

## CASE No. 75

TRIAL OF ALBERT WAGNER  
GENERAL MILITARY GOVERNMENT TRIBUNAL OF THE FRENCH ZONE OF  
OCCUPATION IN GERMANY

(JUDGMENT DELIVERED ON 29TH NOVEMBER, 1946)

*Killing of escaped civilian prisoners—Ill-treatment of individuals  
used as slave labour.*

A. OUTLINE OF PROCEEDINGS

The accused, Albert Wagner, a German guard in a factory at Brebach, in the Sarre, was charged with murdering one Russian worker and ill-treating others who had been deported to Germany as slave labour.

It was shown that in June or July, 1942, Wagner was warned, at about 11 p.m. that a Russian worker was trying to escape. He found him in the yard between the railings of the factory and a wall. After firing two shots in the air he shot the worker dead from a distance of about 20 yards. It was further shown that, while serving as a guard, the accused used to ill-treat the workers by slapping them in the face and kicking them.

The accused pleaded not guilty to the charge of murder, but guilty of unpremeditated homicide and of ill-treatment.

The Court found the defendant guilty of murder and ill-treatment with extenuating circumstances and passed a sentence of 15 years' imprisonment.

B. NOTES ON THE CASE

1. THE COURT AND ITS JURISDICTION

The Court was the General Military Government Tribunal of the French Zone of Occupation in Germany, 2nd Division (chambre), sitting at Rastatt, whose competence is defined in two Ordinances of the French Commander-in-Chief in Germany.<sup>(1)</sup>

Under Article 1 of the Ordinance No. 20 of 25th November, 1945, French Military Government Tribunals in Germany "are competent to try all war crimes defined by international agreements in force between the occupying Powers whenever the authors of such war crimes, committed after 1st September, 1939, are of enemy nationality or are agents, other than Frenchmen, in the services of the enemy, and whenever such crimes have been committed outside of France or territories which were under the authority of France at the time when the crimes were committed."<sup>(2)</sup> Article 2 of

<sup>(1)</sup> For the law in force in the French Zone regarding war crime trials prior to the establishment of Military Government Tribunals, as well as the legal basis of the latter, see Vol. III of this series, Annex II, pp. 100-101.

<sup>(2)</sup> For crimes committed in French territory the competent courts are Permanent Military Tribunals, sitting in France. On their jurisdiction see Vol. III of this series, Annex II, pp. 93 et seq.

the same Ordinance deals with the penalties which these Tribunals are entitled to impose. It provides that they consist of "all the penalties which such Tribunals are empowered to pronounce, including the death penalty."

Article 1 of Ordinance No. 36 of 25th February, 1946, specifies that the crimes falling within the jurisdiction of the above Tribunals are those covered by Law No. 10 of the Allied Control Council for Germany. It reads:

"Military Government Tribunals in the French Zone of Occupation in Germany are competent, in virtue of Law No. 10 of the Allied Control Council concerning the punishment of persons responsible for war crimes, crimes against peace and crimes against humanity, to try the crimes set out in that law."

Law No. 10 defines war crimes, crimes against peace and crimes against humanity, and provides that penal liability extends to "any person without regard to nationality or the capacity in which he acted."<sup>(1)</sup>

It should be observed that the case under review could not have been tried by the French Permanent Military Tribunals which function in France on the basis of the Ordinance of 28th August, 1944, relative to the Suppression of War Crimes, and whose judgments have been recorded in earlier reports. According to Article 1 of the above Ordinance, the jurisdiction of Permanent Military Tribunals applies to crimes committed "since the beginning of hostilities either in France or in territories under the authority of France." On the other hand, it is limited to cases where the victims were alternatively French nationals, persons under French protection, persons serving or having served in the French armed forces, stateless persons resident in French territory before 17th June, 1940, or refugees residing in French territory. In the case tried the crime took place in German territory and the victim was a Russian national, not coming within any of the above categories. The case, therefore, fell entirely within the competence of French Military Government Tribunals, as laid down in Article 1 of Ordinance No. 20 of 25th November, 1945.

## 2. THE NATURE OF THE OFFENCES

### (a) *Killing of Escaping Civilian Prisoners*

The accused was found guilty of "murder" of the Russian worker. His plea of "guilty" of homicide, but not of murder, was rejected by the Tribunal in view of the circumstances in which the killing took place. The Tribunal established that, when found by the accused, the victim was cornered, "between a wall and the railings of the factory," and that consequently "he could have been arrested without bloodshed." The fact that the accused fired two warning shots before killing the worker was held not to constitute a defence but was taken into consideration as an extenuating circumstance.

