

# Reprisals and Orders From Higher Up

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## Introduction by GERMAR RUDOLF, Editor

In early 1944 the Allies landed in Italy, a few miles south of Rome. In order to keep the immense cultural treasures of Rome safe from harm, the German Field Marshal Kesselring declared Rome an “open city”, i.e., a battle-free zone. This made Rome the hotbed of all kinds of partisan groups and foreign secret service activities. Since Italy was at that time engaged in a sort of civil war (not all Italians agreed with the ousting of Mussolini and the betrayal of Germany), the situation in Rome, only a few miles behind the battle front, was explosive. These were the conditions under which Obersturmbannführer [Lieutenant Colonel] Herbert Kappler of the Security Police was charged with keeping peace and order in the city, a task at which he was indeed largely successful.

On March 23, 1944, however, something happened. On this day, as on many other days before, the police regiment “Bozen”, which was comprised almost entirely of South Tyroleans, marched through the Via Rasella. As the regiment passed by a street-sweeper’s cart, an enormous explosive charge in the cart, mixed with iron shrapnel, blew up. 32 of the German policemen were killed instantly, another 10 died later of their injuries. 60 policemen were badly wounded.

To prevent an escalation of the partisan warfare in Rome, the Wehrmacht Supreme Command reacted to this assassination (which had violated international law) by posting placards announcing that if the perpetrators did not turn themselves in, 10 civilians would be shot for every policeman that had been killed. Kappler even released captured partisans with the order to inform the assassins in the underground of this announcement and to persuade them to surrender. When no one had given themselves up by March 24, 335 persons were executed in the Ardeatine Caves near Rome; Kappler had assembled this group mostly of prisoners, and of criminals, saboteurs, spies and partisans who had already previously been sentenced to death.

After the war, Kappler was sentenced to lifetime imprisonment for this act, but his subordinates were acquitted.<sup>1</sup> However, some left-wing lobbyists and the public prosecutor also wanted to imprison, for life, one Captain Erich Priebke, who had belonged to Kappler’s unit and had participated in the execution. The Argentinean government had extradited him to Italy in 1996. The Italian military court acquitted Priebke on August 2, 1996, on the grounds that the limitation period had expired. At this announcement an irate lynch mob gathered outside the court,<sup>2</sup> so that the judges ordered Priebke taken into custody again, and decided in early February 1997 that he would have to

<sup>1</sup> Rudolf Aschenauer, *Der Fall Kappler*, Damm-Verlag, Munich 1968; this work also contains much information on the legality of the execution of hostages, esp. pp. 6-8.

<sup>2</sup> Two detailed monographs appeared in Italy about the Priebke case: Pierangelo Maurizio, *Via Rasella, cinquant'anni di menzogne* (Via Rasella, Fifty Years of Lies), Maurizio Editore, Roma 1996; Mario Spataro, *Repressaglia* (Reprisal), edizione Settimo Sigillo, Roma 1996). In Germany the *Deutsche Rechtsschutzkreis* was the first to publish a brief summary of the case, well worth reading: Günther Stübiger, *Der Priebke-Prozeß in Italien*, Schriftenreihe zur Geschichte und Entwicklung des Rechts im politischen Bereich, issue 5, Deutscher Rechtsschutzkreis, Postfach 40 02 15, D-44736 Bochum 1996, DM 5.-; more detailed: G. Gysecke, *Der Fall Priebke*, Verlagsgesellschaft Berg, Berg am Starnberger See 1997.

be retried before a military court.<sup>3</sup> This court eventually decided, on July 22, 1997, that Priebke would have to go to prison for five years.<sup>4</sup> Meanwhile, those partisans who had been responsible for the explosives attack and who are still living today are also being investigated, on charges of murder, even though it is rather unlikely that they will be tried.<sup>5</sup>

In discussions of the Priebke case, the point at issue is not so much the details of the case per se as first and foremost the legitimacy of executions of hostages or of reprisals against civilians by a military occupation power. In this context, Dr. jur. Karl Siegert, Professor at the University of Göttingen, drew up a legal expert report shortly after the end of the war, pertaining to the trial conducted at that time in Italy against Herbert Kappler.<sup>6</sup> Since this expert report is of extraordinary importance, we shall reproduce it in the following – leaving out, for reasons of space, the discussions of legitimate requisitions.<sup>7</sup> The report is followed by several other examples as well as supplemental explanations pertaining to partisan warfare during the last war, and the German reaction to them.

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## I. The Legal Sources of International Law and Their Development

*Reprisals* were not regulated by the Hague Land Warfare Convention of October 18, 1907.<sup>8</sup> They received first mention in Article 2 Section 3 of the Geneva Agreement of September 27, 1929, about the treatment of prisoners of war. This Agreement prohibited reprisals against prisoners of war. A general prohibition of reprisals against civilians was not issued until August 12, 1949, by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.<sup>9</sup> Its Article 33 decrees:

<sup>3</sup> “SS man on trial again for caves massacre”, *The Daily Telegraph*, April 15, 1997, p. 16.

<sup>4</sup> AP, “Priebke convicted in WWII massacre”, Rome, July 22, 1997. Priebke was sentenced to 15 years’ imprisonment, of which 10 years were annulled. The co-defendant, Karl Hass, was sentenced to 10 years, of which he served only 8 months before being freed under an amnesty. Meanwhile, Priebke has found refuge in an Italian monastery: Reuter, “Ex-Nazi Priebke rejects Italy court order to move”, Rome, August 7, 1997. In his appeal Priebke was given a life time sentence, ZDF-heute News, March 7, 1998.

<sup>5</sup> Reuter, “Italian judge reopens 53-year-old bombing probe”, Rome, June 28, 1997; however, the matter will only proceed to trial if the court can force itself to interpret the bombing attack as not having been directed against the German occupation troops, for such things are not a punishable offense under present Italian law.

<sup>6</sup> Prof. Dr. jur. Karl Siegert, *Repressalie, Requisition und höherer Befehl*, Göttinger Verlagsanstalt, Göttingen 1953, 52 pp. Copies of this expert report are available from Castle Hill Publishers, PO Box 118, Hastings TN34 3ZQ, UK, for US \$10.-.

<sup>7</sup> Due to space limitations, the section dealing with lawful requisitions will not be reproduced here, and for this reasons the following sections are numbered out of sequence. Since the author of this contribution deceased long time ago, we were not in every case able to determine the complete data of all works, which are in most cases quoted only in a very brief form in the original work. The sources which were cited, but which are omitted here due to the abridgement, are: Galasso and G. Sucato, *Codici penali militari di pace e di guerra*, 2<sup>nd</sup> ed., [Stella?] Roma 1941, Heinrich B. Gerland, *Deutsches Reichsstrafrecht*, 2<sup>nd</sup> ed., de Gruyter, Berlin and Leipzig 1932 (reprint: Keip, Goldbach); F. von Liszt, Schmidt, *Lehrbuch des deutschen Strafrechts*, v. 1, 26<sup>th</sup> ed., de Gruyter, Berlin 1932, H. Maschke, *Das Krupperteil und das Problem der Plünderung*, Musterschmidt, Göttingen 1951; Pannain, *Manuale di diritto penale, parte generale*, Roma 1942; W. Rentrop, E. Hasper, (eds.), *Requisitionen, Besatzungsschäden und ihre Bezahlung*, Fachverlag für Wirtschafts- und Steuerrecht, Stuttgart 1950; Rogowski, *Repressalie*, Dissertation, Göttingen 1950; *Summing Up*, Judge Advocate 3-5-1947 in Venedig, Extract.

<sup>8</sup> Cf. R. von Laun, *Haager Landkriegsordnung*, 4<sup>th</sup> ed., Wolfenbüttler Verlagsanstalt, Wolfenbüttel 1948.

<sup>9</sup> Comité international de la croix rouge, *Les conventions de Genève du 12 août 1949*, Geneva 1949.

“Reprisals against protected persons and their property are prohibited.”

Article 34 supplements this with the order that taking hostages is also prohibited. In the time of the Second World War, therefore, there was a gap in the conventions for the treatment of civilians.

*Requisitions* are discussed in Article 52 of the Hague Land Warfare Convention of October 18, 1907. In this context, however, developments have since gone beyond the framework of the Convention [...].<sup>7</sup>

There are no international legal agreements concerning *orders from higher up* and their effect on the legitimacy or indictability of the actions of soldiers carrying out a reprisal or requisition, unless we accept the decrees of the victorious Allies in the London Agreement of August 8, 1945, as international law.

Under these circumstances we must go beyond the framework of the Convention.

The regulations of international law follow from three sources:

1. International treaties
2. International customs as expressions of a general practice that is acknowledged as legal regulation
3. General principles of law

In international and national practice as well as in international jurisprudence these three sources have increasingly found recognition. First and foremost we would mention Article 38 of the Statute of the International Court of Justice. We would also mention the American Nuremberg verdicts in Cases VII and XI, and refer to the Italians Pallieri, Cavaglieri and Francesco Rocco, the Frenchman Cavaré, the Austrian author Verdroß, the Dane Alf Ross, the Germans Wilhelm Sauer, Ernst Sauer, Drost, Schütze, Schwarzenberger, and others.<sup>10</sup> Some authors, such as Anzilotti, Hyde, Guggenheim and Sibert, recognize only two judicial sources of international law, namely treaties and common law.<sup>11</sup> The third source – the general principles of law – is also needed, however, to supplement the treaties and common law.<sup>12</sup>

With the aid of these three judicial sources, we can achieve a reconciliation between the older Continental system characterized by the closed, logical structure of its principles (main advocate, Anzilotti), and the Anglo-American system of jurisprudence guided by practical examples (case law).<sup>13</sup> In this way it is also possible to systematically consider and solve even newer problems of international law which were not yet known to the authors of the older agreements.

<sup>10</sup> Cf. A. Verdroß, *Völkerrecht*, 2<sup>nd</sup> ed., Springer, Vienna 1950, pp. 107-113, and Pallieri as quoted there; Drost, *Grundlagen des Völkerrechts*, Munich and Leipzig 1936, pp. 48ff., who also quote Cavaglieri; Francesco Rocco, *Sistema di diritto internazionale*, Napoli 1938, p. 28; Cavaré, *Le droit international publique positif*, V. 1, Paris 1951, p. 194; Wilhelm Sauer, *System des Völkerrechts*, Röhrscheid, Bonn 1952, pp. 364f.; Ernst Sauer, *Grundlehre des Völkerrechts*, Pick, Cologne 1947, p. 31 (2<sup>nd</sup> ed.: Heymann, Cologne 1955), and others; G. Schwarzenberger, *Einführung in das Völkerrecht*, Mohr, Tübingen 1951, pp. 26, 28; H. A. Schütze, *Die Repressalie unter besonderer Berücksichtigung der Kriegsverbrecherprozesse*, Röhrscheid, Bonn 1950, p. 3; Verdict of the American court-martial no. XI in Nuremberg, of April 11, 1949 (Wilhelmstraße), Protocols, p. 27 616; Alf Ross, *Lehrbuch des Völkerrechts*, Kohlhammer, Stuttgart 1951, pp. 81ff.; Laun, *op. cit.* (note 8), pp. 20ff.; Verdict of the American court-martial no. VII in Nuremberg, of Feb. 19, 1948 (SouthEast Trial), Protocols, p. 10300. Further listings in A. S. de Bustamente Sirven, *Droit international publique*, v. 1, Recueil Sirey, Paris 1934, pp. 60ff., and G. H. Hackworth, *Digest of international law*, vol. I, U.S. Gov. Print. Off., Washington 1940, p. 1.

<sup>11</sup> D. Anzilotti, *Lehrbuch des Völkerrechts*, 3<sup>rd</sup> ed., trans. by Bruns and Schmid, de Gruyter, Berlin 1929, p. 49; C. C. Hyde, *International Law*, v. I, Little Brown & Cie., Boston 1947, p. 10; P. Guggenheim, *Lehrbuch des Völkerrechts*, v. 1, Verlag für Recht und Gesellschaft, Basel 1948, pp. 141, 145; M. Sibert, *Traité de droit international*, v. 1, Dalloz, Paris 1951, pp. 32, 34.

<sup>12</sup> Also Verdroß, *op. cit.* (note 10), pp. 115, 120.

<sup>13</sup> For details cf. Schütze, *op. cit.* (note 10), pp. 11-15.

This goes first and foremost for the application of the Hague Land Warfare Convention of 1907. At the time of its inception there were as yet only few automobiles, neither armored vehicles nor airplanes, neither carpet-bombing nor nuclear weapons, and also no “total war” where civilians are both actively and passively enlisted for participation. In this context, the problem of partisan warfare has attained a significance that could be in no way foreseen in 1907. As well, the inhabitants of occupied zones, even if they have not actively taken up arms, are subjected to the effects of war in a completely different way than was the case in earlier wars. The Belgian court-martial in Lüttich has stated that certain regulations of the Hague Land Warfare Convention are entirely outdated.<sup>14</sup> In his study of the development of the law governing occupation in wartime from 1863 to 1914, the American author Graber<sup>15</sup> wrote in 1949 that it is necessary to examine whether the regulations issued between 1863 and 1914 do in fact still represent the fundamental principles of international law as these pertain to wartime occupation, or whether it is necessary to work out an entirely new law incorporating the new aspects of war-time occupation in present times.

According to the American verdict in Case V, it is necessary to examine the actions of the accused in relation to the circumstances and conditions of their surroundings:<sup>16</sup>

“Sensible and practical guidelines must be applied.”

The aforementioned American verdict in Case VII (SouthEast Trial) speaks of the fundamental principles of justice which most nations have adopted.<sup>17</sup> But justice is not the only thing to evolve and change. Views and judgments about facts of recent history are also subject to change based on the discovery of new historical sources. The view of history that prevailed in 1945 no longer agrees with today’s.

