CASE No. 12

Trial of Kriminalsekretär RICHARD WILHELM HERMANN BRUNS and two others

BY THE EIDSIVATING LAGMANNSRETT AND THE SUPREME COURT OF NORWAY, 20TH MARCH AND 3RD JULY, 1946

Torturing as a War Crime. The Legal Status of the Norwegian Underground Military Organisation. The Defences of Legitimate Reprisals, Superior Orders and Duress.

A. OUTLINE OF THE PROCEEDINGS

1. THE INDICTMENT

The accused were Kriminalsekretär Richard Wilhelm Hermann Bruns, Kriminalassistent Rudolf Theodor Adolf Schubert and Kriminaloberassistent Emil Clemens. All three were accused of the murder and torturing of Norwegian citizens.

Bruns was charged by the Director of Public Prosecutions with having committed war crimes which were in violation of:

1. Art. 233 of the Civil Criminal Code, and Art. 3 of the Provisional Decree of 4th May, 1945,
2. Art. 231 of the Civil Criminal Code, with which should be read Art. 232 ; the Provisional Decree of 4th May, 1945 ; and the Law of 6th July, 1945,
3. Arts. 228 and 229 of the Civil Criminal Code, the Provisional Decree of 4th May, 1945, and the Law of 6th July, 1945.

Schubert was charged with having committed war crimes which were in violation of:

1. Art. 229 of the Civil Criminal Code, with which should be read Art.232; and Art. 3 of the Provisional Decree of 4th May, 1945,
2. Arts. 228 and 229 of the Civil Criminal Code, and the Provisional Decree of 4th May, 1945.

Clemens was charged by the Director of Public Prosecutions with having committed war crimes which violated:

1. Art. 233 of the Civil Criminal Code, and Art. 3 of the Provisional Decree of 4th May, 1945,
2. Arts. 228 and 229 of the Civil Criminal Code, with which should be read Art. 232 ; and the Provisional Decree of 4th May, 1945.

The Public Prosecutor acting in this trial was Statsadvokat Harald Sund. Counsel for the Defence was Høyesterettsadvokat Adam Hjorth.

2. THE EVIDENCE PROVED BEFORE THE LAGMANNSRETT

The case against Bruns, Schubert and Clemens was in the first instance tried by the Eidsivating Lagmannsrett. During the trial several witnesses were called for both the prosecution and the defence. The following facts were established.

On 17th April, 1945, Bruns and Schubert went to arrest a certain Norwegian who was in charge of the arms of the illegal Military Organisation. They rang the bell at his flat and the door was opened by his brother, who slammed it as soon as he saw the Germans. When the brother refused to open in spite of orders, Schubert fired several shots with his automatic through the door. When the door finally gave in, Bruns fired some shots at random through the opening. The brother was mortally wounded and died later in hospital.

In March or April, 1943, Bruns fired from a distance of 25-30 metres at a Norwegian prisoner who was trying to escape. The shot was aimed at the prisoner's legs but, as he was stooping at that moment, he was hit in the head and killed.

On 19th December, 1942, Bruns was present at the interrogation of a sick Norwegian. Leg screws were fastened to his legs and he was beaten with various implements. Later he was thrown unconscious into a cellar, where he remained for four days before receiving medical attention. Between 1942 and 1945, Bruns used the method of " verschärfte Vernehmung " on 11 Norwegian citizens. This method involved the use of various implements of torture, cold baths and blows and kicks in the face and all over the body. Most of the prisoners suffered for a considerable time from the injuries received during those interrogations.

Between 1942 and 1945, Schubert gave 14 Norwegian prisoners " verschärfte Vernehmung," using various instruments of torture and hitting them in the face and over the body. Many of the prisoners suffered for a considerable time from the effects of injuries they received.

On 1st February, 1945, Clemens shot a second Norwegian prisoner from a distance of 1.5 metres while he was trying to escape. Between 1943 and 1945, Clemens employed the method of " verschärfte Vernehmung " on 23 Norwegian prisoners. He used various instruments of torture and cold baths. Some of the prisoners continued for a considerable time to suffer from injuries received at his hands.

3. THE DECISION OF THE LAGMANNSRETT

The Court established that both Bruns and Schubert were aware that, when firing through the door and later at random into the room, they might hit the brother. The Court also established that the wounds from which the latter died had been inflicted by Brun's pistol and Schubert's automatic. The Court found, however, that the defendants could not be held guilty of murder as they were trying to arrest a man who was in charge of the arms of the illegal Military Organisation and they had expected armed resistance.

