

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

(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" or "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.