The best example of this is the 1940 war in Norway. The Nuremberg trial of the chief war criminals dealt with the Norwegian campaign as a case of German aggression.<sup>18</sup> Later publications, however, showed that long before the German plans were made, an attack on Norway’s neutrality was being prepared in England, under the direction of the then Minister of Defense, Churchill.<sup>19</sup> On February 5, 1940, the Allied Supreme Council of War decided to deploy three or four divisions to Narvik, in northern Norway.<sup>20</sup> In the night of April 7-8, 1940, British and French naval forces placed mines in Norwegian territorial waters.<sup>21</sup> Thus, the British and French governments prepared and partially implemented an attack on Norway and its neutral status before the Germans ever did. Consequently, the view of history expressed by the International Military Tribunal in Nuremberg with respect to the case of Norway was wrong. We must ask that both sides be judged according to the same standards.

One can even go a step further and apply the so-called principle of *tu quoque* to suspend an aspect of international law if the opposing side also violates it. The International Military Tribunal applied

<sup>14</sup> Verdict of the permanent court-martial of the province of Lüttich, 2<sup>nd</sup> French chamber, of June 29, 1951, No. 2251 of the St. L., 1947 against Lippert, Strauch and others (Lippert), p. 26; H. A. Smith, *The crisis in the law of nations*, Stevens & Sons, London 1947, p. 16, 32; Laun, *op. cit.* (note 8), p. 15; H. R. Hoppe, *Die Geiselschaft, ihre Entwicklung und Bedeutung*, dissertation, University of Göttingen, Göttingen 1952, p. 12.

<sup>15</sup> D. A. Graber, *The development of the law of belligerent occupation, 1863-1914*, Columbia Univ. Press, New York 1949, p. 292.

<sup>16</sup> Verdict of the American court-martial no. V in Nuremberg, of Dec. 22, 1947 (Case V), Protocols, p. 10747.

<sup>17</sup> SouthEast Trial, *op. cit.* (note 10), Protocols, p. 10397.

<sup>18</sup> Vgl. M.P.A. Hankey, *Politics, trials and errors*, Pen-in-Hand, Oxford 1950, p. 71, and IMT, *Der Prozeß gegen die Hauptkriegsverbrecher*, 14.11.1945-1.10.1916, v. XXII, Nuremberg 1947f., p. 510; K. Heinze, K. Schilling, *Die Rechtsprechung der Nürnberger Militärtribunale*, Girardet, Bonn 1952, Nr. 584.

<sup>19</sup> Evidence from Churchill’s *Zweiter Weltkrieg* and other sources, in W. Hubatsch, *Die deutsche Besetzung von Dänemark und Norwegen, 1940*, Musterschmidt, Göttingen 1952, pp. 13ff.

<sup>20</sup> Cf. Hubatsch, *ibid.*, p. 16.

<sup>21</sup> Cf. *ibid.*, p. 140.

this principle in favor of Admiral Dönitz with respect to his conduct of unrestricted submarine warfare when the American Admiral Nieflitz testified that his forces had also engaged in unrestricted submarine warfare in the Pacific.<sup>22</sup> The American verdict in Case XII (trial of the Wehrmacht Supreme Command) stated that Germans may not be punished for an act for which Americans, British, French or Russians would not also be prosecuted or convicted.<sup>23</sup> Unfortunately this principle was not applied with anything near the desirable degree of consistency.

The principle of *tu quoque* is dangerous because it can lead to a disintegration of the fundamentals of international law, whereas what we need to do is to build up and consolidate a system of international law. If, however, two warring parties consistently disregard a judicial norm, the evolution and development of the law must be reviewed in the context of this *desuetude*.<sup>24</sup> Such a case represents a modification of common law.

## II. Lawful Reprisals

### a) Confusion of Concepts

The preceding general comments were necessary in order to create a solid foundation for understanding before we enter the maze of reprisal law. The late criminologist Franz Exner stated at the International Military Tribunal in Nuremberg that there is only one aspect of reprisal law about which there is absolute certainty, namely, that reprisals against prisoners of war are inadmissible, and that everything else is contested and by no means valid international law.<sup>25</sup> Even the definition of the various concepts is often unclear. In particular, the concepts of collective punishment, hostages, retaliation and reprisal are frequently confused. However, they are clearly distinct.

*Collective punishment* avenges a concrete individual act by punishing a group of persons who bear a share of the responsibility for the act. If such shared responsibility is not given, then under Article 50 of the Hague Land Warfare Convention of 1907 collective punishment is prohibited.<sup>26</sup>

The term *retaliation* is also frequently used. This refers to the reaction to a breach of international law with a similar countermeasure.<sup>27</sup>

Concerning the concept of *reprisals*, Oppenheim-Lauterpacht's definition has been most widely accepted.<sup>28</sup> According to this definition, a wartime *reprisal* is the case if one warring party retaliates against another by means which are otherwise unlawful acts of warfare, and with which he wants to force his opponent, his opponent's branches and the members of the opposing armed forces to give up their illegal acts of war and to return to the principles of lawful warfare.

<sup>22</sup> Cf. *IMT*, v. XXII, pp. 635f., and Hoppe, *op. cit.* (note 14), p. 114. The American Nuremberg verdict in the SouthEast Trial, *op. cit.* (note 10), considers *tu quoque* as mitigating circumstance, cf. protocols pp. 10002 and 10147, as well as K. Heinze, K. Schilling, *op. cit.* (note 18), No. 611, 612.

<sup>23</sup> Verdict of the American court-martial no. XII in Nuremberg, of Oct. 27, 1948 (Trial of the Wehrmacht Supreme Command), Protocols, p. 27616.

<sup>24</sup> Wahl, *Raub und Plünderung in den besetzten Gebieten*, expert report to the U.S. case Fall XI, 1948, p. 29, speaks of a change in legal norms and adds that at least those who themselves had conducted a ruthless war against civilians ought to be denied the active authorization to bring about the criminal punishment of another party.

<sup>25</sup> Cf. Exner, *IMT*, v. IX, p. 364.

<sup>26</sup> Cf. Laun, *op. cit.* (note 8), p. 48.

<sup>27</sup> Cf. E. Vanselow, *Völkerrecht*, Mittler, Berlin 1931, p. 85; Hyde, *op. cit.* (note 11), v. III, p. 1840, says: "*similar in kind*".

<sup>28</sup> L.F.L. Oppenheim, H. Lauterpacht, *International Law, a Treatise*, v. II, 6<sup>th</sup> ed., Longman, London 1944, 7<sup>th</sup> ed., *ibid.* 1952, §247; similarly §358 of the *American Rules of Land Warfare* (U.S. War Dept. General Staff (ed.), Gov. Print. Off., Washington 1914-15 & 1917) with approval of Hackworth, *op. cit.* (note 10), v. VI, p. 181. Cf. also Art. 8 of the *Italian Legge di guerra* of July 8, 1938, as well as Sucato, *Istituzioni di diritto penale militare*, v. II, Roma 1941, p. 509.

This definition shows better than most others<sup>29</sup> that a reprisal is *not* retrospective punishment or revenge for past injury.<sup>30</sup> Rather, a violation of international law by the opposing side is its prerequisite, and its purpose is to force this opposing side to restrict itself to internationally lawful behavior in future.<sup>31</sup> Reprisals differ from collective punishment in that they are directed against members of an enemy nation with *no* regard for their personal guilt, whereas collective punishment has such guilt as its particular requirement.<sup>32</sup> This difference is often overlooked. The American verdict in Case IX,<sup>33</sup> for example, speaks first of “*reprisals*” and then of “*general penalty*” in the sense of Article 50 of the Hague Land Warfare Convention. In this way the verdict comes to false conclusions with regard to “*reprisals*”.<sup>34</sup>

Another difference between reprisals and collective punishment is that the former tries to achieve a specific mode of behavior on the part of the enemy,<sup>35</sup> whereas collective punishment finds its justification and its legal grounds strictly within the crime that was committed. In this way, one could perhaps draw a parallel between collective punishment and a court sentence, vs. reprisals and measures taken by the police.

Reprisals differ from self-defense in that they have as their prerequisite an act that was committed in violation of international law, while self-defense has no such prerequisite. The two concepts are similar in that both aim to prevent future violations of the law.

If a reprisal interferes with the freedom or the lives of individuals, it overlaps with the concept of *hostage-taking*. We shall leave out of consideration the so-called *contractual hostages*, which may be taken as part of an international agreement in order to ensure its implementation, as well as hostages that were taken to enforce requisitions, contributions, etc.<sup>36</sup> *Security hostages*, however – forcibly taken guarantors for the lawful behavior of the opposing party<sup>37</sup> – do come within our present scope. These hostages are liable with their life, and if their side engages in unlawful actions, they become the victims of reprisals. But if persons are not taken prisoner for reprisal purposes until

<sup>29</sup> Eg. cf. Vanselow, *op. cit.* (note 27), p. 85; E. von Waldkirch, *Das Völkerrecht*, Helbing und Lichtenhahn, Basel 1925, p. 328.

<sup>30</sup> P. Fauchille, *Traité de droit international publique*, Tome II, 8<sup>th</sup> ed., Rousseau, Paris 1921, n. 1022, emphasizes this.

<sup>31</sup> Similarly K. Strupp, *Wörterbuch des Völkerrechts*, v. I + II, de Gruyter, Berlin 1924f, p. 350; F. von Liszt, M. Fleischmann, *Das Völkerrecht*, 12<sup>th</sup> ed., Springer, Berlin 1925, p. 439; Schütze, *op. cit.* (note 10), p. 41; Guggenheim, *op. cit.* (note 11), v. II, p. 583; Art. 358 of the American *Rules* of 1940; Fauchille, *op. cit.* (note 30), n. 1022, describes reprisals as “*moyen de coercion, non un châtement*”.

<sup>32</sup> Laun, *op. cit.* (note 8), p. 43, even suggests that reprisals were usually deliberately and on principle directed against innocent persons. But then he speaks of collective punishment without regard for guilt, and thus leaves the way open for misunderstandings. Hyde, *op. cit.* (note 11), v. III, p. 1843, points out, as do we, the clear distinction between “*relation*” and “*penalty*”. Art. 454 of the British *Manual of Military Law* (by L.F.L. Oppenheim and J. E. Edmonds, Her Majesty Stationary Office, London 1929) emphasizes that “[...] *reprisals* [...] *in most cases inflict suffering upon innocent individuals* [...]”. R. v. Keller, *Der Geisel im modernen Völkerrecht*, Forchheim 1932, p. 57, aptly differentiates between reprisals and collective punishment by pointing out the different elements of liability and punishment.

<sup>33</sup> Verdict of the American court-martial no. IX in Nuremberg, of April 10, 1948 (Case IX), Protocols, English text, pp. 6759f.

<sup>34</sup> The verdict overlooks the fact that Art. 50 of the Hague Land Warfare Convention regulates only the “*general penalty*”, but says nothing about retaliation and reprisals; similarly, Hyde, *op. cit.* (note 11), v. II, p. 1840, n. 1, unclear Guggenheim, *op. cit.* (note 11), v. II, p. 824.

<sup>35</sup> Hoppe, *op. cit.* (note 14), p. 48, describes them as measure to force submission. v. Keller, *op. cit.* (note 32), p. 37, says that their nature is expressed in their guarantee function. The Italian verdict of the Tribunale Territoriale di limna of July 20, 1948 says aptly (p. 44): “*La rapressaglia deve avere scopo repressivo e preventivo, non vendicativo*”.

<sup>36</sup> Cf. Laternser, *Verteidigung deutscher Soldaten*, Bohnemeier, Bonn 1950, p. 128.

<sup>37</sup> Cf. Vanselow, *op. cit.* (note 27), p. 240.

AFTER an act has been committed, then it is no longer appropriate to speak of hostages.<sup>38</sup> They are then reprisal prisoners.<sup>39</sup>

In the subject literature, discussions about the permissibility of the execution of hostages always focus on the question of whether killing is a permissible form of reprisal. In this respect, the issue of the execution of hostages is identical to that of lawful reprisals.<sup>40</sup>

Let us investigate whether reprisals and the killing of security hostages were permissible up to 1949. Since customs and common law are very important in this context, let us first take a look at how reprisals were applied in practice.

## b) Reprisals from 1863 to 1951

The American verdict in the SouthEast Trial (Case VII) assumed<sup>41</sup> that the Germans had been the first to kill reprisal prisoners and security hostages. This is easily disproved.

Let us look first at the time preceding the *start of the First World War*.

As early as July 30, 1863, the American President Lincoln threatened to execute prisoners of war in retaliation against the killing of Negroes; General Sherman ordered the execution of 54 prisoners of war as reprisal for the murder of 27 of his soldiers, whose bodies had been found bearing the notice “*Death to the plunderers*”.

During the Russo-Turkish War of 1877, the Russian Commander of Thessaly ordered that the inhabitants of houses from which shots had been fired at Russian soldiers be hung from their house doors.<sup>42</sup>

Considerable numbers of hostages were also taken during the wars of the 19<sup>th</sup> century, for example in the Italian wars of 1848/49 and 1859, in the Crimean War and in the German wars of 1864 and 1866, by the French in Algiers, by the Russians in the Caucasus, by the English in their colonial wars,<sup>43</sup> and in the Franco-Prussian War of 1870/71 as well.<sup>44</sup> In the latter case, as well as in the Boer War, hostages were taken predominantly to ensure safe conduct for railway trains.<sup>45</sup>

In the *First World War*, set customs became established regarding the taking of hostages, as well as their execution, since the Germans, the Russians and the French (in Alsace) all took non-participants as security hostages.<sup>46</sup> Hyde tells of the execution of hostages by the Bulgarians.<sup>47</sup> According to Hackworth, the French government in 1918 suggested retaliation against an Austrian

<sup>38</sup> But this was the wording of an order of Hitler’s of March 23, 1944, in the case of the Via Rasella in Rome; cf. Latenser, *op. cit.* (note 36), p. 63.

<sup>39</sup> Cf. Hoppe, *op. cit.* (note 14), p. 50. Similarly, the American verdict in the SouthEast Trial, *op. cit.* (note 10), Protocols, p. 10320, G. Lummert, *Die Strafverfahren gegen Deutsche im Ausland wegen Kriegsverbrechens*, Arbeitsgemeinschaft vom Roten Kreuz in Deutschland (British Zone), Hamburg 1949, p. 61, Engl. *Law Reports of Trials of War Criminals*, v. VIII, London 1948, Case 44 (Kesselring), p. 14.

