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."