CASE No. 13

Trial of ROBERT WAGNER, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and six others

PERMANENT MILITARY TRIBUNAL AT STRASBOURG, 23RD APRIL TO 3RD MAY, 1946, AND COURT OF APPEAL, 24TH JULY, 1946

Administration of occupied territory. Recruitment of volunteers by the occupant. Introduction of compulsory military service by the occupant. Interference of head of the Administration of occupied territory in the proceedings of occupation courts. The Status of Alsace during the occupation. Jurisdiction of French Military Tribunals. The Legality of the French Ordinance of 28th August, 1944. The Plea of Superior Orders.

The chief accused, Wagner, was Gauleiter and head of the civil government of Alsace, when the province was under German occupation. The others were high administrative, Nazi Party and judicial officers. The accusations brought against them arose mainly out of the systematic recruitment of French citizens from Alsace to serve against France, abuse of legal process resulting in judicial murder, the killing of Allied prisoners of war and the mass expulsion and deportation from Alsace of Jews and other French nationals. Pleas to the jurisdiction of the Tribunal and against the retroactive application of the French Ordinance of 28th August, 1944, Concerning the Suppression of War Crimes, were unsuccessfully entered. All the accused, except one, were found guilty, and were sentenced to death.

Wagner, Röhn, Schuppel, Gädeke and Gruner appealed to the *Cour de Cassation* (Court of Appeal) on various grounds. Gruner was successful in a challenge to the jurisdiction of the Military Tribunal but the pleas of the other appellants failed.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was the Permanent Military Tribunal at Strasbourg. Its members were:

President: Colonel Begue, Commander of the 8th Artillery Regiment.

Judges: Simoneau, chef de Bataillon, of the 23rd Infantry Regiment, former member of a resistance group; Hardiviller, Captain of the General Staff at Strasbourg, former member of the F.F.I.; Grunder, Lieutenant, of the P.O.W. depot, No. 103, former member of the F.F.I.; Bucher, N.C.O. (Adjudant-chef) of the 23rd Infantry Regiment, former member of the F.F.I.

The Public Prosecutor was Colonel Daubisse of the Military Judicial Service.

The Greffier (Clerk of the Court), was Captain Baile.

2. THE ACCUSED

The following were defendants in the trial:

Robert Heinrich Wagner, ex-Gauleiter and Reich Governor of Alsace.

Hermann Gustav Philipp Röhn, ex-deputy Gauleiter of Alsace.

Adolf Schuppel, former Chief of Section (*chef de bureau*) in the Civil Administration of Alsace.

Walter Martin Gädeke, former Chief of the Personnel Section of the Civil Administration in Alsace.

Hugo Grüner, ex-Kreisleiter of Thann.

Ludwig Luger, Public Prosecutor at the Special Court at Strasbourg.

Ludwig Semar, former first Deputy Prosecutor at the Special Court at Strasbourg.

Richard Huber, former President of the Special Court at Strasbourg.

They were accused of war crimes within the meaning of the Ordinance of 28th August, 1944, concerning the Prosecution of War Criminals.

3. THE INDICTMENT

The Indictment (*Acte d'Accusation*), drawn up by the Public Prosecutor (*Commissaire du Gouvernement*) set out the charges against each of the accused.

Wagner, Röhn and Schuppel were charged with having incited Frenchmen to bear arms against France.

Wagner, Röhn, Schuppel and Gädeke were charged with having carried out recruitment for the benefit of a foreign power at war with France.

Wagner was charged with having made attempts against individual liberty.

Hugo Grüner was charged with having committed premeditated murder.

Wagner, Röhn, Schuppel, Gädeke, Luger, Semar and Huber were charged with having been accomplices in premeditated murder.

The Indictment analysed in great detail the positions which the accused had held, the powers they had exercised, and the nature of the alleged offences.

(i) *Position and Powers of the Accused*

Wagner

Wagner, who had been Gauleiter and Reichsstatthalter of Baden, was appointed Gauleiter and Chief of the Civil Administration of Alsace in the

summer, 1940, and was ordered by Hitler to carry out the Germanisation and Nazification of the Province. He claimed to have received Hitler's (oral) orders for his activity in Alsace on the occasion of an interview at Hitler's headquarters near Grendenstadt on 20th June, 1940, i.e., two days before the signing of the Franco-German Armistice. According to Wagner, Hitler had declared that as a result of the victories of the German armies, the Treaty of Versailles was null and void, the " territorial problem of Alsace had ceased to exist " and the province had again become part of the Reich.

The Indictment summed up the position held by Wagner in his double capacity as head of the Nazi Party and of the Executive by saying that he, Wagner, wielded the same powers in respect of Alsace as Hitler did in respect of the Reich.

The entire administrative personnel, including the ordinary police and the Gestapo, were under his direct orders. Though several departments, such as finance, the postal services, transport, war economy, the Four Years Plan and national education, were controlled by the central authorities in Berlin, and though Wagner claimed that other departments would, on occasion, also receive direct orders from the Berlin Ministries, it was Wagner, the Prosecution pointed out, who had taken all major decisions which resulted in the *de facto* incorporation of Alsace into the German Reich, and who had ordered the measures affecting the life and liberty of the population of Alsace.

Thus he was held responsible for the systematic Germanisation of Alsace, for the introduction of Nazi law, the administrative and economic incorporation of the province into the Reich, for the introduction of compulsory labour and military service, for the deportations and the confiscation practice, for the setting-up of concentration camps and the infamous practices in which they indulged.

Wagner had arrogated to himself the power of final decision in the administration of justice, notably in the trials held by the Special Court, which had been established at Strasbourg by his initiative. The Indictment pointed out that no decision could be taken by that tribunal without Wagner's approval and that the hearings were adjourned whenever Wagner happened to be absent from Strasbourg.

It was his normal routine to examine the Indictment before the trial was held, and to communicate to the Prosecutor of the Special Court his orders concerning the penalty which the latter was to demand. Wagner issued these instructions in writing, under the seal of his Civil Cabinet, and the Prosecutor communicated them to the President of the Court. The instructions remained with the Prosecutor's dossier and were not filed with the records of the case.

Wagner's official powers included the privilege of mercy, but it was alleged that he consistently rejected every recommendation for mercy.

Röhn

Röhn held the function of Deputy Gauleiter of Alsace. He claimed that this was merely a Party, not an executive office and that he had no influence on the administration and government of Alsace. Even as a Party official

he claimed to have acted throughout by Wagner's orders, passing on the latter's instructions and directives by circulars to the lower levels of the Party organisation, without in any way altering them ; he had merely been " Wagner's postman."

Against this, the Indictment described Röhn as Wagner's confidant and ascribed to him considerable powers in the administration of Alsace. The Indictment referred to the account of Röhn's functions and activities given by Wagner, who described Röhn as the virtual Party leader both in Alsace and Baden, and maintained that he had issued in his own name orders and instructions, which were neither submitted to, nor countersigned by the Gauleiter. Besides, Wagner stated, Röhn had addressed such orders and instructions not only to the Kreisleiters, but also to the heads of the 22 administrative departments.

The Indictment further referred to a circular issued by Röhn in June, 1944, in which he said : " It is essential that the Party should be informed of all measures that are being prepared with a view to suppressing disorders and to fighting parachutists, so that it (the Party) can give the necessary support to the Police."

Schuppel

Schuppel, whose rank as civil servant was that of " Chief of Section," was in charge of the Department of the Interior of the Civil Administration of Alsace. His Party function was that of Gaustabsamtsleiter (head of the Chief of Staff for the Gau).

Schuppel's activities covered a wide field. He maintained the liaison between the Alsatian administrative and Party authorities on the one hand, and Party Headquarters at Munich and the central authorities on the other. He was under Wagner's and Röhn's orders, but the Indictment alleged that he held powers of decision in many departments, ranging from the organisation of rabbit-breeding in Alsace to the confiscation of Church property, from the census and " total mobilisation " of the Alsatian population for war work to the persecution of French nationals suspected by the Germans, and the deportation of resisters and their families. Besides, it was alleged, special tasks had been repeatedly allotted to him, in the execution of which he also held full powers of decision.

Gädeke

Gädeke had been Chief of the Personnel Department of the Civil Administration and head of Wagner's " Civil Cabinet." It appears that he held no responsible Party function, but was Wagner's right-hand man in the latter's capacity as Governor of Alsace. It was Gädeke who handed on to the various administrative department Wagner's orders and instructions, which were sometimes oral, sometimes in writing ; in the latter case, Gädeke would sign them, adding to his signature the note " by Wagner's orders." Gädeke attended most meetings and conferences held under Wagner's chairmanship and was present at the Governor's interviews with the Prosecutor of the Special Court. It was not alleged, however, that he attended Wagner's conferences with Gestapo officials and with the Minister of the Interior of Baden. According to the Indictment, Gädeke was fully informed of Wagner's consultations which eventually led to the

setting-up of the Special Court at Strasbourg; he knew of Wagner's interference with the procedure of that Court and abetted him in it. He took an active part in the preparation of military conscription in Alsace and in the drafting of the Order introducing conscription.

Grüner

Grüner, Kreisleiter of Thann and Lörrach, was not a member of any of the policy-making bodies in occupied Alsace; he was charged with having personally murdered four Allied airmen who had made forced landings in Alsatian territory in October, 1944.

Luger

He was Public Prosecutor at the Special Court in Strasbourg and accused of complicity in the judicial murders committed by that Court. In his capacity as Prosecutor he kept Wagner informed of all proceedings which he proposed in his *réquisitions* (formal motion concerning sentence to be awarded).

Semar

Semar, " First Deputy Prosecutor " of the Special Court, was charged with complicity in murder. Proceedings against this accused were, however, separated from those against the five others, because, having fled to the American zone of occupation, where he was subsequently arrested, he was transferred to the military prison at Strasbourg at a time when the *information* (preliminary enquiry) in the case was already closed.

