

# THE TRIAL OF PETER VON HAGENBACH: RECONCILING HISTORY, HISTORIOGRAPHY, AND INTERNATIONAL CRIMINAL LAW

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## I. INTRODUCTION

It is an article of faith among transnational penal experts that Sir Peter von Hagenbach's 1474 prosecution in Breisach for atrocities committed serving the Duke of Burgundy constitutes the first international war crimes trial in history. Hagenbach was tried before an ad hoc tribunal of twenty-eight judges from various regional city-states for misdeeds, including murder and rape, he allegedly perpetrated as governor of the Duke's Alsatian territories from 1469 to 1474. Though it remains obscure in the popular imagination, most legal scholars perceive the trial as a landmark event. Some value it for formulating an embryonic version of crimes against humanity. Others praise it for ostensibly charging rape as a war crime. And all are in agreement that it is the first recorded case in history to reject the defense of superior orders. Such a perspective has arguably helped invest the Nuremberg trials with greater historical legitimacy and lent subtle sanction to the development of international criminal law in the post-Cold War world. But the legal literature typically deals with the trial in very cursory fashion and its stature as pre-Nuremberg precedent may hinge on faulty assumptions. As the 1990s explosion of ad hoc tribunal activity is nearing its end and the legal academy is taking stock of its accomplishments and failures, it is perhaps time to look more closely at the Hagenbach trial. This piece will do that by digging below the surface and revisiting some of the historical and legal premises underlying the trial's perception by legal academics.

In the main, international law specialists have relied on older historical accounts to conclude that Hagenbach's service as Burgundy's Alsatian bailiff constituted a five-year reign of terror that culminated in a legitimate and ground-breaking atrocity conviction. But revisionist historians tend to see Hagenbach's ordeal not as a good-faith justice enterprise but rather as a show trial meant to rebuff the territorial ambitions of Sir Peter's master, Charles the Bold. They emphasize that liability was grounded on confessions obtained through torture. And while they concede that Hagenbach may have been boorish and autocratic, they note that the first few years of his rule were relatively

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pacific and the 1474 uprising against Sir Peter was primarily a reaction to attempted Burgundian regional encroachments and perceived feudal suppression of growing urban and bourgeois prerogatives. The trial itself, they point out, was not international at all as the men who sat in judgment of Hagenbach were all subjects of the Holy Roman Empire. Nor was it a war crimes trial, since there was no armed conflict at the time the alleged atrocities took place.

But there are shortcomings in the revisionist analysis as well. The high level of animosity shown Hagenbach, as demonstrated by the severity of the torture and the stripping of his knighthood, as well as a criminal past, indicate that the atrocity allegations may not be unfounded. Moreover, there is evidence that, in the period leading up to the trial, Burgundy's occupation of the territory was hostile and so the charges against Hagenbach may very well be considered war crimes. Finally, by 1474, the Holy Roman Empire was no longer a viable political entity and so the ad hoc tribunal may indeed have been international in nature.

It is no coincidence that such a unique event took place between the erosion of medieval hegemony and the imminent establishment of Westphalian sovereignty. Not until the Westphalian veil was pierced by the Nuremberg trials nearly five hundred years later, did the subject of the Hagenbach trial take on contemporary relevance in the legal literature. In the end, the piece concludes that while some of its details may be lost in the mists of time and its legal status may remain muddled in theoretic gray zones, the Hagenbach trial should continue to play an important role as an historic and conceptual pillar of international criminal law's "pre-history."

## II. HAGENBACH AND INTERNATIONAL CRIMINAL LAW

International criminal law is a product of the twentieth century.<sup>1</sup> After World War I, through the treaties of Versailles and Sèvres, allied leaders contemplated using it to bring to justice Kaiser Wilhelm II and the Ottoman officials responsible for the Armenian genocide.<sup>2</sup> But the requisite political will to follow through proved lacking and the formulation and use of ICL would have to wait for the prosecution of the architects of another world war's horrors.<sup>3</sup> The International Military Tribunal at Nuremberg was, then, a novel enterprise and thought to be without precedent.<sup>4</sup> As such, at the time of its establishment, it was subjected to much criticism.<sup>5</sup> Among other things, detractors accused it of enforcing laws ex post facto and creating out of whole cloth a new offense – crimes against humanity.<sup>6</sup>

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<sup>1</sup> See George P. Fletcher & Jens David Ohlen, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT'L CRIM. JUST. 539, 541 (2005).

<sup>2</sup> Timothy L.H. McCormack, *Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 Alb. L. Rev. 681, 702 (1997).

<sup>3</sup> *Id.* at 703.

<sup>4</sup> Scott W. Johnson & John H. Hinderaker, *Guidelines for Cross-Examination: The Cross-Examination of Hermann Goering*, 59-OCT Bench & B. Minn. 22 (2002).

<sup>5</sup> Lynne Miriam Baum, *Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the International Criminal Court*, 19 WIS. INT'L L.J. 197 (2001).

<sup>6</sup> *Id.*

But at least one expert had a very unique view of the Nuremberg proceedings. Georg Schwarzenberger, an English jurist of Jewish-German descent who had fled Nazi persecution in the 1930s, saw an analogy between Nuremberg and an obscure case from the fifteenth century – the criminal trial at Breisach of Sir Peter von Hagenbach.<sup>7</sup> After the close of evidence at the IMT trial, while the judges were still deliberating, Schwarzenberger published an article in *The Manchester Guardian* titled “A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474.”<sup>8</sup> In it, Schwarzenberger opined that the Hagenbach proceeding “appears to be the first international war crime trial.”<sup>9</sup> He continued:

It has even more modern interest than that, for it was conducted throughout in accordance with high judicial standards and the duel between the public prosecutor and counsel for the defence centered in the issue of obedience to superior orders. Clearly, the roots of modern international criminal law go much deeper than is commonly assumed.<sup>10</sup>

Schwarzenberger explained that, in serving as a governor for the Duke of Burgundy, Hagenbach “established a regime of arbitrariness and terror that went beyond anything that was customary even in those rather rough times.” In fact, he went so far as to analogize Hagenbach’s conduct with that of the Nazi leaders in the dock at Nuremberg.

Life, honour and property counted for nothing. Hagenbach and his soldiers became guilty of outrages which did not lag behind the worst deeds of modern totalitarian gangsterism. They further extended their depredations to Swiss merchants on their way to and from the Frankfurt Fair and frequently encroached upon the rights of neighboring towns.<sup>11</sup>

In referring to the trial itself, Schwarzenberger suggested that Hagenbach was charged with something akin to crimes against humanity. In his own words:

The prosecutor arraigned the accused for having committed crimes which went far beyond the breach of contractual obligations. In Iselin’s submission Hagenbach’s deeds outraged all notions of humanity and justice and constituted crimes under natural law. In the words of the prosecutor, the accused had ‘trampled under foot the laws of God and men’ and had committed what would be called today crimes against humanity.<sup>12</sup>

Moreover, Schwarzenberger stated that Hagenbach’s trial involved charges of war crimes.

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<sup>7</sup> Bardo Fassbender, *Völkerrecht und Machtpolitik: Georg Schwarzenberger (1908-1991)*, 97 AM. J. INT’L L. 1019, 1020 (2003); Jordan Paust, *Comparative Analysis of International and National Tribunals*, 12 N.Y.L. SCH. J. HUM. RTS. 545, 549 n. 16 (1995).

<sup>8</sup> George Schwarzenberger, *A Forerunner of Nuremberg: The Breisach War Crime Trial of 1474*, THE MANCHESTER GUARDIAN, Sept. 28, 1946, at 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Were Hagenbach's crimes war crimes, considering the fact that they had been committed before the outbreak of open hostilities between Burgundy and the allies? It is true that war crimes in the strict sense of the word involve violations of the rules of warfare. Yet it should be remembered that right down to the beginning of the nineteenth century the border-line between states of peace and war was very thin, if often it existed at all. The hold of Burgundy over the pledged Austrian territories was more akin to the occupation of foreign territory in war-time than to a peace-time occupation of foreign territory under treaty.<sup>13</sup>

Similarly, by Schwarzenberger's estimation, the trial was "international" in character:

Whereas an ordinary trial would have been conducted before local judges, it was agreed in this case that the allied cities, including the Swiss towns, should delegate judges. As by then these Swiss towns had ceased to form part of the Holy Roman Empire, their participation gave an international character to the bench before which Hagenbach was tried.<sup>14</sup>

Finally, the article focused on Hagenbach's defense of obedience to superior orders. Schwarzenberger recorded the defense as pleading that "soldiers owe absolute obedience to their superiors" and thus "he had no right to question the orders which he was charged to carry out, and it was his duty to obey."<sup>15</sup> As if to leave no doubt about the strategy employed, Schwarzenberger noted that Hagenbach "based his whole defence on this ground."<sup>16</sup> And he closed the article by stressing that, after "several hours of deliberation," the judges rejected the defense. "When judgment was pronounced, the tribunal rejected the advocate's preliminary objections to its jurisdiction. It overruled the plea of superior orders, found Hagenbach guilty, and condemned him to death."<sup>17</sup>

