CASE No. 45

TRIAL OF CARL BAUER, ERNST SCHRAMECK AND HERBERT FALTEN

PERMANENT MILITARY TRIBUNAL AT DIJON
(COMPLETED 18TH OCTOBER, 1945)

Status of guerrilla units—The concept of occupied territory—Superior orders as an extenuating circumstance.

A. OUTLINE OF THE PROCEEDINGS

1. THE ACCUSED

The accused were officers of a German unit which was engaged in combats with formations of the " French Forces of the Interior " (F.F.I.), which became the major resistance movement in France during the war of 1939–1945.

Karl Bauer was a colonel, in command of a German column of marines which, in August and September 1944, were retreating before the Allied forces from the area of the Landes and Bordeaux to that of Autun. The other two accused were under Bauer's orders in the same column, Ernst Schrameck being a colonel and Herbert Falten a lieutenant.

2. THE CHARGE

The accused were charged with complicity in murder in that, " by abusing authority and powers," they had " provoked murder in reprisals of three soldiers of the F.F.I." captured as " prisoners of war."

3. EVIDENCE OF THE PROSECUTION

According to the evidence submitted by the Prosecution Bauer's column started its retreat on 21 August, 1944. On 8 September it had reached the area of Autun where it met a combined force of French regular troops and an F.F.I. unit. A battle took place, which lasted two days. In the course of the battle three F.F.I. combatants were captured by the Germans, two on the evening of 8 September, and one on the morning of the 9th. They were taken to Bauer's headquarters on 9 September at 11 a.m. Bauer handed them over to Schrameck and ordered that they " be taken away and shot." Schrameck passed the order to Lieutenant Falten, and all three prisoners were shot by a squad under Falten.

The affidavit of a German witness was produced. The latter, Major Spielberg, another officer of Bauer's column, testified that the victims had first been sent to him by Bauer for interrogation. The interrogation had revealed no offence on the part of the prisoners, apart from the fact they had fought for one day against the column in regular combat.

The Prosecution described the three prisoners as having been dressed almost entirely in civilian clothes. According to one witness, however, one of them wore a tricolour strap around the arm, and another had an

American helmet. According to another witness, two of the prisoners had tricolour straps, and the third wore a khaki overall.

4. DEFENCE OF THE ACCUSED

All the accused pleaded not guilty on account of superior orders.

Bauer invoked express orders issued by Hitler in April 1944 to execute irregular combatants, and thereby implied that such was the status of the prisoners. His plea was contested by the Prosecution. Witness Spielberg was quoted to have stated that Hitler's orders " were known to him," but that " in his opinion, they should not have been applied to prisoners captured among elements against which we had been fighting for a day."

Schrameck referred to orders given him by Bauer, and Falten to those given by Schrameck. The latter contended that Bauer's orders were " categorical " and were thus not " subject to discussion." It was shown that Falten, after taking the prisoners to the place of execution in pursuance of Schrameck's transmission of orders, had gone back to Schrameck to see once more whether he should carry on with the execution. He was told to do so " at once."

5. THE JUDGMENT

All the accused were found guilty of the charge. Bauer was sentenced to death. The fact that Schrameck and Falten had acted on Bauer's orders was admitted as an extenuating circumstance, and the two accused were each convicted to five years' imprisonment.

B. NOTES ON THE CASE

1. THE STATUS OF GUERRILLA UNITS

The central question in this trial is the status of the three members of the F.F.I. The Tribunal's findings, which coincided with the Prosecution's charges, were that the victims had the status of belligerents as recognised by the laws and customs of war, and that they were thus covered by the rules concerning the treatment of prisoners of war.

This is clearly indicated in the question put by the President of the Court to the judges and in the confirmative answer given by the latter. The question reads as follows:

> " Is it established that in the area of Autun, on 9th September, 1944, a murder of three F.F.I. French soldiers, *prisoners of war*, was committed on the occasion or under pretence of the state of war, but without being justified by the laws and customs of war, by unidentified German marines belonging to a German column in retreat which included Colonels Bauer and Schrameck and Lieutenant Falten ? " (Italics inserted.)

The judges answered " yes " by a majority vote.

Article 1 of the Regulations respecting the Laws and Customs of War on Land, appended to the IVth Hague Convention, recognises the status of belligerent not only to regular units of the army, " but also to militia and volunteer corps " on four conditions: that they are " commanded by a person responsible for his subordinate "; that they wear a " fixed

distinctive sign recognisable at a distance "; that they "carry arms openly"; and that they "conduct operations in accordance with the laws and customs of war."

Article 2 of the same Regulations goes further and extends the above recognition even to civilian combatants under certain circumstances and conditions. These are fulfilled when "inhabitants of a territory not under occupation, on the approach of the enemy, spontaneously take up arms without having had time to organise themselves in accordance with Article 1" of the Hague Regulations. In such cases it is not required that combatants fight under a commander, or that they wear a distinctive sign, such as a uniform. It is sufficient, and at the same time mandatory, that they carry arms openly and respect the laws and customs of war when conducting military operations.

The Prosecution specifically invoked this latter provision, and not that of Article 1 of the Hague Regulations. It stated that "F.F.I. troops had opposed for a day the column of Bauer, together with French regular troops and with the knowledge of the Germans, and had fought the invading troops without having had time to organise themselves."

The implementation of Article 2 of the Hague Regulations requires the presence of two essential elements: that arms were taken up to resist the enemy by inhabitants "of a territory not under occupation," and that this is done by inhabitants who had no "time to organise themselves" by having a commander and wearing distinctive signs.