Huber

Huber had been President of the Special Court at Strasbourg and, as such, had pronounced the objectionable death sentences. Through the Prosecutor, Luger, he was informed of Wagner's orders concerning the trials and submitted to these orders. Huber was tried *in contumacia* (in his absence).

(ii) *Nature of the Offences Charged*

I. RECRUITMENT OF FRENCH NATIONALS FOR THE GERMAN ARMY

(a) *The Recruitment of Volunteers*

During the early years of the German occupation attempts were made to induce Alsatians to volunteer for the German Army. A large-scale propaganda campaign was launched for this purpose and young Alsatians were invited to join the Wehrmacht and the Waffen SS. Volunteers were promised considerable advantages and privileges, and special efforts were made to obtain the voluntary service with the German Armed Forces of French reserve officers.

Wagner was held responsible by the Prosecution for the organisation and direction of all measures intended to gain volunteers. In one of his circular letters addressed to the lower Party organisations Röhn spoke of the " propaganda campaign for volunteers, which has been ordered by the Gauleiter." The Indictment, quoted, *inter alia*, passages from an appeal for volunteers signed by a group of Alsatian traitors, which expressly referred to Wagner as having inspired the campaign.

Röhn was alleged to have been the author of a number of instructions addressed to Party offices, concerning the recruitment of volunteers. In the above-mentioned circular he spoke of the necessity " of stepping-up the propaganda campaign, which must be given even more effective support than hitherto by the Party and its formations." An example must be set, he said, by young Alsatians employed on salaried jobs in the Party, and he summed up the instruction in the words: " I enjoin upon you to avail yourselves of every opportunity to emphasize the historic importance of the participation of German Alsace in the struggle for liberation and against Bolshevism, in which the great German Reich is engaged." It was Röhn who directed the Kreisleiters by circular to arrange personal interviews with French volunteers.

Schuppel was accused of having taken part in these activities.

(b) *Military Conscription*

The appeals for volunteers proved a failure. On Wagner's own account, only about 2,300 persons responded, and it was alleged that even this negligible contingent included a number of German nationals resident in Alsace.

As a preliminary step towards the introduction of compulsory military service, labour service was introduced in 1941, and military conscription followed in 1942.

The Indictment pointed out that the Germans had given repeated assurances that they had no intention of enlisting Alsatians for the German army.

Early in 1942, a number of Alsatians who had fled to Switzerland were obliged to return home, and in an agreement concluded on that occasion between the German Reich and Switzerland, Germany gave the undertaking that the young people would not be called up in the course of the war.

Military conscription was introduced in Alsace by Wagner's *Ordinance of 25th August*, 1942, which had the following wording:

" By virtue of the powers conferred upon me by the Führer, I order as follows:

Section 1. Compulsory military service with the German armed forces is herewith introduced in Alsace for all Alsatians of German race who belong to any of the age groups to be designated by special order.

Section 2. The persons liable to military service, who have been called up shall be subject to the provisions applicable to German soldiers and shall have the rights that belong to German soldiers."

Section 3 of the Ordinance analogously defined the status of persons liable to, but not actually on, active military service.

The cited Ordinance was promulgated simultaneously with an Ordinance concerning the acquisition of German nationality by Alsatians. This second ordinance merely gave effect in Alsace to the Decree of the Reich Minister of the Interior of 23rd August, 1942, concerning the acquisition of German nationality by Alsatians, Lorrainers and Luxemburgers, which had been issued under a provision of the Order of the Council of Ministers for the Defence of the Reich, of 20th January, 1942, enabling the Minister

of the Interior to grant collective naturalisation to certain groups of aliens. The Decree of the Reich Minister of the Interior of 23rd August, 1942, given effect to in Alsace by Wagner's Ordinance of 25th August, 1942, provided, *inter alia*, that " Alsatians, Lorrainers, and Luxemburgers of German race who have been called up or will be called up for service with the Wehrmacht or with the Waffen SS., or who have proved themselves as reliable Germans and are recognised as such " could be granted naturalization. The acquisition of German nationality would take effect as from the day of joining the Wehrmacht or the Waffen SS. (or from the recognition as a reliable German).

The Ordinance introducing compulsory military service was supplemented by the following carrying-out orders :

Order of 27.8.42, by which the 1920-24 classes were called up.

Order of 5.11.42, by which military service was made compulsory with retroactive effect as from 25.8.42, for all persons acquiring German nationality.

Order of 1.1.43, calling up the 1914-1919 classes.

Order of 1.10.43, concerning sanctions against deserters, persons failing to comply with call-up orders for military or labour service, and against their relatives.

Order of 9.9.44, extending compulsory military and labour service to the 1928 class.

Order of 25.10.44, extending to Alsace the operation of the Order of the Führer concerning the Volkssturm, and involving all able-bodied men from 16-60 years of age.

The Indictment gave the following summary, based mainly on Wagner's and Gädeke's accounts, of the events which preceded the introduction of compulsory military service in Alsace.

At an unspecified date in 1942, Gädeke was ordered by Wagner to consult the responsible officials of the administrative section of the Civil Administration and of the Police, as well as representatives of the " Territorial (Wehrmacht) Command," on the advisability of conscripting Alsatians for the German army. The replies were all in the negative, even in the case of the military authorities, though the latter would obviously have welcomed an increase of available man-power. According to Gädeke all persons consulted had expressed doubts as to the legality of the proposed measure, in view of the " unsettled status of Alsace."

In spite of this, Wagner contacted Bürckel, Gauleiter of Lorraine, and Simon, Gauleiter of Luxembourg, suggesting to them a joint *démarche* in the matter. Hitler, having been informed by the three Party officials of their intentions, convened a conference at Vinnitza in the Ukraine, which was attended, in addition to Hitler and the three Gauleiters, by Keitel, Ribbentrop, Himmler and Bormann. It was Wagner who, after having made a detailed report on the situation in Alsace, proposed the introduction of compulsory military service in the province. The other Gauleiters endorsed the proposal. Hitler then gave orders for conscription to be introduced in the three territories, leaving it to the Chiefs of the respective Civil Administrations to settle all matters of detail. As usual, Hitler's order

was oral. Keitel had strongly recommended the measure during the debate.

The Indictment emphasised the fact that Wagner had been the motive power in preparing and introducing compulsory military service and in support of this allegation referred to a speech made by Wagner at Strasbourg a few months after the introduction of the measure, in which he declared that, seeing that the majority of Alsatians were not aware of their duties towards their new fatherland, one man had to act on behalf of all and that that man could only be he, Wagner, himself. " I therefore solicited the Führer's permission," he said, " to introduce compulsory military service in Alsace, and I have now been given that permission."

After his return from Vinnitza, Wagner, through Gädeke, ordered the Ordinance introducing conscription to be drafted by the administrative section of the Civil Government. With the Ordinance, orders concerning repressive measures to be taken in the case of disobedience were drafted by Gädeke and further transmitted to all Party organisations by a circular issued by Röhn. These instructions provided that every Alsatian liable to military service who failed to report to the Medical Boards or otherwise to comply with his duties under the Ordinance was to be arrested and immediately deported to the Reich. Any attempt at rioting was to be suppressed with the utmost ruthlessness by the police, who were to make use of their weapons on the slightest provocation.

It was alleged that conscription was enforced with the utmost brutality ; numerous deserters and persons who had disobeyed call-up orders were shot, and their families dispossessed and deported to Germany.

Röhn was charged with having circulated the above instructions received from the administrative section, and of having himself drafted and circulated instructions to the Kreisleiters concerning the recruitment of A.R.P. personnel the call-up of the 1908-1913 classes, and the call-up of French reserve officers.

Schuppel was likewise held responsible for having circulated Wagner's orders and instructions concerning compulsory military service. Besides he had issued circulars concerning the deportations of the families of deserters, etc., in which he criticized the delays in the deportation procedure. He was also the author of a circular concerning the employment of Alsatian girls with German military units.

Gädeke was not indicated on the charge of participation in the voluntary recruitment of French nationals ; he was, however, accused of having participated in compulsory recruitment. His part in the events appears from the above account.

II. MURDER AND COMPLICITY IN MURDER

These charges were based on three types of facts : (*a*) Judicial murder, (*b*) the shooting of captured allied airmen, (*c*) the killing of persons detained in concentration camps and prisons.

(a) *Judicial Murders*

The Case of Théodore Witz

This young Alsatian had been involved in proceedings in the Special Court at Strasbourg. The offence for which he was tried was the illegal

possession of a gun, though this was in fact a very old model. Shortly before the trial his Counsel, Maître Merckel, discussed the case with the Prosecutor, who told him that he did not consider Witz as a dangerous criminal, but rather as an excitable youth, and that in his motion concerning the penalty to be inflicted (*réquisition*) he had not proposed the death penalty, but confinement (*réclusion*) for a term of four to five years. When, according to the established practice, the file was submitted to Wagner, however, the latter is alleged to have dictated to Gädeke the following remark: " Yes, to be executed. Urgent," which Gädeke took down in his own hand.

Witz was actually sentenced to death by the Special Court (with Huber as the Presiding Judge), and the sentence was executed. The recommendation for mercy, which was supported by the German Prosecution, was rejected by Wagner.

The " Ballersdorf Case "

In the night of 13th February, 1943, a group of Alsatians, attempting to pass over into Switzerland, had been intercepted by frontier guards, and in the ensuing clash one guard and three of the fugitives were killed.

In the afternoon of 16th February, 1943, the trial was held of 14 survivors of the group, before the Special Court at Strasbourg. The following facts were alleged by the Prosecution in support of the contention that the most elementary principles and rules even of the German law of procedure were disregarded in the " Ballersdorf trial."

Thus, the Indictment referred to a note written in Huber's own hand to the effect that he, the President of the Court, did not receive the Indictment against the 14 men until 12.30 p.m. on the day of the trial. Two hours later, the accused were allowed to see the Indictment and to communicate with their counsel, who had all been appointed *ex officio*. This, the Prosecution pointed out, was in flagrant violation of the German law in that the accused had not been notified of their right to demand a supplementary enquiry, to name witnesses and to choose their own counsel. Moreover, two of the accused, Brungard and Müller, who were under age, had not been examined by a psychiatrist before the trial.

