

## CASE NO. 40

### TRIAL OF GUSTAV BECKER, WILHELM WEBER AND 18 OTHERS

PERMANENT MILITARY TRIBUNAL AT LYON  
(CONCLUDED 17TH JULY, 1947)

*Illegal arrest and ill-treatment as war crimes. The scope of complicity. Attempt as separate offence.*

#### A. OUTLINE OF THE PROCEEDINGS

##### 1. THE ACCUSED AND THE CHARGES

Twenty officers, non-commissioned officers and men of the former German Customs Commissariat at Annemasse, French Savoy, were on trial for illegal arrests of French citizens, some of whom they severely ill-treated, causing the deportation and subsequent death of three victims. Several accused were members of the Gestapo.

The principal defendants were Gustav Becker, Wilhelm Weber and Karl Schultz. They were prosecuted as joint perpetrators of the crimes charged. The other 17 defendants were prosecuted *in absentia* as accomplices to the crimes. Their names are: Rocktegel, Muhe, Gustscher, Zank, Koch, Mocker, Murr, Hartmann, Block, Forster, Schobert, Hofmann, Schoder, Langer, Staffa, Hof and Schade.

##### 2. THE EVIDENCE

The evidence showed that all the accused, except Schultz, had taken part in the arrest of several innocent French inhabitants, and that they had subjected them to severe beating and other physical ill-treatment. One of the victims, Jean Hauteville, had an arm and several teeth broken. As a consequence of the arrests, the victims were deported to concentration camps in Germany. Three identified victims died there from further ill-treatment.

Schultz was acquitted for lack of evidence establishing that he had actually taken part in the commission of the above crimes. The others were found guilty of unlawful arrests and ill-treatment, and of having "caused death without intent to inflict it".

##### 3. FINDINGS AND SENTENCES

Seventeen defendants were convicted to 20 years' hard labour each, and two to three years' imprisonment each.

#### B. NOTES ON THE CASE

##### 1. NATURE OF THE OFFENCES

The offences for which the above accused were found guilty comprise two distinct acts punishable under French law: illegal arrests and ill-treatment, whether or not resulting in death.

*(a) Illegal Arrests*

Convictions for illegal arrests were passed under Article 341 of the French Penal Code, whose relevant passage reads :

“ Those who, without order of the proper authorities and except cases in which the law prescribes the seizure of accused persons, arrest, detain or restrain any persons, shall be punished with a term of hard labour.”

According to Article 342, if the detention has lasted over a month, the penalty is hard labour for life. Article 344 prescribes the same penalty if the arrest was made by using “ false dress ”, “ false names ”, or “ false orders of the authorities ”, or if the arrested person was threatened with death. If the person arrested, detained or restrained was subjected to physical torture, the punishment is death.

Illegal arrest or detention does not appear in the list of war crimes drawn up by the 1919 Commission on Responsibilities.<sup>(1)</sup> Neither is it explicitly mentioned in the Hague Regulations respecting the Laws and Customs of War on Land, of 1907. It has, however, emerged as a clear case of war crime in the course of developments which took place under the impact of the criminal activities of the Nazis and their satellites, during the second world war.

In the early stages of its activities, the United Nations War Crimes Commission decided that the following acts should be added to the 1919 list of war crimes :

“ Indiscriminate mass arrests for the purpose of terrorizing the population, whether described as taking of hostages or not.”

This decision was made explicitly on the basis of the Preamble of the 4th Hague Convention concerning the Laws and Customs of War, 1907, which reads :

“ Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare, that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the laws of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.”

It is not disputable that “ indiscriminate mass arrests ” are a violation of the above principles, usages and laws, as exemplified in particular in the penal law of civilized nations.

It can also be observed that illegal arrests, when carried out repeatedly, represent a clear case of “ systematic terrorism ” which appears as the first item in the 1919 List of war crimes. The fact that they also constitute a violation of the French national law, is relevant in that, according to

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<sup>(1)</sup> *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, which was constituted by the Allied Powers on 25th January, 1919, at the Preliminary Peace Conference in Paris.

Article 43 of the Hague Regulations, 1907,<sup>(1)</sup> the German authorities were, as a rule, under the obligation to respect it.

