

# “Violation of Human Dignity” and Other Crimes Against Humanity in Austrian War Crimes Trials

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The Austrian approach to the punishment of Nazi crimes shows some ways that are distinct from Allied and German regulations.<sup>1</sup> In prosecuting many crimes as a form of high treason, Austria was more similar to liberated countries such as Czechoslovakia and France than to Germany. And Austria prosecuted crimes against humanity as “violations of human dignity”.

Like occupied Germany, Austria also had Allied courts. But unlike Germany there was no Allied legislation to be observed by Austrian courts. The four occupying powers allowed the Austrian courts criminal jurisdiction against both Austrian and non-Austrian nationals on the basis of Austrian laws. And whereas Allied courts in Austria almost exclusively tried war crimes committed against Allied nationals and violations of post-1945 regulations in their respective occupation zones, Austrian courts were allowed to try the whole variety of Nazi crimes, including crimes against Allied soldiers and POWs. This reflects the position of postwar Austria in international politics as a liberated *and* occupied country; it was regarded, by the Allies as both Hitler’s first victim *and* part and parcel of Nazi Germany.

Just two weeks after the liberation of Vienna by Soviet troops in early April 1945, a provisional Austrian government was formed by conservatives, social democrats and communists. One of the first legal acts of this government, the Nazi Banning Act of May 8, 1945, ordered the dissolution of the Nazi party and interdicted any revival of this party or propaganda

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1 For a survey of the Austrian postwar trials cf. my articles “The Trials of Nazi War Criminals in Austria,” *Nazi Crimes and the Law*, eds. Henry Friendlander and Nathan Stoltzfus, Publications of the German Historical Institute (Cambridge, UK: Cambridge University Press, 2008), 139–150, and “Austrians and the Holocaust: A Reception History from the Perspective of Postwar *Volksgerichtsprozesse*,” *New Perspectives on Austria(ns) and World War II*, eds. Günter Bischof, Fritz Plasser, and Babara Stelzl-Marx, Contemporary Austrian Studies 17 (London: Transaction Publishers, 2009), 277–305.

for it.<sup>2</sup> One section of the Nazi Banning Act retroactively declared “acts committed with heinous intent [“verwerfliche Gesinnung”], particularly despicable acts [“besonders schimpfliche Handlungen”], and acts “grossly contradicting the laws of humanity” to be punishable offenses.<sup>3</sup> The law of May 8, 1945, did not define what kind of breaches of the so-called laws of humanity were to be prosecuted apart from the fact that terms like “heinous intent” and “particularly despicable” indicated that the law-makers intended to provide a legal framework for the prosecution of those perpetrators who had degraded their victims.

It is interesting to note the use of the term “heinous intent” and not “base motives” (“niedrige Beweggründe”), which would have been more familiar to judges and prosecutors since it had been in the German penal code since 1941 describing the elements of the crime murder.<sup>4</sup> Of course this had something to do with the politics of the new Austrian government, which was anxious to separate Austria as clearly as possible from Germany.<sup>5</sup> But the different wording also reflected a different understanding of the character of the crime and of the criminal offender. Whereas the so-called “base motives” applies to the perpetrator’s inducement to commit the crime, the term “heinous intent” characterizes the perpetrator as a person with racist or similar political or ideological attitudes.

The law also refers to The Hague Convention of 1899 in using the vague term “laws of humanity”. Obviously, the Austrian provisional government hoped to evade the problem of retroactivity. And what kind of breaches of those “laws of humanity” were to be prosecuted? The so-called Nazi Criminals Act, a law promulgated by the provisional government on June 26, 1945, defined the scope of Nazi crimes that were to be brought before the

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2 This regulation is still in force and even overrules the constitutional right of freedom of speech. It has been used as legal clause for punishing Holocaust denial. The most prominent non-Austrian defendant was the British historian David Irving, who was sentenced by a Viennese court on February 20, 2006 to three years of imprisonment.