Apparently, the prosecutors at Nuremberg noticed Schwarzenberger's article. In the Control Council Law No. 10 "subsequent proceedings," American Chief Prosecutor Telford Taylor relied on the Hagenbach case to argue to the Nuremberg Military Tribunals in *The Ministries Case*, for example, that charging crimes against humanity did not constitute an impermissible *ex post facto* application of law:

So I will now advert briefly to that question in order to show that no problem of "*ex post facto* law" arises under the definition of crimes against humanity in Law No. 10 properly construed . . . So I turn to the concept of crimes against humanity as a concept of international penal law. It needs no elaborate research to ascertain that international penal law has long recognized the international character of certain types of atrocities and offenses shocking to the sense of all civilized nations . . . we are handing up to the Court a description of an international trial held in 1474 at Breisach on the Upper Rhine, only a few hundred kilometers from

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<sup>13</sup> *Id.*  
<sup>14</sup> *Id.*  
<sup>15</sup> *Id.*  
<sup>16</sup> *Id.*  
<sup>17</sup> *Id.*

Nuremberg. The defendant in that case, Sir Peter of Hagenbach, was accused of murders and other outrages committed in his capacity as Governor of Breisach under the authority of Duke Charles of Burgundy, known to history as Charles the Bold. After the death of Charles the Bold, Sir Peter was tried on 4 May 1474 in the market place of Breisach. The acts of which he was accused were not committed during actual hostilities or in time of war and, therefore, under our modern terminology would be akin more to crimes against humanity than to war crimes. . . In the words of the prosecutor, the accused had “trampled under foot the laws of God and men . . .”<sup>18</sup>

And so here was the Rosetta stone for ICL perception of the Hagenbach case – forged by Schwarzenberger and embraced at Nuremberg. Schwarzenberger strengthened its foundation with subsequent scholarly publications. For example, he devoted a short chapter to it in his treatise *THE LAW OF ARMED CONFLICT* (1968).<sup>19</sup> In the book’s second volume, titled “International Law as Applied by International Courts and Tribunals,” chapter 39 is devoted to “The Breisach Trial of 1474.”<sup>20</sup> The chapter more or less restated the materials of his Manchester Guardian article but fleshed out the details a bit more.<sup>21</sup>

By 1976, Professor L.C. Green of the University of Alberta could observe in his book *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* (1976):

There seems to be a widely accepted view that the problem of superior orders on the level of international law is of recent date, originating with the judgment of the Nuremberg tribunal after the Second World War. In fact, this is not historically correct. In September 1946, Professor Schwarzenberger drew attention to the trial conducted on the orders of the Archduke of Austria on behalf of himself and his Allies of Peter of Hagenbach, Charles of Burgundy’s Governor of Breisach. The trial took place in 1474 before a court made up of 28 judges drawn from Breisach, the other allied Alsatian and Upper Rhenian towns, Berne, a member of the Swiss Confederation, and Solothurn, allied with Berne. Broadly speaking, the charges covered what today would be described as war crimes and crimes against humanity . . .<sup>22</sup>

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<sup>18</sup> Trials of War Criminals Before the Nürnberg Military Tribunals under Control Council Law No. 10 (Ministries Case), Vol. 13, pages 96-97. There are errors in Taylor’s recounting. In particular, the trial was not after the Duke’s death and it took place on May 9th, not May 4th. And, as will be discussed infra, Hagenbach’s alleged acts may have amounted to war crimes. The Hagenbach trial factored into *The High Command Case* as well. In noting that the provisions of the IMT Charter and Control Council Law No. 10 were the expression of existing international law, the NMT in *The High Command Case* judgment referred to “the trial of Sir Peter of Hagenbach held at Breisach in 1474. The charges against him were analogous to “Crimes against Humanity” in modern concept. He was convicted.” *The High Command Case*, Vol. XI, page 476.

<sup>19</sup> GEORG SCHWARZENBERGER, *THE LAW OF ARMED CONFLICT* 462-66 (London: Stevens & Sons 1968).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> L.C. GREEN, *SUPERIOR ORDERS IN NATIONAL AND INTERNATIONAL LAW* 263 (Leyden: Sijthoff 1976)

Then, in a passage starkly demonstrating Schwarzenberger's influence in connecting the Hagenbach trial to modern ICL antecedents, Green linked Hagenbach to both Article 227 of the Versailles Treaty (contemplating an international criminal trial for Kaiser Wilhelm II)<sup>23</sup> and a nascent version of crimes against humanity. "Foretelling the charges specified in the Treaty of Versailles against the Kaiser, Hagenbach was alleged to have "trampled under foot the laws of God and man."<sup>24</sup>

Subsequent descriptions of the case in ICL literature, with minor variations, are remarkably consistent with the Schwarzenberger blueprint. Robert Cryer has noted that, with respect to the Hagenbach trial, "the standard reference for international criminal lawyers remains Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals, II: The Law of Armed Conflict* (London: Stevens & Sons, 1968), chapter 39."<sup>25</sup> And thus Schwarzenberger's influence extends to every form of scholarship in ICL, including treatises, compilations, casebooks, law review articles, and internet commentary.

For example, in Chapter 4 ("From Nuremberg to the Hague: The History of International Prosecution") of *SLOBODAN MILOSEVIC ON TRIAL: A COMPANION* (2002), prominent ICL scholars Michael Scharf and William Schabas worked from the Schwarzenberger template with some minor variations:

The history of international war crimes trials begins with the 1474 prosecution of Peter von Hagenbach, a Burgundian governor. After it was discovered that his troops had raped and killed innocent civilians and pillaged their property during the occupation of Breisach, Germany, Hagenbach was tried before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire, which at that time included Austria, Bohemia, Luxembourg, Milan, the Netherlands, and Switzerland. Hagenbach was found guilty of murder, rape, and other crimes against the "laws of God and man," stripped of his knighthood, and sentenced to death.<sup>26</sup>

Similarly, in the ICL compilation *THE PROSECUTION OF INTERNATIONAL CRIMES: A CRITICAL STUDY OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* (2003), in a

<sup>23</sup> Treaty of Peace between the Allied and Associated Powers and Germany (Treaty of Versailles) art. 227, June 28, 1919, 2 Bevens 43, 225 Consol. T.S. 188. Art. 227 of the treaty provides: The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties. A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision, the Tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed. The Allied and Associated Powers will address a request to the Government of Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial."

<sup>24</sup> GREEN, *supra* note 22, at 264.

<sup>25</sup> ROBERT CRYER, *PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME* 17 n.57 (Cambridge University Press 2005).

<sup>26</sup> MICHAEL P. SCHARF & WILLIAM A. SCHABAS, *SLOBODAN MILOSEVIC ON TRIAL: A COMPANION* 39 (2002). Other than Switzerland, none of the twenty-eight judges hailed from the countries noted.

chapter titled *Toward International Criminal Justice*, Canadian jurist Jules Deschênes notes [referring to the Hagenbach trial] that “one had to wait until the fifteenth century to see a real attempt at international criminal justice.”<sup>27</sup> Hagenbach, he added “acted together with his henchmen with extreme brutality: murder, rape, pillage, wonton confiscation, ‘no conceivable evil . . . was beyond him.’”<sup>28</sup> He concluded by noting that an international ad hoc tribunal “charged that the accused had ‘trampled under foot the laws of God and man’” and after a finding of guilt “condemned him to death.”<sup>29</sup>

In the same vein, in an essay that recently appeared in the *Virginia Journal of International Law*, pre-eminent ICL scholar M. Cherif Bassiouni described the case as follows:

The second trial of this historic period was that of Peter von Hagenbach in 1474 in Breisach, Germany. Peter was a Dutch *condottiere* --the equivalent of a modern mercenary leader. Peter was hired by the Duke of Burgundy to raise an army to occupy the city of Breisach and exact taxes from its population. The Duke had acquired the city in exchange for services rendered to the Holy Roman Empire. Uninterested in the fate of the distant German townspeople, the French Duke ordered Peter to collect massive exactions. When the townspeople rebelled, the Duke ordered Peter to sack, pillage, rape, and burn the city. Peter obeyed his superior's orders, as was expected at the time. The attack on Breisach was so horrendous that the news spread throughout the empire, bringing about an uncommon consensus that this situation was a “crime against the laws of God and Man.” The leaders of the twenty-six member states of the Holy Roman Empire, either in person or through representatives, acted as international judges to prosecute Peter, a Dutchman, for crimes committed in Germany on the order of a French head of state. For all practical purposes and in accordance with contemporary standards, this established the first international criminal tribunal. At the trial, Peter sought to exhibit the written orders of the Duke of Burgundy, but the judges refused to allow him to do so. Allowing this evidence would have conveyed the impression that subordinates in Peter's position should not execute the orders of their superiors when they are so manifestly “against the laws of God and Man.” The court declined to articulate this possibility, and, in fact, this duty of conscience would not emerge in ICL for another 471 years, when the IMT Charter was adopted in London in 1945. Accordingly, the court's refusal to accept Peter's defense shielded the Duke from responsibility. Peter was sentenced to be drawn and quartered, a particularly brutal method of inflicting death.<sup>30</sup>

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<sup>27</sup> Jules Deschenes, *Toward International Criminal Justice*, in ROGER S. CLARK & MADELEINE SANN, *THE PROSECUTION OF INTERNATIONAL CRIMES: A CRITICAL STUDY OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 30 (2003).

