CASE No. 43

TRIAL OF GENERAL VON MACKENSEN AND GENERAL MAELZER

BRITISH MILITARY COURT, ROME
18TH-30TH NOVEMBER, 1945

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGE

The accused were jointly charged with committing a war crime by being concerned in the killing as a reprisal of 335 Italians in the Ardeatine Cave.

2. THE EVIDENCE

The evidence showed that on 23rd March, 1944, a bomb exploded amongst a company of German police marching through Rosella Street in Rome. Twenty-eight German policemen were killed outright and a great number wounded, four of the wounded died during the day, thus raising the death roll to thirty-two. When the news of the bomb attack reached Hitler's Headquarters an order was issued to Field Marshal Kesselring, the Commander of Army Group " C " in Italy, to shoot within 24 hours 10 Italians for every German policeman killed. [See **Case No.44 The Trial of Albert Kesselring**. Added]

The order was silent on the question how the persons who were to be shot as a reprisal were to be selected. This order was passed on to the accused General von Mackensen, who was the Commander of the German 14th Army, in whose sector of operations Rome was situated. He telephoned the accused General Maelzer, who was the Military Commander of the City of Rome, to find out whether there were enough persons under sentence of death to make up the required number. Maelzer passed on this enquiry to Lieut.-Colonel Kappler, who was head of the S.D. (German Security Service) at Rome, and was responsible for the prisons of the city.

These facts were agreed upon by Counsel for the Defence and Prosecution, but from here onwards the claims of the two were at variance. The Prosecution relied upon the evidence of Kappler and maintained that Kappler told both accused that he did not have enough prisoners to make up the required number, but that he would compile a list of 280 people " worthy of death." This phrase signified persons imprisoned who were either sentenced to death and awaiting execution or serving long sentences of imprisonment or persons detained for partisan activities or acts of sabotage.

The Defence, basing themselves on the testimony of the two accused as well as that of Field Marshal Kesselring and Colonel Baelitz, one of Kesselring's staff officers, claimed that Kappler completely misled the army authorities by telling Kesselring that he had

enough prisoners under sentence of death to make up the number, and by promising von Mackensen

that if the number of prisoners under sentence of death should be less than 320 he would only execute whatever number there were, but would, nevertheless, publish a communique that 320 had been shot as a reprisal, so that the execution of his order could be reported to the Führer. The Prosecution and the Defence agreed that Kappler told both accused that only four of the selected victims had anything to do with the placing of the bomb in Rosella Street.

The result of the orders given by von Mackensen and Maelzer, whatever these orders were, was neither the formal execution of 320 Italians as ordered by Hitler, nor the execution of all persons in the prisons of Rome who were sentenced to death or long terms of imprisonment as intended by the accused, but an indiscriminate massacre by the S.D. under Kappler.

The rest of the evidence was common ground between the Prosecution and the Defence. After both the Army and the Police authorities had refused to carry out this mass execution, the S.D. under Kappler was ordered to do so. The final number of prisoners executed was 335. Kappler accounted for this number by claiming that another policeman died, making a total death roll of thirty-three, and that he asked the Italian Police to send fifty prisoners to make up the numbers and that they sent fifty-five instead. The victims included a boy of fourteen, a man of seventy, one person who had been acquitted by a Court, and fifty-seven Jews who had nothing to do with any partisan activities and some of whom were not even Italians. The victims were herded together in the Ardeatine Cave on 24th March, and shot in the back at close range by a section of the S.D. under Kappler. They were divided into groups of five and each group was made to kneel on top of or beside the corpses of the previous group. No priest or doctor was present. After all 335 had been killed the cave was blown up by a battalion of engineers. Kappler reported the execution of the Hitler order to the accused Maelzer and von Mackensen, who passed the report on to Kesselring's headquarters.

Neither von Mackensen or Maelzer pleaded superior orders in the strict sense. They pleaded that they were of the opinion that the reprisal as such was justified as the month preceding the bomb attack had seen a long series of crimes against German troops in Rome to which only drastic action could put a stop. Both accused said that they were anxious to take the sting out of the Hitler order by having only people shot who were sentenced to death or long terms of imprisonment. Both accused disclaimed all knowledge of the manner in which the reprisal was eventually carried out by the S.D. and there was no evidence to show that they knew how the 335 died in the Ardeatine Cave.

3. FINDINGS AND SENTENCES

Both accused were found guilty and sentenced to death by being shot. The Confirming Officer confirmed the findings on both accused but commuted both sentences to imprisonment for life.

p.3

B. NOTES ON THE CASE(l)

1. REPRISALS

(i) *Definition*

Lauterpacht in the Sixth Edition of Vol. II of Oppenheim's *International Law,* para. 247, defines reprisals during war as retaliation in order to compel an enemy guilty of a certain illegal act of warfare to comply with the laws of war.