3 “Verfassungsgesetz vom 8. Mai 1945 über das Verbot der NSDAP” (“Verbotsgesetz”), § 11 (*Staatsgesetzblatt für die Republik Österreich* 13/1945). The texts of all postwar anti-Nazi laws are accessible via internet on the website of the Austrian Research Agency for Postwar Justice, <http://www.nachkriegsjustiz.at/service/gesetze>.

4 After the *Anschluss*, in March 1938, most Austrian laws, including almost all sections of the traditional penal code, had remained in force in the Austrian provinces. On September 24, 1941, the Nazis replaced the sections of the Austrian penal code concerning murder and manslaughter with the (new) German clauses.

5 Cf. Steven Beller, *A Concise History of Austria* (Cambridge, UK: Cambridge University Press 2006), 250, 255 sqq.

new People’s Courts, which had special jurisdiction over them.<sup>6</sup> The first eight sections of the War Criminals Act enlisted those crimes as follows:

- § 1. Nazi war crimes (against either against enemy nationals or the civilian population of any country, including Austrians);
- § 2. Inciting people to war (a clause which was directed both against Nazi propagandists and those who tried to prevent people from surrendering to the Allied troops in the last weeks of the war);
- § 3. Torture (defined as setting a person into a painful or terrifying situation), assault, and battery (defined as inflicting severe harm on a person),
- § 4. Violations of humanity and of human dignity;
- § 5. Deportation (or, as the law put it, “expropriation, resettlement, or expulsion from the home country”);
- § 6. Abusive enrichment (such as the seizing of Jewish property, or “Aryanization”);
- § 7. Denunciation out of reprehensible motives (note that the chosen word is “motives” and not “attitudes”);
- § 8. High treason against the Austrian people.

With the exception of high treason and incitement to war, all those crimes can be considered as crimes against humanity, and §§ 3 and 4 define what was understood as a Nazi crime: one which was “committed during the time of Nazi tyranny in the actual or assumed interest of that tyranny, if the perpetrator acted out of political hatred or in taking advantage of official or other forms of power”.<sup>7</sup> Both the Nazi Banning Act and the War Criminals Act contained regulations concerning high treason in the form of clandestine support of the Austrian Nazi movement *before* the annexation of the country by Nazi Germany in 1938, but the definition of crimes against humanity was linked specifically with the Nazi rule, i.e. in Austria the period from March 13, 1938, until the liberation in April/early May 1945.

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6 Until the parliamentary election on November 25, 1945, the provisional government acted as both executive and legislature. Its laws, applicable in the first months after the liberation only in the Soviet occupation zone, were adopted, though, by a meeting of representatives from each Austrian province, including those occupied by the Western Allies, in September 1945. After the democratic elections, these laws were approved and amended by the parliament.

7 “Verfassungsgesetz vom 26. Juni 1945 über Kriegsverbrecher und andere nationalsozialistische Untaten” (“Kriegsverbrechergesetz”), §§ 3 and 4 (*Staatsgesetzblatt für die Republik Österreich* 32/1945).

The War Criminals Act targeted single or continuously perpetrated criminal offenses committed by individuals who had been either members of the Nazi party or profiteers during the Nazi rule, but § 1, which defined Nazi war crimes, and § 3, which defined torture, assault, and battery targeted whole groups of perpetrators and assigned them criminal responsibility without proof of their individual guilt. The former concerned all those who were regarded as “originators and ringleaders” of the crimes defined as Nazi war crimes, namely members of the Nazi Reich government, the governors of the Austrian provinces during the Nazi period (*Gauleiter*) and members of the Nazi elite equal to them in rank (like members of the Reich government), and SS-leaders down to and including colonels. All those should receive the death penalty.<sup>8</sup>

The reason for the threat of such severe punishment also for the province leaders of the Nazi party was the fact that those party leaders had been installed by Hitler in 1943 as so-called “Reich defense commissars” in their respective provinces, and by that position, had been responsible for many of the most appalling crimes committed in the last days and weeks of the Nazi regime. In addition, § 3 assumed that all staff members of concentration camps and all Gestapo officers had either maltreated individual prisoners or been responsible for torture and other violations of human dignity. Judges and prosecutors of the so-called Nazi People’s Court (*Volksgerichtshof*) were put into that category, because the People’s Court had been an important instrument for Nazi persecution in imposing severe punishments, including many death penalties, on people who opposed the Nazi dictatorship. Many of the defendants had been tortured before they stood trial, and after they got the death penalty, many of them had to wait for a long time before they were executed, because the court wanted them to witness against other defendants. Judges and prosecutors of the People’s court were automatically assumed to be accomplices to that crime.