<sup>28</sup> *Id.* at 31. Regarding Hagenbach's “unlimited capacity for evil,” Deschenes quotes nineteenth century French historian Prosper de Barante.

<sup>29</sup> *Id.*

<sup>30</sup> M. Cherif Bassiouni, *Perspectives on International Criminal Justice*, 50 VA. J. INT'L L. 269, 298 (2010). This passage represents a common pattern in Hagenbach ICL literature – scholars take the basic Schwarzenberger blueprint and cite each other citing that. Along the way, certain details get modified. In

In the meantime, one can discern through this entrenched narrative many of the important lineaments of modern ICL norm development. As just demonstrated, it is now conventional wisdom that the Hagenbach case constitutes a foundational rejection of the superior orders defense.<sup>31</sup> As Robert Cryer points out: “One of the most commented parallels between the von Hagenbach trial and more modern trials of international crimes is that of superior orders.”<sup>32</sup> Moreover, Schwarzenberger’s attempt, via the Hagenbach prosecutor’s alleged “laws of man” invocation, to attribute to crimes against humanity an ancient pedigree, has succeeded.<sup>33</sup>

Of perhaps even greater significance, the case is now credited with helping cultivate new ICL norms. For example, Hagenbach’s trial is now thought to be precedent for charging rape as a war crime.<sup>34</sup> In the book *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW*, Thom Shanker cites the Hagenbach case to support the proposition that “rape has been considered a war crime for centuries, and punishable as such.”<sup>35</sup> Similarly, Robert Cryer suggests that the Hagenbach tribunal’s refusal to accept the defendant’s argument that only a court of Burgundy could try him, served as a model for the International Criminal Tribunal for the former Yugoslavia’s rejection of Dusko Tadic’s plea of *jus de non evocando*:

The flip side of this sort of debate about the correct venue for trying those suspected of international crimes also has a historical echo in the von Hagenbach trial. Part of his defence was that he did not recognise any

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this passage, for example, as will be seen, Hagenbach was neither Dutch nor a “*condotierre*” (he was a member of the Duke’s court) and he was not “hired” to raise an army and occupy Breisach (although Breisach was within the Duke’s acquired territories and Hagenbach did hire mercenaries). The Duke was not French – he was Burgundian (although he was francophone and Burgundy is within modern-day France). The Duke did not acquire his new territory from the Holy Roman Empire. And his possession of it was not owing to “services rendered.” Moreover, there is no evidence that Charles the Bold ordered Hagenbach to “sack, pillage, rape and burn” Breisach. There were twenty-eight judges presiding over Hagenbach’s trial, not twenty-six. And Hagenbach was beheaded, not drawn and quartered.

<sup>31</sup> See, e.g., Gary D. Solis, *Obedience to Orders: History and Abuses at Abu Graib Prison*, 2 J. INT’L CRIM. JUST. 988, 990 (2004) (“He [Henry Wirtz, Commandant of the Andersonville prisoner-of-war camp] pleaded superior orders and, like von Hagenbach nearly 400 years previously, the plea was rejected.”).

<sup>32</sup> CRYER, *supra* note 25, at 20.

<sup>33</sup> See, e.g., Evo Popoff, Note, *Inconsistency and Impunity in International Human Rights Law: Can the International Criminal Court Solve the Problems Raised by the Rwanda and Augusto Pinochet Cases*, 33 GEO. WASH. INT’L L. REV. 363, 364 (2001) (“Aside from the Hagenbach case, efforts to create and enforce international crimes against humanity were mostly unsuccessful prior to World War II.”).

<sup>34</sup> And thus paving the way for rape-based war crimes convictions at the International Criminal Tribunal for the former Yugoslavia. See Jill C. Maguire, *Rape under the Alien Tort Statute in the Post-Sosa v. Alvarez-Machain Era*, 13 GEO. MASON L. REV. 935, 956 (2005) (In *Prosecutor v. Furundzija* and *Prosecutor v. Kunarak*, the ICTY confirmed the status of rape as a war crime for which the perpetrator is criminally liable even though it is not named as a grave breach of the laws of war.”).

<sup>35</sup> Thom Shanker, *Sexual Violence in* ROY GUTMAN, DAVID RIEFF, ANTHONY DWORKIN, *CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW* 323 (2d ed. New York: W.W. Norton & Co. 2007). See also Tamara F. Lawson, *A Shift Towards Gender Equality in Prosecutions: Realizing Legitimate Enforcement of Crimes Committed against Women in Municipal and International Criminal Law*, 33 S. ILL. U. L.J. 181, 204 n.94 (“For example, in the 1300s, Italian lawyer Lucas de Penna, urged that wartime rape be punished as severely as peacetime rape; in the 1474 trial of Sir Peter von Hagenbach, an international military court sentenced Hagenbach to death for war crimes, including rape, committed by his troops.”).



other judge but the Duke of Burgundy. The tactic of denying the legitimacy of the tribunal, and claiming that it has no right to try the defendant, is one which has been repeated regularly in international trials and forms a staple of Slobodan Milosevic's defense before the ICTY. The more specialised form of this claim, made by von Hagenbach, was that the only person appropriate to convoke a tribunal to try him would be Charles, as the person to whom von Hagenbach owed allegiance. A similar plea, *jus de non evocando*, was raised in *The Prosecutor v. Tadic* Interlocutory Appeal. There the defence suggested that there was a human right to be tried in front of a home court. The plea was, unsurprisingly, unsuccessful.<sup>36</sup>

More recently, in response to claims that the Rome Statute of the International Criminal Court does not brook state self-referral of cases,<sup>37</sup> Mohamed El Zeidy has invoked the Hagenbach trial as proof to the contrary. "In a historical context, the basic idea of a self-referral and a state's waiver of the exercise of its jurisdiction may even be traced back to the first international war crimes trial: that of Peter von Hagenbach or the *Breisach Trial* in 1474."<sup>38</sup>

This phenomenon of citing Hagenbach to help legitimize modern norm creation is summed up nicely by Timothy L.H. McCormack: "There is a tendency by some commentators to make too much of the Hagenbach trial by characterizing it, without qualification as "the first international war crimes trial" and then relying on it as international legal precedent for more contemporary developments."<sup>39</sup> Is it appropriate for modern jurists to avail themselves of the Hagenbach case in this manner? In order to answer that question, a much deeper look at the historical record and legal issues will be in order.

### III. HAGENBACH AND HISTORY

To understand the Hagenbach phenomenon in the ICL context, one must reconstruct the historical record and then dig below its surface. Given the plethora of historical narratives regarding the Burgundian bailiff, it is necessary to classify and parse the materials – in other words, as a preliminary matter, an examination of the case's historiography is indispensable. Then the history itself can be considered to identify the narrative points of convergence and divergence.

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<sup>36</sup> CRYER, *supra* note 25, at 20.

<sup>37</sup> See, e.g., Gregory S. Gordon, *Complementarity and Alternative Justice*, 88 OR. L. REV. 621, 662 (2009) ("Self-generated referrals, on the other hand, do not inspire the same kind of confidence [and find] no support in the Rome Statute's *travaux preparatoires* . . . [essentially, they] represent a government's request for ICC help in dealing with rebel groups.").

<sup>38</sup> MOHAMED M. EL ZEIDY, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE* 211 (Leiden: Brill 2008).

<sup>39</sup> Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES*, TIMOTHY L.H. MCCORMACK & GERRY J. SIMPSON 38 (The Hague: Kluwer 1997).