The decision of the United Nations War Crimes Commission was made on the face of the evidence collected from occupied countries, that indiscriminate arrests and detentions of inhabitants, without due process of law, was a pattern deliberately implemented by the Nazis for the purpose of terrorizing the population and suppressing what the Nazis considered to represent an obstacle to their rule. Millions of peaceful and innocent people suffered from this policy and scores of thousands died as a result of it. The offences tried by the French Tribunal thus did not constitute isolated violations, but were part of a criminal policy pursued systematically and deliberately, and clearly fell within the terms of the above decision.

It should, however, be noted that, under the French Penal Code, illegal arrests need not be carried out systematically or *en masse* in order to constitute a criminal offence. Neither should it be taken that the decision of the War Crimes Commission is absolute in the sense that it excludes the punishment of even comparatively few cases of illegal arrests. The main issue is the principle which recognizes that unlawful arrests may be punished as war crimes, and which thereby contributes to defining more precisely the obligations of a power in occupied territory.

This principle has been confirmed in a number of other trials conducted by French courts. So, for instance, in the case against two German interpreters, Piffer and Tschander, who served in Kommandanturas set up in two French localities, the accused were convicted for illegally arresting and detaining nine French inhabitants.<sup>(2)</sup> In another trial an Italian, Ferrarese, who served the Gestapo in France, was sentenced to death for having caused the illegal arrest and detention, followed by torture, of 12 inhabitants.<sup>(3)</sup> Another Italian, Gallina, who also served the Gestapo in France, was condemned to death for making personally illegal arrests and ill-treating those apprehended.<sup>(4)</sup> A German Ortsgruppenleiter in a French locality, Pitz, was found guilty of complicity in the illegal arrest of individuals and of whole families, made on purely political grounds, and was sentenced to 5 years' imprisonment.<sup>(5)</sup>

In all cases the judgment was pronounced on the basis of Articles 341–344 of the Penal Code, quoted in the preceding pages.

#### (b) *Ill-treatment*

Convictions on the count of ill-treating the persons arrested, were passed under Article 309 of the Penal Code. Under its terms: "he who wilfully inflicts wounds or blows, or commits any other act of violence" resulting in illness or working incapacity for over 20 days, is punishable for from

(1) This Article reads: "The authority of the power of the State having passed *de facto* into the hands of the occupant, the latter shall do all in his power to restore, and ensure, as far as possible, public order and safety, respecting at the same time, unless absolutely prevented, the laws in force in the country."

(2) Judgment of the Permanent Military Tribunal at Lyon, 30th October, 1947.

(3) Judgment of the Permanent Military Tribunal at Marseilles, 6th November, 1947.

(4) Judgment of the Permanent Military Tribunal at Lyon, 8th April, 1948.

(5) Judgment of the Permanent Military Tribunal at Metz, 8th October, 1947.

2 to 5 years' imprisonment. When such acts of violence are followed by "mutilation, amputation", or other permanent infirmities, the penalty is solitary confinement with hard labour for from 5-10 years. If the acts of violence, committed "wilfully but without intent to inflict death", have caused death, the penalty is hard labour for life.

Physical ill-treatment of inhabitants of occupied territory, as was the case in the trial under review, is included in the 1919 List of war crimes under the heading "torture of civilians" (item III). It is forbidden by implication under the terms of Articles 43 and 46 of the Hague Regulations. As already stressed, the first imposes the duty upon the occupying Power to ensure *inter alia*, "public safety" and to respect the laws of the occupied country, "unless absolutely prevented". The second prescribes the obligation to respect, among others, "family honour and rights" and "individual life". Physical ill-treatment also emerges as a violation of the laws of war from the declaration made in the previously quoted Preamble of the 4th Hague Convention. It is in the light of such evidence of the laws of war that ill-treatment was explicitly recognized as a war crime in Article 6 (b) of the Charter of the International Military Tribunal sitting at Nuremberg, where it is described as "ill-treatment of civilian population of or in occupied territory".

The accused were held guilty for having caused, "without intent to inflict it", the death of the ill-treated victims. As alleged by the Prosecution, and apparently admitted by the court, the evidence did not show that the death took place as a *direct* result of the ill-treatment personally committed by the accused. It apparently demonstrated that the accused had caused the victims' death by contributing to and making possible their deportation to Germany, where they died from further ill-treatment committed by other individuals. Theirs was, thus, the guilt of accomplices, which will be discussed in the next paragraph.