Para. 452 of the British *Manual of Military Law* defines reprisals as
" Retaliation for illegitimate acts of warfare for the purpose of making the enemy comply in future with the recognised laws of war," and adds
" They are by custom admissible as an indispensible means of ensuring legitimate warfare," and further, " they are not a means of punishment or of arbitrary vengeance but of coercion." (Footnote: For an account of the British law relating to trials of war criminals, see Vol. I of these Reports, pp. 105-l10.)

W. E. Hall (*Treatise on International Law,* 8th Edition, 1924, by Higgins) points out the principle underlying the law of reprisals : when the actual offender cannot be reached or identified reprisals are sometimes resorted to by which persons guilty of no offence suffer for the acts of others, " a measure in itself repugnant of justice," and therefore to be resorted to only in cases of absolute necessity and subject to certain restrictions.

The essentials which emerged from these definitions as well as from the opinion of all other writers dealing with the subject are :

1. That reprisals by one belligerent to be justified must be preceded by some violation of the laws and usages of war committed by the other belligerent.

2. That their purpose is coercion, i.e. they must be taken for the purpose of forcing the other belligerent to adhere to the laws and usages of war in future.

3. They are to be used only as a last resort and then only subject to certain restrictions. (Footnote: See p.5)

(ii) *Article 50 of the Annex to the Fourth Hague Convention (1907) and Reprisals*

Article 50 says : " No collective penalty, pecuniary or otherwise shall be inflicted upon the population on account of acts of individuals for which it cannot be regarded as collectively responsible."

Some authors conclude from this that collective responsibility must be established before reprisals can be taken.

Lawrence (*Principles of International Law,* p. 428) says that acts such as destruction of houses and farms may be justified under Article 50 only if there is evidence " that the whole population sympathises with the doers and protects them from capture but not otherwise."

The prevalent opinion, however, is that Article 50 has no bearing upon the question of reprisals. Lauterpacht, in Oppenheim"s *International Law,* Vol. II, 8th Edition, para. 250, says : " There is no doubt that Article 50 of the Hague Regulations enacting that no general penalty, pecuniary or otherwise, may be inflicted on the population on account of acts by individuals for which it cannot be regarded as collectively responsible does not prevent

p.4

the burning by way of reprisals of villages or towns for a treacherous attack committed there on enemy soldiers by unknown individuals, and, this being so a brutal belligerent has his opportunity."

This view has been adopted by the British *Manual of Military Law,* para. 458, which says : " Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be regarded as collectively responsible it may be necessary to resort to reprisals against a locality or community for some acts committed by its inhabitants or members who cannot be identified."

Para. 452 of the.British *Manual of Military Law* explains that reprisals
" are not referred to in the text of the Hague Rules but are mentioned in the Report presented to the Peace Conference, 1889, by the Committee which drew up the convention respecting the Laws and Usages of War on Land," and the note to this paragraph in the *Manual* says : " When dealing with Article 50 which forbids collective punishment the report states that the' Article is ' without prejudice to the question of reprisals ' (Hague Convention, 1899, p. 151)"

Professor Lauterpacht (Footnote: Oppenheim-Lauterpacht, *Internutional Law,* Vol. II, para. 250.) suggests, as a reason why the Hague Conference does not mention the question of reprisals, that one of its predecessors, the Brussels Conference of 1874, had struck out Sections 69-71 of the Russian draft code, which dealt with reprisals. It has also been suggested that the Brussels Conference declined to add to the authority for a practice so reprehensive, though under certain circumstances unavoidable, by legislating on the subject.

The three sections of the Russian draft which were omitted by the Brussels Conference read : (Footnote: See Parliamentary Paper (Miscellaneous) No. 1, 1874, p. 11 and quotation in Westlake's *Laws of War on Land,* Vol. II, p. 123.)

" *Section* 69. Reprisals are admissible in extreme cases only, due regard being paid as far as possible to the laws of humanity, when it shall be unquestionably proved that the laws and customs of war shall have been violated by the enemy and that they had recourse to measures condemned by the law of nations."

Section 70. The selection of means and extent of reprisals should be proportionate to the degree of the infraction of law committed by the enemy. Reprisals which are disproportionately severe are contrary to the rules of International Law."

" *Section* 71. Reprisals are allowed only on the authority of the Commander-in-Chief who shall likewise determine the degree of their severity and their duration."

(iii) *When Reprisals are Admissible*

" Reprisals are admissible for any and every act of illegitimate warfare " (Oppenheim-Lauterpacht, *International Law,* Vol. II, para. 248). Such reprisals are legitimate against the acts of governments or the acts of individuals. " The illegitimate acts may be committed by a government, by its military commanders, or by some person or persons whom it is

obviously impossible to apprehend, try, and punish." (Para. 453, British *Manual of Military Law*.)