## A. Historiography

Over the centuries, history has been progressively more kind to Peter von Hagenbach. That might have seemed inconceivable in 1474. In the aftermath of his execution, he was portrayed as evil incarnate. His trial was seen as fair and his execution entirely justified. Hagenbach's initial infamy owes primarily to contemporary narratives published by his foes.<sup>40</sup> On the Teutonic side, Swiss chaplain Johannes Knebel, a conscientious diarist from Basel, chronicled the governorship, trial and execution of Sir Peter.<sup>41</sup> In the words of historian Gabrielle Claer-Stamm, the Knebel diary results in a [Hagenbach] biography that is very dark, where everything is atrocities, brutality, a portrait completely black, without nuance.<sup>42</sup> To a lesser extent, Johannes von Durlach, Breisach's notary, also described the Burgundian bailiff's supposed depredations in a publication known as "The Reimchronik," a 1474 collection of rhymed verse. Its 8,413 verses are contained in 165 chapters, of which 141 deal exclusively with Hagenbach.<sup>43</sup> Claer-Stamm has noted that "for centuries these first texts would influence historians who would repeat them, without any critical distance."<sup>44</sup> Historian Werner Paravicini adds: "For centuries, histories and poetic accounts cast this dark figure in the role of anti-hero for the Burgundian occupation of the Upper Rhine, the quintessential alien French speaker, the man of every excess, sexual and otherwise."<sup>45</sup>

Among those historians (both expert and lay) one would include Charles the Bold's Gallic enemies (allies of French King Louis XI), who did not give terribly flattering accounts of Hagenbach in those early years.<sup>46</sup> For example, Philippe de Commines, former counselor to the Duke of Burgundy but who switched sides to become a key advisor to Louis XI,<sup>47</sup> contributed toward defaming Hagenbach.<sup>48</sup> Georges Bischoff suggests that Commines played a part in the creation of the "black legend" surrounding Hagenbach.<sup>49</sup> Subsequent French historians wrote even more damning prose about the Alsatian bailiff. In his "History of France," Henri Martin wrote that Hagenbach's

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<sup>40</sup> GABRIELLE CLAER-STAMM, *PIERRE DE HAGENBACH: LE DESTIN TRAGIQUE D'UN CHEVALIER SUNDGAUVIEN AU SERVICE DE CHARLES LE TÊMÉRAIRE* 11 (Société d'Histoire du Sundgau 2004)

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* (author's translation).

<sup>43</sup> Werner Paravicini, *Hagenbach's Hochzeit: Ritterlichhöfische Kultur zwischen Burgund und dem Reich im 15. Jahrhundert* 41 in KONRAD KRIMM AND RAINER BRÜNING *ZWISCHEN HABSBURG UND BURGUND. DER OBERRHEIN ALS EUROPÄISCHE LANDSCHAFT IM 15. JAHRHUNDERTS* (Stuttgart 2003). Paravicini points out that the *Reimchronik* may also have been written by Berthold Stehelin, the mayor of Breisach. *Id.*

<sup>44</sup> CLAER-STAMM, *supra* note 40, at 11.

<sup>45</sup> Werner Paravicini, *Parler d'amour au XVe siècle: Pierre de Hagenbach et la dame de Remiremont*, 3 *COMPTES-RENDUS DES SÉANCES DE L'ANNÉE – ACADÉMIE DES INSCRIPTIONS ET BELLES-LETTRES* 1277, 1278 (2003). Paravicini has devoted much time to reversing this perception of Hagenbach, including publication of a book containing a series of love letters exchanged between Hagenbach and an anonymous paramour. See WERNER PARAVICINI, *UN AMOUR MALHEUREUX DU XVe SIÈCLE: PIERRE DE HAGENBACH ET LA DAME DE REMIREMONT* (Persée 2006).

<sup>46</sup> *Id.* at 11-12.

<sup>47</sup> See Andrew Richard Scoble, *Life of Phiip de Commines* in *THE MEMOIRES OF PHILIP DE COMMINES: LORD OF ARGENTON*, xi-xx (London: Henry G. Bohn 1856).

<sup>48</sup> Georges Bischoff, Preface, *Pierre the Good, or the Bold, Lord of Hagenbach, Knight and Bailiff* in CLAER-STAMM, *supra* note 33, at 7.

<sup>49</sup> *Id.* at 8.

pastimes were murder and rape.<sup>50</sup> P.E. Tueffert described Hagenbach as the archetypal feudal monster whose life was one long string of crime and infamy.<sup>51</sup> Perhaps the best known and most influential of these French historians (and, in many ways, the culmination of the work of previous historians) was Aimable-Guillaume-Prosper Brugière, baron de Barante (commonly referred to as "Prosper de Barante") whose multi-volume work *Histoire des ducs de Bourgogne de la maison de Valois* (1824-1826) figures prominently in any bibliography of the Burgundian duchy.<sup>52</sup> Barante, who apparently relied in large part on the now-missing text of Hagenbach contemporary M. Golbéry, (in a journal kept by sixteenth century architect Daniel Specklin), provided the classic portrait of Hagenbach as demonic villain.<sup>53</sup>

Nevertheless, a more nuanced view of Hagenbach began to emerge in the latter half of the nineteenth century. In his study of the final years of the Burgundian court, *HISTORY OF CHARLES THE BOLD, DUKE OF BURGUNDY* (1868) American historian John Foster Kirk questioned the reliability of the contemporaneous germanophone accounts of Hagenbach.<sup>54</sup> French historians eventually followed suit. In his book *PETER VON HAGENBACH AND THE BURGUNDIAN DOMINATION*, author Charles Nerlinger offered this charitable description of Hagenbach: "He was a forward-looking character, but impressionable, guided only by instinct, brooking no dissent and prone to fly off the handle."<sup>55</sup> That trend continued into the twentieth century. In her 1957 Hagenbach biography, *DER LANDVOGT PETER VON HAGENBACH*, German historian Hildburg Brauer-Gramm attributes tyrannical qualities to Hagenbach but finds them somewhat mitigated by his capabilities as a soldier and partly excusable given the boorish culture of the Burgundian court.<sup>56</sup>

Hagenbach's reputation was further rehabilitated by English historian Richard Vaughan in his 1972 study *CHARLES THE BOLD: THE LAST VALOIS DUKE OF BURGUNDY*. Vaughan portrayed Hagenbach as a visionary administrative reformer who was not given sufficient resources to effect necessary change in the region. Finally, Hagenbach's reputation was more recently rehabilitated in Gabrielle Claer-Stamm's full-length biography of Hagenbach. As Paravicini notes: "Nerlinger, Witte, Bernoulli, and very recently Gabrielle Claer-Stamm have written Hagenbach biographies which tend to rehabilitate his image: Georges Bischoff goes as far as to call him 'Peter the Good, or the Bold.'"<sup>57</sup>

So which historians have it right – those relying on the contemporaneous accounts or the revisionists? Are there any degrees of consensus between them? The section that

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<sup>50</sup> HENRI MARTIN, *HISTORY OF FRANCE* (Paris 1837-1854).

<sup>51</sup> P.E. Tueffert, *Pierre de Hagenbach*, *REVUE D'ALSACE* 210 (April 1878).

<sup>52</sup> PROSPER DE BARANTE, *HISTOIRE DES DUCS DE BOURGOGNE DE LA MAISON DE VALOIS* (1824-1826) (Paris: Librairie Le Normant 1854).

<sup>53</sup> Georges Bischoff, Doctoral Dissertation, at 34. *See also* Joseph Billioud, *Les états de Bourgogne aux XIVe et XVe siècles* 151 n.3 (1922) (stating that Barante relied on the Alsatian history of Daniel Specklin (1536-1589) whose manuscript disappeared in 1870).

<sup>54</sup> JOHN FOSTER KIRK, *HISTORY OF CHARLES THE BOLD, DUKE OF BURGUNDY* (Philadelphia: J.P. Lippincott & Co. 1864).

<sup>55</sup> CHARLES NERLINGER, *PIERRE DE HAGENBACH ET LA DOMINATION BOURGUIGNONNE* 156 (Persée 1890).

<sup>56</sup> HILDBURG BRAUER-GRAMM, *DER LANDVOGT PETER VON HAGENBACH* 48 (Musterschmidt Verlag 1957).

<sup>57</sup> Paravicini, *supra* note 37, at 1278.

follows will attempt to stitch together an historical record from the various strands of available narratives.

## **B. History**

### **1. Points of Consensus in the Record**

#### **a. Overview: The Duchy of Burgundy in a Time of Upheaval and Transformation**

The pre-Westphalian political Europe in and around the time of Peter von Hagenbach bears little resemblance to today's continent. While the nation-state represents the predominant contemporary European unit of organization, a less homogenous political configuration predominated in the fifteenth and early sixteenth centuries.<sup>58</sup> Alongside the larger kingdoms and imperial realms, the landscape was dotted with lordships, principalities, cantons, grand duchies, prince-bishoprics, federations, abbeys, petty lordships, countships, fiefdoms, margraviates, and city-states.<sup>59</sup> The proliferation of these smaller polities was in part responsible for a rather volatile transnational environment with strategic maneuvering and jostling for position and power throughout the continent – sometimes directly in competition with larger kingdoms, nascent nation-states and the continent's supranational behemoth, the Holy Roman Empire.<sup>60</sup> Against this backdrop played out the bloody battles of, among others, the end-stages of the Hundred Years' War and the incipient clashes of what would become the Protestant Reformation and culminate in the Thirty Years' War.<sup>61</sup>

Some of the era's tumult was due to the emerging erosion of certain medieval power structures, such as the Holy Roman Empire and the Catholic Church.<sup>62</sup> Glimmerings on the horizon of the Protestant Reformation, the resolution of dynastic struggles, and embryonic yearnings for democracy and ethno-linguistic self-determination can certainly account for much of this change.<sup>63</sup> On the other hand, some of the violent upheaval of the time was very personality driven – certain ambitious rulers

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<sup>58</sup> See Thomas D. Grant, Review Essay: *Martin van Creveld, The Rise and Decline of the State*, 9 J. TRANSNAT'L L. & POL'Y 309, 310 (2000) (book review).

