened the provisions of both §§ 96 and 97 in the Constitution. His assertion was rejected by Judge Reidar Skau (1893–1975), on behalf of the majority of the court. He argued that international law, now incorporated into Norwegian law through the WCD, authorized the death penalty for Klinge's war crimes. Therefore, no conflict arose with § 96. Since relevant provisions of international law had been in place before his crimes, there was also no retroactive effect that violated § 97.⁷⁹

Of the four dissenting judges, two said that the defendant could not be convicted under the WCD. One of the latter two was Cathinko Stub Holmboe (1892–1980), who stated that

⁷³ NØKLEBY 2004, 24–26, 47–48, 56–57.

⁷⁴ "Oppgjøret med de tyske krigsforbryterne i Norge," in *Morgenbladet*, 19 September 1945.

⁷⁵ RA/S-1557/D/Da/L0034/0004, P.M. from Harald Sund to O. C. Gundersen, 30 January 1946.

⁷⁶ Rt. 1946, 196–224 (Karl-Hans Hermann Klinge).

⁷⁷ Rt. 1946, 196–213 (Klinge).

⁷⁸ RA/S-3138/0001/D/Da/L0067, Dnr. 564, KARL-HANS HERMANN KLINGE, Letter from Georg Waaler to Sven Arntzen, 8 October 1945, Indictment against Karl-Hans Hermann Klinge, 15 October 1945, Letter from Asbjørn Bryhn to Harald Sund, 1 November 1945.

⁷⁹ Rt. 1946, 198–204 (Klinge, judge Skau's vote).

according to the Constitution's § 96, Norwegian courts could only impose penalties based on national law.⁸⁰ Moreover, the principle found in § 96, that no one can be convicted without reference to a law, presupposed that the law, as required by § 97, had been passed before the criminal deed was committed, which was not the case with Klinge.⁸¹

The Klinge verdict drew up the framework for the judicial reckoning with war criminals. From then on, courts presumed that "the laws and customs of the war" already in 1940 had allowed giving the death penalty for actions such as Klinge's and in addition relevant parts of international law through the WCD had been merged into the Norwegian penal code. Thus, the provisional statute of 4 May 1945, had not imposed penalties for acts that at the time of their doing were not punishable by law. The Klinge ruling also set three other precedents. Firstly, violent interrogation techniques were contrary to international law. Secondly, having acted on orders from superiors did not exempt them from punishment. Thirdly, the Gestapo's mistreatment of resistance fighters was not justified as reprisals acceptable under international law, as the German occupants never informed the public that the practice had such a purpose.⁸²

In retrospect, the Klinge verdict has been frequently criticized, but sometimes also defended, by legal scholars, as a few examples demonstrate. The aforementioned professor Andenæs remained critical of the WCD's constitutionality and so had little sympathy for the first verdict based on the law. In 1979, he still had "little doubt" that the minority's position was legally correct.⁸³

Another early critic was Danish law professor Alf Ross (1899–1979), who in 1946 maintained that the Supreme Courts' ruling conflicted with the Constitution's §§ 96 and 97. Moreover, he called it a misunderstanding without legal basis to claim, as the court's majority had, that international law with effect immediately vis-à-vis the individual prohibits specific war crimes and prescribes punishments for them.⁸⁴

Dr. juris Carsten Smith (b. 1932) found it difficult in 1964 to accept the court's decision and its application of international law, especially since the latter was to the detriment of the accused. He also disapproved of a tendency to interpret the national penal code to achieve the greatest possible internal legal effect of provisions the Supreme Court considered applicable under international law.⁸⁵

⁸⁰ Rt. 1946, 204–210 (Klinge, judge Holmboe's vote).

⁸¹ ANDENÆS 1998, 234–241; BORGE and VAALE 2018, 117–119.