A medical expert was, however, heard at the trial itself on the responsibility of these two accused. This expert declared Brungard fully responsible, but considered Müller mentally deficient and proposed that the latter should be taken to a mental institution for further examination. Upon this motion, the Court passed a decision under Art. 81 of the German Code of Criminal Procedure for the separation of the trial against Müller and ordered his removal to a mental hospital.

Before this incident, evidence had been produced of the fact that the frontier guard had been killed by one of the three men who had themselves met with their death in the encounter, and that the accused Gentzbittel had not been present when the clash occurred.

Immediately after the decision for the separation of the proceedings against Müller was passed, the hearing was adjourned. The President of the Court, Huber, the Public Prosecutor, Luger, and the Gestapo and S.D. officials left the Court building and were absent " for a considerable time." It was hinted that during this interval they were received by Wagner.

The hearing was resumed for the final speeches only. In summing up for the Prosecution, the Prosecutor is alleged to have admitted that there was no evidence of the guard having been killed by any of the accused. In spite of this admission, he demanded sentence of death for all of them, and the 13 death sentences were pronounced.

The trial, which had begun late in the afternoon and had been adjourned for some time, was closed at 7.0 p.m.

The 13 condemned men, as well as Müller, were packed on a Gestapo lorry and taken to the Struthof camp. On the following morning they were killed in the most brutal manner by an S.S. detachment in a sand quarry near the camp.

About the fate of Müller, whose case had been separated from that of the other accused, the following facts have come to light: several weeks after the trial, the Prosecutor General of the Court of Appeal at Karlsruhe enquired about the state of the proceedings against Müller. In his reply, Luger reported that Müller had been taken to a concentration camp, where " he had meanwhile died." It appears, however, that he was killed together with the other 13 men; for, on the morning of the executions, Wagner had rejected an appeal for mercy which had been made on their behalf, and in the list of names contained in his decision the name of Müller was included, while that of Brungard had been omitted. A " corrected " list was sent to Luger by Gädeke, when, weeks after the execution, the mistake was pointed out to him. The question whether the inclusion of Müller's name in the list was, in the Prosecutor's words, a deliberate " piece of machiavellianism," or a genuine error, was left open in the Indictment.

Throughout the Preliminary Enquiry, Wagner denied having had any knowledge of the irregularities of procedure, of the adjournment of the hearing and, in particular, having received the members of the Court during the interval and given them any instructions concerning the sentence. Luger's correspondence with the Prosecutor General, however, made it clear that the Gestapo had already received Wagner's orders for the shooting of the 14 men even before Luger was received by Wagner and before the trial was opened. This account was borne out by Gädeke's depositions; according to him, Wagner's original intention had been to have the men shot without any trial, and he only accepted the idea of a trial in the Special Court after a long discussion with a German official and on condition that the trial would be held within 24 hours.

(b) *The murder of four Allied airmen*

On 7th October, 1944, four unknown British airmen made a forced landing at Rheinweiller in Alsace. They were arrested by German pioneers and taken to the town hall. The gendarmerie station at Schlingen was informed of the incident and a detachment of gendarmes led by the *maître gendarme* Reiner went to Rheinweiller to take charge of the prisoners. On their arrival, they found the captured men outside the town hall, surrounded by a crowd which was said to have been " curious rather than hostile " and were faced with the fact that Grüner, Kreisleiter of Thann and Lörrach, had taken control of the situation. Reiner's plan was to take the prisoners to the gendarmerie barracks and to arrange for them to be taken over by the military authorities. Grüner, however, prevented him from doing so. The

account given in the Indictment of the events that followed, was based mainly on depositions made by Grüner himself in the course of the Preliminary Enquiry.

Grüner had told the gendarmes that he was under orders from Wagner to shoot every Allied airman that was captured. He had then ordered the prisoners to be marched off one by one each escorted by a German, and the groups to keep a distance of 50 m. from one another. He had then followed the procession in his car, had taken each prisoner separately to the banks of the Rhine and had shot them with his own *mitraillette*, which he declared to have always carried with him. The bodies of the murdered men were thrown into the river. Grüner withdrew part of his admission during his interrogation saying that the actual shots had been fired by another person ; but even then he admitted that he had given the order for execution. The Indictment maintained that the second version given by Grüner was untrue.

Grüner reported the incident to Schuppel, Wagner not being at his office on that particular day. On the following day he attempted to induce the *maître gendarme* to make a false report to the " Landrat," i.e. to say that the four prisoners, while under escort, had been attacked and " carried off " by men hidden by the roadside.

During the Preliminary Enquiry, Grüner, Wagner, Röhn and Schuppel had mutually incriminated one another. Grüner maintained that the execution of " terror flyers " had been discussed at numerous meetings which were under Wagner's chairmanship, held early in 1944 and at which Röhn had always, Schuppel sometimes, been present, and that Wagner had expressly ordered the Kreisleiters to shoot captured airmen themselves, whenever they had an opportunity of doing so. According to Röhn and Schuppel, Wagner's instructions to the Kreisleiters were to hand captured airmen over " to the vengeance of the population," or, in Schuppel's version, to incite the mob to lynch them. Wagner claimed that these or similar orders had emanated from Goebbels and Himmler and had been communicated to the Kreisleiters not by him, but by Röhn. Among the witnesses for the Prosecution heard in the Preliminary Enquiry, was the former mayor of Mulhouse, who had heard Wagner " explain " the murders of prisoners as reprisal action taken by the population, which was in a state of frenzy as a result of allied air attacks.

(c) *Murders committed in prisons and concentration camps*

Several hundred members of the resistance movement (*Réseau alliance*), accused of having assisted prisoners of war, deserters, etc., to escape, had been interned in the Schirmeck concentration camp and a number of prisons. After the invasion of the Continent by the Allies, 102 of the 104 detainees at at the Schirmeck camp, 87 men and 15 women, were transferred to the extermination camp Strutthof, where they were shot during the night of 1st September, 1944.

Towards the end of November, 1944, 63 inmates of prisons were shot by a certain Gehrum, who made a tour of the prisons for the purpose of exterminating Alsatian patriots. A further contingent was executed after trial in the Special Court at Karlsruhe.

As the crimes committed at the Strutthof camp were to be dealt with in a special trial, the Indictment referred only briefly to the daily executions by

hanging or shooting, which took place for years at that camp, and to the gas-chamber " experiments " that were undertaken there by a certain Professor Hirt. Specific mention was made of 80 women and some 50 men who were killed in the Strutthof gas chambers in August, 1943.

The Prosecution alleged that Wagner, who had ordered the setting-up of the Schirmeck camp, who had inspected the installations at the Strutthof and who was on intimate terms with the said Professor Hirt, must have been aware of the criminal activities carried on by persons who were under his direct orders. Wagner denied any such knowledge.

III. OFFENCES COMMITTED AGAINST THE LIBERTY OF THE INDIVIDUAL

The facts adduced by the Indictment under this head are these :

(i) *Compulsory labour service* was introduced in 1941. When, in August, 1941, the first contingents received orders to appear before the Medical Boards, the parents of the young people were promised that they would not be sent to Germany. As a matter of fact, the first transports bound for German labour camps left in October, 1941.

(ii) *Expulsion from Alsace* into unoccupied France was the method used by the Germans before 1942 to get rid of persons regarded by them as undesirable.

Many Jews, foreseeing events, had left in haste, before the arrival of the Germans, taking with them their most treasured belongings. But for most the persecutions commenced immediately. At Mulhouse for instance they had to meet daily and clean the streets of the town, and on 16th July 1940, all of the Jews of Colmar were called together at the Police Station, and, each furnished with a suit-case and 2,000 francs, they were crowded together in trucks and carried to the lines of demarcation where the French received them. Wagner himself stated that 22,000 Jews had been affected by these first expulsions. Before the declaration of war there were in Alsace around 50,000 Jews, including German refugees.

After the Jews, the French had to suffer. Some French officials of whom the Germans had had need for the transmission of powers were able to leave and take even their furniture, personal property, but these were rare exceptions. The great majority were expelled in August 1940, under the same conditions as the Jews, each with a suitcase and 2,000 francs. Then came the turn of the various groups of Francophile Alsatians. Some particular expulsions were put into effect in the September, October and November of 1940, but the great " cleaning up " took place in the month of December. It was the SS which carried these out with their usual brutality. Everywhere, in all the towns and villages, they took away persons whom they suspected, all the social classes being affected by this stroke.

After these mass expulsions there took place certain individual expulsions, of which the greater part of the victims stayed for a greater or lesser time in the camp of Schirmeck.

(iii) *Deportation to Germany* became the practice from the summer of 1942 onwards. Special camps were created for deported Alsatians at Ulm and Breslau. Deportation was the normal sanction taken against families if one of their members had not complied with call-up orders for military or labour service, or even for the failure of a child to join the Hitler Youth.

The lot of all these unfortunate people was terrible. They lived under strict supervision in camps without comfort, children often being separated from their parents.

(The indictment then went on to describe in some detail the eventual fate of the property of those deported. The belongings of all the exiles were confiscated and sold for the benefit of the Reich ; for more than three years these belongings were sent twice a month to public auction in the big towns. The most valuable movables disappeared as if by magic. The Germans took on hire furnished apartments, then went away again taking away the furniture. Again, the farms of more than 500 peasants who had been deported because their children had refused to present themselves for medical inspection for labour services or military services were immediately given to German peasants.)

Wagner was the only accused who was indicted on a charge of " illegally depriving individuals of their liberty." In his defence he claimed to have been ignorant of many of the alleged facts and in particular to have disregarded Hitler's orders in favour of the population of Alsace. He had received definite orders from Hitler to expel several hundred thousand Alsatians ; in fact only about 25,000 had been forced to leave.