<sup>59</sup> *Id.* ("Europe was divided among numerous rulers of varying rank, viewing lands and persons under their jurisdiction as private possessions, interconnected to one another through a jumble of ties of fealty."). See also Larry Gormley, *The Duchy of Burgundy, Medieval Powerhouse*, eHISTORY.COM, available at <http://ehistory.osu.edu/world/articles/ArticleView.cfm?AID=4> (last visited Aug. 5, 2011) ("During the fourteenth century, the French State was not cohesive and united. The existence of pseudo independent principalities such as Orleans, Bourbon and Brittany, which were led by great princes, created conflict and instability. The most powerful of these principalities was the duchy of Burgundy located between France and the German Empire.")

<sup>60</sup> See generally DENYS HAY, *EUROPE IN THE FOURTEENTH AND FIFTEENTH CENTURIES* (Longman 2d. ed. 1989). See also William Cafferro, *Late Middle Ages in EUROPE 1450 TO 1789: ENCYCLOPEDIA OF THE EARLY MODERN WORLD* (The Gale Group, Inc., 2004).

<sup>61</sup> Cafferro, *id.*

<sup>62</sup> ÉMILE PAUL TOUTEY, *CHARLES LE TÊMÉRAIRE ET LA LIGUE DE CONSTANCE* 227 (Hachette 1902) ("The end of the fifteenth century is thus one of the most dramatic periods in European history; the foundations of the Middle Ages: feudalism, hegemony of the Holy Roman Emperor, collide with the emerging foundations of modern times: centralization, an independent existence for diverse states . . .")

<sup>63</sup> *Id.*

wished to expand their domains and were willing to engage in armed conflict to make that happen.

One such ruler in the latter half of the fifteenth century was Charles, Duke of Burgundy, whom history remembers by the colorful cognomen, “the Bold.”<sup>64</sup> His detractors referred to him as Charles “the Terrible.”<sup>65</sup> The Valois Burgundian duchy that Charles took over in 1465 had grown considerably in size, wealth and power in the century since Charles’s similarly-dubbed great-grandfather, Philip the Bold, received it in apanage from King John II of France.<sup>66</sup> Originally a relatively modest fief in the northeast portion of France, it became something of a middle kingdom between England, France and the German Holy Roman Empire.<sup>67</sup> It eventually stretched from the Low Countries to parts of modern-day Germany and its possessions included, among others, Franche-Comté, Flanders, Brabant, Luxembourg, Lorraine and Alsace.<sup>68</sup>

Charles the Bold, aggressively following the expansionist policies of his father, Philip the Good, was responsible for bringing the duchy’s growth to its apex.<sup>69</sup> Notwithstanding that growth, there were significant north-south territorial gaps in the Burgundian realm and Charles wanted to bridge them to form a united super-landmass, the “Kingdom of Lotharingia,” under his rule in the heart of Europe.<sup>70</sup> He also had hopes of parlaying such power into a bid for accession to the Imperial throne (Holy Roman Empire).<sup>71</sup> As a consequence of such ambition and expansionist aims, as well as a series of shifting alliances among other sovereigns vying for power in the region, Charles found himself within the eye of a bellicose Continental storm that would eventually consume him.

More precisely, to the west, as Burgundy sought to maintain and enlarge its territory in France, Charles was engulfed in a turf war with French King Louis XI.<sup>72</sup> To the east, the duke incurred the enmity of the Swiss and Austrians after gaining control of Alsace and subjecting its citizens to the authoritarian stewardship of Hagenbach.<sup>73</sup> He would ultimately be squeezed between these two axes of conflict.

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<sup>64</sup> RUTH PUTNAM, CHARLES THE BOLD, LAST DUKE OF BURGUNDY, 1433-1477, at iii-v (G.P. Putnam's Sons 1908).

<sup>65</sup> GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 462 (1968). Schwarzenberger notes that the more sinister title owed to massacres committed by Charles in his various military campaigns, including the mass killing of the inhabitants of Nesle in 1472. *Id.*

<sup>66</sup> Gormley, *supra* note 58.

<sup>67</sup> *Id.*

<sup>68</sup> See COLUMBIA ENCYCLOPEDIA 512 (5th ed. 1993)

<sup>69</sup> *Id.* at 2135.

<sup>70</sup> COLUMBIA ENCYCLOPEDIA, *supra* note 67, at 512; BIG SITE OF HISTORY, *The Burgundian Threat and Louis XI, 1419-1483: The Rise of the Nation*, available at <http://bigsiteofhistory.com/the-burgundian-threat-and-king-louis-xi-1419-1483-the-rise-of-the-nation> (last visited Aug. 5, 2011).

<sup>71</sup> RICHARD VAUGHAN, CHARLES THE BOLD: THE LAST VALOIS DUKE OF BURGUNDY 84, 130-131 (Woodbridge: The Boydell Press 2002) (“After all, there was an ultimate aim behind his purchase of Alsace, his attempt on Frisia and his conquest of Guelders: the acquisition of the imperial throne.”).

<sup>72</sup> BIG SITE OF HISTORY, *supra* note 69.

<sup>73</sup> 3 WILHELM ZIMMERMAN & HUGH CRAIG, A POPULAR HISTORY OF GERMANY FROM THE EARLIEST PERIOD TO . . . 1341 (New York: Henry J. Johnson 1878)

At the same time, the Europe of Peter von Hagenbach was transitioning from a feudal, land-based civilization to an increasingly urbanized, bourgeois society.<sup>74</sup> Much of the tension precipitating the armed conflicts was also due to this increasing rift between these old and new orders during the High Middle Ages.<sup>75</sup> Peter von Hagenbach and his master Charles the Bold represented the old order.<sup>76</sup> The emerging nation-state of France, whose king, Louis XI, appreciated and supported the sociological and economic shift from medieval to modern, represented the new order.<sup>77</sup> So did many of the Swiss cantons and Alsatian free city-states.<sup>78</sup> The rising burgher class in these pre-modern territorial pockets would lock horns with Charles<sup>79</sup> and his bailiff and history would never again be the same.

### **b. The Conflict with Louis XI**

The contest between Charles the Bold and Louis XI began not long after the death of Louis's father, Charles VI, upon Louis's ascension to the French throne.<sup>80</sup> In an effort to extend and centralize royal power, Louis began to limit the prerogatives of the French nobility – assessing them new levies and stripping them of much authority.<sup>81</sup> In many instances, basic privileges, such as the right to hunt, were curtailed.<sup>82</sup> At the same time, Louis discharged some of his father's most loyal and competent ministers and officers and they in turn intrigued with the nobility to stir up rebellion against the French monarch.<sup>83</sup> The foremost champion of their cause was Charles the Bold, who used Louis's young and ineffectual brother Charles, the Duke of Berry, as the figurehead of a nobility opposition group, known as “the League of the Public Weal.”<sup>84</sup> As rallied by Charles the Bold, the League went to war against the King of France.<sup>85</sup> The position of the two sides ebbed and flowed.<sup>86</sup> But after royal forces failed to check a Burgundian advance on Paris, Louis, a very shrewd diplomat (later dubbed the “Universal Spider”) gave the impression that he was yielding to the League's demands.<sup>87</sup> He granted Normandy to his brother, returned to Burgundy certain contested cities on the Somme, and even granted privileges to lesser nobles implicated in the uprising.<sup>88</sup> But all these measures were seemingly taken in an underhanded effort to break up the League. Louis

<sup>74</sup> TOUTEY, *supra* note 62, at 227.

<sup>75</sup> *Id.*

<sup>76</sup> VAUGHAN, *supra* note 71, at 265, 270, 277.

<sup>77</sup> 17 ENCYCLOPEDIA AMERICANA 776 (New York: Grolier 1966) (“He [Louis XI] favored the craftsmen and merchants, aiding in particular the development of silk and metal manufactures, and in his wars he was generally supported by the townspeople.”).

<sup>78</sup> ROBERT W. SCRIBNER & ROY PORTER, THE REFORMATION IN NATIONAL CONTEXT 30 (Cambridge University Press 1994).

<sup>79</sup> VAUGHAN, *supra* note 71, at 99, 97 (“ . . . ducal policy towards the towns [included] verbal threats . . . hostility [and] an anti-urban attitude.”)

<sup>80</sup> Michel J. Molat, *Louis XI* in ENCYCLOPAEDIA BRITANNICA (2011).