⁸² HIORTHØY, FINN, "Lovgivningstiltak vedkommende landssvikoppgjøret," in *Om landssvikoppgjøret*, published by Justis- og Politidepartementet, Gjøvik, Mariendal 1962, 94, 261–263.

⁸³ ANDENÆS 1979, 219.

⁸⁴ ROSS 1946, 247–252.

⁸⁵ SMITH 1964, 363–365. For an elaboration, see SMITH and SMITH 1982, 31–39, 83–94, 147–151.

In more recent times, Jan Erik Helgesen (b. 1947), Ketil Lund (b. 1939), Jørgen Aall (b. 1958) and Benedikte Moltumyr Høgberg (b. 1972) have all, in references to Klinge's sentence, characterized it as unconstitutional with reference to §§ 96–97 and § 97 respectively.⁸⁶

Two law professors who have found the verdict legally satisfying are Carl August Fleischer (b. 1936) and Hans Petter Graver (b. 1955). Fleischer, while underlining that the circumstances were unique, called it “surprising” that the verdict's critics would allow a foreign torturer to benefit from the legal guarantees of the Constitution. For his part, Graver characterized the relationship between national and international law as complex and difficult, not least regarding the principle of legality. Nevertheless, since for him, and the court's majority in 1946, it was crucial that Klinge ought to be punished in accordance with the gravity of his deeds, Graver found it acceptable to give the death sentence with a reference to international law.⁸⁷

The WCD in the Supreme Court after Klinge 1946–1949

In Western European transitions from authoritarian to democratic regimes after 1945, the courts often played a vital role in re-establishing legitimacy of the state powers, by giving their decisions “the stamp of legality,” as the Belgian sociologist Luc Huyse (b. 1937) has put it.⁸⁸ This implied to honour the rule of law and principles of legality and distribution of powers. Norway's Supreme Court seemed more inclined to do so in the cases towards war criminals than traitors, even if not setting aside the WCD and the following law as unconstitutional through judicial review. The main reason was that the judges had to take international law into consideration when assessing the actions of the accused foreigners in Norway.⁸⁹ Introducing it into national law, through the WCD, proved more legally problematic than the legislators in London and the prosecutors in Oslo probably had anticipated.⁹⁰

“War criminals are punished, fundamentally, for breaches of international law” wrote Cambridge legal scholar Hersch Lauterpacht (1897–1960) in the spring of 1944. Only then were they also to be considered such criminals according to the municipal law of the

⁸⁶ HELGESEN 1982, 76–88; LUND 1987, 217–218; AALL 1995, 502; HØGBERG 2010, 149, 205, 240–249; HØGBERG 2013a, 113–115.

⁸⁷ FLEISCHER 1975, 204–205; GRAVER 2013, 275, 281, 289; BORGE and VAALE 2018, 205.

⁸⁸ CONWAY, MARTIN, *Western Europe's Democratic Age 1945–1968*, Princeton and Oxford, Princeton University Press 2020, 16, 28–29; HUYSE, LUC, “The Criminal Justice System as a Political Actor in Regime Transitions: The Case of Belgium, 1944–1950,” in *The Politics of Retribution in Europe. World War II and Its Aftermath*, edited by ISTVÁN DEÁK, JAN T. GROSS and TONY JUDT, Princeton, New Jersey, Princeton University Press 2000, 158.

⁸⁹ WALNUM, JACOB, “De prinsipielle rettsspørsmål som landssvikoppjøret reiste, og deres avgjørelse i Høyesterett,” in *Om landssvikoppjøret*, published by Justis- og Politidepartementet, Gjøvik, Mariendal 1962, 104; BORGE and VAALE 2018, 178–183, 199–200, 237–248; SANDMO 2005, 329–339; KIERULE, ANINE, *Taking Judicial Review Seriously. The Case of Norway*, PhD dissertation in law, University of Oslo 2014, 156–158.