(4) THE EVIDENCE BEFORE THE COURT

Complete records of the trial not being available, such evidence as was produced during the hearing of the case cannot be dealt with in this report. Some indications of the evidence relied upon both by the Prosecution and the Defence, can, however, be gathered from references in the Indictment to depositions made in the course of the Preliminary Enquiry, and from the Judgment.

Apart from the mutually incriminating evidence of the accused themselves, the Court heard, *inter alia*, the accounts given of the case of Théodore Witz and the Ballersdorf case by the lawyer who had acted as counsel for the defence in these cases, and of one of the Prosecutors of the Special Court. In the case of the four murdered airmen, the depositions of the *maître gendarme* who had been summoned to take charge of the prisoners, were available. As will be seen, the charges of illegal recruitment were brought against the accused in two forms ; on the one hand they were indicted on the general charge of having recruited French nationals for a Power at war with France, on the other hand they were charged with having caused the incorporation into the German Army of six individual Alsatians, who had been called up at various dates between January 1943 and 1944. One of these six men was heard during the trial ; he made his depositions not as a sworn witness, but as a person called upon to give information without taking an oath. Among the evidence considered by the Court were also depositions made by Keitel, Ribbentrop and Lammers, obtained through a *commission rogatoire* of the *juge d'instruction*.

The Indictment dealt at length with the general line of defence taken by the accused during the Preliminary Enquiry.

In most cases they had denied any knowledge of the criminal acts with which they were charged. Apart from this, they relied mainly on two defences : (*a*) the denial of the illegality of the acts or measures which formed the substance of the charges, (*b*) the plea of superior orders.

In regard to the charge of illegal recruitment Wagner maintained on the one hand that, according to reports which he had received from the Police

and the Party formations, the majority of Alsatians were anxious to join the German Army, but were deterred from enlisting as volunteers by fear of the disapproval of their compatriots; conscription enabled them to gratify their wish without any anxiety. On the other hand he claimed that in his opinion the recruitments had not been illegal, Alsace having been incorporated in the Reich. (*See below*).

5. PLEAS OF THE DEFENCE

(i) *Plea to the Jurisdiction of the Court*

Counsel for the accused Grüner offered a Plea to the Jurisdiction of the Court. (Under Art. 81 of the Military Code, pleas to the jurisdiction of the Court must be raised before the hearing of witnesses.)

The Plea was rejected by the Tribunal on the following grounds:

(*a*) The Tribunal had been seized with Grüner's case by an Order for Trial (*ordonnance de renvoi*) issued on 6th April, 1946, by the *juge d'instruction* under Art. 177 of the Military Code. All accused and their counsel had been duly notified of the Order and no objection had been raised.

(*b*) Under Art. 177 of the Military Code[1] the provisions of Art. 68 of that code (concerning the exclusive authority of the Indictments Division of the Court of Appeal, *Chambre des mises en accusation de la Cour d'appel*, to commit cases for trial to a Military Tribunal) was inapplicable in times of war. Under Art. 177, the decision on the question whether an offence comes within the jurisdiction of a Military Tribunal and the authority to commit the trial to such Tribunal rests with the *juge d'instruction*; the Orders for Trial issued by the *juge d'instruction* (*ordonnance de renvoi*) have the same effect as Orders for Trial issued by the Indictments Division of the Court of Appeal (*arrêts de renvoi*).

(*c*) It is an established principle that the *arrêt de renvoi* issued by the Court of Appeal is constitutive of the jurisdiction of the Court to which it commits the case for trial. The same principle applied to the Order for Trial issued by the *juge d'instruction* where such Order replaces the decision of the Court of Appeal. No appeal lying against the Order of the *juge d'instruction* of 6th April, 1946, it had become final.

(*d*) Three of Grüner's co-defendants, Wagner, Röhn and Schuppel, were being tried on the one hand for complicity in the murders with the commission of which Grüner was charged, on the other for offences which were undeniably within military jurisdiction. The proceedings against Wagner, Röhn and Schuppel being inseparable from those against Grüner, it was essential in the interest of the effective administration of justice and the establishment of truth, that the accused should all be tried by the Strasbourg Military Tribunal.

(ii) *Plea relating to the status of Alsace*

As has been seen, Wagner claimed that his recruitment had not been illegal, Alsace having been incorporated in the Reich. In this connection,

(1) *See* the notes on the case, p. 49.

Wagner referred to his interview with Hitler, shortly before his appointment as Gauleiter and Governor of Alsace, to the terms of the Armistice denouncing the Treaty of Versailles, and to certain " tacit or secret agreements " concerning the status of Alsace.[1]

The Prosecution denied that Wagner could have held in good faith his view that his recruitments were legal, and in support of this contention adduced the following facts :

(*a*) In a letter dated 9th July, 1942, and addressed to Bormann, one of the Departments of the Civil Administration expressed the view that nobody except Hitler himself was in a position to say whether " the introduction of German nationality in Alsace " was, or was not, compatible with the terms of the Armistice.

(*b*) Wagner could not have been ignorant of the vehement protests raised by the French (Vichy) Government against the compulsory recruitment of Alsatians for the German Army.

(*c*) Wagner must have had knowledge of the protests raised by the French Government against his demand for the resignation of the Deputies Haut-Rhin and Bas-Rhin ; the French Government's note, dated 28th July, 1941, expressly stated that France did not recognize the legality of the German Civil Administration in Alsace. Wagner must also have known of the note of the French Government of 17th September, 1941, protesting against the introduction of compulsory labour service in Alsace and declaring that Germany was not entitled under the Armistice to introduce this measure.

(*d*) The Prosecution referred to the following incident which took place in 1942, and of which Wagner must have had knowledge : Abetz, German Ambassador with the Vichy Government, was asked by Ministerialrat Kraft, an official of the Civil Administration of Alsace, to support the demand for the restitution to Strasbourg University of the equipment of its Science Institutes. To this request, Abetz replied to the effect that, in contrast with what had happened in 1918, the status of Alsace had not been settled by the Armistice of 1940. This, he said, was true in spite of the *de facto* situation created after 1940 by unilateral administrative measures taken by the Germans and based on rules and regulations introduced by them. The French Government could not be expected to give recognition, by the gesture of relinquishing possession of the material in question, to a *de facto* state of affairs, before they had even been asked by the German Government to recognize this state *de jure*.

Besides, Wagner's attention had been drawn to the illegality of introducing compulsory military service in Alsace by high officials of his own Civil Administration and by responsible military circles in Alsace.

Other accused merely repeated Wagner's contention that Alsace was part of the Reich by virtue of the Armistice of 1940, which had declared the Treaty of Versailles null and void.

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(1) *See* pp. 25 and 36.

(iii) *The Plea of Superior Orders*

Wagner occasionally referred to orders he had received from Hitler. All other accused claimed to have acted on orders from Wagner, either in the latter's capacity as Head of the Civil Administration or as Gauleiter.[1]

(iv) *The Challenge of Wagner's Counsel to the legality of applying the Ordinance of 28th August*, 1944

The Tribunal rejected the contention of Wagner's counsel that the retroactive application of the Ordinance was not legal, on the following grounds :

The Ordinance in question provides in its Art. 1 that French Military Tribunals shall be competent to try under the French law in force and in accordance with the provisions of the Ordinance, such *enemy nationals* and non-French agents who are or were in the service of the enemy administration or interests, as are guilty of *crimes or offences committed since the beginning of hostilities* either in France or in any territory under French authority.

Wagner, the decision went on to say, was a German national. He was tried for crimes punishable under the Penal Code and committed between 940 and 1944, i.e., after the beginning of hostilities. These crimes had een committed in Alsace, i.e., in French territory.

The Ordinance in question establishes the jurisdiction of Military Tribunals to try enemy nationals for such offences as are not justified by the laws and ustoms of war, even if they were committed under the pretext of or during state of war.

The Tribunal, whose jurisdiction had been duly established by the Order for Trial of 6th April, 1946, which order had become final, was not competent to decide on the correctness of applying the Ordinance.

The decision further referred to directives issued by the Ministry of War, Direction of Military Justice, and to its own decision rejecting the plea to its jurisdiction, which had been offered by counsel for the accused Grüner.

6. PROGRESS OF THE TRIAL

The trial having been opened on 23rd April, 1946, the Presiding Judge ruled that in view of the fact that the accused Huber had not presented himself within five days of the issuing of the order to appear, made by the Judge under Art. 119 of the Military Code, judgment would be passed in default.

After the interrogation of the accused for purposes of identification, the *Commissaire du Gouvernement* (Prosecutor) made a motion for the disjunction or severance of the trial against the accused Semar. The application was granted by the Court and the disjunction of the trial ordered on the grounds that Semar had been handed over to the Strasbourg Military Tribunal after the closure of the Preliminary Enquiry and had therefore not been interrogated by the *juge d'instruction* ; that the effective administration of justice required that the trial and judgment against Semar's co-accused should not be postponed ; and finally that the disjunction was not prejudicial to the interests of the other accused. The Tribunal based its decision on Art. 474 of the Code of Criminal Procedure, which provides that the absence

(1) *See* p. 54.

(*contumace*) of any accused must on no account lead to an adjournment or delay in the proceedings against the co-defendants who are present. At the same time the Tribunal ordered a supplementary *information* to be instituted and conducted by one of the Judges of the Tribunal.

The President, in accordance with Art. 79 of the Military Code, then ordered the reading of the Order convening the Tribunal, of the decision committing the case to the Tribunal, of the Indictment and of a number of other documents ; he gave a summary of the crimes for which the accused were prosecuted and instructed them and their counsel of their rights and duties under the Military Code and the Code of Criminal Procedure.