This was the law. But the legal reality was quite different. After two decades of thorough examination of the court records of Austrian postwar court records, the Research Agency for Postwar Justice did not find a single case where a defendant was sentenced only because of his membership to one of the administrative bodies described above. All of them had been accused of concrete criminal acts. And only one of them received the death sentence—a high ranked Gestapo officer in the province of Styria who had personally supervised abominable tortures of resistance fighters. Whereas the attribution of crimes against humanity to certain categories of defen-

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8 “Kriegsverbrechergesetz,” § 1 (6).

dants without examination of individual guilt did not work, there were more or less formal counts in many indictments, but they did not concern crimes against humanity, but high treason.

In that respect the Austrian People’s courts resembled the special denazification courts in the British occupation zone of Germany, the so-called *Spruchgerichte*, which conducted criminal proceedings for membership in criminal organizations like the leadership corps of the Nazi party, the Gestapo or the SS.<sup>9</sup> According to the Austrian Nazi Banning Act of May 8, 1945, every person recognized after the Nazis came to power in 1938 as a member of the clandestine Austrian Nazi party in preceding years had to face a charge of high treason, and it came to more than 100,000 people. Legal proceedings were instituted against most of them after the war. Some 25,000 were indicted and 50 % of those convicted, most of them either because they had committed other crimes or because they had held leadership positions in the Nazi party.<sup>10</sup>

In the ten years between 1945 and 1955, the special courts for the punishment of Nazi crimes, the so-called Austrian People’s Courts, imposed 13,000 sentences and 10,000 acquittals. Out of the 13,000 convictions, almost 8,000 were based on “formal” reasons, mostly that the defendants had been members of the clandestine Nazi party before 1938 or had held positions in the party hierarchy, which was accounted high treason. Among the more than 5,000 defendants who were found guilty for crimes against humanity, approximately 3,000 were sentenced for the crime of denunciation (3,000 more were indicted for the same crime but were acquitted).<sup>11</sup>

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9 Ian D. Turner, *Reconstruction in Post-War Germany: British Occupation Policy and the Western Zones, 1945–1955* (Oxford: Berg Publishers, 2007), 239–267.

10 For the official statistics cf. Karl Marschall, *Volksgerichtsbarkeit und Verfolgung von nationalsozialistischen Gewaltverbrechen in Österreich. Eine Dokumentation*, 2nd ed. (Vienna: Justizministerium, 1987). In English, see Winfried R. Garscha and Claudia Kuretsidis-Haider, “Justice and Nazi Crimes in Austria, 1945–1955: Between Self-purge and Allied Control,” *Bulletin du comité international d’histoire de la deuxième guerre mondiale* 27/28 (1995), 245–255; Marschall’s figures are reproduced on pp. 250–251. An internet version of Marschall’s figures as well as current updates are available on the web site of the Austrian Research Agency for Postwar Justice, <http://www.nachkriegsjustiz.at/prozesse/volksg/index.php>.

11 Heimo Halbrainer, “Der Angeber musste vorhersehen, dass die Denunziation eine Gefahr für das Leben des Betroffenen nach sich ziehen werde”: Volksgerichtsverfahren wegen Denunziation mit Todesfolge in Österreich,” *Holocaust und NS-Kriegsverbrechen vor Gericht: Der Fall Österreich*, eds. Thomas Albrich, Winfried R. Garscha, and Martin F. Polaschek (Innsbruck: Studien Verlag, 2006), 229–261. The article deals with cases in which the denunciation had caused the

The Austrian War Criminals Act declared denunciation a criminal offense, if the perpetrator intentionally had inflicted harm on a person by denouncing him or her to the Nazi authorities. The sentence was to be upgraded if some preconditions were fulfilled, e.g., if the information given to the Nazi authorities was knowingly wrong, or if the informer acted out of selfish motives (“eigennützige Beweggründe”). If the informer should have been able to foresee that the denunciation would endanger the life of the denounced person, and if the denounced person actually received the death penalty (or was murdered in a concentration camp), the sentence for the informer was life imprisonment. Three hundred fifty defendants had to stand trial for a denunciation that had caused the death of the denounced person (around 50 % of all defendants in homicide cases tried by the People’s courts), 187 out of those 350 defendants were found guilty; 40 received sentences of more than 5 years, among them three life imprisonments.