From this it follows that the concept of what is and what is not an "occupied territory" is also essential. Article 42 of the Hague Regulations provides the following:

> "Territory is considered occupied when *actually* placed under the authority of the hostile army.
>
> "The occupation extends only to the territory where such authority *has been established* and *is in a position* to assert itself." (1)

The setting up and maintenance of an actual and effective occupying administration makes the difference between occupation and mere invasion.(2) It thus appears that, when the occupant withdraws from a territory or is driven out of it, the occupation ceases to exist.(3) This is clearly so in cases where liberating forces are steadily advancing and gradually regaining control of parts of the occupied territory. But the question arises of the status of smaller parts still *within* the occupied territory, in which the occupant's powers cannot be exercised on account of military operations still in progress. Are the inhabitants of such parts entitled to rise to arms, drive the enemy out, even temporarily, and while doing so, enjoy the rights of belligerents?

According to the facts of the trial as they appear from the indictment, it would seem that there was, in the area of Autun, a situation combining that of a territory being liberated by outside forces and that being freed by

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(1) Italics are inserted.
(2) *See* L. Oppenheim-H. Lauterpacht, *International Law*, Vol. II, 6th Edition, pp. 339–340.
(3) *Op. cit.*, p. 341.

local inhabitants. In any case it would appear that the military operations were in full development and that, at the time of capturing the three F.F.I. combatants, the occupant's authority in the area had not yet disintegrated.

If one is to assume that the Tribunal accepted the Prosecution's thesis and applied Article 2 of the Hague Regulations, its decision that the F.F.I. combatants had the status of belligerents and were consequently to be treated as prisoners of war, would contribute to defining the concept of occupied territory. It would appear to be based upon the view that, once control of an occupied territory is disputed by the force of arms, and consequently, already at the stage in which the occupant's authority is at stake, the status of occupation ceases to exist. This would not necessarily mean that the contest may be wholly conducted by local inhabitants who are under the occupant's authority. The main fact of the trial is that the latter were fighting *jointly* with regular French troops, which formed part of the Allied forces who invaded France in June 1944 with the purpose of driving the Germans out of France and other occupied European countries. There is also no indication that the F.F.I. members had resorted to arms prior to their junction with the regular troops, and consequently before at least one portion of their own territory had been, however temporarily, already liberated. It can be observed, of course, that the fact that the F.F.I. members in question were fighting together with the regular troops, which in fact means within their ranks, could have provided grounds for both the prosecution and the Tribunal to establish that they were under proper command, and had thus fulfilled one of the conditions of Article 1 of the Hague Regulations. The fact that some or all of them wore certain military distinctive signs, as alleged by the Prosecution on the basis of witnesses' accounts, could have made possible the application of Article 1 instead of Article 2 of the said Regulations. The whole issue of whether the F.F.I. combatants were or were not in territory " not under enemy occupation," would have then been immaterial.

If, however, Article 2 is accepted as having been applied by the Court the case brings the following features to light in the manner in which Article 2 was implemented :

(*a*) Any part of territory in which the occupant has been deprived of *actual* means for carrying out *normal* administration by the presence of opposing military forces, would not have the status of " occupied " territory within the terms of Articles 2 and 42 of the Hague Regulations. The fact that other parts of the occupied country, as a whole, are under effective enemy occupation, would not affect this situation.

(*b*) Inhabitants of such parts as are described above, when taking up arms against the enemy, would be deemed to have done so " on the approach of the enemy." This would mean not only the resorting to arms in the initial stages of a country's invasion by the future occupant, but in any other stage during or nearing the end of occupation. The enemy's " approach " in contested areas, from which the enemy has been or is being driven out, would consist in the combats fought between the two hostile forces in the disputed area.

(*c*) Inhabitants resorting to arms in the above circumstances would enjoy the rights of belligerents. It is immaterial whether they wear civilian clothes or any other kind of dress. The sole conditions are that they carry

arms openly and respect the laws and customs of war when fighting. In our case the German witness Spielberg testified that the three F.F.I. men had committed no violations of the laws of war, and from the fact that they were captured while fighting it follows that they carried arms openly.

A word or two should be said regarding the allegation that the F.F.I. combatants " had no time to organize themselves " by having a commander of their own and by wearing military signs such as full uniforms. It has already been observed that, by fighting shoulder to shoulder with regular French troops, it could have been said that they were " commanded by a person responsible for his subordinates." On the other hand, it is a matter of opinion whether objects such as tricolour straps around the arm, helmets or khaki overalls, are sufficiently distinctive signs as required by the Hague Regulations. The F.F.I., as a whole, were an underground but nevertheless a single and well organised body of combatants throughout France, so that, from this point of view, it cannot be said that its members " had no time to organise themselves." They were divided into units, at the head of which stood commanders. Whenever on military duty they wore, as a rule, a French tricolour sign or badge. However, as the operations against the occupant developed and progressed, their ranks were filled by new members, who often had no time either to be placed under proper command, or to wear anything else but plain mufti clothes. This was particularly true of units which grew during the weeks and months that preceded the liberation of the whole of France, between June 1944 and April–May, 1945. It may well be, and it is very likely, that such was precisely the case with the units fighting in the area of Autun. Inhabitants were filling the ranks of F.F.I. combatants and joining regular troops in military operations in continuous streams and waves, and as a unit or units of the F.F.I., as distinct from the regular troops, they may have had no commander of their own in the strict sense of the word. It is probably this position which was meant by the Prosecution when it referred to Article 2 of the Hague Regulations.(1)

2. THE KILLING OF PRISONERS OF WAR

Once the status of belligerent was recognised in regard to the F.F.I. combatants, the rule that they were to be treated as prisoners of war, and could not therefore be shot after capture, followed by itself.