After hearing the plea of Grüner's Counsel to the Jurisdiction of the Tribunal, the latter proceeded to the interrogation of the defendants Schuppel, Gädeke and Röhn. Before the interrogation of Wagner, application was made by his counsel for a number of new witnesses, among them Keitel, Ribbentrop and Lammers, to be heard. The Tribunal rejected the application for the time being, ordering the " junction of the incident to the substance of the case " and reserved its final decision on the matter until the hearing of the other witnesses had been completed. The decision was based on the consideration that the trial was not sufficiently advanced to enable the judges to decide whether the hearing of the proposed new witnesses was essential to establish the truth.

The following days of the trial were devoted to the interrogation of Wagner, and the hearing of witnesses and a number of persons called to give information.

On the seventh day of the trial, the Presiding Judge, by virtue of his discretionary power under Art. 82 of the Military Code, ordered a number of documents, received by the Court after the closure of the Preliminary Enquiry, to be filed with the records of the case. Among these documents were the depositions of Keitel, Ribbentrop and Lammers, obtained through a *commission rogatoire* of the *juge d'instruction.*

The hearings were closed on the eighth day of the trial. In his final address the Prosecutor required that the accused be convicted and sentenced in accordance with the Indictment.

Then followed the final addresses by counsel for the defence. In his *plaidoyer*, counsel for Wagner requested a decision by the Court on the legality of applying the Ordinance of 28th August, 1944, retroactively.[1]

Finally the Tribunal passed a decision on the application for the hearing of new witnesses made earlier in the trial by counsel for Wagner.

The application was rejected on the following grounds :

Counsel for Wagner had been free during the Preliminary Enquiry to communicate with his client. He had been notified of the date of the trial on 7th April, 1946, and had access to the documents relating to the case. Both Wagner and his counsel had received the instructions concerning the naming of witnesses in accordance with Art. 179 of the Military Code. Wagner had thus been given sufficient time to prepare his defence. The addresses by counsel for the Prosecution and for the Defence had supplied sufficient material on which the judges could base their decision. The

(1) *See* p. 38.

hearing of further witnesses was therefore not essential to establish the truth.

At every stage of the trial as set out above, the Prosecution, the defendants and their counsel were invited to make their observations, the defence " having the last word."

All decisions mentioned above were announced as having been arrived at by a majority vote, in accordance with Art. 91 of the Military Code, which, provides that " the Judgment shall merely state the fact of the majority of votes without indicating the number of pro and contra votes, non-compliance with this provision involving the nullity of the Judgment."

7. THE QUESTIONS EXAMINED BY THE TRIBUNAL AND THE VERDICT

Under Art. 88 of the Military Code, which provides that the :

> " Presiding Judge shall announce the questions arising from the Indictment and the hearings which will be put to the Judges,"

the Tribunal was called upon to examine a total of 207 questions for their findings. These questions fall into the following groups :

(*a*) A group of questions relating to the incriminated *facts* and their classification. The Tribunal was asked whether the deaths of Théodore Witz and the 14 accused of the Ballersdorf case were due to wilful homicide and whether such homicide had been committed with premeditation ; whether in the case of the four airmen wilful homicide had been committed and in each case whether such homicide was preceded, accompanied or followed by some other crime ; whether six individual Alsatians had at definite dates in 1943 and 1944 been enrolled in the German army.

The findings of the Tribunal on each of these 44 questions was in the affirmative.

(*b*) Questions relating to *Wagner*

In regard to the murders of Théodore Witz and 13 of the accused in the Ballersdorf case the Tribunal considered the question whether Wagner, in abusing his power or authority, had been an accomplice in the crime by dictating or ordering the sentence to be awarded by the Special Court. Wagner was found *guilty* on the charge of complicity in these murders.

He was found *not guilty* of having ordered the 14th accused, Müller, to be executed without sentence.

His complicity in the murder of the airmen was examined by reference to the question whether, in abusing his power or authority he had given orders for allied airmen to be killed on the spot. He was found *not guilty* on this charge.

He was found *guilty* of having during the years 1940 to 1942 incited French nationals to bear arms against France, by addressing to them appeals to join the Wehrmacht at a time when France was at war with Germany. He was further found *guilty* of having recruited French nationals for the German armed forces, and of having caused the recruitment of the six Alsatians by signing the Ordinance of 25th August, 1942.

Wagner was the only accused in regard to whom the question was asked whether he was guilty of having, during the years 1940 to 1944, arbitrarily

deprived French nationals of their liberty. The Tribunal found him *guilty* on this charge, and answered in the affirmative the further question whether he had during the material period held the *de facto* executive power in Alsace.

(*c*) Questions relating to *Röhn*

The Tribunal considered the question whether Röhn was guilty of having incited French nationals to join the Wehrmacht, of participation in illegal recruitment in general and in the recruitment of the six Alsatians, the first by circulating Wagner's orders and instructions, concerning compulsory military service, the latter by passing on the circular letter concerning persons disobeying call-up orders. He was found *guilty* on all these charges.

He was found *not guilty* of having given instructions for the killing of allied airmen, and thus of complicity in the four murders.

In regard to each of the charges the Tribunal considered the question whether Röhn had acted on superior orders. This question was answered in the negative throughout.

(*d*) Questions relating to *Schuppel*

Schuppel was found *guilty* on the charges (*a*) of having incited French nationals to bear arms against France, (*b*) of participation in illegal recruitment in general on the ground that he had circulated Wagner's orders and instructions, in particular the order concerning sanctions against Alsatian deserters and persons not complying with their military duties; (*c*) of participation in the illegal recruitment of one of the six Alsatians, this latter crime having been committed by him by issuing the circular letter of 13.12.43 concerning sanctions against the families of deserters.

He was found *not guilty* of having been an accomplice in the murder of the four airmen by approving Wagner's relative orders.

The Tribunal denied that he had been acting on superior orders.

(*e*) Questions relating to *Gädeke*

Gädeke was found *guilty* on the charge of illegal recruitment in general and of participation in the recruitment of the six Alsatians, the first on the ground that he had circulated Wagner's orders and instructions concerning compulsory military service, the latter because of his authorship of the circular threatening sanctions against resisters and their families.

He was found *guilty* of complicity in the murder of Théodore Witz on the ground that he had taken down Wagner's order to the Court to pass sentence of death, and in the murder of the 13 Ballersdorf men on the ground that he had passed on to the Prosecutor Wagner's order to demand sentence of death.

He was not found to have acted on superior orders.

(*f*) Questions relating to *Grüner*

Grüner was found *guilty* of the premeditated murder of the four airmen, each offence being preceded, followed or accompanied by another crime. The Tribunal found that he had not acted on the orders of his superiors.

(*g*) Questions relating to *Luger*

The Tribunal examined the questions whether Luger, by demanding sentence of death against the accused in the Ballersdorf trial under pressure from Wagner was an accomplice in the murder of the 13 men. He was found *guilty* on this charge.

The Tribunal, however, came to the conclusion that he had acted on superior orders.

(*h*) Questions relating to *Huber*

Huber was found *guilty* of complicity in the murder of Théodore Witz and the 13 Ballersdorf men on the ground that under pressure from Wagner he had pronounced death sentences against them.

The Tribunal found that he had not acted on superior orders.

8. THE SENTENCES

Wagner, Röhn, Schuppel and *Gädeke* were sentenced to death and confiscation of their entire property for the benefit of the nation.

Grüner and *Huber* were sentenced to death. The sentence on Huber was pronounced in his absence.

Luger was acquitted.

All accused, including Luger, were declared to be jointly and severally liable for the costs of the proceedings.

9. RECOURSE TO AND DECISIONS OF THE COURT OF APPEAL (*Cour de Cassation*)[1]

Wagner, Röhn, Schuppel, Gädeke and Grüner lodged appeals on a number of different grounds relating both to procedural and substantive law. Their arguments are set out below, together with the decision of the Court as to each plea. The order in which the Court dealt with the pleas put forward has not been disturbed in this report, but headings have been added for the convenience of the reader. It will be noted that, of the five appellants, only Grüner was successful. The Court delivered judgment on 24th July, 1946.

(i) *The Composition of the Military Tribunal* (2)

The Court of Appeal first decided on a plea put forward by Wagner, Röhn and Schuppel, and based upon the alleged violation of Art. 156 of the *Code de Justice Militaire*, claiming that the Military Tribunal was irregularly composed because Wagner had the rank of a General commanding an Army Corps and the Tribunal could not, therefore, properly be presided over by a Colonel.

The judgment of the Court of Appeal pointed out that, according to Art. 5 of the Ordinance of 28th August, 1944, " For adjudicating on war crimes the Military Tribunal shall be constituted in the way laid down in the *Code de Justice Militaire*."

The provisions of Arts. 10 *et seq.* and 156 of the *Code de Justice Militaire*, which varied the composition of Military Tribunals according to the rank of the accused, applied only to French military personnel and to persons treated as such.

(1) *See* p. 100.
(2) *See* p. 94.

Paragraph 13 of Art. 10, according to which Military Tribunals called upon to try prisoners of war are composed in the same way as for the trial of French military personnel, that is according to rank, would not be applied to Wagner, who was not sent before a Military Court as a prisoner of war. It was therefore right that the appellants were brought before a Military Tribunal composed in accordance with Arts. 156 and 186 of the *Code de Justice Militaire.*

(ii) *Four Pleas Based upon Alleged Infringements of the Procedural Rights of the Accused* [1]

(*a*) The Court of Appeal had next to decide on a plea put forward by Wagner, Röhn, Schuppel and Gädeke, alleging a violation of Art. 65 of the *Code de Justice Militaire* in that the Order for Trial had been issued on the 6th April, 1946, before the return of a Commission of Enquiry sent by the *juge d'instruction* on 14th March, 1946, to hear Ribbentrop, Keitel and Lammers, and that Counsel for the accused had not been furnished with the evidence of these witnesses before the close of the preliminary hearing.

The Court of Appeal rejected this plea.

According to the terms of Art. 81 of the *Code de Justice Militaire*, which were applicable to the proceedings of Military Tribunals established in territorial districts in a state of war in virtue of the provisions of paragraph 3 of Art. 179, the accused should have formulated their complaint before the Military Tribunal.