Murder of civilians, prisoners of war or disarmed or wounded combatants in the field of battle is a violation of the laws and customs of war whose criminal nature has acquired undisputed recognition. The lives of civilians are protected under the terms of Article 46 of The Hague Regulations, 1907,

<sup>(1)</sup> For full text of the relevant provisions see Vol. III of this series, Annex II, pp. 101-102.

and those of prisoners of war and combatants by the provisions of the Geneva Convention of 27th July, 1929. Their killing was treated as a war crime in the list of war crimes of the 1919 Commission on Responsibilities. From the facts of this trial it appears that the victim was a Russian deported to Germany for slave labour and kept there in conditions similar to those of a prisoner. The question as to whether and to what extent detaining authorities are entitled to prevent the escape of prisoners by the use of fire arms, or other means endangering their lives, is an issue in itself. By finding that the Russian worker could have been prevented from escaping without the use of fire arms the Court applied the test of necessity, which is one of the major tests in the case of prisoners of war.<sup>(1)</sup>

It should be observed, however, that whilst the circumstances of the case, as presented to the court, were sufficient to make the case clearly one of murder whatever the type of victim, the status of the victim was of particular theoretical interest. The latter was not a prisoner of war, and there is no indication that he was a civilian prisoner punished by being used as labour for some specific offence committed against the German occupying authorities in Russia. His case would rather appear to be that of a civilian arbitrarily deported from Russia for the sole purpose of being used as slave labour. The court did not need to, and did not, enter into consideration of this fact, which represents a separate offence. In Article II (b) of the Allied Control Council Law No. 10, under whose terms the accused was tried, deportation to slave labour is expressly treated as a war crime, and had the court had to elaborate on the point, it might well have established that the use of the victim as slave labour being a crime in itself, the German authorities were in no case entitled to detain him and consequently to prevent him from escaping by resorting to means endangering his life. In such case the use of fire arms would appear to be entirely illegal, the position of the victim being distinct from that of a lawfully detained civilian prisoner or prisoner of war, where the use of such arms may be recognised as justified in appropriate circumstances.

As a consequence, the main test in this type of case would shift from that of "necessity" to the question of "lawful" or "unlawful" detention, and the principle introduced that the killing of an unlawfully detained prisoner trying to escape, always amounts to a crime, whatever the circumstances. This would, however, leave open the question of the individual responsibility of the perpetrator. A guard, such as the accused, is not likely to be able to distinguish a lawfully from an unlawfully detained prisoner, and in such case may not be expected to judge whether or not he is under the obligation to follow the instructions of his superiors, concerning the escape of prisoners. The degree of his guilt would therefore probably depend on his own *mens rea*, and the punishment would be imposed accordingly.

French Military Government Tribunals in Germany had also the opportunity of considering the use of fire arms in the case of prisoners of war proper. In one of the trials held before them the accused, Paul Korber, a German frontier guard at the German-Swiss borders, was found guilty of

(1) As to the shooting of prisoners of war who attempt to escape, see Vol. I, pp. 86-7, Vol. III, p. 22, and Vol. VII, p. 61.

murdering two of four Italian prisoners of war who were trying to cross the frontier into Switzerland. The event took place at night, which presumably indicated that there could be necessity to use fire arms. On encountering them the accused summoned the four prisoners, but admitted having fired at them at the same time. The court found that there had been no proper warning, and consequently no proper use of arms, but admitted extenuating circumstances. The accused was condemned to 10 years' imprisonment with reprieve for the last 6 years of the punishment.<sup>(1)</sup>

The killing of the Russian worker by Albert Wagner was punished as a war crime under the terms of Article II (b) of the Allied Control Council Law No. 10, and the sentence of 15 years' imprisonment pronounced under Article II, 3, of the same law.

*(b) Ill-treatment of Slave Labour*

The accused was also found guilty of ill-treating the Russians used as slave labour in the factory at Brebach. Ill-treatment of civilians and prisoners of war is a clear violation of the laws and customs of war, and therefore a war crime. It is explicitly punishable under the terms of Article II (b) of the Allied Control Council Law No. 10, which was applied in the case of Albert Wagner.

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<sup>(1)</sup> Judgment of the General Military Government Tribunal of the French Zone of Occupation in Germany, 2nd Division (chambre) at Restatt, 27th November, 1946.