## 2. THE SCOPE OF COMPLICITY

As previously stressed, two of the accused, Becker and Weber, were convicted as perpetrators of the illegal arrests and ill-treatments, and the remaining 17 accused as their accomplices.

There is not much to be said in regard to the latter's complicity in the carrying out of arrests and the ill-treatment in which they personally took part. It is a principle of penal law that accomplices are held responsible in the same manner as actual perpetrators, and this principle is recognized in the field of war crimes as it is in that of common penal law.

The point of interest in this case is that all the accused, perpetrators and accomplices, were found guilty of the death of the victims which took place in Germany. According to the formula used by the court on the basis of Article 309 of the Penal Code, they were found guilty of having "caused death without intent to inflict it". It is not clearly indicated in the judgment whether the ill-treatment inflicted in France was of such a nature as to cause in itself the victims' death after they had been removed to Germany. There is, however, some ground to believe that the Tribunal may have found the accused responsible as instrumental to the death inflicted upon the victims' at the hands of the other perpetrators in Germany.

Further forms of complicity are illustrated in other French trials concerning illegal arrests. In one of the trials previously referred to, the accused, Ferrarese,<sup>(1)</sup> was convicted not for having personally arrested and detained innocent French inhabitants, but for having *caused* their arrest and detention. Ferrarese, an Italian national, came to France in 1934 from Brazil. He settled down, married a French woman, and lived in Marseilles. During the war he became a secret agent of the Gestapo. Being a Catholic, he gained the confidence of a French Catholic priest, Paul Ardouin, who was a member of the French resistance movement and distributed resistance leaflets and pamphlets among his compatriots. Ferrarese denounced him to the Gestapo, which arrested the priest and deported him to Germany. The accused carried out this activity throughout the war and denounced a large number of French Catholic priests and other French citizens involved in the resistance movement. They were all arrested and tortured, and some were deported. The accused was condemned to death under Article 341 of the Penal Code, for having "caused the arrest, detention" and torture of the victims.

In another trial, also previously mentioned, the accused, Pitz,<sup>(2)</sup> a Nazi party administrator in Sierck, French Lorraine, was found guilty of having "aided or assisted" in the arrest and deportation of numerous French inhabitants in the area, by drawing up lists and submitting them to the authorities which made the arrests. He tried to induce French youths to enlist in the German army, which they refused to join. Upon his reporting to this effect they were arrested, interned and forcibly drafted in the Wehrmacht, and their families were deported to Germany. In July, 1942, he asked the French population to state openly whether they wanted to become Germans. Those unwilling had to report their names for transfer to other parts of France. Most of the latter were deported to Germany upon lists prepared by the accused. He was convicted to five years' imprisonment.

Special attention should be drawn to the case of complicity committed by means of denunciation. The question as to whether and to what extent denunciation is a crime in itself, was studied by the United Nations War Crimes Commission in connection with specific cases brought by member governments. A decision was made to the effect that denunciation did not in itself, constitute a war crime. The offence is committed only if, by giving information, the informer becomes a party to, or accomplice in, a war crime recognized as such in international law. This condition is fulfilled if circumstances constituting complicity are present, e.g., if the informer knew that his action would lead to the commission of a war crime and either intended to bring about this consequence or was recklessly indifferent with regard to it. This decision was applied by the War Crimes Commission in numerous instances.

It thus appears that, according to the above decision, denunciation is not punishable in itself, but only if it has resulted in a war crime and taken the shape of complicity in the traditional sense. This condition was present in the circumstances of the trial referred to above, the individuals denounced

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(1) Judgment of the Permanent Military Tribunal at Marseilles, 6th November, 1947.

(2) Judgment of the Permanent Military Tribunal at Metz, 8th October, 1947.

by the accused (Ferrarese) having all been arrested, detained, some of them tortured and deported, and the accused having deliberately sought these consequences.