If an act of illegitimate warfare has been committed it is up to the injured belligerent to consider whether reprisals should be resorted to at once or only after a complaint to the enemy.

" In practice, however, a.belligerent will rarely resort at once to reprisals, if the violation of the rules of legitimate warfare is not very grave, and the safety of his troops does not require prompt and drastic measures." (Oppenheim-Lauterpacht, Vol. II, para. 248,. note 2.)

The British *Manual of Military Law* adopts the same view. Para. 456 says : " . . . As a rule the injured party would not at once resort to reprisals, but would first lodge a complaint with the enemy in the hope of stopping any repetition of the offence or of securing the punishment of the guilty. This course should always be pursued unless the safety of the troops requires immediate drastic action, and the persons who actually committed the offences cannot be secured."

Applying the above-mentioned principles to the case of the crime committed by unknown partisans in Rosella Street, the German authorities were entitled to take reprisals if they had come to the conclusion that the offenders could not be found and that there was danger for the safety of their troops.

The Defence claimed that both conditions were fulfilled. The Prosecutor said in his closing address that the German authorities would have been entitled to blow up the houses in Rosella Street. The Prosecution thus conceded that the taking of some reprisals was justified in this case.

On the other hand the Prosecutor pointed out that there had not been an adequate enquiry before the reprisal was taken as the two accused admitted in cross-examination that " enquiries were not completed when the killing at the Ardeatine Cave took place."

(iv) *Restrictions Imposed by International Law on a Belligerent Inflicting Reprisals*

It is the opinion of almost all writers on the subject that if reprisals are inflicted they must be :

(1) Proportionate.

(2) Reasonable.

(3) In accordance with the fundamental principles of war, e.g. respect for lives of non-combatants or the interest of neutrals.(Footnote: *See inter alia*, Oppenheim-Lauterpacht, *Year Book of International Lmv,* 1944, p. 76 ; W. E. Hall;*Treatise of International Law*, 8th Edition, para. 135 ; Westlake, *International Law,* Part 2, paras. 123-126 ; Lawrence, *International Law*, para. 209a ; Spaight, *War Rights on Land*, pp. 462-465)

The third point was not considered in this case as no neutral interests were involved and the crime for which reprisals were being inflicted was committed by non-combatants, so that the question of sparing non-combatants did not arise as a separate issue. The Prosecution rested their case on points (1) and (2), alleging that the reprisals were disproportionate and unreasonable.

The British *Manual of Military Law* follows the view expressed by the majority of writers. Para. 459 states :

" What kinds of acts should be resorted to as reprisals is a matter for the consideration of the injured party. Acts done by way of

reprisals must not, however, be excessive, and must not exceed the degree of violation committed by the enemy."

The illustrations given in the footnote show what is meant by " degrees of violation." The first example quotes an incident in the German-Franco War, 1870-1871. The French captured forty German merchant ships and made their crews prisoners of war, the Germans considered this contrary to International Law and imprisoned forty prominent Frenchmen as a reprisal.

The next two examples given are cases of the burning down of buildings and villages by the Germans during the 1870-1871 war and the order given by Field Marshal Lord Roberts during the South African war for the destruction by way of reprisals of houses and farms in the vicinity of a place where damage was done to the lines of communication.(Footnote: Section 4 of the Proclamation of 19th June, 1900 (Martin's *Recueil de Traités N.R.G.,* second series XXXII, p. 147.) The reprisals resorted to in these precedents are thus imprisonment for an unlawful imprisonment by the enemy and destruction of property for unlawful destruction of property by the enemy.

The United States *Rules of Land Warfare,* 1940, in Article 358, say :
" . . . Villages or houses, etc., may be burned for acts of hostility from them where the guilty individuals cannot be identified, tried, and punished. . . ."

The British *Manual of Military Law,* Chapter XIV, Article 414, states :

" The custom of war permits as an act of reprisal the destruction of a house, by burning or otherwise, whose inmates, without possessing the rights of combatants, have fired on the troops."

These regulations thus permit the destruction of property as a reprisal for firing on troops but there is no precedent quoted and no reference in the regulations permitting the taking of lives for unlawful assination [sic.ed.] by the enemy.

Thus the first question the court had to consider with regard to reprisals was whether the action taken by the accused to deal with the crime committed in Rosella Street was reasonable and proportionate to that crime ? If so it was a legitimate reprisal. Or was it unreasonable to take enemy lives as a reprisal for the lives lost through that crime or was the ration ten to one excessive ? If so it was a war crime.