<sup>40</sup> In §358d of the American *Rules of Land Warfare* the problems of hostages and reprisals are also presented in a close relationship; cf. Latenser, *op. cit.* (note 36), p. 129.

<sup>41</sup> *Op. cit.* (note 10), Protocols, p. 10324; also Oppenheim-Lauterpacht, *op. cit.* (note 28), 7<sup>th</sup> ed., v. II, p. 591, where the killing of hostages is treated as a one-sided (reprehensible) German practice.

<sup>42</sup> Account by Latenser, *op. cit.* (note 36), p. 192.

<sup>43</sup> Evidence in Hoppe, *op. cit.* (note 14), p. 26.

<sup>44</sup> For examples see v. Keller, *op. cit.* (note 32), pp. 47ff., Schütze, *op. cit.* (note 10), p. 46, and others.

<sup>45</sup> Cf. v. Keller, *op. cit.* (note 32), pp. 48-54. The railway hostages have been condoned by Oppenheim-Lauterpacht, among others: *op. cit.* (note 28), v. II, p. 259. Art. 463 of the British *Manual* objects to them because they are also endangered by legitimate incidents of war.

<sup>46</sup> Cf. Hoppe, *op. cit.* (note 14), p. 41; v. Kellers, *op. cit.* (note 32), pp. 25, 39.

<sup>47</sup> Hyde, *op. cit.* (note 11), v. III, p. 1903, n. 3.

breach of international law; this retaliation was to involve the reprisal execution of two Austrian officers (prisoners of war) for each French airman that was killed.<sup>48</sup>

After the First World War this practice was commonly retained and perpetuated. In December 1918, for example, the Belgian Commanders of occupied cities in the Rhineland ordered the taking of hostages whose lives were to guarantee the safety of the occupation troops.<sup>49</sup> In 1919, the Romanian General Madarescu demanded 500 hostages, of which he threatened to shoot 5 for each Romanian killed.<sup>50</sup> In Beuthen, Upper Silesia, the French took more than 20 reprisal prisoners in retaliation against the shooting death of one Major.<sup>51</sup> Further, during the invasion of the Ruhr region in 1923, French Commanders imposed severe prison sentences on German persons in retaliation for acts of sabotage committed against the invaders by the populace.<sup>52</sup> Security hostages were also taken there on railway trains serving the French and Belgian regime.<sup>53</sup> During the political upheavals in Ireland in 1919-1921, the British troops carried out numerous reprisal killings.<sup>54</sup> And we should also mention that the French active service order of 1924 instructs that, when occupying enemy territory, “prendre des ôtages”.<sup>55</sup>

In the Second World War, the practice of taking and killing hostages was continued by all parties involved. The fact that it occurred frequently on the German side may be partially explained by the great extent of the enemy territory occupied by fairly weak military forces, but also by the fanatical resistance of the population of these occupied regions, who paid no heed to the relevant regulations of the Hague Land Warfare Convention of 1907.

Since the attitude of the civilians towards the German soldiers was more positive in Italy than in the other European countries, few executions of hostages and reprisal prisoners took place there, apart from the special incident of the “Fosse Ardeatine” (March 24, 1944).

Between 1941 and 1944 executions were especially numerous in the Balkans, where partisan activities were particularly widespread. In this respect, the Chief of the Wehrmacht Supreme Command issued an order on September 16, 1941, which named the vengeance death of 50 to 100 Communists per German soldier as generally appropriate ratio.<sup>56</sup> On the basis of this order, an attack of bandits at Topola (resulting in 22 dead and 16 missing on the German side) was followed by the order to execute 2,200 prisoners; 449 were in fact executed.<sup>57</sup> There were also numerous other instances of hostage killing, but the ratio of 1:100 was never applied.

The war in Russia also led to reprisals. Paget,<sup>58</sup> for example, reports that 50 hostages were shot in Simferopol in the Crimea, after executions at a ratio of 1:100 had been threatened as vengeance against bomb explosions where Germans were killed.

<sup>48</sup> Hackworth, *op. cit.* (note 10), v. VI, p. 272. However, the American Department of States did not agree in this case.

<sup>49</sup> Evidence in Laternser, *op. cit.* (note 36), p. 192. Hoppe, *op. cit.* (note 14), p. 42, and v. Keller, *op. cit.* (note 32), p. 43, specifically mention the Belgian General Lemerrier. – That the hostages were not killed was primarily due to the correct behavior of the Rhinelanders.

<sup>50</sup> Cf. Hoppe, *op. cit.* (note 14), p. 42.

<sup>51</sup> Cf. v. Keller, *op. cit.* (note 32), p. 43.

<sup>52</sup> *Ibid.*, pp. 44f.

<sup>53</sup> *Ibid.*, p. 54.

<sup>54</sup> Numerous references in Laternser, *op. cit.* (note 36), p. 74, Hoppe, *op. cit.* (note 14), p. 43, and others [cf. Winston Churchill, *The World in Crisis*, vol. 5: “The Aftermath”, T. Butterworth, London 1929, pp. 278ff.]

<sup>55</sup> Cf. v. Vanselow, *op. cit.* (note 27), p. 240, A. 162 and Hoppe, *op. cit.* (note 14), p. 44.

<sup>56</sup> Cf. the American verdict in the SouthEast Trial, *op. cit.* (note 10), Protocols, p. 10 345, and Schütze, *op. cit.* (note 10), p. 47. For the individual cases, cf. Laternser, *op. cit.* (note 36), p. 222-227.

<sup>57</sup> Cf. Laternser, *op. cit.* (note 36), p. 223, and the American verdict, Southeast Trial, *op. cit.* (note 10), Protocols, p. 10353.

<sup>58</sup> R. T. Paget, *Manstein, seine Feldzüge und sein Prozeß*, Limes, Wiesbaden 1952, p. 171f. Further cases are discussed in the American verdict for the Wehrmacht Supreme Command trial, *op. cit.* (note 23), pp. 10010 ff, 10051, and others.

In the Belgian trial of General von Falkenhausen, the conditions in *Belgium and northern France* were discussed in detail. In particular, an extensive collection of documents was presented, which Behling has supplemented with a chronological table of the executions.<sup>59</sup>

This was a case of numerous attacks by partisans. Reprisal executions followed in each case; the ratio of victims of the attacks to hostages executed varied from 1:5 to 1:25. Generally, 10 Belgians or French were shot per German killed.<sup>60</sup> The number depended on the circumstances of each particular case, for example on the severity of the attack.

In one case, after a German soldier was murdered in Haarlem, *Holland*, the execution of 100 prisoners was ordered; 10 were actually shot.<sup>61</sup>

There is no need to go into details here, since the German side always took pains to establish the permissibility of reprisals and reprisal killings. Examples from the *opposing sides*, on the other hand, are more impressive. The aforementioned collection of documents from the Falkenhausen Trial contains extensive materials on this topic.<sup>62</sup> We shall just mention the following example.

After the capture of Bengasi, Montgomery stated that he believed that numerous mines and traps had been set in the city. For every British soldier that was killed, he would have 10 Italians shot.<sup>63</sup> A November 30, 1944, radio message from the Allied headquarters in Paris stated:<sup>64</sup>

*“Regarding General Leclercq’s proclamation in Strassbourg, according to which 5 hostages were to be shot for every French soldier killed in ambush, Headquarters has ordered that Allied expedition troops operate in accordance with the Geneva Convention of 1929 and especially its Article 2, which states that reprisals against prisoners of war are prohibited.*

*Under martial law, however, taking hostages in order to ensure that the inhabitants of the occupied territory obey the orders of the military government is permitted by the laws of warfare. Such hostages may be tried in court, and even sentenced to death.*

*Therefore, under certain circumstances – especially in cases where civilians have violated the orders of the Geneva Convention – the threat expressed by General Leclercq may be enforced, but not against prisoners of war.”*

According to Falkenhausen Document 58a, 6 officers and 34 soldiers were executed at Annecy (Haute Savoie), and another 40 Germans at Habère, as reprisal for atrocities allegedly committed by a Russian battalion.

On April 24, 1945, in Reutlingen, Württemberg, four reprisal prisoners were shot by the French for the murder of a French soldier.<sup>65</sup> On April 28, 1945, the following announcement was made in Leutkirchen:<sup>66</sup>

*[...] 4. If a German shoots at Frenchmen, or if any other incident whatsoever happens, 5 houses will be torched and 100 Germans executed.*

*[...] 6. I am responsible, on pain of my own death, to ensure that these orders are enforced [...] the Mayor [...].”*

<sup>59</sup> Cf. collection of documents pertaining to the Falkenhausen Trial before the 2<sup>nd</sup> French Chamber, on March 9, 1951, No. 1658 crimes de guerre, des notices de 1948, No de l’affaire: 48 against von Falkenhausen and others; also Behling, *Zeittafel und Materialien zur Frage der während des 2. Weltkrieges im Befehlsbereich Belgien-Nordfrankreich durchgeführten Exekutionen*, Brüssel 1950, Zeittafel.

<sup>60</sup> For details cf. Behling, *ibid.*, p. 15-104.

<sup>61</sup> Cf. Steinmetz, summation for G. B. Haase in the criminal trial before the Special Court in Groningen, p. 17.

<sup>62</sup> Document collection, *op. cit.* (note 59), Fa-Doc. 53-76.

<sup>63</sup> Falkenhausen-Dokument 55.

<sup>64</sup> Falkenhausen-Dokument 56 b.

<sup>65</sup> Falkenhausen-Dokument 57 b.

<sup>66</sup> Falkenhausen-Dokument 63 a.

In Markdorf, 4 German civilians were executed per 1 French soldier shot.<sup>67</sup>

In Saugau it was proclaimed on April 27, 1945, that if a French soldier were killed or even only wounded, 20 hostages would be shot and the corresponding city district would be burned to the ground.<sup>68</sup>

The Berlin Ordinance of July 1, 1945,<sup>69</sup> stated, *inter alia*:

*“Anyone who commits an attack on a member of the occupation forces or on a bearer of official functions, or who commits arson for reasons of political enmity, seals not only his own fate but that of 50 former members of the Nazi Party as well. Their lives are forfeit together with that of the assassin or arsonist.”*

Falkenhausen Document 74 tells of the execution of 8-12 Germans for one officer killed during the American march-in in Treseburg.

Further threats of reprisal killings were proven in the SouthEast Trial in Nuremberg in Case VII;<sup>70</sup> examples include a ratio of 1:25 in Stuttgart, 1:10 in Birkenfeld, 1:30 in Markdorf, and an American threat of 1:200 in Harz. Hoppe<sup>71</sup> mentions further that the Americans took French officials hostage in 1941 in Syria; as well, the Russians took Persian officers hostage in 1949 in Azerbaijan. Further, the French took and killed hostages in Indochina.<sup>72</sup> Sonnenburg<sup>73</sup> reports that the French shot 80 prisoners of war in Fort Mont Lucon in 1944, as well as 20 hostages in Saigon in May 1951.

According to the publication *Der Heimkehrer*,<sup>74</sup> French officers and soldiers returning from Indochina stated that they could not understand what was happening at that time, 7½ years after the war, to the former members of the German occupation forces. They pointed out that incidents like Oradour take place in Indochina on a weekly basis, and must take place, in fact, for the sake of the protection of the French troops there.

*As we can see, hostages were taken by all sides in World War Two, and in many cases they were also killed as reprisal.*

### c) Fundamental Permissibility of Reprisals

From the way in which reprisals were used we can conclude that they were applied as a form of lawful justice. Therefore, for the time prior to Geneva Convention of August 12, 1949, and in the context of our previous findings (cf. p. 530), the permissibility of reprisals *per se* – disregarding for the moment the individual circumstances and prerequisites, and the legal consequences – may be considered to have been an international custom expressing a general practice acknowledged as lawful.

At times this common law has been disputed in the subject literature. However, the overwhelming number of examples from the first half of the 20<sup>th</sup> century proves the fundamental permissibility of reprisal measures during the Second World War. It was not until the Geneva Convention of August 12, 1949, that this state of affairs was changed, but of course only for the time following, not retroactively for the past.

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<sup>67</sup> Falkenhausen-Dokument 65 a.

<sup>68</sup> Falkenhausen-Dokument No. 65 a.

<sup>69</sup> Falkenhausen-Dokument No. 71 a.

<sup>70</sup> Cf. Latenser, *op. cit.* (note 36), p. 193, and Schütze, *op. cit.* (note 10), p. 94.

<sup>71</sup> Hoppe, *op. cit.* (note 14), p. 43, as quoted in Hammer and Salvin, *Taking of hostages*, 1944, p. 32.

<sup>72</sup> *Deutsche Zeitung u. Wirtschaftszeitung*, 24.1.1951; *Frankfurter Allgemeine Zeitung*, 19.5.1951; both quoted in v. Hoppe, *op. cit.* (note 14), p. 43.

<sup>73</sup> K. Sonnenburg, *Die französischen Kriegsverbrecherprozesse*, Arbeitsgemeinschaft für Recht und Wirtschaft, Munich 1951, pp. 27f.

<sup>74</sup> Edition of October 1952.

The earlier international agreements do not oppose the development of common law regarding the use of reprisals. In particular, Article 50 of the Hague Land Warfare Convention dealt only with collective punishment, but not with reprisals and not with hostage-taking.<sup>75</sup>

We would point out that in Italy, both Article 8 of the Martial Law of July 8, 1938, and Article 176 of the *Codice Penale Militare di Guerra* acknowledge the permissibility of reprisals. Article 358d of the *American Rules of Land Warfare* of 1940<sup>76</sup> also permits reprisals, including the killing of reprisal prisoners.