Article 4 of the Hague Regulations provides :

> " Prisoners of war are in the power of the hostile government, but not of the individuals or corps who capture them.
>
> " They must be humanely treated."

The same rule is repeated in Article 2 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1929, which stresses that humane treatment has to be applied " at all times," and that the prisoners have to be " protected, particularly against acts of violence." A specific prohibition to " kill or wound an enemy " who has " laid down his arms " or " no longer has means of defence," and has surrendered, is contained in Article 23 (*c*) of the Hague Regulations.

Under the terms of Article 2, para. 4, of the French Ordinance of

(1) Regarding the status of guerrilla units, *see also* pp. 57–9.

28 August, 1944, concerning the Suppression of War Crimes,(1) any " putting to death in reprisals " is regarded as premeditated murder as provided against in Article 296 of the French Penal Code. It was submitted by the Prosecution and admitted by the Tribunal that the three F.F.I. prisoners had been shot as a " reprisal," that is in revenge for having fought against the German troops. The Tribunal applied Article 2 of the said Ordinance, and consequently also Article 296 of the Penal Code.

3. THE PLEA OF SUPERIOR ORDERS

As already stressed, the Tribunal dismissed the plea of superior orders in regard to the chief defendant, Bauer, and admitted it as an extenuating circumstance in the case of Schrameck and Falten.

In doing so the court applied the rule that superior orders do not, in themselves, exonerate the perpetrator from responsibility when the orders are illegal, but may be admitted in mitigation of punishment on the merits of each particular case. This rule is generally recognised in contemporary International and Municipal Law, and has been applied in numerous war crimes trials.(2) In instruments of International Law the most authoritative source is Article 8 of the Nuremberg Charter :

> " The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

In French law, the rule is laid down in Article 3 of the Ordinance of 28 August, 1944, concerning the Suppression of War Crimes, in the following terms :

> " Laws, decrees or regulations issued by the enemy authorities, orders or permits issued by those authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the Penal Code, but can only, in suitable cases, be pleaded as an extenuating or exculpating circumstance."

Article 327 of the French Penal Code provides that if " homicide, wounds and blows " have been ordered by the law and committed under " command " of the proper authority, there is no crime.

Bauer's plea consisted in that there were orders issued personally by Hitler in April 1944, that " partisan " ôr " guerrilla " combatants should be regarded as rebels and shot after capture.

As was established at the Nuremberg Trial of the German Major War Criminals, orders of this kind existed as early as in 1942. On 18th October, 1942, a directive, authorised by Hitler, was issued to " slaughter to the last man " all members of Allied " Commando " units, whether armed or not, even if they surrendered.(3) The Nuremberg Tribunal found all such orders contrary to the laws and customs of war, and consequently criminal in nature. The rejection of Bauer's plea was based upon the rule

(1) Regarding the French war crimes laws, *see* Vol. III of this series, pp. 93–102.
(2) On this point, *see* Vol. I of this series, pp. 18–20, 31–33 ; and (particularly) Vol. V, pp. 13–22.
(3) *See Judgment of the International Military Tribunal,* sitting at Nuremberg, H.M. Stationery Office, London, 1946, p. 45.

that he should not have obeyed orders which were of a criminal nature, and it may be noted further that, at the time of the crime, he was under no direct pressure or duress to implement Hitler's orders.

Bauer's personal liability in this case lay in that he originated the crime by giving orders to his subordinates in pursuance of Hitler's instructions. Such responsibility is covered by Article 6, last paragraph, of the Nuremberg Charter :

> " Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any . . . crimes are responsible for all acts performed by any persons in execution of such plan."

In French law, it is covered by Article 4 of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes :

> " Where a subordinate is prosecuted as principal perpetrator of a war crime, and his hierarchical superiors cannot be charged as joint perpetrators, the latter are regarded as accomplices to the extent to which they had organised or tolerated criminal acts of their subordinates."

From this it follows that, if a superior is prosecuted because of orders issued to subordinates, he is held responsible as principal or joint perpetrator, as the case may be.

In our case it would appear that Bauer was found guilty as principal perpetrator, and therefore convicted to death. This resulted from the findings regarding the part played by his two subordinates. By admitting their respective pleas, the Tribunal in fact decided that both were instrumental in the killing of the three F.F.I. prisoners, but bore lesser responsibility. The Tribunal presumably took into account Schrameck's defence that Bauer's orders were " categorical " and left no room for " discussion." It would also appear that it took into consideration the fact that Falten had postponed the execution on his own initiative and gone back to Schrameck to raise once more the issue, thus giving an opportunity for cancelling the order. All these or other considerations were in the powers of the Tribunal which was at liberty to estimate the degree of guilt of each participant in the crime according to the circumstances. By convicting the two to five years' imprisonment each, the Tribunal admitted the plea of superior orders only in mitigation of the punishment, but not in exculpation of guilt, as it was empowered to do under the terms of Article 3 of the Ordinance of 28th August, 1944.

CASE No. 46

TRIAL OF FRANZ HOLSTEIN AND TWENTY-THREE OTHERS

PERMANENT MILITARY TRIBUNAL AT DIJON
(COMPLETED 3RD FEBRUARY, 1947)

The killing of civilians as "reprisals"—Destruction of inhabited buildings—Ill-treatment of civilians—Pillage—Guilt of instigators and other accomplices.

A. OUTLINE OF THE PROCEEDINGS

1. THE ACCUSED

The accused were members of various German units who took part in a series of crimes against the French population in the area of Dijon in 1944. Some belonged to the Army, and others to the Gestapo and SD (Security Police).