⁹⁰ NØKLEBY 2004, 103–105.

belligerent.⁹¹ The WCD of 1945 satisfied Lauterpacht's formal requirement, because it had a specific reference to breaches of "the laws and customs of war," outlined in these conventions and principles, which the DPD of 1942 lacked. Still, also the latter implicitly preconditioned them and would, in all probability, have required Norwegian courts to take international law into account, since an act committed by a foreign citizen could not be defined as "legitimate" warfare to be punishable. WDC, on the other hand, made it mandatory to consider non-domestic legislation.⁹²

When delivering his Supreme Court vote in the Klinge verdict 27 February 1946, Chief Justice Paal Berg (1873–1968) made a startling, but often quoted, statement at the end of the ruling: "Enemies who break into the country and assault the people, stand outside the Norwegian legal community." Hence, the principles of legality and non-retroactivity in the Constitution, did not apply to them, according to him.⁹³ The split vote in this case and divided ruling in future ones show firstly that the Justice's view was not shared by all fellow judges and secondly that connecting the WCD to international law proved to be a double-edged sword, giving concrete results that were, by no means, clear cut.⁹⁴ A closer investigation of the court's deliberation in the individual cases following Klinge clearly illustrate these points.

After the initial turbulent phase of the reckoning, including the Klinge case, Supreme Court judges were determined to treat war criminal cases in a factual and an objective manner, according to German historian Robert Bohn (b. 1952).⁹⁵ Firstly, they had to discuss if their actions in Norway 1940–1945 found legitimacy in international law or not and how the WCD affected the Norwegian rule of law after 1945 in this regard. Secondly, they needed to appraise the aggravating and extenuating circumstances in each individual case. In doing so, our national justice system was confronted with the same basic legal question as the war crimes trials in Leipzig 1921–1922 and at Nuremberg 1945–1946: What was the range of the Hague convention from 1907, the Versailles principles from 1919 and the Geneva convention from 1929?⁹⁶

⁹¹ LAUTERPACHT, HERSCH, "The Law of Nations and the Punishment of War Crimes," in *British Yearbook on International Law* 95, 1944, 64. His article was based on a P.M. from August 1942, finished in May 1944 and printed in autumn the same year. LAUTERPACHT, ELIHU, *The Life of Sir Hersch Lauterpacht, QC, FBA, LL.D.*, Cambridge, Cambridge University Press 2010, 212–213, 246–249; KITA, YASUO, *Sir Hersch Lauterpacht as a prototype of post-war modern international legal thought: analysis of international legalism in the universalisation process of the European law of nations*, DPhil dissertation in law, Durham University 2003, 140–160.

⁹² P.M. from John Lyng to Terje Wold, 26 October 1944.

⁹³ Rt. 1946, 196, 213 (Klinge, judge Berg's vote). HEM, PER E., *Megleren: Paal Berg 1873–1968*, Oslo, Aschehoug 2012, 667–668.

⁹⁴ ØSTLID, HENRY, *Dissensavgjørelser i Norges Høyesterett: 20-årsperioden 1936–1955*, Oslo, Fondet til fremme av forskning på privatretts område 1977, 162–170.

⁹⁵ BOHN 1993, 124.

⁹⁶ HURWITZ, STEPHAN, *Respekt for mennesket: Kriminalistiske kronikker og foredrag*, København, Gad 1951, 13–22; SEGESSER, DANIEL MARC, "Die Haager Landkriegsordnung in der internationalen wissenschaftlichen Debatte über Kriegsverbrechen im Ersten und Zweiten Weltkrieg" in *Die Friedens-Warte* 82, no. 4, 2007, 69–77; CROWE 2014, 94–101, 152–165.