In its Articles 452-464, the British *Manual of Military Law*<sup>32</sup> fundamentally permits reprisals. Only in its Article 461 does it forbid the killing of contractual hostages. This does not prohibit the killing of reprisal prisoners. And in the Kesselring trial, which dealt mostly with the permissibility of the execution of reprisal prisoners, the Judge Advocate General stated on May 3, 1947:<sup>77</sup>

“However, I have come to the conclusion that there is nothing which makes it absolutely clear that in no circumstance and especially in the circumstances which I think are agreed in this case – that no innocent person properly taken for the purpose of a reprisal cannot be executed.”

Thus, British law also permits the execution of reprisal prisoners.<sup>78</sup> In Germany there was no Martial Law and no special *Manual*; but the permissibility of reprisal killings has been much discussed in German and Swiss literature, and affirmed without exception.<sup>79</sup> The American verdict in the SouthEast Trial (Case VII) stressed<sup>80</sup> that many nations, including the USA, Great Britain, France and the Soviet Union, have acknowledged the lawfulness of the execution of hostages. Incidentally, other academic literature is also predominantly in favor of viewing reprisals, including reprisal killings, as permissible.<sup>81</sup> Only a minority has rejected them, and called them a war crime;<sup>82</sup> however,

<sup>75</sup> For details cf. i Schütze, *op. cit.* (note 10), pp. 54 and 80; cf. also note 2 regarding Art. 452 of the British *Manual*, and v. Keller, *op. cit.* (note 32), p. 37.

<sup>76</sup> Commented on by: Hackworth, *op. cit.* (note 10), v. VI, p. 181 s.

<sup>77</sup> Report by Latenser, *op. cit.* (note 36), p. 193, and Schütze, *op. cit.* (note 10), p. 85.

<sup>78</sup> This was already pointed out by J. M. Spaight, *War Rights on Land*, Macmillan, London 1911, p. 465, and S. Glueck, *War Criminals, Their Prosecution and Punishment*, A. A. Knopf, New York 1944, p. 55, both cited in Latenser, *op. cit.* (note 36), p. 193. Much harsher measures, which in fact violate international law, are urged by the English *Handbook of Modern Irregular Warfare*, Pamphlet No 1: The Principles of Irregular Warfare (Document Warlimont No. 10 in Case V before the American Military Tribunal in Nuremberg). This work states, among other things: “[...] 7. [...] best method of dealing with informers is their ruthless extermination as soon as discovered. Pin a note to the body saying why they were killed [...] 8. for the time being every soldier must be a potential gangster [...] use the gangster methods [...] 9. close combat [...] you have to kill [...] a strangle hold from behind [...]”

<sup>79</sup> Eg. cf. Vanselow, *op. cit.* (note 27), p. 241; J. C. Bluntschli, *Das moderne Völkerrecht*, 3<sup>rd</sup> ed., Beck, Nördlingen 1878, p. 319; F. von Liszt, M. Fleischmann, *op. cit.* (note 31), p. 493; J. Kohler, *Grundlagen des Völkerrechts*, Enke, Stuttgart 1918, p. 218; A. Waltzog, *Recht der Landkriegsführung*, Vahlen, Berlin 1942, p. 83; Hoppe, *op. cit.* (note 14), p. 134; Schütze, *op. cit.* (note 10), pp. 56, 74, 79, with co-authors; also, Lummert, *op. cit.* (note 39), p. 63, and H.-H. Jeschek, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht*, Bonn 1959, p. 335. On a tangent, Schneeberger, “*Reziprozität als Maxime des Völkerrechts*”, *Schweizerische Juristenzeitung*, 1948, pp. 201-208, here p. 207; instead of reprisals he acknowledges only “*negative reciprocity*”.

<sup>80</sup> SouthEast Trial, *op. cit.* (note 10), Protokolle, p. 10325ff.

<sup>81</sup> Cf. Glueck; Flore; Pfenniger; Rivier; Hammer and Salvin; Kuhn; E. C. Stowell, *International Law*, Holt, New York 1931; Jessup, Pilloud, all of them cited in Hoppe, *op. cit.* (note 14), pp. 69 and 93; verdict of the permanent court-martial of Brussels, 2<sup>nd</sup> French Chamber of March 9, 1951, (cf. note 59; Falkenhausen), pp. 28 f; verdict Lippert, *op. cit.* (note 14), pp. 36/37, and the American verdict in the SouthEast Trial, *op. cit.* (note 10), pp. 10325ff., where it is also pointed out that many nations, including the United States, Great Britain, France and the Soviet Union, have acknowledged the execution of hostages as being lawful; cf. also Sterling E. Edmunds, *The lawless law of nations*, J. Byrne, Washington, D.C., 1925; German trans.: *Das Völkerrecht, ein Pseudorecht*, de Gruyter, Berlin 1933, p. 331, printed as Falkenhausen-Dokument No. 1. Cf. also Fauchille, *op. cit.* (note 30), n. 1021; he adds his regrets about the cruelty involved.

<sup>82</sup> Cf. Roosevelt, Bernadotte, Westlake, Wheaton, Melen, all of them cited in Hoppe, *op. cit.* (note 14), pp. 95f., also

these minority voices have lost their weight by the fact that soldiers from their own nations have themselves applied reprisals as common law. Their rejective view can thus be accorded value only in the context of efforts to abolish this common law.<sup>83</sup>

#### d) Prerequisites for Reprisals

The acknowledgement of reprisal killing as common law has provided a basis for further analysis. From what has been said so far, we can also draw conclusions as to individual prerequisites as well as regarding the degree of the reprisals (to be discussed in Section e).

Where prerequisites are concerned, Exner's view<sup>84</sup> that there is nothing about this issue that is not disputed would seem to be accurate. However, there is much that can be eliminated from this dispute if we remember the difference between collective punishment and reprisals (cf. previous, p. 533). A reprisal does not in *any way* require *blame* or *guilt* on the part of the person affected. This is why, for example, the prosecutor in the Kesselring Trial falsely accused the defendant of having made use of innocent persons.<sup>85</sup> This is also why reprisals may be imposed on persons or groups of persons that were demonstrably innocent of the violation of international law that is to be avenged.<sup>86</sup>

From practical examples, from martial laws and from jurisprudence we can derive a number of other prerequisites.

1. Punishments may be imposed on the basis of actions of individual persons. Where reprisals are concerned, it is disputed whether the actions of any single individual can give grounds for a reprisal. For example, Strupp<sup>87</sup> requires that the action must emanate from the enemy state. According to Article 358c of the American *Rules of Land Warfare* of 1940, however, illegal acts justifying a reprisal can be committed by a government, its military commanders, or a community or group of its individuals. According to Article 453 of the British *Manual of Military Law*, they can be committed by a government, by its military commanders, by several persons, or by individuals. Consequently, the actions of any single individual can give rise to a reprisal.<sup>88</sup>
2. The action that gives rise to a reprisal must *violate international law*. Where partisan activities are concerned, the question is first of all whether the partisans, in accordance with Article 1 of the Hague Land Warfare Convention, wore an insignia clearly visible from a distance, and whether they bore their arms openly. Consequently, the partisan activity in the Balkans has been described as a violation of international law.<sup>89</sup> Similarly, the July 20, 1948, verdict of the Tribu-

Nuvolone, *La punizione dei crimini di guerra*, 1945, p. 139. – Oppenheim-Lauterpacht *op. cit.* (note 28), 7<sup>th</sup> ed., v. II, p. 592, declares the killing of hostages to be a “war crime”; he completely overlooks the fact that it was used by all warring parties; cf. also his error already discussed in the previous, note 41.

<sup>83</sup> Let us hope that the abolition of reprisals, as decided at the Geneva Convention of August 12, 1949, will be carried through and that the reprisals of recent years (cf. prev. pp. 20f.) will remain exceptions and will not re-establish the old common law.

<sup>84</sup> Exner, *IMT*, IX, p. 364.

<sup>85</sup> Cf. Latenser, *op. cit.* (note 36), p. 72.

<sup>86</sup> Eg. Schütze, *op. cit.* (note 10), p. 73, and Rolin, Oppenheim-Lauterpacht and Hyde, cited there. Cf. also Fauchille, *op. cit.* (note 30), n. 1019, as well as Westlake, quoted in Latenser, *op. cit.* (note 36), p. 73.

<sup>87</sup> Strupp, *op. cit.* (note 31), p. 350.

<sup>88</sup> On the other hand, the Oct. 25, 1952, verdict of the Italian *Tribunale Supremo Militare* in the Kappler case states (regarding B, 3): “*L'inosservanza che legittima la rappresaglia del nemico deve essere effetto di azione od omissione imputabile allo Stato, rispettivamente in contrasto con divieti o comandi del diritto internazionale.*” It disputes that these prerequisites were met in the case of the assassination in the Via Rasella on March 23, 1944, which was committed by partisans. With that, the Court is in opposition to the rules mentioned in the text, which must be regarded as expression of the international legal regulations that are in force.

<sup>89</sup> Cf. Schütze, *op. cit.* (note 10), p. 48, and the American verdict in the SouthEast Trial, *op. cit.* (note 10), p. 10314.

nale Territoriale di Roma had declared that the bombing attack perpetrated against the German police company in the Via Rasella in Rome on March 23, 1944, had been in violation of international law (verdict p. 42).

3. Further, the application of reprisals requires that an appropriate investigation has been conducted first. Article 358b of the American *Rules of Land Warfare* speaks of a “careful inquiry”.<sup>90</sup> However, the circumstances surrounding the incident must also be considered. In reprisals, a quick reply to the violation of international law is important. If, for example, all likely participants in a crime have been arrested and their guilt has been established, it is not necessary to wait and see if more evidence might turn up in the future.
4. Another prerequisite that has been mentioned is that a *public warning* shall precede the implementation of any reprisal.<sup>91</sup> This would mean that relevant proclamations warning of reprisals are issued, either during march-in, or after the first attack to stave off any repetition thereof. Such warnings would certainly be nice; but neither the American *Rules* nor the British *Manual* require them, and so we cannot consider them an absolute prerequisite.
5. Besides the prerequisites already discussed, there is also the decisively important factor of *military necessity*. In this context, Article 358b of the American *Rules* states that the reprisals must never be a means of mere vengeance, but an inevitable last resort in order to force an enemy to give up an unlawful practice. Thus, Fauchille<sup>92</sup> states that reprisals must be a matter of necessity. Like Vanselow, Sibert, Bluntschli and the verdict in the Falkenhausen Trial, Hyde states that military necessity is the only limit on reprisals.<sup>93</sup> Oppenheim adds:<sup>94</sup>

“Victory is necessary in order to vanquish the enemy, and this necessity justifies all the undescrivable horrors of war, the immense sacrifices of human life and health and the inevitable destruction of property and the devastation of land. Aside from the limits imposed on the warring parties by international law, all kinds and degrees of force can and at times must be applied in war in order to achieve that goal, in spite of the cruelty and the extremes of misery that war brings with it. War is a struggle for existence waged between nations, and no degree of individual suffering and hardship can be specially taken into account; the national existence and independence of the warring nations is a higher consideration than any individual welfare.”

We must particularly keep in mind that the Hague Land Warfare Convention, according to Section 6 of its Introduction, serves only as a *general guideline* for the warring parties in their relations with each other and the population, and applies only insofar as *military interests permit*. Far too little attention was paid to this restriction in the post-war trials. Many an excessively harsh verdict has been due to this omission. The Introduction makes it clear that military necessity plays an important role in the application of the Hague Land Warfare Convention and that the latter does not define formal conditions. Even at that early date the authors left room for natural

<sup>90</sup> Similarly, Art. 456 of the British *Manual*. Latemser, *op. cit.* (note 36), p. 76, speaks of an appropriate investigation. – The American verdict in the Wilhelmstraßen Trial, *op. cit.* (note 10), also demands (Protocols, p. 28078) that attempts should be made to isolate the guilty person/s and to try them before a court of law.

<sup>91</sup> Eg. Waltzog, *op. cit.* (note 79), p. 83; Latemser, *op. cit.* (note 36), p. 199; J. Hatschek, *Völkerrecht*, Deichert, Leipzig and Erlangen 1923, p. 405 regarding b; Fauchille, *op. cit.* (note 30), n. 1023, and the American verdict in the Southeast Trial, *op. cit.* (note 10), p. 10323. – Jackson, *IMT*, IX, p. 362, stated that a protest must precede reprisals.

<sup>92</sup> Fauchille, *op. cit.* (note 30), n. 1023. For further references to the prerequisite of military necessity, cf. Hoppe, *op. cit.* (note 14), pp. 71–74, e.g., Wright, Spaight and §22f of the American *Rules*. The American verdict in the trial of the Wehrmacht Supreme Command rejects this characteristic, *op. cit.* (note 23) (Protocols p. 9932).

<sup>93</sup> Hyde, *op. cit.* (note 11), v. III, p. 1843. Similarly, Vanselow, *op. cit.* (note 27), p. 241; Sibert, *op. cit.* (note 11), p. 564; verdict Falkenhausen, *op. cit.* (note 81), pp. 28f; Bluntschli, *op. cit.* (note 79), p. 319; Manassero, *I codici penali militari*, v. 1 + 2, 2<sup>nd</sup> ed., Milano 1951, II, p. 555.