Three accused were present at the trial. They were Franz Holstein, a Major; Georg Major, a Captain commanding "Ost Battalion 654"; and Emil Goldberg, an Adjutant of the S.D. at Châlon-sur-Saône. The remainder twenty-one accused, were tried *in absentia* and were the following: Hans Kruger, head of the S.D. at Châlon-sur-Saône; Ludwig Schellaas, Adjutant of the S.D. at Dijon; Klaus Schenevoigt, non-commissioned officer of the S.D. at Dijon; Schirmacher, a Lieutenant commanding the 3rd Company, Ost Battalion 654; Vier, a Colonel, Feldkommandant at Nevers; Eder, Artillery Lieutenant, Ortskommandant at Château-Chinon; Verfurt, Lieutenant serving at Autun; Gierszewski, a Lieutenant, commanding the 2nd Company, Ost Battalion 654; Fuierer, a Lieutenant, commanding the 1st Company, Ost Battalion 654; Lenartz, Adjutant, interpreter of the S.D. at Dijon; Gottlieb Hilgenstohler, sergeant of the S.D. at Châlon-sur-Saône; Runkewitz, sergeant, interpreter of the S.D. at Châlon-sur-Saône; Eugen Knodler, Chief Adjutant of the S.D. at Châlon-sur-Saône; Karl Haeberle, sergeant-major of the S.D. at Châlon-sur-Saône; Hildebrand, deputy O.C. of the German Officer Cadet School at Dijon; Moeckel, Lieutenant, Feldgendarmerie at Autun; Gunther Irmisch, Colonel, head of the Feldkommandantur 669 at Dijon; Hulf, Sturmbannführer of the Gestapo at Dijon; Hefeke, Captain, 2nd Battalion, 5 Kouban Regiment; Albert Hippe, Colonel, O.C. of the German Officer Cadet School at Dijon, and Merck, a Lieutenant serving at Dijon.

2. THE FACTS AND EVIDENCE

(i) *Background of the Crimes and Composition of Units Involved*

According to the evidence presented by the prosecution, the accused took part in combined operations against members of the French resistance movement. The operations were decided upon and planned at a conference held at Dijon under the auspices of General Hederich, Feldkommandant and "Befehlshaber Nord-Ost Frankreich" (G.O.C., North-East, France), in June, 1944. Six of the accused attended in their respective commanding capacities: Irmisch, Hippe, Major, Hulf, Kruger and Verfurt. They were

to provide the troops and issue instructions, and all had to take persona part in the operations at the head of their units.

The conference decided that the French resistance movement in the area was to be suppressed and annihilated, and that severe measures were to be taken against them and the population " in reprisals " for their struggle against the occupying authorities or assistance given in this respect. In the light of some of the evidence, such measures were to consist in executing on the spot every member of the resistance, captured with arms, pursuant to Hitler's orders to kill all " terrorists " or " saboteurs "; in the burning down of three farms for every German soldier killed, and of one farm for every German soldier wounded.

The events described by the Prosecution showed that, in carrying out the above instructions, the accused killed a large number of inhabitants, destroyed by fire many buildings in various localities, and pillaged property of the population.

The assignment was conducted and the crimes perpetrated by several columns operating simultaneously in the different areas, and moving from one area to the other. One column was composed of German officer-cadets supplied and commanded personally by Hippe and his deputy, Hildebrand. Another column consisted of Russian quisling troops, Ost Battalion 654, under the command of German officers and N.C.O.'s. The O.C. was Major. The ranks of a third column were filled with members of 5 Kouban Regiment, another Russian (cossack) unit, under Captain Hepeke. In addition, there were detachments of German Feldgendarmes from the Ortskommandantur at Château-Chinon, under Lieutenants Moeckel and Eder, and almost the entire personnel of the S.D. at Châlon-sur-Saône, with its head Kruger. In the events of August, 1944, another German officer, Colonel Vier, took an active part as Feldkommandant at Nevers.

(ii) *The Crimes*

The crimes were committed in six different places and their surroundings.

Events at Toulon-sur-Arroux

On 25th June, 1944, two columns left Dijon for Toulon-sur-Arroux. One was composed of the officer cadets and the other of one company of Ost Battalion 654. The latter arrived at Châlon-sur-Saône at 10 a.m. and was joined by three more companies of the same Battalion. The column then headed towards Toulon-sur-Arroux and, when approaching it, deployed in the fields. In a hamlet, Prayes, they shot at farmers who were hay-making. One was wounded and several others were seized and executed on the spot. When the wounded man moved, he was killed by five Germans. He was later identified as one Swedrowski.

The column then surrounded another small locality, St. Eugene, north-east of Toulon-sur-Arroux. They seized two inhabitants, ill-treated them and shot them without investigation or trial. After this the place was looted.

Events at Dun-les-Places

The column regrouped and arrived at Autun at 11 a.m. There they found the first column, with officer-cadets. At this juncture, a third column,

that of the Russian Cossacks, 5 Kuban Regiment, arrived from Dôle, via Châlon-sur-Saône. Together with the other two columns, as well as with elements of the Feldgendarmeries, Gestapo and S.D., they all moved the next day, 26th June, towards Dun-les-Places. According to some witnesses the Cossacks column, before arriving at Dun, met detachments of the French resistance movement and shots were exchanged, which did not extend beyond mere skirmishes. According to other witnesses, however, no such encounter took place. When the above combined force arrived at Dun-les-Places, Feldgendarmes and S.D. men arrested a large number of the male population. The arrestees were all taken at their homes, and were locked in the local church. Some were interrogated and all were physically ill-treated. At this point fires were heard in the village and a confusion arose. The Germans contended that shots were fired at them from the church steeple by resistance men. According to other witnesses, the incident was entirely invented by the Germans themselves in order to justify hard measures against the population. At any rate, after this the inhabitants detained in the church were massacred. They were lined up in front of the church and shot by Bren-guns. The massacre was carried out under Kruger's direct orders and supervision. In the early morning, an officer cadet was seen killing off some of those who had survived. Two of the victims, however, who had also survived, had time to flee before the morning, and were later to give full account of the event. Twenty-one inhabitants in all fell as victims on this occasion.