In French municipal law, however, denunciation is regarded as a crime in itself. By an Ordinance of 31st January, 1944, concerning the Suppression of Acts of Denunciation (*Ordonnance relative à la répression des faits de dénonciation*), Article 83 of the French Penal Code was interpreted so as to include denunciation as a separate offence. Article 83, last paragraph, renders punishable "acts knowingly committed which are harmful to the national defence", and which, technically, do not fall within the notion of treason, espionage, or other "injury to the external security of the State" (*atteinte à la sûreté extérieure de l'Etat*), as covered by Articles 75-87 of the Penal Code. The latter entail heavy punishments, including the death penalty, whereas the former entail only imprisonment of from one to five years. In all cases the persons liable to punishment are both French citizens and foreigners. The Ordinance of 31st January, 1944, prescribed that acts of denunciation were regarded as "harmful to the national offence", and were, therefore, cases covered by Article 83, last paragraph. Denunciation is described as giving information to enemy authorities or to the French quisling administration or organizations, concerning, *inter alia*, "facts relating to the resumption of the struggle against Germany and her Allies, or the refusal to associate with those who did not resume the struggle". These words mean the denunciation of individuals who took part in French resistance movements, and of individuals who declined to serve the enemy or quisling authorities. Two more types of "facts" or acts are punishable if reported to the authorities or organizations mentioned: acts punishable under the laws of the French quisling administration, when such laws were not confirmed by the French Government after the war; and acts for which an amnesty had been granted or which had entailed punishments quashed by higher courts.

It will be noticed that the first type of facts or acts included in the notion of denunciation would have applied to the case of Ferrarese, who denounced individuals engaged "in the struggle against Germany". Neither the Prosecution, however, nor the Tribunal made use of the said Ordinance, apparently because the other counts, relating to the offences resulting from the accused's denunciations, were sufficient to result in conviction.

The comparative analysis of the above decision of the United Nations War Crimes Commission and of the French Ordinance of 31st January, 1944, show two different methods of dealing with cases of denunciation. The course taken by the United Nations War Crimes Commission was to absorb denunciation in the general concept of complicity, and to punish the offences resulting from denunciation, but not denunciation in itself. According to the course taken by the French legislation, however, denunciation was separated from subsequent offences in which the informer becomes or may become an accomplice according to the War Crimes Commission's decision, and was treated as an offence of its own.

### 3. ATTEMPT TO COMMIT ILLEGAL ARREST

It is convenient to close this analysis of the trials concerning illegal arrests and detentions with yet another trial of interest. It serves as evidence and illustration that not only actual illegal arrests, but attempts to commit such arrest are also treated as a war crime.

In the trial in question, the accused, Stucker, was a Nazi party official serving in the "Kreisleitung" of Thann, district of the French Upper Rhine.<sup>(1)</sup> As a zealous member of the Nazi party, he made numerous suggestions to the competent German authorities as to who of the inhabitants, in his opinion, should be arrested and/or removed from the area. Thus, in February, 1943, he recommended to the S.D., a branch of the Gestapo, the arrest and deportation of Edouard Kiffer and all members of his family, which he reported as politically undesirable. No action was taken by the S.D. in the matter.

The accused was found guilty of "attempt to arrest, detain or restrain" the inhabitants concerned, under the terms of Article 341 and Article 2 of the Penal Code.

Article 2 contains a general provision on the attempt to commit a crime, which reads :

"Any attempt to commit a crime which is displayed by a commencement of execution, when it is suspended or has failed to achieve its object on account of circumstances independent of the will of the perpetrator is regarded as the crime itself."

The Tribunal established that the accused had attempted to commit illegal arrest and detention "by suggesting to the S.D. the deportation" of Kiffer and his family "as detainees or internees", whilst "no sentence in accordance with the laws and customs of war had been pronounced" against the would-be victims. It also established that the attempt was "displayed by a commencement of execution", and that it was "suspended or failed to achieve its effect on account of circumstances independent of the accused's will" in that no action was taken by the competent authorities. The accused was condemned to imprisonment for two years.

It will be noted that, in the above formulæ, the Court referred both to Article 2 of the Penal Code and to Article 2 paragraph 5 of the Ordinance of 28th August, 1944, concerning the Suppression of War Crimes, previously mentioned. The latter punishes the illegal deportation of persons "detained or interned".

The above judgment is thus an instance of how general principles of penal law contribute, through municipal law and decisions of the courts, towards the building up of an international penal law.

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(1) Judgment of the Permanent Military Tribunal at Metz, 25th November, 1947.