<sup>94</sup> L.F.L. Oppenheim, *International Law*, 4<sup>th</sup> ed., Longman, London 1926, v. II, p. 123 [retranslated from German], quoted by: Latemser, *op. cit.* (note 36), p. 191.

developments; and the developments after 1907 must be considered (cf. previous, p. 532). But this can only be done if the factor of military necessity is given the attention it deserves. In the American verdict against the Japanese General Yamashita, military necessity was treated as decisive factor.<sup>95</sup>

6. The American verdict in Case VII (SouthEast Trial) demanded another prerequisite, namely a *link* between the place of the crime and that of the reprisal; the victims of the reprisal, it said, should come from the same area where the unlawful attack took place.<sup>96</sup> We have not found this prerequisite expressed anywhere else in the subject literature. Further, it is not justified. The required characteristic of military necessity for the reprisal action means that there must be an inquiry into whether the action and its scope was militarily necessary. In this way, even if there is no connection between the location of the crime and that of the reprisal, a retrospective observer may perceive the military necessity in, for example, the circumstance that a reprisal managed to restore peace to a previously unruly region.
7. In the aforementioned SouthEast Trial verdict, the American court identified a number of further prerequisites for a reprisal.<sup>97</sup> It stated that all sorts of rules ought to have been proclaimed before any hostages were executed. These rules include:
  1. Registration of the inhabitants,
  2. mandatory carrying of passports and ID cards,
  3. the establishment of prohibited zones,
  4. restriction of the people's freedom of movement,
  5. introduction of curfew hours,
  6. prohibition of assembly,
  7. detention of suspect persons,
  8. traffic restrictions,
  9. restrictions on food supply,
  10. evacuation of areas of unrest,
  11. imposition of mandatory financial contributions,
  12. forced labor to make up for the damage done by sabotage,
  13. the destruction of property at the location of the crime,
  14. as well as other measures that are not forbidden by international law and which are likely to produce the desired result.

This verdict is an isolated case. Nowhere else have we found demands such as these – concocted in a bureaucratic ivory tower, and quite impracticable. One does not need to have been in the Balkans to realize that such measures were not suited to preventing acts of sabotage. Only a small part of the measures listed could be applied in Central Europe or in the United States within the framework of military necessity.

## e) Enforcement of Reprisals

As we can see, reprisals could be ordered if there was a military necessity for them. Now let us examine how they were to be carried out.

1. The matter of who is *responsible* for ordering the reprisals is not entirely clear. An individual soldier may not take reprisal measures on his own initiative. Article 358b of the American *Rules*,

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<sup>95</sup> Cf. A. F. Reel, *The case of General Yamashita*, Univ. of Chicago Press, Chicago 1949, p. 296, n. 13, in a similar vein Manassero, *op. cit.* (note 93), p. 555.

<sup>96</sup> SouthEast Trial, *op. cit.* (note 10), Protocols, p. 10354. Elsewhere this verdict speaks of a connection of geographic, racial or other nature.

<sup>97</sup> *Ibid.*, p. 10322.

for example, states that the highest available office should be consulted, unless military necessity demands immediate action. According to Article 455 of the British *Manual*, “even though there are no international rules on the subject, reprisals should never be ordered by an individual soldier, but only ever by a commander.” In the case of France, Fauchille<sup>98</sup> states that the orders for a reprisal should come from the commanding General, if possible. According to Article 10, Section 2 of the Italian Martial Law of July 8, 1938, reprisals... if immediate and exemplary action is necessary,... may be ordered by any other “*comandante*” as well. Such a “*comandante*” can be a soldier, for example,<sup>99</sup> who has an operating unit under his command;... it must be a unit which allows its commander the opportunity for initiative, even if limited.

In Germany, reprisals were to be ordered by a higher commander, generally a divisional commander.<sup>100</sup> As Latenser comments aptly, there was no applicable rule of martial law here, especially since lower-ranking commanders were also responsible in the English, American and Italian armed forces. Therefore, since reprisal law in particular is governed by the principle of reciprocity,<sup>101</sup> other commanders could also lawfully order reprisals during the Second World War, despite this purely German regulation. This is why Waltzog<sup>102</sup> says, correctly, that the regulation stating that only a divisional commander could give the order was binding only for as long as the opponent also observed such a restriction. But since Germany’s opponents in World War Two acted differently even in their formal regulations, German commanders of lower rank similar to English commanders or Italian *comandantes* were also entitled to order reprisals.

In conclusion we shall add that the American verdict in Case VII (SouthEast Trial) expresses the opinion that under international law a *judicial decision* is required prior to an execution.<sup>103</sup> This view is incorrect. Under continental law reprisals are never within the jurisdiction of a court. Courts are responsible only for punishment, not for the assessment of military necessities. The opinion expressed in the verdict proves that the court confused the concepts of reprisals and punishment.

2. Where the *extent of reprisals* is concerned, practice and legislation as well as the subject literature of international law are very unclear. The numerous examples of practical cases, of which we have mentioned a few (cf. Section b), range from a ratio of 1:1 to one of 1:200 (Americans in April 1945, in the Harz). Similarly, only a part of the authors contributing to the subject literature support the theoretical demand for a balance between the number of victims of an assassination and that of the victims of the resulting reprisal.<sup>104</sup> Schütze advocates proportionality, but declares the principle to be a flexible one and suggests that the extent of the reprisal is determined primarily by its purpose, which is to be an effective means of coercion.<sup>105</sup> Lo Cascio considers the limit of a reprisal to be an appropriately high quotient of damage sustained vs. inflicted.<sup>106</sup> On the

<sup>98</sup> Fauchille, *op. cit.* (note 30), n. 1024.

<sup>99</sup> Cf. Sucato, *op. cit.* (note 28), v. II, pp. 507f.

<sup>100</sup> Cf. Waltzog, *op. cit.* (note 79), p. 84; Latenser, *op. cit.* (note 36), p. 200.

<sup>101</sup> Eg. cf. Schneeberger, *op. cit.* (note 79), pp. 201ff.

<sup>102</sup> Waltzog, *op. cit.* (note 79), p. 84.

<sup>103</sup> SouthEast Trial, *op. cit.* (note 10), Protocols p. 10327; opposing this (and rightly so) cf. Schütze, *op. cit.* (note 10), pp. 92f.; Hoppe, *op. cit.* (note 14), p. 75; Lummert, *op. cit.* (note 39), p. 61; Jeschek, *op. cit.* (note 79), p. 335.

<sup>104</sup> Eg. Guggenheim, *op. cit.* (note 11), v. II, p. 585; F. von Liszt, M. Fleischmann, *op. cit.* (note 31), p. 4397; Oppenheim-Lauterpacht, *op. cit.* (note 28), 6 th. ed., p. 115; the American verdicts in the SouthEast Trial, *op. cit.* (note 10), p. 10320, and in case IX (*op. cit.* (note 33), p. 6982); Art. 459 of the British *Manual*; Art. 358e of the American *Rules*; Law Reports, *op. cit.* (note 39), case 43 (Mackensen-Maeltzer), p. 5; Nuvolone, *op. cit.* (note 82), p. 137.

<sup>105</sup> Schütze, *op. cit.* (note 10), p. 65; similarly, Jeschek, *op. cit.* (note 79), p. 223.

<sup>106</sup> Lo Cascio, in *Archiv des Völkerrechts* (Tübingen), v. III., 1952, pp. 357-366, here p. 366.

other hand, Strupp, Hatschek, Fauchille, Hyde, Lummert and others reject the requirement of proportionality outright.<sup>107</sup>

Repeatedly we also see the matter of military necessity being considered in setting the extent of a reprisal. For example, von Keller<sup>108</sup> states aptly that the number of prisoners must be high enough that pressure is actually exerted on those responsible. Fauchille writes:<sup>109</sup>

*“Il faut donc qu’elles (les représailles) soient de nature à faire impression sur ceux-là-mêmes dont dépend la cessation de cette conduite.”* (Therefore, the reprisals must be of a nature to make an impression on those on whom the cessation of this conduct depends.)

Thus, the extent of a reprisal ultimately becomes a matter of the military commander’s situational judgment.<sup>110</sup>

*In view of all this, we can sum up by saying that there was no set common law with respect to proportionality, much less with regard to a ratio of 1:1.* And thus we must agree with Laternser,<sup>111</sup> that in the Italian case of the Fosse Ardeatine on March 24, 1944, given the particular circumstances in Rome (only 20 km behind the Nettuno front), the execution of 330 Italians ordered in reprisal for the death of 33 German policemen<sup>112</sup> did not exceed the degree warranted by military necessity.

Another factor in determining the extent of a reprisal is the further damage it can prevent. For example, a reprisal may prevent a riot that would involve further loss of life on both sides. The balance, therefore, must be comprehensively qualitative, not schematic.<sup>113</sup>

3. Not only the number of victims, but also the *circumstances of the reprisal’s enforcement* are determined by military necessity. Just as the ordering of a reprisal killing must be the last resort, the manner of its implementation must also be limited. Since a reprisal, in its individual case, suspends a norm of international law, its implementation must be limited and must observe the principles of humaneness as far as possible.<sup>114</sup>

An important aspect of this is that a reprisal must be carried out *quickly* in order to be effective.<sup>115</sup> For this reason it is not generally possible to prepare for it in every detail. Rather, it is better to accept some disadvantages if the speed of implementation would suffer otherwise, and perhaps even necessitate harsher measures.

<sup>107</sup> Strupp, *op. cit.* (note 31), p. 351; Fauchille, *op. cit.* (note 30), n. 1024; Hatschek, *op. cit.* (note 91), p. 405; Hyde, *op. cit.* (note 11), v. III, p. 1843, n. 9; v. Waldkirch, *op. cit.* (note 29), p. 328; Vanselow, *op. cit.* (note 27), p. 85; v. Keller, *op. cit.* (note 32), p. 59; Hoppe, *op. cit.* (note 14), p. 89; Lummert, *op. cit.* (note 39), p. 60; Schneeberger, *op. cit.* (note 79), p. 207.

<sup>108</sup> v. Keller, *op. cit.* (note 32), p. 59.

<sup>109</sup> Fauchille, *op. cit.* (note 30), n. 1024.

<sup>110</sup> Cf. also Lummert, *op. cit.* (note 39), p. 61.

<sup>111</sup> Laternser, *op. cit.* (note 36), pp. 76f.

<sup>112</sup> Since more policemen eventually died of their injuries, the number of casualties is even greater. Additionally there were about 60 officers severely injured, so that the bottom line is a ratio of about 1 : 3 to 1 : 4.

<sup>113</sup> Cf. R. Frank, *Strafgesetzbuch*, 18<sup>th</sup> ed., Mohr, Tübingen 1931, p. 153; Siegert, *Notstand und Putativnotstand*, Mohr, Tübingen 1931, p. 24; H. Henkel, *Der Notstand nach gegenwärtigem und künftigem Recht*, Beck, Munich 1932, pp. 43 ff.; Maurach, *Kritik der Notstandslehre*, Heymann, Berlin 1935, pp. 72 ff., esp. pp. 79ff. (reprint: Keip, Goldbach); E. Mezger, *Strafrecht, I. Allgemeiner Teil. Ein Studienbuch*, 4<sup>th</sup> ed., Beck, Munich 1952, §48; A. Schönke, *Strafgesetzbuch, Kommentar*, 6<sup>th</sup> ed., Beck, Munich 1952, p. 199; G. Bettiol, *Diritto penale, parte generale*, 2<sup>nd</sup> ed., Driulla, Palermo 1950, p. 251ss. The latter rightly calls for a “*bilanciamento qualitativo*” (p. 254).

<sup>114</sup> Accordingly, Section 9 of the Introduction to the Hague Land Warfare Convention after the “*lois de l’humanité et les exigences de la conscience publique*”; cf. Hoppe, *op. cit.* (note 14), p. 90.

<sup>115</sup> Jackson (*IMT*, IX, p. 362) says that a reprisal must be carried out within an appropriate period of time; also Hoppe, *op. cit.* (note 14), p. 117.

4. The *termination of reprisals* is also limited by military necessity. As soon as such necessity ends – specifically, as soon as the opponent gives in to the pressure exerted on him and ceases to act in violation of international law – the measures ordered as coercion must be ended.<sup>116</sup> [...]<sup>7</sup>

### III. Higher Orders

If the foregoing considerations regarding reprisal law and requisitions had been consistently applied in the trials of the post-war years, then under the principle of “*equality under the law*” a large part of our prisoners of war would already have to have been acquitted. In the remaining cases, where such measures must be assumed to have been a violation of international law, one must consider the additional factor of higher orders. We shall investigate this in the following.

#### a) General Principles

Superiors’ orders have always had special significance regarding the criminal liability of a subordinate obeying them. It would be impossible to command soldiers or police forces if the subordinates were authorized or perhaps even obliged to examine the lawfulness of an order before carrying it out. Alternatively, every military or police commando would have to be assigned its own legal adviser. For this reason, military law has everywhere and at all times depended on discipline, *i.e.*, on the *general principle that the subordinate must obey his superior’s orders if such orders are given within the limits of his jurisdiction*. Consequently, if the carrying-out of the order constitutes a violation of some law, criminal liability is on principle restricted to the superior who had given the order, and conversely the subordinate who had obeyed the order on principle remains exempt from liability. This is explicitly set out by §47 of the German Military Criminal Code, by Article 18 of the Swiss Military Criminal Code, by Article 40 Sections 2 and 3 of the Italian Codice Penale Militare di Pace, and by other regulations.<sup>117</sup> For example, §443 of the British *Manual of Military Law* of 1914 decreed that members of the armed forces who violated accepted rules of warfare on the orders of their commanding officers are not war criminals and therefore cannot be punished by the enemy.<sup>118</sup> Similarly, Article 347 of the American *Rules of Land Warfare* ruled out the punishment of subordinates obeying orders.

As a practical example we would mention the execution of the order issued to the British Admiral Sommerdille, to sink the French fleet at Oran in the summer of 1940; 1,500 French marines lost their lives in the process.<sup>119</sup> In France, Article 327 of the Code penal rules out liability for manslaughter or bodily harm if the actions in question were ordered by the law or by the lawful government.<sup>120</sup> – The other nations had similar regulations.

Thus, we find that even during the first years of World War Two the regulations in force in the various nations were quite similar to each other.

<sup>116</sup> Cf. Guggenheim, *op. cit.* (note 11), v. II, p. 586, and the British *Manual*, Art. 460.

<sup>117</sup> The view expressed here is also shared by Oppenheim, Manner and Kelsen, who are quoted in Latenser, *op. cit.* (note 36), pp. 116ff.

<sup>118</sup> Quoted according to Aschenauer, “*Richterliche Nachprüfungspflicht und Handeln auf Befehl*”, in *Die andere Seite*, Juni 1950, pp. 2–41, here p. 27. Another reference in E. Schwinge, “*Angehörige der ehemaligen deutschen Wehrmacht und der SS vor französischen Militärgerichten*”, *Monatsschrift für deutsches Recht*, 1949, pp. 650–654, here p. 650.