On 27th June, the place was thoroughly pillaged and twelve houses were set on fire and burnt to the ground. On 28th June, at 1 p.m., the Germans left the locality.

Events at Vermot

The third or Cossacks column, under the Command of Hefeke, had left on the 26th June, at about 5 p.m. It went to Vermot, a hamlet 2 kms. north of Dun. When leaving, it took with it six hostages from Dun-les-Places. According to the evidence of the Prosecution, while approaching Vermot, the column met a group of resistance men hidden in the nearby woods. A battle took place which lasted one hour. After the battle the column entered Vermot, and as revenge for the battle, severely ill-treated many inhabitants and pillaged their property. One of the victims, named Petit, had his jaw fractured by a rifle butt, and his grandson had his right arm broken. Petit died of the ill-treatment. In addition, the six hostages were executed. They were all identified. Eleven houses were set on fire and property of the inhabitants was looted. The column left Vermot on 28th June.

Events at Vieux Dun

According to the accused Major, on 26th June, in the evening, while at Dun-les-Places, he received orders from Hildebrand to proceed with a detachment to Vieux-Dun, another small locality in the area, and search all the woods on the way. He arrived at Vieux-Dun on 27th June, at 8 or 9 a.m. According to a German witness no members of the resistance movement were met or found and no incidents took place. The head of

the S.D., Kruger, also came to Vieux-Dun, and in spite of these quiet conditions, had one house set on fire. The village was also pillaged.

Events at Arleuf

Several weeks later, a similar expedition was made on the orders of Vier, Feldkommandant at Nevers and was carried out by Major. His assignment was to make a general search in the area of Nevers for hidden arms, to execute those found with arms, and to destroy houses from which shots would be fired. Major alleged that the expedition took place as a result of shots which were fired at German soldiers eight or ten days before. On 10th August the detachment arrived at Arleuf and soon several crimes were to be committed. According to a German witness the events took place in the following manner :

A French girl, Mlle. Buteau, had her parents arrested by members of the French resistance movement, and they were taken away. She appealed to Major for help to liberate them, and on this occasion told him that the whole population of Arleuf was in the resistance movement. Major had the locality surrounded by a company under Schirmacher, and gathered one member of every family in a café. He told them that if Mlle. Buteau's parents were not returned by the night, he would have the whole village set on fire. The Mayor despatched two youths to contact men of the resistance and request the return of the Buteau's by 8 p.m.

The crimes took place in the course of these events. At 6.30 a.m., when members of families were being collected, an agricultural worker, Goujon, took fright and tried to escape or hide. He was apprehended and brought to Major, who ordered that he be shot. The man was taken away and executed.

A revolver was found in the house of an old man, Boulle, aged 71. The man and the revolver were brought to Major. The latter fired a shot from the revolver into the ceiling and told Boulle : " For this you are going to be shot." These words were heard by a soldier who instantly took Boulle away and killed him.

A third man was killed in the following circumstances. Several inhabitants were lined up against a wall with their hands up, and were searched by Major's men. At one moment one of the inhabitants, Gantes, moved his right arm down. A soldier moved one or two yards back and killed him with a Bren-gun.

Events at Crux-la-Ville

Several days later an expedition took place under the direct command of Colonel Vier. The purpose was to annihilate units of the resistance movement, which were encamped west of Crux-la-Ville. Major and his men again took part in this operation.

On 15th August, Major and elements of his Battalion attacked a body of resistance men and suffered losses. The following day, after the battle was over, a young resistance combatant, Chermette, who had been captured on the 15th, was taken to a yard and tortured. Over a hundred soldiers watched the torture. The victim was laid on a table and beaten all over his body. After that he was thrown on a heap of refuse and killed by

Bren-guns. At 7 p.m., of the same day, soldiers broke into the house of a farmer, Ricard. They found his wife and son working on the cattle and accused the son of being a " terrorist." They shot him on the spot. Another four inhabitants were seized, tortured and killed, bringing the total to six victims. Seven houses were set on fire, one on 15th August and six on 16th August.

3. THE FINDINGS AND SENTENCES

Twenty-two accused were found guilty of some of the above offences and two were acquitted for lack of evidence that they had personally perpetrated crimes.

According to the findings the accused could conveniently be classified into three categories: those found guilty as instigators, mainly by issuing orders; those found guilty as perpetrators; and those found guilty as their accomplices.

Irmisch, Hippe, Hulf and Hildebrand were found guilty as instigators of the killing of twenty-one inhabitants at Dun-les-Places. Kruger, Schenevoigt, Lenertz, Hilgenstohler, Runkewitz, Knodler, Hoeberle, Schellhaas, were found guilty as perpetrators, and Merck, Goldberg, Eder and Moeckel as their accomplices.