In the absence of such steps the plea could not be brought up for the first time before the Court of Appeal.

(*b*) The Court of Appeal also rejected a plea put forward in two parts, the first by Wagner, Röhn, Schuppel and Gädeke and the second by all the appellants, the plea as a whole being based on an alleged violation of Art. 71, paragraph 1, and Arts. 172 and 179 of the *Code de Justice Militaire*, and Art. 1 of the Ordinance of the 28th August, 1944, relating to the rights of the defence. The first part of the plea claimed that the indictment had not been delivered to the appellants three days at least before the meeting of the Tribunal, along with the text of the law applicable and the Christian names and surnames, professions and residences of the witnesses. The second part of the plea alleged that the order to appear which was delivered to the accused did not contain among the texts of the law applicable that of the Ordinance of 28th August, 1944, despite the fact that such notification was expressly required by the above-mentioned texts and the fact that the Ordinance, which bestowed upon the alleged acts the character of war crimes and furnished the basis for the proceedings and alone provided legal jurisdiction to the French Military Tribunal to try belligerent persons belonging to an enemy nation, was pre-eminently a legal text applicable to the proceedings and which ought therefore to have been notified to the accused.

In its decision on this plea the Court of Appeal laid down that the combined effect of Arts. 172 and 179 of the *Code de Justice Militaire* was that the provisions of Art. 71, paragraph 1, of the same code were not applicable to proceedings held by Military Tribunals established in territorial districts in a state of war. According to Art. 179, an accused ordered to appear

[1] *See* pp. 97-9.

before such a tribunal must, 24 hours at least before the meeting thereof, receive notification of the summons containing the order of convocation of the Court as well as the indication of the crime or delict alleged, the text of the law applicable and the names of the witnesses which the prosecution proposed to produced. The summons was duly notified to the accused on the 6th April, 1946.

It was true that it was maintained that the summons did not make mention of the Ordinance of 28th August, 1944, which gave to the alleged acts the character of war crimes and provided a basis for the jurisdiction of the Military Tribunal, and therefore did not satisfy the requirements of Art. 179 of the *Code de Justice Militaire*. Nevertheless, since the provisions of this article, which were relied upon in the second part of the plea, envisaged only the texts of the law which laid down the penalties applicable to the crimes committed, and since this category did not include the Ordinance of 28th August, 1944, the complaints contained in both parts of this plea were not substantiated.

(*c*) The Court of Appeal had next to decide upon a plea put forward by Wagner, based upon alleged violations of the rights of the defence, and claiming that the Military Tribunal had rejected the arguments of the appellant in favour of hearing further witnesses.

The Court of Appeal recalled that the Military Tribunal had decided on 3rd May, 1946, to reject the arguments of the appellant in favour of hearing several witnesses because it was for the accused to arrange for the appearance of all witnesses whom they judged necessary for their defence. In deciding thus, the Military Tribunal had made an exact application of the provisions of paragraph 3 of Art. 179 of the *Code de Justice Militaire* the language of which was as follows :

" . . . The accused has the right, without formality or previous notification, to arrange for the hearing on his behalf of all witnesses of whom he has notified the Prosecutor before the opening of the proceedings, provided they are present at the hearing."

Therefore the plea was rejected.

(*d*) The court rejected the plea of Röhn, based upon an alleged violation of the rights of the defence, and claiming that the Memoranda of the appellant dated 28th January, 1st June and 14th September, 1943, which had not been submitted as evidence at the preliminary hearing, were made the subject of argument at the main hearing and were used as a basis for the verdict.

The documents referred to in the plea, said the Court of Appeal, appeared in the dossier of the preliminary enquiry and were made the subject of interrogations of the accused Röhn on the 18th June and 5th October, 1945. Furthermore, they had been made the subject of discussion between the parties in the course of the main hearing without the appellant having raised any objection. It followed that the plea must fail.

(iii) *The Alleged Retroactive Application of the Ordinance of 28th August*, 1944

The Court of Appeal had next to decide on a plea put forward by Wagner, based upon the alleged violation of Art. 4 of the *Code Penal* (1) and of the

(1) " No misdemeanour, delict or crime can be punished except by penalties laid down by law before the perpetration thereof."

principle of the non-retroactivity of the criminal law, claiming that the Ordinance of the 28th August, 1944, had been applied against the appellant despite the fact that the Ordinance, which was aimed at punishing acts committed before its promulgation, did not respect Art. 4 and the principle just mentioned.

The judgment of the Court of Appeal recalled that the Ordinance laid down that the crimes and delicts set out in its Art. 1, "which have been committed since the beginning of hostilities," shall be prosecuted before French Military Tribunals and tried in accordance with the French laws in force and with its own provisions. This legal text, duly promulgated, became binding on the Tribunals and could not be questioned before them on grounds of its unconstitutional nature. The plea could not, therefore, be upheld.

(iv) *The Status of Alsace*

Wagner put forward a plea based upon an alleged violation by false application of the Ordinance of 28th August, 1944, claiming that the acts alleged were committed in Alsace, which was annexed by Germany, and on territory over which French sovereignty had ceased to operate.

The purported declaration of annexation of Alsace by Germany on which reliance was placed in the plea was deemed by the Court of Appeal to be nothing more than a unilateral act which could not legally modify the clauses of the treaty signed at Versailles on 28th June, 1919, by the representatives of Germany. Therefore the acts alleged to have been committed by Wagner were committed in Alsace, French territory, and constituted war crimes in the sense of Art. 1 of the Ordinance of 28th August, 1944.

(v) *A Plea based on the Fact that the Judges were not asked whether the Acts charged were Justified by the Laws and Customs of War.*[1]

The Court of Appeal had next to decide on a plea put forward by all appellants and based upon an alleged violation of Arts. 88, 90 and 172 of the *Code de Justice Militaire*, Art. 1 of the Ordinance of 28th August, 1944, and Art. 7 of the Law of 20th April, 1810, and upon an alleged lack of legal basis.

The appellants claimed that, since the prosecution arose out of crimes and delicts committed by persons belonging to an enemy nation and whose acts were of a belligerent nature, the questions put to the military judges should have aimed at making it clear that the alleged crimes were within their competence and should be punished with the penalties laid down in the Ordinance of 28th August, 1944, because they were not justified by the laws and customs of war.

In fact, however, none of the questions put to the military judges had asked whether the acts charged were or were not justified by the laws and customs of war. The silence of the questions on this point resulted in the judges not taking a decision on an essential element of the war crimes alleged against the appellants.

The Court of Appeal pointed out that the war crimes set out in Art. 1 of the Ordinance must, in the language of that Article, be punished by

(1) And *see* pp. 53-4.

French Military Tribunals, in accordance with French law, " when such offences even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."

The effect of these provisions was that justification by the laws and customs of war of the alleged acts would, if established, take away their criminality. Distinct questions regarding the existence of this justifying element were not, therefore, necessary, since they were implicitly included in the questions regarding guilt. It followed that the plea must be rejected.

(vi) *Five Pleas relating to the Application of Provisions of French Law regarding Enrolments on Behalf of an Enemy Power, and relating to Superior Orders.*[1]

The Court then had to decide on pleas put forward by Wagner, Röhn, Schuppel and Gädeke alleging violation of Arts. 75 and 77 of the *Code Pénal* and of Art. 24 of the Law of 29th July, 1881,[2] and failure by the Tribunal to answer Counsel's arguments.

It was pleaded:

(*a*) that the appellants had not been guilty of an infraction of these articles since the first text envisaged only Frenchmen and the second, foreigners, and were not applicable to the appellants who belonged to a country at war with France;

(*b*) that the Ordinance of 28th August, 1944, did not refer to the articles of the *Code Pénal* set out above;

(*c*) that the question whether or not the provocation of Frenchmen to bear arms against France had been effective, had not been asked;

(*d*) that Schuppel and Gädeke, who were simply inferior officials, had only obeyed orders received from their superiors;

(*e*) and finally that the Tribunal had omitted to answer arguments of Gädeke's Counsel in which he pleaded this justifying circumstance.

Dealing with the first part of the plea, the Court of Appeal pointed out that the first paragraph of Art. 77 of the *Code Pénal* declaring guilty of espionage " any foreigner who commits one of the acts set out in Art. 75, paragraph 4," and which is aimed especially against enrolment for a foreign power at war with France, made no distinction between foreigners coming from an enemy nation and those who do not. Moreover, paragraph 2 of Art. 77, according to the language of which " provocation to permit or proposal to commit one of the crimes set out in Arts. 75 and 76 and by the present article shall be punished in the same way as the crime itself," makes no exception in favour of persons coming from an enemy country.

Therefore, in declaring Wagner, Röhn, Schuppel and Gädeke guilty of having carried out enrolment for a power at war with France and the first three of having encouraged Frenchmen to bear arms against France, the Military Tribunal, far from violating Arts. 75 and 77 of the Criminal Code, on the contrary, made an exact application thereof.

On the second part of the plea, the Court of Appeal laid down that it was of no importance that the infractions mentioned in the plea did not

(1) And *see* pp. 51-4.
(2) *See* p. 53.

appear in the enumeration, contained in paragraph 2 of Art 1. of the Ordinance, of offences which must in particular be punished as war crimes, since this enumeration had not an exhaustive character.

On the third part of the plea, the Court of Appeal recalled that Wagner, Röhn and Schuppel had been accused of offences against Arts. 75 and 77 of the *Code Pénal* for having incited Frenchmen to bear arms against France. In view of the affirmative answers to the questions regarding guilt in this connection, it was in order for the Military Tribunal to pronounce the penalty laid down by the above-mentioned articles.

It was for the defence to request that subsidiary questions should be asked as to whether the provocations alleged had been committed in one of the ways set out in Art. 23 of the Law of 29th July, 1881, and had not had any effect; but no use had been made of this right and consequently Art. 24, paragraph 1, of the said law of 29th July, 1881, had no application in this connection.