It appeared later that the person in charge of the arms was not at home that night and that arms were never kept in the flat, but the defendants may not have known that and may have thought that they were encountering armed resistance.

The Court felt satisfied that Bruns, when trying to stop the prisoner from escaping, had aimed at his legs but that, as the victim stooped at that very moment, the shot hit him in the head. The Court came to the conclusion that, as the prisoner had not stopped when ordered to do so, the defendant had acted within his rights in shooting at him. The fugitive had been an important official in the illegal intelligence service whose capture was of great importance to the German authorities, and the only way to stop him from getting away was to shoot at him. The Court, therefore, did not consider the defendant guilty of his murder.

The Court felt it established beyond doubt that the sick Norwegian had been most brutally ill-treated, but, as it had not been possible to ascertain Bruns' part in the torture, the Court gave him the benefit of the doubt and acquitted him on that count of the indictment.

The Court found that the prisoner shot by Clemens had been trying to escape and that the defendant had not exceeded his rights in trying to prevent him from escaping by shooting at him. The Court, therefore, held the defendant not guilty of his murder.

The Court then turned to a consideration of the torture allegations. In this connection Counsel for the Defence, Høyesterettsadvokat Adam Hjorth, had claimed that the Military Organisation and its activities were at variance with International Law and that the Germans in fighting the organisation were, therefore, justified in using methods contrary to International Law. The German methods of carrying out interrogations had to be regarded as constituting reprisals.

The Court could not accept this point of view. The Military Organisation had been established in 1941, and soon had members all over the country, with its centre in Oslo. In 1945, it had more than 40,000 members. The organisation received its orders from the Norwegian High Command in England and its task was to take part in the fight for freedom and to organise acts of sabotage.

The members of the organisation, continued the Court, were instructed in the use of small arms and had courses in explosives and other means of sabotage with a view to carrying on partisan warfare. Such warfare did not take place, however, and the skirmishes which occurred between the men of the home forces and German groups were of a casual nature. It was not till the German capitulation that the Military Organisation mobilised. During the occupation its activities consisted mainly of organising, training, military intelligence and some sabotage. The members were not in uniform and bore no special marks of distinction on such occasions ; nor did they carry their weapons openly. They had, therefore, no rights as soldiers according to Article 1 of the Regulations on Land Warfare (Hague Regulations). On the other hand they had no unlawful weapons, they did not attack objectives contrary to the Hague Regulations nor did they commit any other acts at variance with the laws and customs of war. Thus their activities were permissible according to international law, but they had no rights as soldiers as long as they did not appear in uniform, did not bear marks of distinction and did not carry their arms openly. They could, therefore, be shot when caught.

In the opinion of the Court, this underground military movement did not constitute a breach of International Law and therefore the Germans were not justified in using torture against its members as a means of reprisal.

Further, the defendants has pleaded superior orders in connection with all the torture charges. In the beginning, said the Court in its judgment, only the Chief of the Sipo, Fehlis, had any right to give such orders. Later that right was extended to those under him, first to StumbannführerReinhardt, Chief of Abteilung IV, and then to Fehmer who was in charge of counter-espionage and matters concerning the Military Organisation. Bruns, who was directly responsible to Fehmer, and other Sachbearbeiters often employed torture of their own accord, though as a rule with the connivance of their superiors. The Court took it for granted that the defendants, when employing torture during interrogations in order to extort confessions or information, acted to the best of their belief in the interest of their country.

The Court could not accept the defendants' plea that they would have been in serious danger from their superiors had they refused to perform such acts of alleged duty. The Court could not believe that a state, even Nazi Germany, could force its subjects, if they were unwilling, to perform such brutal and atrocious acts as those of which the defendants were guilty. There was no doubt that the German methods were effective. Their investigations were solely based on betrayal and torture. But for these methods they would never have succeeded in interfering with the underground movement to the extent they did.

On the other hand, the Germans had omitted to try a considerable number of prisoners whom they could have sentenced to death, without infringing the laws and customs of war, for sabotage or participation in the activities of illegal organisations.

In deciding the degree of punishment, the Court found it decisive that the defendants had inflicted serious physical and mental suffering on their victims, and did not find sufficient reason for a mitigation of the punishment in accordance with the provisions laid down in Art. 5 of the Provisional Decree of 4th May, 1945.[1] The Court came to the conclusion that such acts, even though they were committed with the connivance of superiors in rank or even on their orders, must be regarded and punished as serious war crimes. If a nation, which without warning has attacked another, finds it necessary to use such methods to fight opposition, then those guilty must be punished, whether they gave the orders or carried them out.