Kruger was found guilty for instigating the arsons at Dun-les-Places, the killing of six hostages at Vermot and the arson at Vieux-Dun. He was also found guilty as perpetrator of the killing of Swedrowski at Toulon-sur-Arroux. Verfurt was found guilty as perpetrator of the arsons at Dun-les-Places, Hefeke was found guilty of instigating the arsons at Vermot, and of being an accomplice to the killing of the six hostages, the pillage and the ill-treatment of Petit and his grandson, all at Vermot. Major was found guilty of instigating the murder of two of the three victims at Arleuf, and the arson at Arleuf. Vier was found guilty as instigator of the killing of all the three victims at Arleuf and of the six victims at Crux-la-Ville, and of the arsons at Arleuf and Crux-la-Ville. Schirmacher was also held responsible as instigator in the arson at Arleuf and Holstein was found guilty of the arson at Crux-la-Ville as an accomplice.

The two acquitted were Fuierer and Gierszewski.

All the accused found guilty, except two, were sentenced to death. Holstein and Major were convicted with extenuating circumstances and were sentenced, Holstein to hard labour for 15 years, and Major to hard labour for 20 years.

B. NOTES ON THE CASE

1. THE NATURE OF THE OFFENCES

The offences for which the accused were found guilty fall into the following four categories: killing of civilians, which the court described as murders committed as " reprisals "; destruction of property by arson; pillage; and ill-treatment of civilians.

(a) *Killing Civilians as " Reprisals "*

Convictions for murder were made in respect of the killing of the twenty-one inhabitants at Dun-les-Places, the farmer Swedrowski at Toulon-sur-Arroux, the six hostages at Vermot, the three inhabitants at Arleuf, and the six victims at Crux-la-Ville.

In respect of all these killings the court found the accused concerned guilty of murder in that they " deliberately inflicted death " and that all such " wanton homicides were committed in reprisals."

The first part of this finding was based on Article 295 of the French Penal Code which provides :

> " Homicide committed deliberately is murder."

The second part was based upon Article 2, para. 4, of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, which reads :

> " Premeditated murder, as specified in Article 296 of the Penal Code, shall include killing as a form of reprisal."

In this manner the consequence of the finding that all the above killings were committed in " reprisals," was that the accused were found guilty of " premeditated " murder (*assassinat*) and not of ordinary murder (*meurtre*).(1)

That murder, premeditated or not, is punishable as a war crime, has had a long recognition in the laws and customs of war. Its latest expression can be found in the Charter of the International Military Tribunal at Nuremberg (Article 6) and also of that at Tokyo (Article 5). It can also be found in the municipal law of many nations dealing with war crimes, as it emerged during or after the war 1939–45.(2) The main point of interest in this trial, however, is the element of " reprisals " which, under the Ordinance of the 28th August, 1944, had the effect of making the accused guilty of premeditated murder.

The subject of " reprisals " is one of difficulty in International Law. Its limitations are still not well defined, and regarding the rules guiding it one has chiefly to rely on the opinion of learned publicists and on judicial precedents of a differing nature. This gap is particularly felt within the sphere of the laws and customs of war. As stressed by Lord Wright, Chairman of the United Nations War Crimes Commission, no complete " law of reprisals " in time of war has yet developed.(3)

In the theory concerning reprisals in time of peace it is generally agreed that the latter are exceptionally permitted as a means of enforcing International Law. They are then regarded as an answer to international delinquency and as one of several different modes of compulsive settlement of disputes when negotiations or other amicable modes have failed. The development of International Law after the first World War, by the setting

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(1) One of the main consequences of the distinction which the French Penal Code draws between " assassinat " (Art. 296) and " meurtre " (Art. 295) is that, according to Art. 302 of the Penal Code, the former entails as a rule death penalty, whereas the latter entails, again as a rule and according to Art. 303 of the Penal Code, hard labour for life. In exceptional cases, " assassinat " is punishable with lesser penalties and " meurtre " with death.

(2) For such laws, *see* Annexes to the different volumes of this series.

(3) *See History of the United Nations War Crimes Commission and The Development of the Laws of War*, H.M. Stationery Office, London, 1948. Foreword, p. vi.

up of the League of Nations and, *mutatis mutandis*, of the United Nations, has led some authoritative writers to raise the problem as to whether, after the acceptance of obligations regarding the pacific settlement of international disputes, States are still entitled to resort to compulsive means of settlement between themselves, including reprisals. The opinion has been expressed that " so long as the renunciation of the right of war," as the paramount means of compulsive settlement, " is not accompanied by an obligation to submit disputes to obligatory judicial settlement, and so long as there is no agency enforcing compliance with that obligation and with the judicial decision given in pursuance thereof, *reprisals*, at least of non-forcible character, *must be recognised as a means of enforcing international law.*"(1)

Similar conclusions, though for other reasons, were drawn in regard to reprisals in time of war. It was admitted that " reprisals between belligerents cannot be dispensed with, for the effect of their use and of the fear of their being used cannot be denied."(2)

It would thus appear that, in the present stage of its growth, International Law still recognises reprisals, admittedly within certain conditions and limitations. The problem in time of war, as a learned writer put it, is that " a war crime does not necessarily cease to be such for the reason that it is committed under the guise of reprisals," but that, on the other hand, " as a rule, an act committed in pursuance of reprisals, as limited by International Law, cannot properly be treated as a war crime."(3) It is precisely the limitations within which reprisals are permissible that are still left to be answered with precision sufficient to remove elements of doubt and uncertainty.

In conditions created by a state at war, the question of reprisals arises when one belligerent violates the rules of warfare and the other belligerent retaliates in order to bring about a cessation of such violations. The problem then consists in determining the scope and nature of acts which the retaliating party is deemed entitled to undertake.