<sup>81</sup> CHRISTOPHER HARE, THE LIFE OF LOUIS XI: THE REBEL DAUPHIN AND THE STATESMAN KING 95 (London and New York: Harper & Brothers 1907).

<sup>82</sup> *Id.*

<sup>83</sup> Molat, *supra* note 78.

<sup>84</sup> HARE, *supra* note 79, at 99-100; Molat, *supra* note 78.

<sup>85</sup> HARE, *supra* note 79, at 102.

<sup>86</sup> *Id.* at 102-109.

<sup>87</sup> *Id.* at 109-110.

<sup>88</sup> *Id.*

was temporizing. Within months of ceding Normandy, for example, he reclaimed it.<sup>89</sup> In the end, France was saved from collapse by the refusal of the lesser gentry to rise up against its king, and by the alliance of Louis with the citizen class, especially the growing ranks of city dwellers.<sup>90</sup>

But the larger war between Louis XI and Charles the Bold continued and entered a new phase. Louis extended an olive branch to certain key members of the League by returning to them various estates and privileges and beginning the process of turning them against Charles.<sup>91</sup> Over the next few years, the Duke of Burgundy would win various military campaigns against Louis but could not bring him down.<sup>92</sup> Louis had some success on the battlefield as well and in 1472, after an unsuccessful invasion of France, the Duke of Burgundy was obliged to make a lasting truce with the King of France.<sup>93</sup> A new phase opened in which Charles the Bold's projects were to be concentrated primarily on his eastern flank, in other words toward the German-speaking territories. In the meantime, Louis kept his eye on Charles's new endeavors and waited for his chance to destroy Burgundy through new diplomatic alliances.

### c. Austria, Switzerland and Alsace

To put the case of Peter von Hagenbach into context, one must also consider the situation on Charles the Bold's eastern flank – in particular, the area that now comprises Switzerland, Austria, and Germany. The territories of what is considered modern Switzerland were brought under the control of the Holy Roman Empire in approximately 1033 A.D.<sup>94</sup> Over the next couple hundred years, certain Swiss cantons entered into a political alliance known as the “Old Swiss Confederacy.”<sup>95</sup> By the mid-fifteenth century, the confederates, or “*Eidgenossen*,” formed a loose affiliation of about a dozen largely independent small states.<sup>96</sup>

Although they had the status of “imperial immediacy” within the Holy Roman Empire (i.e., directly under the Emperor), they had been for some time under the effective control of Austria's ruling family, the Habsburgs.<sup>97</sup> The latter resisted Swiss efforts to gain independence and this led to a series of fourteenth century battles against Habsburg forces that the Swiss won decisively, most notably the Battles of Sempach and Näfels.<sup>98</sup> By the time Charles the Bold assumed the Burgundian mantle in 1465, there was still

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<sup>89</sup> Molat, *supra* note 78.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Switzerland*, ENCYCLOPAEDIA BRITANNICA (2011).

<sup>95</sup> MEDIEVAL TIMES HISTORY, *Swiss Confederacy or the Swiss League*, available at <http://www.medievaltimes.info/medieval-europe-13th-to-15th-century/swiss-confederacy-or-swiss-league.html> (last visited Aug. 5, 2011).

<sup>96</sup> ARLIN C. MIGLIAZO, *TO MAKE THIS LAND OUR OWN* 47 (University of South Carolina Press 2007); VAUGHAN, *supra* note 71, at 263.

<sup>97</sup> Eugen Huber, *Switzerland* in *A GENERAL SURVEY OF EVENTS, SOURCES, PERSONS AND MOVEMENTS IN CONTINENTAL LEGAL HISTORY* 485, 499 (Boston: Little, Brown, & Company 1912)

<sup>98</sup> CAROL L. SCHMID, *CONFLICT AND CONSENSUS IN SWITZERLAND* 78 (University of California Press 1981).

much bad blood between the fiercely independent Swiss and their former Austrian feudal overlords.<sup>99</sup> And the Swiss were expanding their control over territory in the Rhine region.<sup>100</sup> The Confederacy controlled most of the land south and west of the Rhine to the Alps and the Jura mountains and was poised to take the Sundgau portion of the Rhine territory.<sup>101</sup> Ultimately, the *Eidgenossen* agreed not to attack this region in exchange for a significant reparations pledge from the Austrians.<sup>102</sup>

Unfortunately for the Austrians, Archduke Sigismund (also known as "Sigmund") was in dire financial straits and could not afford to pay the Swiss and/or maintain control over his possessions on the Upper Rhine.<sup>103</sup> So he agreed to mortgage these Alsatian lands to Charles the Bold.<sup>104</sup> By the treaty of St. Omer, entered into on May 9, 1469, Charles acquired Habsburg possessions on both sides of the Rhine, including the Landgraviate of Alsace, the counties of Ferrette and Hauenstein (with a large part of the Black Forest), the towns of Breisach and Ortenburg, and the four so-called "Forest Towns" of Rheinfelden, Seckingen, Lauffenburg, and Waldshut.<sup>105</sup> In exchange, Sigismund received 50,000 Rhenish florins and a promise from Charles that he would pay the Swiss reparations in the sum of an additional 10,000 Rhenish florins.<sup>106</sup> Title to these possessions could be redeemed by Sigismund but only upon a lump-sum payment made at a specified place – it was not contemplated that Sigismund would ever be solvent enough to regain his Upper Alsace lands.<sup>107</sup>

So what exactly did Charles acquire for 60,000 florins? His new possessions might be described as an archipelago of city-states more or less accustomed to independence given the absentee-landlord role played by Sigismund while he was nominally in control.<sup>108</sup> Assuming Charles could keep the citizens of these newly-acquired towns happy, the Treaty of St. Omer put him in quite an advantageous position. In concluding the entente with Sigismund, Charles and the Austrian archduke both gave and received pledges of friendship and support to one another. After all, Charles would be solving for the Austrian ruler a thorny financial and administrative problem in Alsace and in return Sigismund would help quench the Burgundian's thirst for territorial aggrandizement. At the same time, Charles would extinguish Sigismund's reparations debt to the Swiss Confederacy. This could help strengthen the longstanding friendly relationship between the Confederacy and the House of Burgundy.

On the other hand, from Charles the Bold's perspective, the new arrangement was fraught with peril. For one thing, the *Eidgenossen*, likely believing Sigismund incapable of satisfying his reparations debt, were prevented by Charles's assumption of the debt

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<sup>99</sup> VAUGHAN, *supra* note 71, at 262, 264-265.

<sup>100</sup> *Id.* at 85, 264.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 262.

<sup>103</sup> *Id.* at 85-86.

<sup>104</sup> *Id.* at 86.

<sup>105</sup> *Id.* at 87, 88-89.

<sup>106</sup> *Id.* at 86.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 88.



from acquiring new territory.<sup>109</sup> Moreover, the new Austro-Burgundian arrangement might have convinced the Swiss that Charles had formed a strong alliance with Sigismund, the Confederacy's perceived oppressor and sworn enemy. This could potentially put Charles in a precarious position vis-à-vis the militarily powerful *Eidgenossen*.

Moreover, the smaller power brokers of the parts of Upper Alsace not within Burgundian control – the independent city leaders and Imperial regional governors, for example, would now have to coexist with the acquisitive Duke of Burgundy in their backyard, and they were justifiably concerned about Charles's territorial ambitions.<sup>110</sup> Further, all these independent neighborhood polities, in addition to those in Charles's possession, were German-speaking.<sup>111</sup> The Burgundians were francophone – and no overlord in this largely Germanic region had ever spoken a foreign language.<sup>112</sup> That could certainly become a source of friction.

So while the treaty of St. Omer could understandably have brought many strategic advantages to Charles, it certainly had the potential to upset the relatively harmonious relations his duchy had previously established in the region. If governed judiciously, the new Alsatian possessions might promote ducal prestige, generate tax revenue, serve as a strategic buffer and perhaps further solidify Charles's relations with his Germanic allies. If governed maladroitly, Charles could alienate his eastern neighbors and perhaps make attractive an alliance with the ever-scheming Louis XI that could squeeze Burgundy within a dangerous pincers.

Thus, Charles the Bold seems to have needed someone effective and politically astute to administer these territories. In the event, he chose Peter von Hagenbach, a trusted lieutenant whose dog-like loyalty and blind devotion had endeared him to Charles through years of Burgundian court intrigue and military conquest. Unfortunately, while the ideal candidate might have won the region over with a light touch and effective diplomacy, Charles's deputy ultimately terrorized Upper Alsace with blunt force trauma and what some accounts would describe as a reign of terror.

#### **d. Peter von Hagenbach**

The origins of Peter von Hagenbach are rather obscure<sup>113</sup> – even his date of birth is unknown (although estimated to be 1420).<sup>114</sup> His father Anton was a lesser nobleman of southern Alsace, a region known as the “Sundgau.” His family had been under the feudal dominion of the Habsburgs since the middle 1300s. Anton hailed from the town

<sup>109</sup> *Id.* at 86 (“Bern would have preferred conquest to cash and probably hoped for a further opportunity of military expansion when, as seemed likely, the impecunious Sigismund failed to pay the promised reparations.”).