The Defence submitted that the taking of lives as a reprisal for the murder of German police did not " exceed the degree of violation committed by the enemy " and that the ratio 10-l was not excessive in view of the extremely dangerous situation, as Rome was only a few miles from the front line.

The second question to be considered by the Court was the question of the execution of these reprisals. The Judge Advocate said in his summing up ; " In my view, gentlemen, in considering whether a reprisal is a proper and lawful one and can be excused according to International Law you are entitled to look not only at what the reprisal was to be in its inception but at the way in which it was carried out. . . ."

The Defence agreed that the execution was most improper but pleaded that the accused did not know how the execution was carried out and also

p.7

that they could not be held responsible for the improper execution of their orders, as these orders explicitly charge the S.D. with the execution. The accused were thus under no obligation to see that their orders were carried out properly. There was therefore in the submission of the Defence neither criminal intent nor criminal negligence on the part of the accused.

The Prosecutor stated that if the accused did not know what happened at the Ardeatine Cave they ought to have known as they had a duty as military commanders to see that their orders were carried out properly.

It cannot be said with certainty whether the Court found that the reprisals were unreasonable (i.e. the taking of lives was not warranted) or that they were excessive (i.e. the ratio 10-l was not warranted) or that the accused were responsible for the manner in which they were carried out. Any of these three contentions would support the findings.

The question whether von Mackensen and Maelzer ordered only prisoners who had been condemned to death or a long sentence of imprisonment to be shot or others as well seems to have no bearing on the finding, though it may have some bearing on the sentences.

Para. 454 of the British *Manual of Military Law* states :

" Reprisals are an extreme measure because in most cases they inflict suffering upon innocent individuals. In this, however, their coercive force exists, and they are indispensable as a last resource."

Thus, if the reprisal was reasonable and proportionate, no war crime could have been committed even if the victims had been completely innocent people. On the other hand, if the so-called reprisal was unreasonable and excessive a war crime was committed even if all the victims had been sentenced to death or to long-term imprisonment.

2. DEFENCE OF SUPERIOR ORDERS COMBINED WITH THE DEFENCE OF REPRISALS

The Judge Advocate in his summing up said it was not quite clear whether the accused in their defence relied upon the defence of Superior Orders or not.

He then summarised General von Mackensen’s defence thus : He was not saying : " I did only carry out the order of my superiors and, therefore, I should not be blamed." He was saying, " I got this order, I had to follow it, but I tried to modify it and I thought I had modified it in a more humane way. " The Judge Advocate then advised the Court that the

Defence of Superior Orders does not, as a general rule, avail an accused charged with a war crime.

The following passage from the article by Professor Lauterpacht in the British *Year Book of International Law*, 1944, page 76, deals with the Defence of Superior Orders where these orders are described as a reprisal :

" The element of reprisals may have a significant and perplexing bearing upon the plea of superior orders. It has been shown that the strength of the plea of superior orders is conditioned by the degree of heinousness of the offence and its approximation to a common crime apparently divorced both from belligerent necessity and from elementary considerations of humanity. But the force of this latter consideration may become considerably impaired-though never totally eliminated-when the act has been ordered, or represented to the subordinate as having been ordered, in pursuance of reprisals against a similar or identical crime committed by the adversary. The subordinate may

be expected, when confronted with an order utterly and palpably contemptuous of law and humanity alike, to assert, at the risk of his own life, his own standard of law and morality. This is an exacting though unavoidable test. But no such independence of conviction and action may invariably be expected in cases where the soldier or officer is confronted with a command ordering an act admittedly illegal and cruel but issued as a reprisal against the similarly reprehensible conduct of the adversary. We may attribute to the accused a rudimentary knowledge of the law and an elementary standard of morality, but it may be more difficult to expect him to be in possession of the necessary information to enable him to judge the lawfulness of the retaliatory measures in question in relation to the circumstances alleged to have given rise to them. An example will illustrate the position : No person can be allowed to plead that he was unaware of the prohibition of killing prisoners of war who have surrendered at discretion. No person can be permitted to assert that, while persuaded of the utter illegality of killing prisoners of war, he had no option but to obey an order. But the situation is more complicated when the accused pleads not only an order, but the fact that the order was represented as a reprisal' for the killing by the adversary of the prisoners of his own State. When the German Supreme Court in the case of *The Dover Castle* acquitted in 1921 the accused who pleaded guilty of torpedoing a British hospital ship, the Court expressed the view that the accused were entitled to hold, on the information supplied to them by their superiors, that the sinking of enemy hospital ships was a legitimate reprisal against the abuse of hospital ships by the enemy in violation of Hague Convention No. X."

The Court by finding both accused guilty seems to have held that in this case the combined defences of reprisals and superior orders-if they thought the second defence was pleaded-did not avail the accused..