Even if the WCD, with reference to these, opened for an extended use of the death penalty, the Supreme Court applied it quite sparsely 1946–1949, following the prosecutor’s claim in only 12 of 45 cases.⁹⁷ Comparing the indictments and verdicts, we contend that the result in some cases could have been different, had the judges based their sentencing solely on the DPD. For 6 Gestapo torturers, including Klinge, the outcome would probably have been life instead of death sentences, because their mistreatment did not cause “significant bodily harm” on the victims, in the strict sense of the law, as the decree required for imposing the capital punishment.⁹⁸ On the other hand, using the WCD, was more beneficial for a number of war criminals, due to the fact that international law became an important factor when assessing the aggravating and mitigating circumstances in each case.⁹⁹

Firstly, three SS judges and the Sonderkommando leader who had passed and executed death sentences over Norwegian citizens were acquitted, because the occupant were justified to curb resistance from the occupied with such means, according to the rules of land warfare from 1907 and 1929.¹⁰⁰ If executions of prisoners were based on administrative decisions, not court verdicts, the responsible were, however, sentenced to death for war crimes. Among these were the Sipo leader in Trondheim and three of his subordinates.¹⁰¹

Secondly, even if Gestapo torturers or internment camp guards were held individually accountable for their mistreatment of prisoners, a clear example of war crimes, carrying it out under strict military discipline and the threat of being shot for insubordination swayed the judges not to impose capital punishment, but prison sentences of various length, from life and downwards.¹⁰²

⁹⁷ Besides the 12 mentioned, 2 additional war criminals were sentenced to death and executed, but are excluded from our investigation, due to being tried for serious crimes mentioned in the Norwegian 1902 penal code, not the WCD. The reason for this was that they had acquired Norwegian citizenship or had been residents in the country for a longer period. WALNUM 1962, 90, 94, 99–103; NØKLEBY 2004, 71–73.

⁹⁸ Probable life sentences: RM. 1946, no. 21, 3–5 (Richard Wilhelm Hermann Bruns, Rudolf Theodor Schubert and Emil Clemens); RM. 1948, no. 45, 15–18 (Siegfried Wolfgang Fehmer); NØKLEBY 2003, 126–127, 226, NØKLEBY 2004, 74–75, 134–135, 178 (Hugo Friedrich Wilhelm Heinrichs); WEGNER, ROLF B., *Djevelen fra Østfold: Kongen av Halden*, Halden, Ask 2016, 148–160 (Hugo Friedrich Wilhelm Heinrichs).

⁹⁹ DAHL 1987, 200–205; NØKLEBY 2004, 103–105.

¹⁰⁰ SS judges: RM. 1949, no. 52, 11–14 (Hans Paul Latza, Reinhold Regis and Christian Kehr). Sonderkommando leader: RM. 1947, no. 39, 104–108 (Oscar Hans). BOHN 1993, 120–121; NØKLEBY 1996, 77–82; GRAVER, HANS PETER, *Dommernes krig: Den tyske okkupasjonen 1940–1945 og den norske rettsstaten*, Oslo, Pax 2015, 156–157, 196–205.

¹⁰¹ Sipo leader: Rt. 1948, 79–81 (Gerhard Ernst Friedrich Flesch); REITAN, JON, “Gerhard Flesch – Reichskommissar Terbovens mann i Trondheim,” in *Trondhjemske Samlinger*, 2000, 75–84. Subordinates: LEVSEN, DIRK, “Die Gestapo in die besetzten Gebieten. Das Beispiel eines Mitläufers: Sturmscharführer August Stuckmann in Lillehammer/Norwegen,” in *Rund um die Meere des Nordens: Festschrift für Hain Rebas*, edited by MICHAEL ENGELBRECHT, ULRIKE HANSEN-DECKER and DANIEL HÖFFKER, Heide, Boyens 2008, 168–172 (August Stuckmann); HØVDE, KJETIL, “Emil Køber,” in *Byneset historielag. Årshefte 2015*, 3–5 (Emil Hugo Friedrich Koeber); NØKLEBY 2003, 234 (Julius Hans Friedrich Nielson).