In Germany denunciation could not be prosecuted according to German law, but rather according to Control Council Law No. 10, which, however did not mention the crime explicitly, counting it among the “other inhumane acts” mentioned in article 2-1-c of the law. An explicit legal basis was finally provided by Directive 38 of October 12, 1946, in which the Allied Control Council for Germany regulated the “arrest and punishment of war criminals, Nazis, and militarists, and the internment, control, and surveillance of potentially dangerous Germans.”<sup>12</sup> The actual goal of this directive was to establish a framework for the denazification of German society by establishing five categories of subject ranging from “major offenders” to “persons exonerated”. Among the second group, called “activists, militarists, and profiteers,” the directive included as “activists ... anyone who, as a provocateur, agent, or informer, caused or attempted to cause, institution of a proceeding to the detriment of others because of their race or religion or political opposition to national socialism or because of violation of national socialist rules.” In East Germany “denuncia-

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death of the denounced person. On p. 230 Halbrainer presents a table of all denunciation cases.

- 12 Quoted according to the internet publication of the documents by the German Historical Institute Washington DC, <http://germanhistorydocs.ghi-dc.org/pdf/eng/Denazification%203ENG.pdf>, which is based on John J. McCloy, “Present Status of Denazification,” *Office of the U.S. High Commissioner for Germany, 5th Quarterly Report on Germany* October 1–December 31, 1950, 46–55 (accessed December 2019).

tion” trials were not unknown, but they played a less important role than in Austria; in West Germany such trials were extremely rare.<sup>13</sup>

The most important category of crimes against humanity to be tried by postwar courts in both Austria and Germany were those committed in the last weeks of Nazi rule which the Dutch law professor Christiaan Frederik Rüter calls the “final phase crimes.” Rüter has been leading a huge documentation project on Nazi crimes trials since 1965.<sup>14</sup> German prosecutors charged perpetrators who had taken part in such crimes with murder or manslaughter according to the German penal code, and as the hundreds of judgments published by Rüter show, “final phase crimes” accounted for a large part of the sentences imposed by district courts in all four occupation zones.

For the prosecution of those crimes it was of special importance that, as already mentioned, the Austrian War Criminals Act defined war crimes in a manner unique in international law at that time and included crimes against the civilian population of the home country. Of course, this was not in anticipation of the second additional protocol to the Red Cross Conventions passed in 1977<sup>15</sup>, but was intended to avoid impunity for crimes committed by armed forces of the Nazi state in cases where the victims were not enemy nationals. The Act distinguished two kinds of Nazi

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- 13 Cf. the comparative table by Heimo Halbrainer, “Das Verbrechen der Denunziation während der NS-Zeit und die justizielle Ahndung in den Nachfolgestaaten des Dritten Reichs,” *Kriegsverbrechen, NS-Gewaltverbrechen und die europäische Strafrechtswissenschaft von Nürnberg bis Den Haag*, eds. Heimo Halbrainer and Claudia Kuretsidis-Haider (Graz: Verlag Clio, 2007), 103–117 (table on p. 111). For West Germany cf. also Claudia Bade, “‘Das Verfahren wird eingestellt.’ Die strafrechtliche Verfolgung von Denunziation aus dem Nationalsozialismus nach 1945 in den Westzonen und in der frühen BRD,” *Historical Social Research* 26.2/3 (2001), 70–85.
  - 14 1965–2012 Rüter led a huge documentation project on Nazi crimes trials. See C. F. Rüter (ed.), *Justiz und NS-Verbrechen. Die deutschen Strafurteile wegen nationalsozialistischer Tötungsverbrechen* (West German series: 49 volumes) and *DDR-Justiz und NS-Verbrechen* (East German series: 14 volumes). The two series had been published by Amsterdam University Press and different German publishing houses. The online edition is hosted by <https://www.junsv.nl/>, licenses are distributed by <https://www.expostfacto.nl/junsvlizenz.html> (accessed December 2019).
  - 15 Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977. The text is available on the website of the International Committee of the Red Cross, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument> (accessed December 2019).