In the trial under review the killings, and in fact all the other offences as well, were committed by German occupying authorities against French inhabitants on account of the struggle of members of the French resistance movement. It would appear that the Germans had taken the view that such struggle was in violation of the laws and customs of war, and that the inhabitants were to be victimised as a means of inducing the resistance members to stop their struggle.

According to the general theory regarding reprisals, referred to above, it is required that retaliation is made " in proportion to the wrong done."(4) One trend of opinion, however, gives further definition to this principle and qualifies it by certain limitations. In regard to reprisals in time of peace it is emphasised that " the only acts of reprisals admissible against foreign officials or citizens is arrest; they must be treated not like criminals, but like hostages, and in no circumstances may they be executed, or subjected

(1) *See* Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), p. 118. Italics inserted.
(2) *See op. cit.*, § 247, p. 446.
(3) H. Lauterpacht, " The Law of Nations and the Punishment of War Crimes," *British Year Book of International Law*, 1944, p. 76.
(4) Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), p. 115.

to punishment."(1) A similar conclusion regarding treatment of civilians is made by certain writers in respect of reprisals in time of war. It is considered that, in any case, reprisals must take place " in compliance with fundamental principles of war," and in this connection it is stressed that this implies " respect for the lives of non-combatants."(2)

This authoritative trend of opinion(3) provides certain indications as to how our problems may be solved. According to it, it would appear that wherever persons are the object of reprisals, their lives are the ultimate limit the retaliating party is not permitted to transgress. On the other hand, the recognition that " foreign citizens " may lawfully be taken as hostages in time of peace, would also apply in time of war to inhabitants of occupied territory, as conditions are then more compelling than in time of peace. A further rule would then follow, that while entitled to take hostages in order to bring about a cessation of violations of the laws of war by the other party, the retaliating party is expected to treat hostages in a humane manner, which in no case may lead to putting them to death. Any such act committed in retaliation for acts for which persons were taken and kept as hostages, would be criminal and would, legally speaking, result in a situation where there was no " reprisal " in the proper sense, but merely arbitrary acts of revenge.

It will be noted that Article 2, para. 4, of the French Ordinance of 28th August, 1944, according to which any " killing as a form of reprisal " constitutes premeditated murder, is fully in line with this school of thought. One of the striking features of the case tried is that no evidence was at hand to show that any of the inhabitants killed was guilty of any violation of the laws and customs of war. There was nothing to show that they belonged to the resistance movement and that, as such, they indulged in the commission of acts prohibited or punishable under the said laws and customs.

The solution furnished by the French Ordinance of 28th August, 1944, is a welcome contribution to the gradual elimination of uncertainty regarding the law of reprisals in time of war, and to the further determination of obligations which lie upon belligerent powers. The fact that it reflects so strikingly the principles formulated by authoritative writers prior to the enactment of the Ordinance, tends to indicate that the course adopted may bear the seeds for a wider agreement among nations in the further development of International Law in this field.

(b) *Destruction of Inhabited Buildings*

Convictions for destruction of buildings were made in respect of the setting on fire of 12 houses at Dun-les-Places, 11 houses at Vermot, 7 houses at Crux-la-Ville, and 1 house each at Vieux-Dun and Arleuf.

The accused concerned were found guilty under the terms of Article 434, of the French Penal Code, which prescribes the heaviest penalty, death, for anybody who " wantonly sets fire to buildings, vessels, boats, shops, works, when they are inhabited or used as habitations." When the buildings

(1) *Op. cit.*, p. 114.
(2) H. Lauterpacht, " The Law of Nations and the Punishment of War Crimes," *British Year Book of International Law*, 1944, p. 76.
(3) It should be stressed that, according to Art. 38 of the Statute of the International Court of Justice, appended to the Charter of the United Nations, " teachings of the most highly qualified publicists " are recognized as one of the sources of international law.

or places are not inhabited or used as habitations, the penalty is hard labour for life.

In International Law, Article 23(*g*) of the Hague Regulations respecting the Laws and Customs of War on Land, 1907, forbids the " destruction or seizure of enemy property " unless it is " imperatively demanded by the necessities of War." This careful phraseology is usually interpreted to mean that " imperative demands of the necessities of war " may occur only in the course of active military operations. In the case tried there was no evidence to show that, on the few occasions of clashes between the German units involved and the French resistance movement, there was any necessity to set the houses on fire. On the contrary, the evidence was to the effect that the houses were deliberately set on fire as a measure of intimidation for suppressing the activities of the resistance movement in the area.

Another provision of International Law is contained in the general rule of Article 46 of the Hague Regulations, whereby " private property must be respected."

According to the list of war crimes drawn up by the 1919 Commission on Responsibilities, item XVIII, " wanton devastation and destruction of property " is regarded as a violation of the laws and customs of war. Finally, Article 56 of the Hague Regulations, which assimilates " the property of local authorities " to private property, prescribes that " any seizure or destruction of " property " should be made the subject of legal proceedings," thus presumably signifying both civil and penal proceedings.

Under the terms of Article 1 of the Ordinance of 28th August, 1944, when committed during the war against French citizens, destruction of property by arson, as covered by Article 434 of the Penal Code, is punishable as a war crime when such destruction " was not justified by the laws and customs of war." The Tribunal's findings were that the acts of arson committed were not justified by these laws and customs.

Reflected upon the question of reprisals, this means that, even though the Germans may have carried out destruction as a measure of retaliation for the activities of the resistance movement, their deeds were regarded by the Tribunal as trespassing the limitations of International Law, and, therefore, constituting arbitrary acts of revenge of a criminal nature. The distinction between lawful and unlawful, or legitimate and arbitrary reprisals, was, thus, brought to light once more.