¹⁰² Torturers: RM. 1947, no. 39, 121–124 (Johann Arndt, Peter Franz Lauer, Ernst Weimann and Walter Küper); RM. 1948, no. 45, 31–36 (Josef Heinrich Seufert). Internment camp guards: RM. 1948, no. 47, 70–72 (Alfred August Zeidler, Kurt Walter Kuntze, Wilhelm Heilmann and Karl Albert Hermann Schlegel);

Thirdly, superior order was not accepted as an exculpating excuse from the accused in the Supreme Court or in the IMT at Nuremberg.¹⁰³ Nonetheless, it played a part when opting for prison instead of execution in Norway, and saved the life of Gestapo officials, who had participated in terror killings of Norwegian resistance fighters and the deportation of 773 Jewish nationals to Auschwitz, out of which only 34 survived.¹⁰⁴ The Holocaust perpetrators were not given proper priority during the war crimes processes either in Norway or the other, former German-occupied, European countries at the present time.¹⁰⁵

Alas, district attorney Harald Sund's prospect from January 1946 of well over 200 death sentences, secured by the WCD, was not fulfilled. Of 348 investigated war crimes cases, 260 were dropped without indictment, 1 after indictment and 5 were non-enforceable, leaving 82 to be tried by the courts, as previously mentioned. 8 of these were born abroad, but Norwegian citizens, and therefore indicted after the 1902 penal code, not the 1945 WCD. Excluding them, we are left with 74 war criminals. This amounted to 21 % of the initially planned 348 cases but was a direct result of a decision made by Sund's superior, Prosecutor General Sven Arntzen (1897–1976). In a circular from 24 October 1945, he chose to only indict persons, guilty of serious acts of torture, including special tools, causing severe bodily harm on the victim or death and where there was a possibility of securing a sentence of at least 10 years imprisonment.¹⁰⁶

Claims of severe sentences from the prosecutors met with concrete resistance in the Appellate courts and legal opposition in the Supreme Court over time, as public emotions waned, and wartime experiences faded.¹⁰⁷ During the years from 1946 to 1949 the Supreme Court sharpened 1 sentence to death and upheld 12 other death sentences, but also reduced 6 death sentences to prison sentences. The remaining 38 cases were only tried by lower courts, resulting in 1 death sentence, 35 prison sentences and 2 acquittals.¹⁰⁸

FLATMARK, JAN OLAV, *Gestapo på Sunnmøre*, Ålesund, Lys forlag 2020, 18–25, 311–324 (Josef Siegfried Schossmann).

¹⁰³ NØKLEBY 2004, 129–133.

¹⁰⁴ Terror killings: RM. 1948, no. 45, 31–36 (Josef Heinrich Seufert); BOHN 1993, 117 (n. 38, Heinrich Friedrich Wilhelm Vierke); NØKLEBY 2004, 123, 180 (Heinrich Friedrich Wilhelm Vierke). Deportation of Jews: RM. 1947, no. 36, 19–22 (Wilhelm Arthur Konstantin Wagner); BRULAND, BJARTE, *Holocaust i Norge: Registrering, deportasjon, tilintetgjørelse*, Oslo, Dreyer 2017, 674–701; MENDELSON, OSKAR, *Jødenes historie i Norge gjennom 300 år*, Oslo, Press 2019, 519–644; WIRTZ, RAINER, “‘Blümchenpflücken’: Der Gestapo-chef Hellmuth Reinhard in Oslo,” in *Historische Anthropologie: Kultur, Gesellschaft, Alltag* 22, no. 3, 2014, 455–465.

¹⁰⁵ JOHANSEN, PER OLE, “Fortrengning av et nasjonalt traume,” in *Brott i välfärden: Om brottslighet, utsatthet og kriminalpolitik. Festskrift till Henrik Tham*, edited by HANNS VON HOFER and ANDERS NILSSON, Stockholm, Kriminologiska institutionen, Stockholms universitet 2007, 145–147.