<sup>119</sup> Cf. Paget, *op. cit.* (note 58), p. 140, and Aschenauer, *op. cit.* (note 118), p. 30.

<sup>120</sup> Cf. Aschenauer, *op. cit.* (note 118), pp. 25f., with further references regarding disputed aspects of Art. 526 of the Justice Militaire of 1928, which regulates the punishment of insubordination; cf. also Henri D. de Vabres, *Précis de droit criminel*, 2<sup>nd</sup> ed., Paris 1951p. 72ff.

## b) Post-1944 Break With Traditional Principles

But after 1944 this tradition was overthrown. The first step was taken by the American scholar Glueck,<sup>121</sup> who suggested that since the application of the non-liability clause contained in the British and American regulations would in many cases prevent the conviction of war criminals, it was necessary to pass a new and realistic regulation.

Similarly, the English author Lauterpacht changed his views.<sup>122</sup> Consequently, the majority of the Allied nations adjusted their principles regarding actions based on orders.<sup>123</sup> This is how the American *Rules* (Article 347) and the British *Manual of Military Law* (§443) came to be revised, giving rise to special laws – such as Article 3 of the French Ordonnance of August 28, 1944,<sup>124</sup> the Danish bill of July 12, 1946, §5 of the Norwegian law governing the punishment of war criminals, §13 of the June 19, 1945, Decree of the Czech President, and the Belgian law of June 26, 1947.<sup>125</sup> The new and retroactive regulations of all these laws corresponded with the London Agreement of August 8, 1945, in introducing the criminal liability of the subordinate following orders, and reduced the circumstance of higher orders to no more than a mitigating factor whose precise extent would depend on the court.

These are the Special Laws under which the trials of the German, Italian and Japanese so-called war criminals were conducted. Because these laws were one-sided, they could not form a new international law. Italy in particular did not join in this creation of special laws, and retained its prior regulations.

## c) Post-1949 Restoration of the Original Principles

In those countries that had rescinded the tradition by which a commanding officer's orders exempted a subordinate from punishment, a return to the earlier principles was soon demanded. For example, in its verdict of June 29, 1951, against Lippert and others,<sup>126</sup> the Belgian court-martial in Lüttich rejected the criminal liability of the accused because these had acted under orders. The Brussels court-martial came to a similar decision on March 9, 1951, in its verdict against General von Falkenhausen.<sup>127</sup>

In the oath of allegiance demanded of its soldiers, the Russian armed forces exact a vow of unconditional obedience.<sup>128</sup> Further, the English Generals Montgomery and Robertson, the American General Clay and Admiral Blandy have stated clearly that a soldier must obey orders unquestioningly.<sup>129</sup> Thus, a French Captain who had acted on higher orders and had 10 foreign internees executed (in violation of international law) was acquitted; on the other hand, some Dutch soldiers were

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<sup>121</sup> In: War Criminals, their Prosecution and Punishment, quoted by Aschenauer, *op. cit.* (note 118), p. 27.

<sup>122</sup> Cf. Oppenheim-Lauterpacht, *op. cit.* (note 28), 6<sup>th</sup> ed., v. II, pp. 452f.

<sup>123</sup> Cf. K. Heinze, K. Schilling, *op. cit.* (note 18), p. 131, N. 161; Smith, *op. cit.* (note 14), p. 47; Jeschek, *op. cit.* (note 79), pp. 260f.

<sup>124</sup> Cf. the expert report by Vabres, Henri D. de, *Rechtsgutachten*, June 25, 1949.

<sup>125</sup> All quoted in Aschenauer, *op. cit.* (note 118), p. 28.

<sup>126</sup> Lippert, *op. cit.* (note 14), Ref. No. 2251, p. 58.

<sup>127</sup> Verdict Falkenhausen, *op. cit.* (note 81), p. 29. Cf. also Smith, *op. cit.* (note 14), p. 47, and in *Free Europe* (vol. 13, No 162, 1946, July); Paget, *op. cit.* (note 58), p. 145; Hankey, in F. H. Maugham, *UNO and War Crimes*, Murray, London 1951, p. 111; Hyde, *op. cit.* (note 11), v. III, p. 1811; Kelsen and Morgan, both quoted in Lummert, *op. cit.* (note 39), pp. 33f.

<sup>128</sup> Cf. Aschenauer, *op. cit.* (note 118), p. 28; Jeschek, *op. cit.* (note 79), p. 270; R. Maurach, *Die Kriegsverbrecherprozesse gegen Deutsche in der Sowjetunion*, Arbeitsgemeinschaft vom Roten Kreuz in Deutschland (British Zone), Hamburg 1950, p. 38.

<sup>129</sup> Quoted from Aschenauer, *op. cit.* (note 118), p. 30f.

convicted because they had refused to carry out an unlawful order to burn down an Indonesian village.<sup>130</sup>

According to a newspaper report,<sup>131</sup> J. E. Edmonds, one of the two authors of the British *Manual of Military Law*, stated that the 1944 revision of the *Manual* had been made without consulting or even notifying the author; the other author, Oppenheim, had already passed away at the time. Therefore, conversely, the information provided by Lord Hankey of the British House of Lords is not really surprising: namely, now that England has no so-called war criminals left to convict, the revision of 1944 has quietly disappeared from reprints of the *Manual of Military Law*, leaving only the old text of 1929, which does provide for the exemption of liability in the presence of higher orders.<sup>132</sup>

In light of these circumstances we cannot agree with the view expressed in the American verdict in the Nuremberg SouthEast Trial,<sup>133</sup> that the civilized nations had increasingly espoused the principle that higher orders could not be claimed as defense against criminal acts. This court's opinion has already failed due to the military necessities of post-war times. Its implementation would have undermined all military authority. And this is why the latest (7th, 1952) edition of the well-known *Manual* by Oppenheim-Lauterpacht contains the following section:<sup>134</sup>

*"Given a reference to higher orders for purposes of justifying a war crime, a court must unquestionably consider that obedience to any not blatantly illegal order is the duty of every member of the armed forces, and that under the conditions of war-time discipline one cannot expect a subordinate to carefully weigh the legal basis of the orders he receives. It must also be considered that the norms regarding the conduct of war are often controversial, and that an act intended to serve as reprisal, though it might at other times constitute a war crime, can be carried out in obedience to orders."*

*These conditions in and of themselves already suffice to rid the disputed action [Kappler's and Priebke's involvement in reprisal shootings, E.G.] from the stigma of a war crime.*

As a result, the Nuremberg court's attempts to revise the general principles failed. Therefore, under international law, orders issued by a responsible superior on principle preclude criminal liability on the part of the subordinate obeying the orders; the superior giving the orders is criminally liable for their implementation.

This restoration of the previous legal position must also be considered with respect to those war crimes for which sentence has already been passed – and reflected in a pardon, if necessary.

#### d) Liability of the Recipient of an Order in Exceptional Cases

There are individual exceptions to the general principle discussed here. In the passage quoted above, Lauterpacht acknowledges the exemption from punishment if the order given is *"not blatantly illegal"*. In Article 40 Section 4 of the Italian Codice Penale militare di Pace an exception is introduced to the principle of the superior's sole liability, for the event that carrying out the order given does in fact obviously constitute a crime (*costituisc manifestamente reato*).<sup>135</sup> Article 18 Section 2 of the Swiss Military Criminal Code states that the subordinate is also criminally liable if he is aware that, by following the order, he contributes to a crime or misdemeanor. It is left to the judge's personal discretion to moderate or dispense with punishment. Therefore, the subordinate has

<sup>130</sup> Cf. *ibid.*, p. 33.

<sup>131</sup> *Frankfurter Allgemeine Zeitung* of August 7, 1952.

<sup>132</sup> Cf. Th. W. van den Bosch, *Tijdschrift voor Strafrecht*, Deel LXI, p. 19.

<sup>133</sup> SouthEast Trial, *op. cit.* (note 10), Protocol, p. 10301.

<sup>134</sup> Oppenheim-Lauterpacht, *op. cit.* (note 28), v. II, 7<sup>th</sup> ed., p. 569.

<sup>135</sup> Also, verdict of the American military tribunal in Nuremberg, Case IV, Protocol, p. 8087, cited in K. Heinze, K. Schilling, *op. cit.* (note 18), p. 126, No. 618.

no clear-cut duty to evaluate his orders.<sup>136</sup> According to §47 Section 1 of the German Military Criminal Code, the subordinate obeying the orders was punished as participant in a criminal act if:

1. he went beyond the orders given him;
2. he knew that his superior's orders pertained to an act whose aim was the commission of a general or military crime or misdemeanor.<sup>137</sup>

If the subordinate's share of the blame was minor, his punishment might be dispensed with.

## e) Significance of Führer Orders for a Subordinate's Exemption from Liability

During World War Two Germany as well as other countries saw trends towards the limitation of exceptions to the general principles, and towards the introduction of strict discipline with a concomitant, absolute exemption from liability and punishment for the subordinate obeying orders. Today it is apparent that these views were wrong. But we must take into consideration the circumstances prevailing in those days in the "Führer state". Since 1938 Hitler had been the Supreme Commander of the German Wehrmacht, and the highest Chief of the SS and the SD ever since their establishment. As a result, and in accordance with the organization of an authoritarian state, he was able to give direct orders to any office or position he chose. In this context, the American verdict at Nuremberg in Case XII (Wehrmacht Supreme Command Trial) stated:<sup>138</sup>

*"Hitler's personal decrees had the force of law."*

In Huber's book *Das Verfassungsrecht des Großdeutschen Reiches* this was expressed as follows:<sup>139</sup>

*"The Führer consolidates within his person all sovereign power of the Reich: all public power in the state as well as in the Movement is derived from his leadership power [...] He is the carrier of all political power [...] He is the highest carrier of all social functions [...]"*<sup>140</sup>

This means that he could also give binding orders in individual cases, and these orders had the force of law. This was expressly confirmed by the Reichstag in its well-known decision of April 26, 1942.<sup>141</sup> In other words, in deviation from the principle of the separation of powers, Hitler as head of state could give an individual order which required the same obedience as does a law in a democratic state.

*From today's perspective we must deny an authoritarian head of state's order its force of law if this order violates natural right.* In other words, when retrospectively assessing the legitimacy of an act from those days, we cannot content ourselves with the simple observation that it was done on the basis of an order from the highest chief of state. If such an order violated natural right, we cannot consider it legitimate, and carrying out such an order may be regarded as *unlawful*. But before we treat the carrying-out of the order as a *criminal offense*, we must in any case consider the application of the aforementioned (in d) §47, Sections 1 and 2 of the Military Criminal Code. Further, we must then also consider whether there may not also be other grounds for ruling out liability, either as typical or as individual case. Let us take a brief look at these issues in the following.

<sup>136</sup> Cf. F. H. Comtesse, *Das Schweizerische Militärstrafgesetzbuch*, Schulthess, Zürich 1946, p. 59.

<sup>137</sup> Similar comments were made in the American verdict at Nuremberg in Case IV, Protocol, p. 8087. For the inconsistent punishment of subordinates obeying orders, cf. Jeschek, *Zeitschr. f. d. ges. Strafrechtsw.* 65, 123.

<sup>138</sup> Quoted in Aschenauer, *op. cit.* (note 118), p. 25; cf. also Lummert, *op. cit.* (note 39), pp. 32 and 56.

<sup>139</sup> 2<sup>nd</sup> ed., Hanseatische Verlagsanstalt, Hamburg 1939, pp. 230 and 278, quoted in Aschenauer, *op. cit.* (note 118), p. 10.

<sup>140</sup> Similarly, Jahrreiss, *IMT*, XVII, p. 536.

<sup>141</sup> *Reichsgesetzblatt*, 1912, Teil I, p. 247

## IV. Errors and State of Emergency

### a) Errors

Our analysis of the reprisal issue has shown that jurists from the various countries are by no means in agreement on what is permitted and what is not. Therefore it is not surprising that military practice also varies in many respects. In view of the disagreement even between the subject experts, we cannot by any means expect soldiers to be clear on the issues of right and wrong as these pertain to reprisals and requisitions. Rather, in many cases where a court deems an act to be unlawful it is probably correct to assume that the accused believed that his actions were legitimate. In other words, many persons charged with war crimes believed their actions to have been permissible, *i.e.*, they were not aware that they were unlawful.

Even in Germany there is much controversy about how someone who is unaware of the *unlawfulness* of his actions should be treated under the law.<sup>142</sup> It is beyond the scope of the present study to discuss this controversy in detail; suffice it to say that British and American criminal law do not require an awareness of the illegality of one's actions.<sup>143</sup> In every case, however, it is important to determine whether the judicial system in question requires the affirmation of the guilt of an accused. Articles 5 and 47 of the Italian Criminal Code, for example, permit the consideration of a non-criminal error on the part of the accused. If an accused believes his actions to be permissible, for example on the basis of a misinterpretation of the Hague Land Warfare Convention, then he must not be punished for a deliberate offense. Under German law the element of intent would be inapplicable if, for example, someone charged with unlawful confiscations had erroneously believed that there was a pressing need for his actions, to serve the war effort.<sup>144</sup> These examples may indicate that the question of blame as pertaining to unlawful reprisals and requisitions must be of far greater significance than the post-war trials would in fact show.