<sup>110</sup> *Id.* at 97.

<sup>111</sup> *Id.* at 273.

<sup>112</sup> *Id.*

<sup>113</sup> Heinrich Witte, *Zur Geschichte des burgundischen Landvogts Peter von Hagenbach*, 8 ZEITSCHRIFT FÜR DIE GESCHICHTE DES OBERRHEINS 646 (1893)

<sup>114</sup> HILDBURG BRAUER-GRAMM, *DER LANDVOGT PETER VON HAGENBACH: DIE BURGUNDISCHE HERRSCHAFT AM OBERRHEIN 12 1469-1474* (1957)

of Hagenbach, where his family's like-named ancestral castle was located. This small municipality was within the vicinity of Mulhouse, a larger town that would later factor prominently in Peter's life as a servant of the Duchy of Burgundy. Records indicate that Anton von Hagenbach became a citizen of Thann and entered into the service of the powerful Habsburgs.<sup>115</sup> In 1428, he became the mayor of Thann and in 1440 he was named Habsburg Council at the Court of Ensisheim.<sup>116</sup>

When Anton von Hagenbach met Peter's mother, Catherine, she was the widow of a French nobleman by the name of Jean de Montjustin, the Lord of Belmont.<sup>117</sup> Belmont's castle, in which Peter was raised, was located in the Franche-Comté, a nearby francophone Burgundian province. Reflective of his parents' respective mother tongues, Peter was fully fluent in French and German. Catherine had two sons from her previous marriage – Etienne and Philippe – as well as three additional children from her marriage to Anton von Hagenbach – John, Stephen and Isabelle.<sup>118</sup>

Peter von Hagenbach appears to have received his education in a francophone monastery and then turned to a life of military and ducal court service. As a nobleman of Belmont, and thus within the feudal auspices of the Duchy of Burgundy, one can imagine Peter might have had opportunities to interact with members of the Burgundian court. Historian Werner Paravicini writes that an "unknown intermediary opened the door for him [Hagenbach] to the Burgundian court."<sup>119</sup> An early reference to his service to the Duchy appears in 1443, when he apparently took part in a military operation in Luxembourg conducted under the aegis of Charles the Bold's father, Philip the Good.<sup>120</sup> Perhaps not coincidentally, in the same year, Peter was made a Knight of the Order of St. George of Burgundy,<sup>121</sup> which was created in 1390 by Philip the Good's squire, Phillibert de Mollans.<sup>122</sup> The year 1443 played a significant role in Hagenbach's personal life too as he then married Marguerite d'Accolans, a noblewoman of the Franche-Comté.<sup>123</sup> Of their five children, only a son and two daughters survived to adulthood.

By 1448, Sir Peter von Hagenbach's darker side had begun to manifest itself. According to historian Hildburg Brauer-Gramm, Hagenbach kidnapped a certain Marquard Baldeck, a banker from Basel with whom he had dined the previous evening.<sup>124</sup> Hagenbach demanded a ransom from Baldeck's family.<sup>125</sup> The plot was foiled when, at Philip the Good's behest, Baldeck was immediately released without the ransom being

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<sup>115</sup> *Id.* at 12.

<sup>116</sup> *Id.* at 12-13.

<sup>117</sup> *Id.* at 14

<sup>118</sup> *Id.*

<sup>119</sup> Paravicini, *supra* note 45, at 1277.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> The order was created to honor the relics relating to St. George that Phillibert de Mollans had brought back from the Holy Land. See JOANNIS GUIGARD, BIBLIOTHÈQUE HÉRALDIQUE DE LA FRANCE 55-56 (E. Dentu, Paris, 1861). It also appears to have gone by the name "the Order of St. George's Shield." See KIRK, *supra* note 54, at 499.

<sup>123</sup> BRAUER-GRAMM, *supra* note 2, at 14

<sup>124</sup> *Id.* at 14-15.

<sup>125</sup> *Id.* at 14-15.

paid.<sup>126</sup> This seems a foreshadowing of Hagenbach's future interaction with Swiss citizens and his eventual trial and execution as Charles's Alsatian bailiff.<sup>127</sup>

In the early 1450s, Hagenbach's name first appears in official Burgundian court records as "Aquenbacq" or "Archembault."<sup>128</sup> In 1453, serving as a Chamberlain to Duke John of Cleves, Hagenbach participated in the great Burgundian banquet known as the Feast of the Pheasant – a lavish ceremony for princes, lords and knights meant to rally support for a new Crusade against the Ottomans, who had taken Constantinople the previous year.<sup>129</sup> By 1460, Hagenbach was a maitre d'hotel at the ducal court and the Burgundian career prospects of the ambitious courtier were rapidly improving.<sup>130</sup> According to Duchy of Burgundy expert Richard Vaughan:

Soon after then [Hagenbach] took sides with Charles, then count of Charolais, in the quarrels between him and his father Philip the Good, and he was able to earn Charles's undying gratitude in the summer of 1462 when he exposed Jehan Coustain's alleged plot to murder him, a plot which he himself may have contrived on Charles's behalf in order to eliminate Coustain and discredit his patrons the Croys. It was probably soon after this that Charles wrote to Hagenbach addressing him as "my very good friend" and assuring him that he would neither abandon nor fail him whatever might happen.<sup>131</sup>

Hagenbach's exploits on the battlefield during the 1460s further endeared him to Charles. In fact, Vaughan reports that "Hagenbach won military renown in the 1465 war of the League of the Public Weal."<sup>132</sup> That war began in June with Charles attacking the French Count of Nevers's towns of Péronne, Roye, and Montdidier, with Péronne being "captured by a nocturnal escalade" in October.<sup>133</sup> "[Hagenbach's] most brilliant exploit," according to Vaughan, "was the seizure of the town of Péronne on 3 October 1465 from the Count of Nevers, Jehan de Bourgogne."<sup>134</sup>

Vaughan also attributes Hagenbach's military renown to his participation in Charles's bloody campaigns against Dinant and Liège, two rebellious towns in the Burgundian territory of what is now Belgium.<sup>135</sup> For example, in 1466, as the officer in

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<sup>126</sup> *Id.* at 14-15. Hagenbach subsequently wrote a letter to the local Habsburg bailiff attempting to justify his actions. *Id.*

<sup>127</sup> More evidence of Hagenbach's sinister side comes to light in connection with Burgundian court intrigue. Valois Burgundy historian Richard Vaughan describes how Hagenbach likely eliminated an opponent by manufacturing a murder plot against the duke of Charolais and falsely pinning it on the opponent. *See infra* note 130.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 16.

<sup>131</sup> VAUGHAN, *supra* note 71, at 255.

<sup>132</sup> *Id.*

<sup>133</sup> RICHARD VAUGHAN, PHILIP THE GOOD: THE APOGEE OF BURGUNDY 391 (Woodbridge The Boydell Press 2002).

<sup>134</sup> VAUGHAN, CHARLES THE BOLD, *supra* note 71, at 255.

<sup>135</sup> *Id.* at 256.

command of the duke's artillery, Hagenbach played a decisive role in the defeat of Dinant, a fortified city that had to be reduced by siege.<sup>136</sup> During that era, sieges were typically conducted at night to cloak the attackers under cover of darkness. Disregarding that precaution, Hagenbach brazenly took the lead in charging the town in the middle of the day. John Foster Kirk describes Hagenbach "ordering the field pieces to be advanced as close as possible to the walls" and, in the face of Dinant's fire bringing up the "bombards," as the siege ordnance were called, "leading the foremost horse with his own hand" and thereby succeeding in "getting them into position in broad daylight."<sup>137</sup> Kirk notes that Hagenbach's "vigor and resolution strongly recommended him to the favor of a commander [Charles the Bold] personally so distinguished for these qualities, and obtained for him ultimately a place in Charles's confidence productive of fatal consequences to both."<sup>138</sup>

Hagenbach was also valuable to Charles off the battlefield. Owing to his fluency in German, for example, he was frequently employed on diplomatic missions.<sup>139</sup> It was Hagenbach, for instance, who negotiated the 1465 alliance between Burgundy and the count palatine of the Rhine.<sup>140</sup> In the estimation of Richard Vaughan: "In the summer of 1469, [Hagenbach] was an obvious choice for the post of ducal bailiff in Upper Alsace."<sup>141</sup> Alsatian historian Gabrielle Claer-Stamm elaborates:

He was an effective military leader, which had been proven on the battlefields of Dinant, Bouillon, Liège . . . He had the requisite energy to take control of the administration of these territories. He knew the practices and customs of the region as well as the workings of German politics. Bilingual, he could successfully negotiate the redemption of property rights for his master [which had been encumbered by Sigismund to the petty nobility]. Finally, and this is probably the most important point, his Alsatian roots would easily allow him to claim the support of the Alsatian nobility.<sup>142</sup>

## **2. Points of Divergence in the Historical Record – The Bailiff Years**

### **a. The Demonic Portrait of Hagenbach**

There are differing accounts of Hagenbach's time as Charles's bailiff in Upper Alsace. The older and more contemporaneous accounts tend to paint him as a tyrannical, sexually deviate, bloodthirsty monster. This portrait is nicely encapsulated by French historian Prosper de Barante in his book, *Histoire des ducs de Bourgogne de la Maison de Valois* (1824-1826). In introducing readers to Hagenbach, Barante notes that the

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<sup>136</sup> KIRK, *supra* note 54, at 411 (Philadelphia: J.P. Lippincott & Co. 1864)

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> VAUGHAN, *supra* note 71, at 255.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> CLAERR-STAMM, *supra*, note 40, at 171.