war crimes. One was a criminal offense which “contradicts the natural demands of humanity and the generally accepted fundamental principles of international law or martial law, committed against members of the armed forces or the civil population of a country which was at war with the German Reich or the territory of which was occupied by German troops”.<sup>16</sup> The other kind of Nazi war crime could be directed against any person, including Germans and Austrians: “Guilty of the same crime is anybody who, in the actual or assumed interest of the German armed forces or the Nazi tyranny, during that war and in connection with military acts or with acts of militarily organized squads, willfully has committed or caused deeds which contradict the natural demands of humanity.”<sup>17</sup>

Many of the offenses which the Austrian legislature of 1945 had called war crimes also fulfilled the elements of the crimes murder or manslaughter, and many defendants were sentenced both for Nazi war crimes according to § 1 of the War Criminals Act and for murder according to § 134 of the Austrian penal code of 1852. This applied especially to cases which fell under the clause of § 1 (2) War Criminals Act, because the courts tended to prefer the respective clauses of traditional Austrian criminal law. The texts of the verdicts provide no reason for that, but it seems obvious that for the judges, the War Criminals Act § 1 (2) deviated too far from what had been understood as a war crime in traditional martial law.

The last part of this article presents some considerations about what the Austrian lawmakers called “violation of human dignity”, and its punishment. “Macro-criminality” ordered by the state, such as mass shootings behind the front, the running of extermination camps, or the transformation of hospitals into killing sites, did not fit into legal systems conceived for the purpose of prosecuting criminal offenses by individuals. These new crimes included genocide and mass murder committed by “public” institutions and their henchmen, but also countless individual acts of cruelty and inhumane or degrading treatment. Although many European constitutions contain a catalogue of fundamental civil rights, there existed hardly any procedure granting individuals to recourse for mental or bodily harm inflicted through a violation of those rights.

After the atrocities committed in Nazi concentration camps and during mass shootings it was inevitable that many people would try to gain impunity by claiming that said atrocities were tolerated or even ordered by the state. The Allied occupation administration in Germany, as well as sev-

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16 “Kriegsverbrechergesetz,” § 1 (1).

17 “Kriegsverbrechergesetz,” § 1 (2).

eral European states, pre-empted this by promulgating retroactive laws enabling the judiciary to punish those who had perpetrated such atrocities. Despite the atrocities committed during the First World War by the German army in Belgium and France and then by the Austro-Hungarian army in the Eastern war theater, hardly any judicial system was prepared to face that problem,<sup>18</sup> so different legal concepts were adopted. The most powerful, which was eventually accepted worldwide, was that of “crimes against humanity” as described in the London Charter for the Nuremberg Trial and in Control Council Law No. 10.

The use of this term in international politics goes back to 1915, when Great Britain, France, and Russia in a joint statement denounced the massacres of the Turkish army and declared that they would hold personally responsible all members of the Ottoman government for that crime against humanity.<sup>19</sup> But after 1918 the term disappeared almost completely. The Moscow Declaration of 1943 did not use the term “crimes against humanity”, but “atrocities” which had been “perpetrated by Hitlerite forces”.<sup>20</sup> The legal concept of crimes against humanity is that the perpetrator not only inflicts individual harm to the victim, but also deprives that person of fundamental rights inherent to any human being. “Humanity” thus refers not only to the opposite of inhumane behavior, but also to humankind as a whole.