¹⁰⁶ ANDENÆS 1998, 231; NØKLEBY 2004, 162–163.

¹⁰⁷ DAHL 1987, 200, 204–205; VAALE 2004, 115–116, 170; DAHL 2006, 148–157; BORGE and VAALE 2018, 109.

¹⁰⁸ NØKLEBY 2004, 166–184.

The last execution of a war criminal in Norway was carried out by a firing squad 10 July 1948 at Kristiansten fortress in Trondheim.¹⁰⁹ Found guilty of 4 murders and 16 acts of grave torture, his actions legally qualified the criminal secretary of the Gestapo for capital punishment under the DPD alone, in contrast to Klinge, where the WCD was necessary to secure that result.¹¹⁰ Apart from 11 being shot and 1 committing suicide, the remaining 62 war criminals, comprising people convicted of torture and murder, served their sentences in work camps located outside Bergen and Oslo.¹¹¹ On 2 November 1953 a West German border control officer in Kiel sent a note to the Norwegian JD, informing that he earlier that day had received 4 passengers, travelling with the ship *Bonn* from Oslo. The former Gestapo men were the last life sentence prisoners released, marking the conclusion of the war crimes processes in Norway after 1945, related to the German occupation.¹¹²

57 years after they left, the Norwegian Supreme Court also abandoned the legal reasoning behind the Klinge verdict of 1946. Bosnian military officer Mirsad Repak (b. 1966) was 3 December 2010 tried for war crimes, committed during the civil war in Bosnia-Herzegovina in 1992. A majority of judges based their sentence on Norwegian penal law, valid at the time of his actions, with specific reference to the UNHR- and ECHR-declarations on human rights from 1951–1952. The minority argued in favour of using a revised version of the penal law from 2008, implementing international regulations on war crimes. A split vote in both cases, with contrary results, the legal pendulum had now swung from monism to dualism again, but not ending the discussion about neither Klinge nor Repak.¹¹³

¹⁰⁹ SAT/A-1887/3/1/L0056/0001, Protokoll vedr. Fullbyrdelse av dødsdommer på Kristiansten festning. Instruks for gjennomføring av dødsstraff, JULIUS HANS CHRISTIAN NIELSON, 10 July 1948.

¹¹⁰ NØKLEBY 2003, 93–94, 155–157, 234; VAALE 2004, 204.

¹¹¹ NØKLEBY 2004, 158–160, RØDLAND, KJARTAN, “Krigsforbrytarleir 1945–1948: 60 fangar, 1000 års fengsel,” in *Helter, svikere og mordere: Espeland fangeleir*, edited by MICHAEL STOKKE and KJARTAN RØDLAND, Espeland, Stiftelsen Espeland fangeleir 2011, 176, 182–183, 188–189.

¹¹² RA/S-3138/0032/D/Da/L0302/0001, Dnr. 716, JOHANN ARNDT, Note from the Passkontrollstelle Kiel-Holtenau to the Justice Department in Oslo, Kiel 2 November 1953. The 4 mentioned were Johann Arndt, Hugo Friedrich Wilhelm Heinrichs, Rudolf Kerner and Ernst Weimann. Their travel from Oslo to Kiel was also reported by Norwegian newspapers and documented for the public in words and pictures: “Siste tyske gestapister er nå reist fra Norge,” in *Verdens Gang*, 2 November 1953; “Da gestapistene dro fra Oslo,” in *Fædrelandsvennen*, 5 November 1953. Still an Austrian citizen, Franz Dirrank was expelled to Linz 29 January 1954, but is excluded from our survey, being convicted as a traitor, not a war criminal. NØKLEBY 2004, 73–74, 158, 176.

¹¹³ Rt. 2010, 1445–1469 (Mirsad Repak); HØGBERG 2013b, 399; GRAVER 2013, 294.