### b) State of Emergency

The *state of emergency* is an aspect particularly important to the cases dating from the last war. We have already pointed out the tendency for commanding officers to demand unconditional obedience from their subordinates. This was accompanied by a considerable tightening of law and justice as it pertained to military disobedience and insubordination. Someone who sought to act on natural right and an accordingly lack of obligation to the orders of the state leadership (cf. p. 548), and thus disobeyed an order from a higher source, would have had to expect a severe backlash and harsh punishment. Especially in the last years of the war these dangers were by no means vague; they were very immediate indeed. Since not only the threats of punishment were draconic, but the sentences passed were also very severe, anyone who had dared insubordination would have put himself in immediate danger of his life. Thus, such cases always represented a state of emergency, as according to §54 of the German Criminal Code. A soldier could therefore not have been expected to act in keeping with natural right. Though he was obliged to stand up to dangers in battle, he could not have been expected to willingly run the risk of execution for insubordination.<sup>145</sup> Therefore his conduct would have been exempt from liability as per §54 of the German Criminal Code.<sup>146</sup>

<sup>142</sup> Eg. cf. *Entscheidungen des Bundesgerichtshofs in Strafsachen*, Band 2, pp. 194-212; Schönke, *op. cit.* (note 113), pp. 224ff.; Mezger, *op. cit.* (note 113), Postscript, pp. 1-7; Siegert, *op. cit.* (note 113), p. 73; and others.

<sup>143</sup> Cf. A. R. Tidow, *Der Schuldbegriff im englischen und nordamerikanischen Strafrecht*, Röhrscheid, Bonn 1952, pp. 111, 181.

<sup>144</sup> Cf. E. Schwinge, *Militärstrafgesetzbuch, Kommentar*, 5<sup>th</sup> ed., Junker & Dünhaupt, Berlin 1943, p. 302; W. K. M. M. von Gleispach, *Das Kriegsstrafrecht*, Teil II, Kohlhammer, Berlin/Stuttgart 1940, p. 13.

<sup>145</sup> Also, Lummert, *op. cit.* (note 39), pp. 55, 57f. – The International Military Tribunal in Nuremberg (*IMT*, XXII, p. 530)

## V. Summary

We have seen how a wide range of legal aspects bear upon an area of exceedingly practical significance and how international and national law, conventions and common law must all be considered in order to arrive at a just solution. In some respects, wartime saw a kind of intellectual confusion that did not allow for equal and balanced justice for all. The post-war years, and with them an increasing distance from the events of the war, provided the basis for a morally unexceptionable order. Reprisals were prohibited at the Convention of August 12, 1949, the theory and practice of requisitions have been reconciled, and the issue of higher orders has seen a return to principles that agree with criminal law *per se*. On the other hand, matters must also be put right for the past. First and foremost it is necessary to subject the cases of our prisoners of war still detained today by our erstwhile enemies to a review guided by the reformed legal perspectives. The way in which these cases are dealt with shows whether the path is now clear for equal justice for all, and thus for a new European peacetime order.

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## Concluding Remarks by GERMAR RUDOLF

German newspapers rarely carry articles about reprisals threatened or implemented by the western Allies at or after the end of the war. However, the *Stuttgarter Zeitung*, for example, reported that the French had threatened reprisal executions at a ratio of 1:25 even in the event that shots would be taken at their soldiers at all, regardless of the actual outcome.<sup>147</sup> On April 4, 1992, the *Paderborner Zeitung* reported an incident where the Americans had taken harsh revenge for the death of their General Maurice Rose, who had been shot in regular combat: 110 German men not involved in the event were killed.<sup>148</sup> Probably there are a great many more such examples, where harsh reprisals or unlawful acts of revenge were inflicted on the German population. We know very little today about conditions prevailing from 1945 to 1947, especially in West Germany, since these actions on the part of the victors were never prosecuted. The Germans were forbidden to prosecute because of a law that is still in effect today, and the victors, naturally enough, had no particular interest in such prosecution.<sup>149</sup> The fact that East and Central Germany saw some dreadful excesses is somewhat more fully documented, on the other hand, since this was in the interests of the anti-Communist western powers.

In light of the facts as established by Professor Siegert, reprisals and the execution of hostages will be considered to be tactically questionable and perhaps morally reprehensible, but strictly speaking these acts were not unlawful at the time they took place. This also should be ever kept in mind when the topic at issue is the reactions of German troops in Russia and Serbia, *i.e.*, in vast re-

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considered whether a choice in accordance with moral law was actually possible; similarly, the verdict of the American military tribunal of Nuremberg in Case VI, Protocol pp. 16172f., quoted in K. Heinze, K. Schilling, *op. cit.* (note 18), p. 113, No. 554.

<sup>146</sup> Cf. Siegert, *op. cit.* (note 113), pp. 44ff., and others. Regarding Italy we refer to Art. 54 of the Codice penale, and to Bettioli, *op. cit.* (note 113), p. 334. – The state of emergency was also examined by the American courts in cases V, VI, IX through XII; cf. K. Heinze, K. Schilling, *op. cit.* (note 18), pp. 111-117.

<sup>147</sup> hoh, “Die Franzosenzeit hat begonnen”, *Stuttgarter Zeitung*, 25.4.1995

<sup>148</sup> Cf. Heinrich Wendig, *Richtigstellungen zur Zeitgeschichte*, issue 8, Grabert, Tübingen 1995, p. 46. In fact, this has not been a reprisal, but merely a mass murder; cf. also *ibid.*, issue 2 (1991), pp. 47ff.; issue 3 (1992), pp. 39ff.; issue 10 (1997), pp. 44f.

<sup>149</sup> One exception is a recently publicized case of the unwarranted murder of 48 German soldiers who had already surrendered: Michael Sylvester Kozial, “US-Kripo ermittelt nach 51 Jahren”, *Heilbronner Stimme*, September 24, 1996; “Später Fahndung nach Mördern in US-Uniform”, *Stuttgarter Zeitung*, September 27, 1996, p. 7.

gions where a weak occupation power had to battle brutal partisans in order to facilitate the oft-disrupted flow of supplies to the eastern front. Partisan attacks began immediately following the start of the eastern war; certain partisan units deliberately let themselves be overrun, in order then to engage in sabotage behind the advancing German troops and to commit horrific atrocities against soldiers and civilians they caught unaware. Later on, partisan units as large as entire divisions were flown into the hinterland of the German troops, or smuggled in through the lines.<sup>150</sup>

Naturally, the data to be found in the subject literature about the numbers of partisans and the damage they caused vary widely, since there are few reliable documents about this kind of unlawful warfare and since the Soviet Union also always had a strong propagandistic interest in the historiography of partisan warfare. The most reliable data seems to be that provided by Bernd Bonwetsch,<sup>151</sup> who gives the numbers of partisans as follows: late 1941: 90,000; early 1942: 80,000; mid-1942: 150,000; spring 1943: 280,000; by 1944, skyrocketing to approximately half a million. These figures are based both on Soviet and on contemporaneous Reich-German sources. The damage done by the partisans, especially in the area of Byelorussia, is considerably more difficult to quantify. Wilenchik tells of impressive quantities of weapons and ammunition that were allegedly at the partisans' disposal, as well as of extensive crippling of the German supply lines through paralysis of railway lines, especially in 1944.<sup>152</sup> In general terms, this is confirmed by Werner.<sup>153</sup>

Regarding the numbers of German soldiers and civilians killed by partisans, Bonwetsch contrasts the claims from Soviet sources – up to 1.5 million – with those from the German side: 35,000 to 45,000,<sup>154</sup> which he considers to be more reliable, since allegedly the German sources would have had no reason to minimize the figures. However, he overlooks the fact that it is generally customary in war to downplay one's own losses. Seidler<sup>155</sup> recently published a balanced up-to-date study about the Wehrmacht's struggle in the partisan warfare, showing not only the disastrous and probably decisive effects of the partisan's attacks against German units and especially their supplies, but he proves also that most of the German reactions were totally covered by international law – although not always most far-sighted. Furthermore, he shows that those orders from higher up which broke international laws (e.g., the infamous “*Kommissar order*”, which might be considered morally appropriate, but politically stupid and judicially untenable) were in most cases sabotaged by the front units, and that these orders, after long-lasting and massive protest, were eventually revoked.

In a book critically discussed by the renowned German historians Andreas Hillgruber and Hans-Adolf Jacobsen, Boris Semionovich Telpuchowski writes:

*“Within three years of the war, the Byelorussian partisans eliminated approximately 500,000 German soldiers and officers, 47 Generals, blew up 17,000 enemy military transports and 32 armored trains, destroyed 300,000 railway tracks, 16,804 vehicles and a great number of other material supplies of all kinds.”*<sup>156</sup>

<sup>150</sup> Relevant orders were issued by Stalin and were broadcast via all Soviet Russian stations; cf. *Keesing's Archiv der Gegenwart*, 1941, July 3rd + 21st 1941; cf. *Sowjetski Partisani*, Moscow 1961, p. 326.

<sup>151</sup> Bernd Bonwetsch, “*Sowjetische Partisanen 1941-1944*”, in Gerhard Schulz (ed.), *Partisanen und Volkskrieg*, Vandenhoeck & Ruprecht, Göttingen 1985, pp. 99, 101.

<sup>152</sup> Witalij Wilenchik, “*Die Partisanenbewegung in Weißrußland*”, in Hans Joachim Torke (ed.), *Forschungen zur osteuropäischen Geschichte*, v. 34, Harrassowitz, Wiesbaden 1984, pp. 280f., 285, 288f. This chapter has a certain anti-Fascist undertone.

<sup>153</sup> S. Werner, *Die 2. babylonische Gefangenschaft*, originally self-published by author, Pfullingen 1990; 2<sup>nd</sup> ed. Grabert, Tübingen 1991, pp. 88-93 (online: [vho.org/D/d2bg/I\\_II.html](http://vho.org/D/d2bg/I_II.html)); English online only ([vho.org/GB/Books/tsbc](http://vho.org/GB/Books/tsbc)).

<sup>154</sup> B. Bonwetsch, op.cit. (note 151), pp. 111f.

<sup>155</sup> Franz. W. Seidler, *Die Wehrmacht im Partisanenkrieg*, Pour le Mérite, Selent 1998; cf. Hans Poepfel (ed.), *Die Soldaten der Wehrmacht*, 3<sup>rd</sup> ed., Herbig, Munich 1999.

<sup>156</sup> B.S. Telpuchowski, *Die Geschichte des Grossen Vaterländischen Krieges 1941-1945*, Bernard & Graefe Verlag für Wehrwesen, Frankfurt/Main 1961, p. 284; comparable Seidler, op. cit. (note 155), p. 36f.; similar data may also be

The data also diverge greatly regarding the personnel (and concomitant costs) involved in the Germans' efforts to maintain security behind the frontlines: 300,000 to 600,000 persons were needed according to Soviet sources, vs. roughly 190,000 according to German sources.<sup>154</sup>

To what degree these data were inflated in order to glorify the partisans is not known, but there is no doubt that the policy of *scorched earth*<sup>157</sup> practiced by the Red Army in their retreat in 1941-42, together with the acts of sabotage and murder by the partisans, were the major contributing factors in the defeat of the German army in the East. The brutality with which the Red Army and especially the partisans fought, right from the start of the war and on orders from the highest echelons, was described vividly by J. Hoffmann,<sup>158</sup> for example, and again recently by A.E. Epifanow<sup>159</sup> and Franz W. Seidler<sup>160</sup>; A.M. de Zayas, in his study of the Wehrmacht War Crimes Bureau, also confirmed and corroborated much of the material which the Reich government had already collected even in those days to document the atrocities committed by not only the Red Army.<sup>161</sup> De Zayas also reports that the German wartime leaders did not resort to reprisals as a standard matter of course, but rather for the most part after carefully weighing the pros and cons. Especially in Russia, however, this could not prevent the fact that lower-ranking units, acting on the basis of their own experiences with the Soviet manner of warfare, engaged in reprisals (and revenge) not ordered or approved by higher ranks.<sup>162</sup>

As we know today, the German Wehrmacht deployed in the East fought not only for the survival of the Third Reich, but after they abandoned all illusions of imperialism, they also fought for the freedom of all of Europe from Stalinism,<sup>163</sup> and therefore, in light of Prof. Siegert's findings, we must observe that there was nothing unlawful and very little immoral about the merciless battle of the German security forces against unlawful Soviet partisans, even if that battle did involve draconic reprisals. If the official Soviet information about the numbers of German soldiers and/or their allies killed by partisans should be accurate, then it must be noted that reprisal killings of several millions of people (ratio 1:10) would have been *theoretically* justified. But even the numbers given by German authorities (some 40,000 victims) could have resulted theoretically in reprisal killings of

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found in Heinz Kühnreich, *Der Partisanenkrieg in Europa 1939-1945*, Dietz, Berlin (East) 1965; for further interesting information, see I.I. Minz, I.M. Rasgon, A.L. Sidorow, *Der Große Vaterländische Krieg der Sowjetunion*, SWA Verlag, Berlin 1947; it is said that the Washington National Archive's document copies regarding partisan warfare in the former Soviet Union have recently been made unavailable to the public. This information and the preceding references are courtesy of Fritz Becker; cf. also Becker, "Stalins völkerrechtswidriger Partisanenkrieg", *Huttenbriefe* 15(4) (1997), pp. 3-6 (online: [vho.org/D/Hutten/Becker15\\_4.html](http://vho.org/D/Hutten/Becker15_4.html)).

<sup>157</sup> Cf. Walter N. Sanning, "Soviet Scorched-Earth Warfare", in *The Journal of Historical Review*, vol. 6/No. 1, Spring 1985, pp. 92-116 (online (German): [vho.org/D/DGG/Niederreiter29\\_1.html](http://vho.org/D/DGG/Niederreiter29_1.html)).

<sup>158</sup> J. Hoffmann, *Stalin's War of Extermination 1941 - 1945*, Theses & Dissertations Press, Capshaw, AL, 2001, pp. 305-327.

<sup>159</sup> A.E. Epifanow, H. Mayer, *Die Tragödie der deutschen Kriegsgefangenen in Stalingrad von 1942 bis 1956 nach russischen Archivunterlagen*, Biblio, Osnabrück 1996.

<sup>160</sup> Franz W. Seidler, *Verbrechen an der Wehrmacht*, Pour le Mérite, Selent 1998, pp. 5f. (online: [vho.org/D/vadw/vadw.html](http://vho.org/D/vadw/vadw.html)); English in preparation.

<sup>161</sup> A. de Zayas, *Die Wehrmachtuntersuchungsstelle*, 4<sup>th</sup> ed., Ullstein, Berlin 1984, passim., esp. pp. 273-307.