As extenuating circumstances, Bruns had pleaded various incidents in which he had helped Norwegians, Schubert had pleaded difficulties at home, and Clemens had pointed to several hundred interrogations during which he had treated prisoners humanely.

The Court did not regard any of the above-mentioned circumstances as a sufficient reason for mitigating the punishment and found it necessary to act with the utmost severity. Each of the defendants was responsible for a series of incidents of torture, every one of which could, according to Art. 3 (*a*), (*c*) and (*d*) of the Provisional Decree of 4th May, 1945, be punished by the death sentence.

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[1] *See* p. 85.

The defendants were found not guilty of the murder charges, but guilty of the torture allegations with the exception of one or two minor instances.

All three defendants were sentenced to death by shooting.

4. THE APPEAL TO THE SUPREME COURT

All three defendants appealed to the Supreme Court. Their appeal was based on the following arguments:

(*a*) That the acts of torture which the defendants had committed were permitted under International Law as reprisals against the illegal Military Organisation whose activities were at variance with International Law.

(*b*) That the acts were carried out on superior orders and that the defendants acted under duress.

(*c*) That the acts of torture in no case resulted in death. Most of the injuries inflicted were slight and did not result in permanent disablement.

5. THE DECISION OF THE SUPREME COURT

The Supreme Court upheld the sentence of the Lagmannsrett and rejected the appeal. Judge Larssen delivered the opinion of the Court.

Dealing with the defendants' appeal point by point, Judge Larssen said that it could not be established that the acts of torture had been carried out as reprisals. Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. During the whole of the occupation there was no indication from the German side to the effect that their acts of torture were to be regarded as reprisals against the Military Organisation. They appeared to be German police measures designed to extort during interrogations information which could be used to punish people or could eventually have led to real reprisals to stop activities about which information was gained. The method of " verschärfte Vernehmung " was nothing but a German routine police method and could, therefore, not be regarded as a reprisal.

In Judge Larssen's opinion it was not, therefore, necessary to deal with the question whether the various acts of the Military Organisation were contrary to International Law and whether as such they justified reprisals.

As to the second point of the appeal, the argument that the acts of torture were performed on superior orders and under duress, Judge Larssen said that he supported what had been said by the Lagmannsrett in that connection. There was no definite proof that such orders had been given. The Lagmannsrett had established that on many occasions the defendants had used torture on their own accord though frequently with the connivance of their superiors. The Lagmannsrett had also established that the defendants would have been in no serious danger had they refused to perform such acts of alleged duty. New evidence had come forth in support of the latter contention. The Supreme Court was in possession of two documents, a report from Hans Latza, President of the S.S. Polizeigericht Nord, dated 4th December, 1945, and another from Dr. Helmut Schmidt of the same

Polizeigericht, dated March, 1945. The latter wrote in his report: " I regret that the Sipo did not report cases of torture. Those involved would certainly have been punished." It is evident that at least that particular Polizeigericht would not have punished any leniency towards prisoners in cases where the method of " verschärfte Vernehmung " was employed.

Judge Larssen concluded that the pleas of superior orders and duress put forward by the three defendants must therefore fail.

Considering the third point of the appeal, in which the defendants pleaded that their acts of torture had in no case resulted in death or permanent disablement, Judge Larssen found that the acts that had been committed were not casual violations of various paragraphs of Norwegian law but constituted a methodically carried out ill-treatment of Norwegian patriots, conducted throughout several years. He found no extenuating circumstances and therefore voted for the rejection of the Appeal.

The four other judges concurred.

B. NOTES ON THE CASE

1. THE OFFENCES ALLEGED

It was alleged that the accused had violated provisions made by Arts. 228, 229, 231, 232 and 233 of the Norwegian Civil Criminal Code. Of these, Arts. 228, 229 and 232 have already been quoted in these pages.(1) The remaining paragraphs read as follows:

" Art. 231. He who inflicts considerable injury to another person's body or health, or is an accomplice to such an act, will be punished with a term of imprisonment not under two years if the act was premeditated; and life imprisonment may be applied if the act resulted in death.

Art. 233. He who without premeditation causes another person's death or is an accomplice to such an act, is punishable with imprisonment for up to six years. If the act was premeditated or if it was committed in order to facilitate or conceal another crime or in order to avoid punishment for such other crime, life imprisonment may be inflicted. The same applies in cases of repeated violation and when other particularly aggravating circumstances are present.