Conclusion

The empirical findings presented in this article may be summarized in the following points:

- 1) The enactment of the constitutionally contested WCD only days prior to the German capitulation in Norway was not, like claimed in most of the literature, a pure necessity in light of the Sipo's intensified fight against the resistance nor a symbolic concession to the Allies but materialized due to the efforts of influential Norwegian public servants in London, most notably bureau chief Hiorthøy of the JD.¹¹⁴
- 2) However, as shown above the replacement of the war crime act of 1942 with the WCD in general did not produce the desired sharpening of penalties, and so had considerably less effect than implicitly assumed in previous research. Both the number of death sentences and their percentage share of all the war crime cases to come up in the courts were markedly lower than demanded by the prosecution. While Sund, the public prosecutor, expressed his disappointment publicly, the limited use of the capital punishment in all probability also was disappointing to the decree's original proponents.¹¹⁵
- 3) Even though the special law provided judges with ample scope, nearly a *carte blanche*, for sentencing foreign nationals to death, both the Courts of Appeal and the Supreme Court proved hesitant to do so and even after the Klinge verdict maintained that each case be given an individual assessment based on the specific circumstances.¹¹⁶
- 4) Despite the WCD's problematic relationship to the Constitution's §§ 96 and 97, the two principles in reality seldom were stretched by judges with fatal consequences for the defendant. Besides, the approximately six executed death penalties resulting from the use of the decree may have been balanced out by its explicit reference to international law, as some acts that could be severely punished under Norwegian criminal law nonetheless were deemed permissible by the courts in light of international provisions.¹¹⁷

Both the WCD and the Klinge verdict stand out in a comparison with war crime processes in the four other countries. However, the tension between international and national law was not unique to the Norwegian case. Even if international law everywhere at least to some degree was taken into consideration by the judges, its effect on verdicts varied considerably. Normally, references to international legislation had a mitigating effect on the penalties, since an act punishable under domestic law still could be permissible for an occupying power.¹¹⁸ When a Dutch court in 1947 sentenced a German (Ludwig Heinemann, 1911–1947)

¹¹⁴ DAHL 1987, 198–199.

¹¹⁵ NØKLEBY 2004, 30, 77, 95, 119–120, 156.

¹¹⁶ DAHL 1987, 200; RM. 1948, no. 45, 15–16 (Fehmer, judge Holmboe's vote).

¹¹⁷ NØKLEBY 2004, 103.

¹¹⁸ TAMM 1984, 631, 640–641, 650–652; LIPPMAN 2000, 6, 8–10; de Mildt 2006, 290–292; LAGROU 2006, 333–348.

to death without considering international law it caused a scandal and led to the passing of a new war crimes decree.¹¹⁹ Only in Norway did courts, as in the Klinge case and some later cases, use a vague reference to punishments defined by the law of nations to justify death sentences. As shown earlier, that practice was fully in line with the WCD's original intention.

"We wanted justice, and we got the rule of law (*Rechtsstaat*)," East German dissident Bärbel Bohley (1945–2010) remarked after the reunification of the two Germanies in 1989–1990.¹²⁰ As we have shown, her statement also applies, in many ways, to the legal reckoning with foreign war criminals in Norway after 1945. Caught between International Law and National Constitution, this part of the Norwegian post war justice eventually proved to be more in favour of the accused than their accusers. By and large, also in the other countries those who had hoped for a harsh and comprehensive war crimes process found the end result disappointing.¹²¹

At the crux of this was the WCD. Owing to the independence of the judiciary vis-à-vis the government and the parliament, the processes for the courts did not challenge the rule of law to the extent made possible under the act of 4 May 1945.

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¹¹⁹ DE MILDT 2006, 293–296.

¹²⁰ QUOTED after BETTS, PAUL, "Germany, International Justice and the Twentieth Century," in *History and Memory* 17, nos. 1–2, 2005, 70, 84 (n. 104).

¹²¹ LIPPMAN 2000, 112.

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