<sup>162</sup> *Ibid.*, pp. 198-23.

<sup>163</sup> Cf. J. Hoffmann, "Die Sowjetunion bis zum Vorabend des deutschen Angriffs", in Horst Boog et al., *Das Deutsche Reich und der Zweite Weltkrieg*, vol. 4: *Der Angriff auf die Sowjetunion*, 2<sup>nd</sup> ed., Deutsche Verlags-Anstalt, Stuttgart 1987; Hoffmann, "Die Angriffsvorbereitungen der Sowjetunion", in B. Wegner (ed.), *Zwei Wege nach Moskau*, Piper, Munich 1991; V. Suvorov, *Icebreaker: Who Started the Second World War?*, Hamish Hamilton, London 1990; Suvorov, *Der Tag M*, Klett-Cotta, Stuttgart 1995; E. Topitsch, *Stalin's War: A Radical New Theory of the Origins of the Second World War*, Fourth Estate, London 1987; cf. W. Post, *Unternehmen Barbarossa*, Mittler, Hamburg 1995; F. Becker, *Stalins Blutspur durch Europa*, Arndt Verlag, Kiel 1996; Becker, *Im Kampf um Europa*, 2<sup>nd</sup> ed., Leopold Stocker Verlag, Graz/Stuttgart 1993; W. Maser, *Der Wortbruch. Hitler, Stalin und der Zweite Weltkrieg*, Olzog Verlag, Munich 1994.

about 400,000 civilians. It goes without saying that such numbers are horrific, and we can just be thankful that reprisal killings are forbidden nowadays and hope that the law will be observed. We must, however, ask whether such killings actually took place in those days.

The so-called *Einsatzgruppen of the Security Police and the SD (Security Service)* were among others the units in charge of combating the partisans.<sup>164</sup> They started with not more than 4,000 men in summer 1941, but at the end of 1942 up to 15,000 Germans and 240,000 natives were involved,<sup>165</sup> an increase of manpower which indicates very well the parallel increase of partisan warfare at that time. Considering their relatively unsuccessful efforts at curbing partisan activity, we must note that these initially numerically weak troops were obviously entirely overwhelmed by their task of policing the enormous region (many hundred thousands of square kilometers), which they were in charge of and whose more remote areas were increasingly under the control of partisans.<sup>166</sup> Thus it appears a bit ridiculous when H. Höhne states:<sup>167</sup>

*“Heydrich’s Death envoys started their cruel adventure: 3,000 men were hunting Russia’s five million Jews.”*

Höhne omits to say that at the same time these troops were fighting against some 100,000 partisans. The allegations made against these troops today – namely, that, aside from their hopeless battle against the partisans, they also cooperated with many Wehrmacht soldiers to kill several million Jews as part of the Final Solution – beg the comment that, as Gerald Reitlinger says, this is absolutely unbelievable;<sup>168</sup> further, we would agree with Hans-Heinrich Wilhelm that the figures given in the various documents are probably entirely unreliable.<sup>169</sup> This holds true for at least as long as no serious efforts are made to locate the mass graves of the alleged victims, and as long as the criticisms presented in this volume regarding the cases of Babi Yar,<sup>170</sup> Marijampol<sup>171</sup> and the gas vans<sup>172</sup> are not accorded any serious discussion.<sup>173</sup>

Aside from all this, I consider it possible and even likely that German units in the hinterland shot countless civilians in the course of the so-called “*gang battles*”, and primarily in the form of reprisal

<sup>164</sup> For more details about this combat cf. F. W. Seidler, *op. cit.* (note 155), pp. 69-132.

<sup>165</sup> Cf. H. Höhne, *Der Orden unter dem Totenkopf*, Bertelsmann, Munich 1976, pp. 328, 339; cf. H. Krausnick, H.-H. Wilhelm, *Die Truppe des Weltanschauungskrieges. Die Einsatzgruppen der Sicherheitspolizei und des SD 1938-1942*, Deutsche Verlags-Anstalt, Stuttgart 1981, p. 147, cf. p. 287; Richard Pemsel, *Hitler – Revolutionär, Staatsmann, Verbrecher?*, Grabert, Tübingen 1986, pp. 403-407.

<sup>166</sup> For more information about the partisan warfare cf., e.g., Erich Hesse, *Der sowjetrussische Partisanenkrieg 1941-1944 im Spiegel deutscher Kampfanweisungen und Befehle*, 2<sup>nd</sup> ed., Muster-Schmidt, Göttingen 1992; John A. Armstrong (ed.), *Soviet Partisans in World War II*, Univ. of Wisc. Press, Madison, Wisc., 1964; Tomas Nigel, *Partisan Warfare 1941-1945*, Osprey, London 1983.

<sup>167</sup> H. Höhne, *op. cit.* (note 165), p. 330.

<sup>168</sup> G. Reitlinger, *Die SS, Tragödie einer deutschen Epoche*, Desch, Munich 1957, p. 186; similar Efraim Zuroff, *Beruf: Nazijäger. Die Suche mit dem langen Atem: Die Jagd nach den Tätern des Völkermordes*, Ahriman, Freiburg 1996, p. 44, where he says that 3,000 men, “*mobil killing units, whose task was to kill all Jews and communist officials in the area occupied by the Wehrmacht.*” This included the huge area “*from the suburbs of Leningrad in the north to the Asov sea in the south.[...] Their weapons were conventional firearms. Nevertheless they succeeded in killing 900,000 Jews in 15 months.*” Zuroff wonders, but he has no doubts. This has been possible, according to Zuroff, because of the “*fanatic support by the native population.*” (p. 47) That there has been a mass partisan warfare in the back of the fighting German army is either unknown to Zuroff or he is not interested in it.

<sup>169</sup> Cf. introductory comments by G. Rudolf, note 143, p. 44.

<sup>170</sup> Cf. the chapters by John C. Ball and Herbert Tiedemann in the present volume.

<sup>171</sup> Cf. introductory comments by G. Rudolf, note 145, page 45.

<sup>172</sup> Cf. the chapter by Ingrid Weckert in the present volume.

<sup>173</sup> Regarding the activities of the Einsatzgruppen as troops to combat partisans or to murder the Jews (depending on which view one takes), Udo Walendy has written three critical studies well worth reading: *Historische Tatsache* Nr. 16 & 17, “*Einsatzgruppen im Verband des Heeres*”, parts 1 & 2; *Historische Tatsache* Nr. 51, “*Babi Jar – die Schlucht mit 33.771 ermordeten Juden?*”; Verlag für Volkstum und Zeitgeschichtsforschung, Vlotho 1983, 1983, and 1992.

killings.<sup>174</sup> Obviously, in selecting the victims of such reprisals, one would not choose Ukrainians, Byelorussians or members of the Balkan, Baltic or Caucasian peoples, of whom considerable numbers fought in German units. The fact that the Jews were predominantly unpopular amongst these peoples was mainly due to fairly recent causes. In the previous decades many people had had terrible experiences with Communist commissars, disproportionately many of whom were of Jewish descent, especially in the first few decades of Soviet Bolshevism.<sup>175</sup> The Russian Jewess Sonja Margolina has made some interesting points regarding the involvement of the Russian Jews in the Bolshevik reign of terror.<sup>176</sup>

*“Nevertheless: the horrors of revolution and civil war, just like those of the repressions later, are closely tied to the image of the Jewish commissar.”* (p. 47)

*“The Jewish presence in the instruments of power was so impressive that even such an unbiased contemporaneous researcher as Boris Paramonov, a Russian cultural historian living in New York, asked whether the promotion of the Jews into leadership positions may perhaps have been a ‘gigantic provocation’.”* (p. 48)

Margolina has written a particularly detailed analysis of a book which appeared in 1924 under the title *Rußland und die Juden*. This book examines the causes of the Russian Jews’ conspicuously above-average participation in the excesses of the October Revolution and the dictatorship that followed it, and analyzed the consequences of this involvement. In their appeal *“To the Jews in all nations!”* the authors of this book discussed by Margolina wrote:

*“The Jewish Bolsheviki’s overeager participation in the subjugation and destruction of Russia is a sin that already bears within itself the seeds of its retribution. For what greater misfortune could happen to a people than to have its own sons engage in excesses. Not only will this be counted against us as an element of our guilt, it will also be held up to us as reproach for an expression of our power, for a striving for Jewish hegemony. Soviet power is equated with Jewish power, and the grim hatred of the Bolsheviki will transform into a hatred of the Jews [...] All nations and peoples will be swamped by waves of Judeophobia. Never before have such thunderclouds gathered above the heads of the Jewish people. This is the bottom line of the Russian upheaval for us, for the Jewish people.”* (p. 58)

Margolina quotes further from this anthology:

*“The Russians have never before seen a Jew in power, neither as governor nor as policeman, nor as postal official. There were both good and bad times in those days too, but the Russian people lived and worked and the fruits of their labors were their own. The Russian name was mighty and threatening. Today the Jews are at every corner and in all levels of power. The Russians see them at the head of the Czarist city, Moscow, and at the head of the metropolis on the River Neva and at the head of the Red Army, the ultimate mechanism of self-destruction. [...] The Russians are now faced with a Jew as judge as well as executioner; they encounter Jews at every step, not Communists who are just as poor as they themselves but who nevertheless give orders and take care of the interests of the Soviet power [...] It is not surprising that the Russians, in comparing the past to the present, conclude that the present power is Jewish, and so bestial precisely because of that.”* (p. 60)

In the early 1990s, Professor Dr. Ernst Nolte also pointed out the Jews’ intimate entanglement in Communism, though naturally he rejects equating the Jews with Bolshevism. Nolte writes:<sup>177</sup>

<sup>174</sup> For the time between Jan. 1, 1943, and Oct. 31, 1944 (22 months), the German authorities have claimed 145,364 persons killed in the partisan warfare, 88,493 imprisoned, and 90,993 civilians “registered”, i.e., either sent into camps or otherwise punished; cf. F. W. Seidler, *op. cit.* (note 156).

<sup>175</sup> Gernar Rudolf, Sibylle Schröder “Partisanenkrieg und Repressaltötungen”, *Vierteljahreshefte für freie Geschichtsforschung*, 3(2) (1999), pp. 145-153, have discussed this recently.

<sup>176</sup> S. Margolina, *Das Ende der Lügen*, Siedler, Berlin 1992.

<sup>177</sup> E. Nolte, “Abschließende Reflexionen über den sogenannten Historikerstreit”, in U. Backes, E. Jesse, R. Zitelmann (eds.), *Die Schatten der Vergangenheit*, Propyläen, Berlin 1992, pp. 83-109, here pp. 92f.

“For readily apparent social reasons, was not the percentage of persons of Jewish extraction particularly great among the participants in the Russian Revolution, different from the percentages of other minorities such as the Latvians? Even at the start of this century Jewish philosophers were still pointing with great pride to this extensive participation of the Jews in Socialist movements. After 1917, when the anti-Bolshevist movement – or propaganda – stressed the topic of the Jewish People’s commissars above all others, this pride was no longer expressed, [...] But it took Auschwitz to turn this topic into a taboo for several decades.

It is all the more remarkable that in 1988 the publication *Commentary*, the voice of right-wing Jews in America, published an article by Jerry Z. Muller who recalls these indisputable facts – though of course they are open to interpretation:

‘If Jews were highly visible in the revolution in Russia and Germany, in Hungary they seemed omnipresent. [...] Of the government’s 49 commissars, 31 were of Jewish origin [...] Rakosi later joked that Garbai (a gentile) was chosen for his post ‘so that there would be someone who could sign the death sentences on Saturdays’. [...] But the conspicuous role of Jews in the revolution of 1917-19 gave anti-Semitism (which ‘seemed on the wane by 1914’) a whole new impetus. [...] Historians who have focused on the utopian ideals espoused by revolutionary Jews have diverted attention from the fact that these Communists of Jewish origin, no less than their non-Jewish counterparts, were led by their ideals to take part in heinous crimes – against Jews and non-Jews alike.’”

Referring to the causal nexus Nolte had postulated between GULag and Auschwitz, Muller concludes:

“The Trotskies make the revolutions [i.e., the GULag] and the Bronsteins pay the bills [in the Holocaust].”<sup>178</sup>

Thus it seems understandable that National Socialism, and the eastern peoples fighting alongside for their freedom, equated the Jews in general with the Bolshevist terror and the activities of the commissars – though such an identification, being sweeping and collective, was unjust. Nevertheless, it is therefore more than plausible that it was Jews, first and foremost, who were made to pay for the partisan warfare and other war crimes of the Soviets. Anyone who (rightly) criticizes this, however, should also not omit to consider where the blame for this kind of escalation of the war in the East was to be found. And clearly it was to be found with Stalin who, as an aside, had treated the Jews in his sphere of influence at least as mercilessly ever since the war had begun, as Hitler had.<sup>179</sup>

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<sup>178</sup> J.Z. Muller, “Communism, Anti-Semitism and the Jews”, in *Commentary*, issue 8, 1988, pp. 28-39; for a more ideological approach to National Socialist anti-Semitism cf. Erich Bischoff, *Das Buch vom Schulchan aruch*, Hammer Verlag, Leipzig 1929; on this expert opinion one of the best known National Socialist anti-Semites, Theodor Fritsch, relied heavily: T. Fritsch, *Handbuch zur Judenfrage*, 31<sup>st</sup> ed., Hammer-Verlag, Leipzig 1932; a comparison to modern Jewish critics of Judaism is extremely revealing, cf. Israel Shahak, *Jewish History, Jewish Religion*, Pluto Press, London 1994 (online: [codoh.com/zionweb/zishahak/zishahakan01.html](http://codoh.com/zionweb/zishahak/zishahakan01.html)).

<sup>179</sup> Regarding the question of the involvement of Jews in the soviet partisan warfare against German troops cf. E. Jäckel, P. Longerich, J. H. Schoeps (eds.), *Enzyklopädie des Holocaust*, Argon, Berlin 1993, p. 1348; cf. Nechama Tec, *Defiance, the Bielski Partisans*, Oxford University Press, New York 1993.