The defendants were found not guilty of murder but guilty of the torture allegations, and in sentencing them to death the Court was acting under Art. 3 of the Decree of May 4th, 1945.(2) The question of the retroactive character of this provision and its position in relation to Art. 97 of the Norwegian Constitution had already been settled by the Supreme Court in its judgment on the appeal of Karl-Hans Hermann Klinge.(3) In considering the plea of the appellants in the present trial to the effect that their acts of torture had in no case resulted in death or permanent disablement, Judge

(1) *See* p. 12.

(2) *See* p. 89. It is to be noted that the sections of the Civil Criminal Code which the accused in this and the Klinge Case were found to have violated are contained in Chapter 22 of the Code (Offences against Life, Body and Health). In sentencing these accused to death, therefore, the Court may have acted under subsection (*c*) of Art. 3, as well as under (*a*) and possibly (*d*).

(3) *See* p. 1.

Larssen stated that the acts that had been committed were not casual violations of various paragraphs of Norwegian law but constituted a methodically carried out ill-treatment of Norwegian patriots, conducted throughout several years.

2. THE LEGAL STATUS OF THE NORWEGIAN UNDERGROUND MILITARY ORGANISATION AND THE QUESTION OF REPRISALS

The attitude taken by the Lagmannsrett to the question of the legal status of the Norwegian Underground Military Organisation is interesting, and the conclusion reached seems in effect to have been that, while the acts of the Organisation did not constitute a breach of International Law on the part either of the men involved, or of the Norwegian Government, they did amount to breaches committed by the Organisation of the laws enforced in Norway by the German occupation authorities.

In Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), p. 446, it is said that, " . . . reprisals in time of war occur when one belligerent retaliates upon another, by means of otherwise illegitimate acts of warfare, in order to compel him and his subjects and members of his forces to abandon illegitimate acts of warfare." It is to be noted that " one belligerent retaliates upon another "; and, by holding that the Norwegian Government had committed no breach of International Law, the Court ruled out the defence of reprisal. (Similarly the use of spies in wartime is not considered an illegitimate act of warfare justifying reprisals.)

Article 1 of the Hague Convention No. IV of 1907 provides that:

" The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions:

(1) They must be commanded by a person responsible for his subordinates;

(2) They must have a fixed distinctive sign recognisable at a distance;

(3) They must carry arms openly; and

(4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

The Lagmannsrett decided that, since the men of the Military Organisation did not come within the scope of this Article, they had no rights as soldiers and could therefore be shot when caught. Since they were held not to have infringed the laws and usages of war, however, it is assumed in these notes that the Court regarded them as having been guilty of breaches of the municipal laws then enforced by the German occupation authorities. This assumption seems to be supported by the fact that the Court held that a killing carried out by Bruns and Schubert when trying to arrest a man who was in charge of the arms of the Military Organisation did not make them guilty of a war crime. The accused could, it seems, claim that they were merely carrying out a legal duty.

Judge Larssen, delivering judgment upholding the decision of the Lagmannsrett, restricted himself to stating that the acts of torture could not be regarded as reprisals. Reprisals were generally understood to aim at

changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. It may be added that had the men of the Military Organisation fallen within the scope of Article 1, they would have become prisoners of war on capture and reprisals taken against them would in all circumstances have been illegal, since Article 2 of the Geneva Prisoners of War Convention of 1929, in setting out in general the rights of such prisoners, provides that " . . . Measures of reprisals against them are forbidden."

3. THE LEGALITY OF SHOOTING A PRISONER WHILE TRYING TO ESCAPE

The Court held that Bruns and Clemens did not become guilty of a war crime by shooting at a prisoner who was trying to escape. This decision is reminiscent of the advice offered to the Court by the Judge Advocate in the *Dreierwalde Case*, in his statement that, if the accused Amberger " did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape," to shoot at them to prevent their escape would not be a breach of the laws and customs of war.(1)

4. SUPERIOR ORDERS AND DURESS

The comments of both Courts on these two pleas were restricted to questions of probability, and legal problems were not touched upon in the judgments. Nor were they dealt with in those delivered by the Judges of the Supreme Court in the trial of Klinge. Judge Skau did not go beyond expressing the opinion that the acts of ill-treatment of which the defendant had been found guilty were such severe violations of the " laws of humanity " that he, the defendant, regardless of all German propaganda, could not have been in doubt that his acts, irrespective of their purpose, not only were to be condemned morally but were also unlawful.(2)

(1) *See* Volume 1 of these *War Crime Trial Law Reports*, pp. 81-87, especially the notes on pp. 86-87.
(2) *See* p. 6.