On the 4th and 5th items of the plea, the Court of Appeal pointed out that, in connection with each of the infractions of Arts. 75 and 77 of the *Code Pénal*, set out in the charge against Schuppel and Gädeke, the Military Tribunal had been asked whether the accused " had acted under order of his superiors for purposes within the jurisdiction of the latter and on which he owed them obedience due to rank."

The putting of these questions gave satisfaction to the request formulated in the arguments put forward by Gädeke and set out in his plea. Further, the Tribunal had answered in the negative to each of these questions. The answers duly given to these questions were irrevocable. Therefore the plea must fail.

(vii) *The Jurisdiction of the Military Tribunal*[1]

The Court of Appeal had then to decide on the joint pleas put forward on the one hand by Grüner and on the other hand by Röhn and Schuppel, founded upon the alleged violation of Art. 81 of the *Code de Justice Militaire* and of Art. 1 of the Ordinance of 28th August, 1944. They pointed out that the Military Tribunal, in its decision of the 23rd April, 1946, had rejected the arguments based on lack of jurisdiction put forward by Grüner, on the ground that the competence of the Military Tribunal, being based on the Order for Trial, could not be questioned. The appellants pleaded that, according to the terms of Art. 81 of the *Code de Justice Militaire*, the question of lack of jurisdiction could be brought up at any time before the hearing of witnesses, and that the voluntary homicides alleged in the charge against Grüner had been committed on German territory against an English prisoner of war. The terms of the Ordinance of the 28th August, 1944, could not, therefore, be applied in this instance.

In its decision on this plea, the Court of Appeal recalled that the terms of Art. 81 of the *Code de Justice Militaire* stated that " if the accused or the Prosecutor has pleas based on lack of jurisdiction to put forward, such a plea must be put forward before the hearing of witnesses and the submission must be decided upon immediately." The provisions of this article were applicable in proceedings before a Military Tribunal established in territorial districts in a state of war, in virtue of Art. 179, paragraph 3 of the same

(1) And *see* p. 49.

Code. Counsel for Grüner, before the hearing of witnesses, had claimed that the Military Tribunal lacked jurisdiction in view of the fact that the acts had not been committed either in France or in territory under the authority of France or against or to the prejudice of any of the persons mentioned in paragraph 1 of Art. 1, of the Ordinance of 28th August, 1944.

The Military Tribunal in its decision of 23rd April, 1946, had rejected his arguments on the ground that the formal act of sending the case to trial had bestowed jurisdiction on the Tribunal, the Order of Trial had become final in the absence of any opposition and the competence of the Tribunal could not, therefore, be put into question.

The Court of Appeal ruled that in deciding thus, the Military Tribunal had violated the provisions of Art. 81 of the *Code de Justice Militaire*. Moreover the Court of Appeal pointed out that paragraph 1 of Art. 1 of the Ordinance of 28th August, 1944, laid down that :

> " Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be prosecuted by French military tribunals and shall be tried in accordance with the French laws in force, and according to the provisions set out in the present Ordinance, where such offences, even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."

The Tribunal's decision of the 3rd May, 1946, stated that Grüner was, by the answers made to the questions Nos. 146 to 153, declared guilty of four acts of voluntary homicide, each specified by questions Nos. 31—38 in the following terms : " Is it proved that on the 7th October, 1944, at Reinweiler (Baden), a homicide was voluntarily committed against the person of an English prisoner of war of unknown address ? " " Did this murder immediately precede, accompany or follow the murder set out in the —th question ? "[1]

The crimes set out in the charge against Grüner were shown by the answers made to the above-mentioned questions to have been committed in Germany against the persons of soldiers of an Allied army and were not among those which, according to the terms of the Ordinance of 28th August, 1944, could be prosecuted before French Military Tribunals and tried according to French laws.

It followed that, in applying to Grüner provisions of the said Ordinance, the decision which was challenged violated these provisions and had no legal basis.

Finally, since the Military Tribunal had answered in the negative the question whether Röhn and Schuppel were accomplices to the crime of voluntary homicide committed by Grüner, the accused were without interest in making a complaint based on the violation of the law on which reliance

[1] *See* pp. 97 and 99.

was placed in the plea. Accordingly, the plea in so far as they were concerned could not be received.

There was, according to the Court of Appeal, no need to decide on the plea put forward by Gädeke based on an alleged violation of Art. 60 of the *Code Pénal*, concerning complicity in the acts of premeditated murder specified in questions 1—28 of which he had been declared guilty by the answers to questions 118-144, since the penalty inflicted upon him was legally justified having regard to the dispositions of Arts. 75 and 77 of the *Code Pénal*, which was aimed at punishing the crime of recruiting for the benefit of a foreign power, and the provisions of Art. 411 of the *Code d'Instruction Criminelle*.

(viii) *The General Outcome of the Appeal*

For the reasons set out above the Court of Appeal rejected the appeals lodged by Wagner, Röhn, Schuppel and Gädeke and condemned them collectively to pay costs.

The Court quashed the ruling of 23rd April, 1946, which rejected the arguments of Grüner based on lack of competence, together with the judgment of 3rd May, 1946, as far as it related to Grüner.

Since the acts contained in the charge against Grüner did not fall within the jurisdiction of the existing French Courts, the Court stated that a reference back for re-trial was not possible and that Grüner was to be freed if he was not detained for another reason or required by an Allied authority.(1)

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE TRIBUNAL AND ITS JURISDICTION

The Tribunal was convened by virtue of the French Ordinance of 28th August, 1944, Concerning the Prosecution of War Criminals.(2)

Art. 177 of the *Code de Justice Militaire*, on which the Tribunal relied when rejecting the arguments of Grüner's Counsel in making his plea to the jurisdiction of the former, includes the following passage:

> " If the *juge d'instruction* . . . is of the opinion that the act charged constitutes an offence within the military jurisdiction he shall refer the accused for trial to a Military Tribunal, Article 68 not being applicable. . . ."

Article 68 lays down the exclusive authority of the Indictments Division (*Chambre des mises en accusation*) of the Court of Appeal to commit cases to a Military Tribunal for trial.(3)

The Court of Appeal, however, ruled that an accused was, despite the provisions of Art. 177, still entitled, under Art. 81(4), to question the jurisdiction of the Tribunal at any time before the hearing of witnesses. The

(1) Grüner was subsequently handed over to the British Authorities for trial by British Military Court (which has jurisdiction to try all war crimes committed against Allied victims). Grüner succeeded in escaping on the eve of his trial and at the date of going to press of this Volume he had not been recaptured.
(2) *See* p. 93.
(3) *See* p. 97.
(4) *See* p. 47.

Court of Appeal went on to state that the Tribunal had in fact been without jurisdiction to try Grüner, whose crimes were committed in Germany against Allied prisoners and were therefore outside the scope of Art. 1 of the Ordinance of 28th August, 1944.(1)

As will be seen, Grüner could properly have been tried by a Military Government Tribunal in the French Zone of Germany.(2)

One word may be added regarding the reliance placed by the Tribunal on the fact that Art. 68 of the *Code de Justice Militaire* was inapplicable in war time.

At the time of the trial (April, 1946), fighting between France and the ex-enemy countries had ceased. The question whether, under International Law, in view of the fact that no treaty of peace had been signed with Germany, the war against Germany must still be regarded as being in progress, is, however, of no relevance to provisions of municipal law such as Art. 68 of the *Code de Justice Militaire*. Each country is free to appoint, for its own internal legal purposes, an official date at which the war is to be deemed to have ended. For the French legal system, the date so appointed was 1st June, 1946, for that of the United States, 31st December, 1946.(3) On the other hand, the British Government has taken the view that, no treaty of peace or declaration of the Allied Powers terminating the state of war with Germany having been made, the United Kingdom is still in a state of war with Germany, although, as provided in the Declaration of Surrender of 5th June, 1945, all active hostilities have ceased. (*R.* v. *Bottril, ex parte Küchenmeister* [1946] 1 All England Reports, p. 635).

2. PRISONERS OF WAR RIGHTS NOT GRANTED TO PERSONS ACCUSED OF WAR CRIMES

It is a recognised rule that a person accused of having committed war crimes is not entitled to the rights in connection with his trial laid down for the benefit of prisoners of war by the Geneva Prisoners of War Convention of 1929.(4) An interesting corollary is provided by the decision of the French Court of Appeal that Wagner was not entitled to the rights provided for a prisoner of war *under French Law*.(5)

3. THE CHARGES AGAINST THE ACCUSED

Article 1 of the Ordinance makes certain persons punishable for breaches of French law in respect of specified persons and property, provided that their acts are not justified by the laws and customs of war.(6)

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(1) *See* p. 48.

(2) *See* p. 101.

(3) President Truman, in a proclamation on 31st December, 1946, announced with immediate effect the official termination of hostilities of the Second World War. At a news conference he pointed out that his proclamation did not officially end the state of emergency proclaimed by President Roosevelt in 1939 and 1941 nor formally end the state of war itself, and that such action could only be taken by the U.S. Congress. The termination of hostilities meant the immediate ending of 20 war-time statutes, and the cessation of 33 others within six months.

(4) *See War Crime Trial Law Reports*, Vol. I, pp. 29-31 and also a Report on the trial of General Yamashita by a United States Military Commission, to be contained in Volume IV of this series.

(5) *See* pp. 2-3.

(6) *See* p. 94.

In the Wagner trial the legal provisions describing the offences which the accused were alleged by the Prosecution to have committed, were those contained in Arts. 75, 77, 295, 296 and 297 of the *Code Pénal* and in the Ordinance of 28th August, 1944. It is interesting to examine these in turn.

(*a*) Art. 77 of the Code provides that any foreigner who commits any of the acts referred to in Art.75 (2), (3), (4) and (5) and in Art. 76 thereof shall be guilty of espionage and punished by death.

Provocation to commit, or proposal to commit, one of the crimes set out in these paragraphs of Art. 75, or in Arts. 76 or 77 itself, shall also be punished as espionage.