The Austrian legal concept was different. It started not from humankind, but from human dignity. From the catholic point of view shared by most of the Austrian lawmakers of that time, it clearly did not target the individual as part of the human race, but as individual *per se*. And it is not

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18 The only exception was Belgium where already in 1917 a law concerning collaboration had been passed. The law was amended in 1934 and provided a legal—non-retroactive—basis for the Belgian post war trials. Cf. Nico Wouters, “Völkermord vor belgischen Militärtribunalen am Beispiel der gerichtlichen Ahndung von Verbrechen an Juden und Jüdinnen (1944-1951),” *Kriegsverbrechen*, eds. Halbrainer and Kuretsidis-Haider, 171–191 (the laws are presented on p. 172–173).

19 The notice to the Sublime Porte, issued on the request of the French government, is mentioned in a telegram of the U.S. embassy in Constantinople to the State Department, stored at the National Archives, R.G. 59, 867.4016/67, published as facsimile in the internet on the web site of the Armenian National Institute, Washington DC, [http://www.armenian-genocide.org/popup/affirmation\\_window.html?Affirmation=160](http://www.armenian-genocide.org/popup/affirmation_window.html?Affirmation=160) (accessed December 2019).

20 The Statement on Atrocities was one of the four declarations passed at the end of the meeting of Roosevelt, Churchill, and Stalin in Moscow, October 31, 1943. The declaration is available on many internet sites, e.g. the Legal Tools Database of the International Criminal Court <https://www.legal-tools.org/doc/3c6e23/pdf/> (accessed December 2019).

a certain set of rights which is attributed to that individual, but it is his or her personality as a child of God that must be protected by the law. This personality comprises attributes which make him or her a human being, and the most important of those attributes is human dignity, inherent in all creatures of God and derived from the divine nature of the creation of mankind.

In the end both legal concepts had the same effect on postwar jurisdiction: deeds of Nazi perpetrators which intended to dehumanize the victim were criminal offenses, regardless whether or not they had been prohibited by German law at the time. This was a prerequisite for the re-establishment of the rule of law. It was of no further practical importance whether this rule of law was derived from natural law or from a concept of divine rules for human existence, or simply imposed by a victorious army upon the occupied territory. The outcome was that similar definitions had been found for the same Nazi crimes, such as for degrading, hurting and killing people on political, racist, or religious grounds.

In Austrian law up to 1945 there existed no violation of human dignity, but only defamation clauses that concerned disputes between individuals and were therefore no offenses requiring public prosecution. The only exception was the derision of religious feelings or grave acts belittling of other nations, referring to the time of the multi-ethnic Habsburg Monarchy and the old Austrian Criminal Code promulgated in 1852.<sup>21</sup> The War Criminals Act of June 26, 1945, used the terms “violation of human dignity” and “violation of the laws of humanity” at the same time and made both a criminal offense, if they had been committed in the interests of the Nazi regime.

The War Criminals Act § 3 (2), which concerned torture, assault, and battery, made clear when this crime had to be punished with the death sentence if the inflicting of severe bodily harm or the setting into a painful or terrifying situation had caused the death of the victim or, if it had been accompanied by severe “violations of human dignity and of the laws of humanity.” By imposing the same sentence for killing of a person during torture and for gravely degrading his or her human dignity, the Austrian lawmakers of 1945 took into account that there are forms of torture that can harm the victim to the extent that he or she becomes unable to continue normal life. The reason for this inventive approach could be that the then secretary of Justice, Josef Gerö, had experienced a Nazi concentration

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21 “Das allgemeine Strafgesetz vom 27. Mai 1852” (as amended and promulgated on July 31, 1945), § 494.

camp. It is remarkable that this kind of “social death” of the victim should be treated in the same way as the physical death.

As the court records show, the courts did not always follow the intention of the lawmakers, but in many trials the degrading treatment of both Jewish and non Jewish victims by SS guards, policemen, and ordinary people, e.g. during the pogrom in Vienna in March 1938 or during the Night of Broken Glass in November 1938, played a decisive role in the conviction of the defendant. Although both the Austrian Nazi Banning Act and the War Criminals Act preceded the London Charter of August 8, 1945, the Austrian approach to punishing crimes against humanity resembled that of the Allies and the Germans. This shows that the so-called Nuremberg principles represented, in some way, a kind of common sense among democratic forces in Europe at the end of World War II.