(c) *Ill-treatment of Civilians*

Convictions for ill-treatment were made in regard to the farmer Petit and his grandson at Vermot, and also in regard to five of the six men who were killed at Crux-la-Ville. The five were beaten and tortured before being killed.

The accused concerned were found guilty of " wantonly inflicting blows and wounds " as provided against in Article 309 of the Penal Code. In the case of Petit, who died as a consequence of the ill-treatment, the findings were that the " wantonly inflicted blows and wounds had caused death without intent to inflict it."

According to Article 309, when the ill-treatment has resulted in illness or in a working incapacity for over twenty days, the penalty is imprisonment

for from two to five years. If it has resulted in more serious consequences, such as mutilation, amputation, or other permanent infirmities, the penalty is solitary confinement with hard labour for from five to ten years. If ill-treatment has resulted in death which was not intended, as in the case of Petit, the penalty is hard labour for from five to twenty years. Finally, according to Article 311, if none of the above consequences have occurred, the penalty is imprisonment for only from six days to two years.

As in the case of destruction of property, under Article 1 of the Ordinance of 28th August, 1944, the offences covered by the above provisions of the French Penal Code are punishable as war crimes if committed during the war against French citizens and not justified by the laws and customs of war. As already reported in connection with another trial, ill-treatment of civilians, irrespective of whether they are or are not guilty of offences, is explicitly regarded as a war crime and made punishable as such by provisions of both international and municipal law.(1)

(d) *Pillage*

Convictions on the count of pillage were made for the lootings which took place at Dun-les-Places, Vermot and Vieux-Dun.

The accused concerned were found guilty of " pillage committed in gangs by military personnel with arms or open force," as provided against by Article 221 of the Code of Military Justice. The latter makes punishable by hard labour for life " any pillage or damage to food, merchandise or goods, committed by military personnel in gangs either with arms or open force, or with breakages of doors or external closures, or with violence against persons." Pillage in gangs committed in any other circumstances is punishable by solitary confinement with hard labour for from five to ten years. This provision was made applicable by the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, to cases of pillage committed by enemy occupying authorities in France.

Pillage was recognised as a war crime in the list of the 1919 Commission on Responsibilities, as well as in the Charters of the International Military Tribunals at Nuremberg and Tokyo. Prior to that it was explicitly prohibited by Article 47 of the Hague Regulations.

2. THE PERSONAL GUILT OF THE ACCUSED

As previously stressed, each of the accused was found guilty of some of the above offences in different capacities: as instigator, as perpetrator, or as accomplice other than instigator. Some were found guilty in two or all three capacities, according to the part they took in the commission of the various crimes. The guilt of instigators and other accomplices in French law deserves special attention.

(a) *The Guilt of Instigators*

The offences for which a number of accused were found guilty as instigators include the killing of the twenty-one inhabitants at Dun-les-Places, of the six

(1) *See* Vol. VII of this series, p. 70.

hostages at Vermot, of the three men at Arleuf, and of the six inhabitants at Crux-la-Ville. They also include the arsons in all these places.

The accused involved were in all cases in command of the men who committed the crimes and were held responsible for either issuing orders to their subordinates or permitting that they commit their misdeeds.

The responsibility of persons in authority over perpetrators and other accomplices, is covered by a general provision of the French Penal Code and also by the Ordinance of 28th August, 1944.

Article 60, para. 1 of the Penal Code reads:

> " Those who, by gifts, promises, threats, *abuse of authority or powers*, guilty machination, or artifices, provoke an act constituting a crime or a delict, or *give instructions* to commit it, shall be punished as accomplices."(1)

Article 4 of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes provides:

> " When a subordinate is prosecuted as principal perpetrator of a war crime and when his hierarchical superiors cannot be accused as joint perpetrators, they are treated as accomplices to the extent to which they have organised or tolerated the criminal acts of their subordinates."

The Tribunal applied the provision of the Penal Code and found all those concerned guilty of " provoking " the offence in question " by abuse of authority and powers " or of " giving instructions." The accused found guilty in this capacity were: Irmisch, Hippe, Hulf, Hildebrand, Kruger, Hefeke, Major, Schirmacher and Vier.

The above provisions are based on the same principle as that expressed in Article 6, last paragraph, of the Charter of the International Military Tribunal at Nuremberg. Referring to crimes against peace, war crimes and crimes against humanity, as defined in its previous paragraphs, Article 6 provides:

> " Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan."

This rule is to be regarded as evidence of the present state of International Law in the field of personal responsibility for war crimes.

(b) *Guilt of Accomplices other than Instigators*

It is a universally recognised principle of modern penal law that accomplices during or after the fact are responsible in the same manner as actual perpetrators or as instigators, who belong to the category of accomplices before the fact. That is a principle recognised equally in the field of war crimes.

It is a matter of comparative interest to pass briefly in review the provisions of the French municipal law under which the accused concerned were found guilty as accomplices other than instigators. Their liability is regulated in

(1) Italics inserted.

Article 60, paras. 2 and 3 of the Penal Code, which comprises among accomplices the following two categories :

> " Those who have furnished arms, instruments or any other means which have served in the action(1) knowing that they would serve this purpose;
>
> " Those who knowingly have aided or assisted the perpetrator or perpetrators of the action in the facts which have prepared or facilitated or in those which have consumated the action."

Most of the accused concerned were found guilty of complicity in the latter capacity, that is for having " aided or assisted in the facts which prepared or facilitated or in those which consumated " the crime involved. Some, however, were also found guilty for supplying the means used in the crime.

(1) The term " action " is defined in Art. 60, para. 1 quoted above, as " action constituting a crime or delict."