The only provision referred to in Art. 77 which is relevant to the present discussion is the following paragraph from Art. 75 :

> " 75. The following shall be guilty of treason and punished with death :
>
> . . . . . .
>
> " (4) Any Frenchman who, in time of war, incites soldiers or sailors to pass into the service of a foreign power, facilitates such an act, or carries out enrolments for the benefit of a power at war with France."

These provisions were the basis of the charges of inciting Frenchmen to bear arms against France which were made against Wagner, Röhn and Schuppel.

(*b*) Article 114 of the *Code Pénal* provides that :

> " Whenever a public official, an agent or an officer of the Government, orders or commits an arbitrary act against, or attempt against, individual liberty, the civic rights of one or more citizens, or the Constitution, he shall be sentenced to civic degradation.
>
> " If, however, he pleads that he acted under orders of his superiors for objects which were within their province, and concerning which he owed them obedience due to rank, he shall be exempt from punishment, which shall be applied only to the superiors who gave the order."

It will be recalled that Wagner was charged with attempts against individual liberty. It should be noted that under Art. 35 of the *Code Pénal* the penalty of " civic degradation " must, in the case of an alien, be accompanied by a sentence of imprisonment for a term not exceeding five years.

(*c*) The remaining three Articles of the *Code Pénal* which were referred to in the *Act d'Accusation* and in the judgment of the Tribunal, as describing the alleged offences, were as follows :

> " 295. Homicide committed voluntarily is called murder.(1)
>
> " 296. Murder committed with premeditation or by foul play(2) is called premeditated murder.(3)

(1) In the French, " meutre."
(2) In the French, " guet-apens."
(3) In the French, "assassinat." The term " murder " and " premeditated murder " are used throughout these pages as signifying " meutre " and " assassinat." No closer equivalents are available ; for instance, if " assassinat " were translated as " murder," then " meutre " would have to be rendered as perhaps " manslaughter," whereas such a translation would be inexact.

" 297. Premeditation consists of forming a plan, before the act, to make an attempt against the person of a specific individual, or of anyone who may be found or encountered, even if the plan should depend on the existence of some circumstances or the fulfilment of some condition."

It will be recalled that Hugo Grüner was charged with having committed premeditated murder, and Wagner, Röhn, Schuppel, Gädeke, Luger, Semar and Huber with having been accomplices thereto. (As to complicity, *see* p. 17.)

(*d*) Reference was also made to the Ordinance of 28th August, 1944.

Article 2(1) thereof states that illegal recruitment of armed forces, as specified in Art. 92 of the *Code Pénal*, shall include all recruitment by the enemy or his agents. The provisions of Art. 92 are as follows:

" Whoever raises armed forces or causes them to be raised, or engages or recruits soldiers, or causes them to be engaged or recruited, or furnishes them with or procures for them arms or munitions, without the orders or permission of a lawful authority, shall suffer death."

These provisions would provide a basis for the charges against Wagner, Röhn, Schuppel and Gädeke, alleging recruitment for the benefit of a foreign power at war with France.

Art. 2(4) of the Ordinance provides that:

" Premeditated murder, as specified in Art. 296 of the *Code Pénal* shall be interpreted to include killing as a form of reprisal."

Art. 2 (5) of the Ordinance states that: " Illegal restraint, as specified in Arts. 341, 342 and 343 of the *Code Pénal* shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced."

The wording of Art. 341 is as follows:

" With the exception of cases in which the law orders the seizing of accused persons, whoever arrests, detains or sequestrates any person without the order of the constituted authority, shall be punished with a term of penal servitude."

" Whoever affords a place for carrying out the imprisonment or sequestration shall undergo the same penalty."

Arts. 342 and 343 set out the circumstances in which sentences of penal servitude for life, or imprisonment for from two to five years may be delivered for the commission of this offence.

These provisions would provide the basis for the charge of attempts against individual liberty, brought against Wagner.

Art. 23 and the first paragraph of Art. 24 of the Law of 29th July, 1881, on the liberty of the Press, on which a plea was based by Wagner, Röhn, Schuppel and Gädeke, run as follows:

" *Art.* 23. Anyone who by speech, shouts or threats uttered in public places or meetings, either by writing or printed matter sold or distributed, placed on sale or displayed in public places or meetings, or by placards or posters displayed to the public eye, has directly provoked the author

or authors to commit an act defined as a crime or a delict, if the provocation has been effective, shall be punished as an accomplice in that act. This provision shall apply also when the provocation has only resulted in an attempted crime, as defined in Art. 2 of the *Code Pénal*.

Art. 24. Anyone who by any of the means set out in the preceding Article has directly provoked anyone to theft, murder, pillage, arson or one of the crimes or delicts made punishable by Arts. 309 and 313 of the *Code Pénal*, or one of the crimes made punishable by Art. 435 of the *Code Pénal*, or one of the crimes or delicts provided against by Arts. 75 to 85 inclusive of the same code, shall be punished, where this provocation has not been put into effect, by from one year to five years' imprisonment and a fine of from 1,000 to 1,000,000 francs. . . ."

As has been seen,(1) the Court of Appeal ruled that Counsel for Wagner, Röhn and Schuppel should have requested that a subsidiary question be put to the judges of the Military Tribunal asking whether the accused came within the terms of Article 24, but, since they had failed to do so, that Article had no application to the case.

Art. 88 and 90 of the *Code de Justice Militaire*, to which reference was made by the Defence in connection with their plea based on the fact that the judges were not asked whether the acts charged were justified by the laws and customs of war,(2) make the following provisions, regarding the questions which the President of a Military Tribunal must or may put to the judges thereof; they elucidate also the plea of the Defence, based on Arts. 23 and 24 of the Law on the Freedom of the Press, referred to in the last paragraph:

" *Art.* 88. The President shall ask the questions arising out of the Indictment and the proceedings in Court which must be put to the Judges.

" He may also, acting *ex officio*, put to them subsidiary questions, if the proceedings have shown that the principal act can be considered either as an offence punishable by a different penalty or as a crime or delict under the general law; but in this case he must declare his intentions in public sitting before the closing of the proceedings, in order to put the public prosecutor, the accused and his Counsel, in a position to give their observations in due course.

" *Art.* 90. The questions shall be put by the President in the following order for each accused:

" (1) is the accused guilty of the act of which he is charged?

" (2) was this act committed in such and such aggravating circumstances?

(3) was this act committed in such and such circumstances which make it excusable according to the law?

. . . . . "

The investigation attempted in the previous paragraphs of the specific offences which the accused were alleged to have committed and of various provisions of French law relied upon by both Counsel and the Tribunal is of value, since it illustrates French state practice in the matter of war crimes,

(1) *See* p. 47.
(2) *See* p. 45.

as do also, for instance, the provisions relating to the defence of superior orders, to be discussed later The emphasis placed on breach of provisions of French law and defences based upon the same law does not signify, however, that the accused were not tried also for offences against the laws and customs of war. The French practice is merely an example of the prevailing continental approach to war crimes and their punishment, according to which the accused must be shown to have committed some breach of municipal law which was at the same time *not justified by the laws and customs of war.* In many trials of alleged war criminals by French Military Tribunal, the judges are specifically asked whether the acts proved against the accused were justified by the laws and customs of war. The Court of Appeal had to decide upon a plea based upon the fact that this step had not been taken in the Wagner Trial, and ruled that it was not necessary that the Judges should be asked this specific question, because Art. 1 of the Ordinance of 28th August 1944, made it clear that the legality of an accused's acts under the laws and customs of war would render him not guilty of an offence. It was not, therefore, necessary to ask the judges whether this element of justification existed.

4. THE DEFENCE OF SUPERIOR ORDERS

Wagner occasionally referred to orders he had received from Hitler. All other accused claimed to have acted on orders from Wagner, either in the latter's capacity as Head of the Civil Administration or as Gauleiter. Only in Luger's case, however, was the plea of superior orders successful in securing an acquittal.

The Judgment of the Tribunal states that Luger was acquitted in virtue of Art. 3 of the Ordinance, which lays down broadly that superior orders, while they " cannot be pleaded as justification within the meaning of Art. 327 of the *Code Pénal,*" may, in suitable cases, be pleaded as an extenuating or exculpating circumstance.

Art. 327 of the *Code Pénal* provides :

> " No crime or delict is committed when the homicide, wounding or striking was ordered by the law or by legal authority."

The Judges answered in the affirmative the question whether, in committing the acts proved against him, Luger had "acted under the orders of his superiors, for objects which were within their province, and concerning which he owed them obedience due to rank." On the other hand, whenever the Judges were asked whether any of the other accused had acted under similar circumstances, their answers were in the negative.

The Prosecution, and the Tribunal, made reference, in the *Acte d'Accusation* and in the judgment respectively, to Art. 114 of the *Code Pénal,* and, in view of the wording of Art. 3 of the Ordinance, it is interesting to examine the former provision.(1)

The first paragraph thereof states that any public official who has ordered or committed an arbitrary act against, or an attempt against, individual liberty, the civic rights of one or more citizens, or the Constitution, shall suffer civic degradation. The second paragraph, however, states that if he

(1) *See also* earlier in these notes, p. 51.

pleads that he acted under the orders of his superiors, for objects which were within their province, and concerning which he owed them obedience due to rank, he shall not suffer this punishment, which shall be applied only to the superiors who gave the order.

The similarity between the wording of this second paragraph and that of the question put to the Judges whether Luger acted under superior orders (*see above*) is evident. The position seems to be that the defence of superior orders, when pleaded in war crime trials before French Military Tribunals, does not constitute an absolute defence such as is envisaged in Art. 327, but that circumstances similar to those described in the second paragraph of Art. 114 may constitute an extenuating or exculpating circumstance. It is left to the Tribunal to decide in each case, whether and to what extent the plea is to be heeded.(1).

(1) *See* Michel de Juglart, *Répertoire Méthodique de la Jurisprudence Militaire.* (Paris, 1946), pp. 242-5.