Alsatian bailiff was “one of the most cruel and violent men to hold power over a people.”<sup>143</sup> “He knew no justice,” Barante elaborates, “and the slightest refusal to satisfy his whims was tantamount to a death sentence.”<sup>144</sup> Barante notes that he had people killed without even giving the slightest clue as to why – many of them with his own hand.<sup>145</sup> By way of example, Barante describes the case of four citizens of the Alsatian town of Thann who were sent by the Thann government to complain to Hagenbach about exorbitant taxation (this incident would eventually become a focal point at Hagenbach's own trial in 1474).<sup>146</sup> “Without any sort of trial,” Barante recounts, “Hagenbach had these four unfortunate burghers decapitated.”<sup>147</sup>

As these Thann executions indicate, Hagenbach’s taxes were responsible for sowing much discontent in the Upper Alsace. One of the conditions on which the Alsatian lands were mortgaged to Charles, Barante explains, was that the liberties of their residents be preserved and respected.<sup>148</sup> Barante recounts that Hagenbach paid no heed to that guarantee and ultimately violated it by imposing a one-pfennig tax on each bottle of wine consumed in the region.<sup>149</sup> Barante then details a series of other violations of the Alsatian rights under his stewardship:

(1) Farmers were subjected to compulsory labor service and thereby prevented from engaging in their agricultural work;

(2) Soldiers were regularly quartered in the homes of the citizens without their consent and the soldiers would mistreat the homeowners without the latter having any legal protection or recourse;

(3) Noblemen were deprived of their right to hunt;

(4) Sexual violence was visited on young girls from all walks of life and classes, including nuns.<sup>150</sup>

With regard to sexual depredations, Johannes Knebel, a chaplain from Basel who wrote contemporaneous accounts of Hagenbach, reported that the bailiff became acquainted with a cloister of nuns in Breisach.<sup>151</sup> Among them was a beautiful young vestal.<sup>152</sup> Knebel writes that Hagenbach “stared at her with burning desire.”<sup>153</sup> He

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<sup>143</sup> BARANTE (Vol. IX), *supra* note 52, at 405.

<sup>144</sup> *Id.* at 406.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* These killings would eventually be the basis of one of the counts against Hagenbach at his 1474 trial.

<sup>147</sup> *Id.* A point that supports the revisionists is that other specific examples of murder are not given. It would seem that Hagenbach's chief atrocity crime was mass rape.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 405-406

<sup>150</sup> *Id.* at 406-407

<sup>151</sup> JOHANNES KNEBEL, CHRONICLE OF THE CHAPLAIN JOHANNES KNEBEL FROM THE TIME OF THE BURGUNDIAN WARS 49 (Basel 1851).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

threatened her with death if she did not submit to his desires.<sup>154</sup> One of his lieutenants searched the cloister, found the attractive holy woman, and took her to Hagenbach, who raped her.<sup>155</sup> Hagenbach's lieutenant threatened the other nuns with death for having attempted to hide Hagenbach's victim.<sup>156</sup>

Prosper de Barante focuses on one particularly heinous incident wherein Hagenbach invited a town's married couples to his residence for a party.<sup>157</sup> Once all were assembled, he removed the husbands from his residence and forced the wives to strip naked. Following this, he placed a covering over the head of each woman. The husbands were then ordered to return and inspect the naked bodies of the masked women. Those who were not able to identify their wives in this state were thrown down a long flight of stairs. Those who recognized their wives were rewarded by being forced to ingest copious amounts of alcohol that rendered them fatally ill.<sup>158</sup>

According to Barante, Hagenbach's hatred for the inhabitants of his ducal charge was particularly intense toward the townspeople, as opposed to the rural residents.<sup>159</sup> And this included the towns outside the Duke's direct authority, such as Strasbourg, Colmar, Schelestadt, and other cities under Imperial aegis. Hagenbach is supposed to have subjected them to a regular litany of insults and poor treatment. Barante quotes Sir Peter as informing one group of burghers that "We should not have to suffer persons of lower station in life exercising the privileges of power. Only princes are fit to govern; not tailors and cobblers."<sup>160</sup> Strasbourg in particular seemed to bear the brunt of the bailiff's wrath. He subjected Ortenberg Castle, owned by the Strasbourgeois, to a military siege and then occupied it as ducal property. He imposed the dreaded wine tax on Strasbourg and then demanded that its citizens swear an oath of allegiance to the Duke of Burgundy.<sup>161</sup> "In the end," writes Barante,

no one knew when the limits of the bailiff's tyranny would be reached. . . [The nobles and bishops of Alsace under Imperial dominion] feared becoming subjects of the Duke of Burgundy. Thus, Peter von Hagenbach put an end to the discord between feudal lords and townspeople. They were now united by the same resentments and fears."<sup>162</sup>

Even the profligate Sigismund, who barely paid attention to his Alsatian subjects when he had title to their lands, was allegedly aware of the appalling treatment they suffered at Hagenbach's hands. According to Barante, "Duke Sigismund of Austria wrote to [Hagenbach] from Insbruck, where he was vacationing, and asked that

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 49-50.

<sup>157</sup> BARANTE (Vol. IX), *supra* note 52, at 407.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 408.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 408-409

Hagenbach treat his poor subjects less harshly; but such appeals had no effect on this obstinate and arrogant man.”<sup>163</sup>

However, Hagenbach’s greatest mistake by far, writes Barante, was alienating the Swiss, the House of Burgundy’s traditional ally and good neighbor. This began with Hagenbach’s seizure of the seigneurie of Schenkelberg, which was property of the Swiss city of Berne. Later on, one of Hagenbach’s deputies arrested near the town of Breisach a group of Swiss merchants traveling with their fine cloths to the Frankfurt Fair. “They were mistreated, their goods were confiscated, and they were imprisoned in the Schuttern Castle, where their captors demanded from them a ransom of 10,000 crowns.”<sup>164</sup> These prisoners were liberated by soldiers of Strasbourg who burned Schuttern Castle to the ground.<sup>165</sup> This helped forge an alliance between the Swiss and the free cities of Alsace.<sup>166</sup>

### **b. The Revisionist Portrait of Hagenbach**

Later chroniclers of the period have taken a much more charitable view of Hagenbach’s role in alienating Alsace and its neighbors. In his work, *A History of Charles the Bold, Duke of Burgundy*, (1863-67), American historian John Foster Kirk pointed out that surviving contemporaneous accounts, those supporting Barante’s history, were written by the chroniclers of those who prosecuted and put to death Peter von Hagenbach. “The truth is, these chroniclers – monks and municipal scribes at Basel and Strasbourg – recorded simply from day to day, without personal cognizance or investigation, whatever rumors had currency and a special interest in their localities.”<sup>167</sup>

And the negative reports regarding Hagenbach, he notes, date from his final year in Alsace – there is little to nothing during the first four years.<sup>168</sup> Nevertheless, even Kirk acknowledges that Charles the Bold “left Alsace to the mercies of a tyrannical steward, the minor villain of the piece, in whom the vices of his principal were mixed with others still more odious, whose cruelty and craft had no false luster, no redeeming trait.”<sup>169</sup>

British historian Richard Vaughn, in his magisterial biography *Charles the Bold: The Last Valois Duke of Burgundy* (1973), refuses to accept wholesale the cartoonish depiction of Hagenbach “as the archetypal tyrant, the Burgundian bogeyman, the iniquitous immoral official of a detested foreign regime.”<sup>170</sup> Instead, Vaughn focuses on the fact that Charles was not very concerned about the administration of his Alsatian properties.<sup>171</sup> And thus Peter von Hagenbach was left to fend for himself with few resources and little direction. Given his aristocratic sense of superiority, his gruff

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<sup>163</sup> *Id.* at 407-408

<sup>164</sup> *Id.* at 410

<sup>165</sup> *Id.* at 411

<sup>166</sup> *Id.*

<sup>167</sup> KIRK, *supra* note 54, at 471

<sup>168</sup> *Id.* at 472

<sup>169</sup> *Id.* at 475

<sup>170</sup> VAUGHAN, *supra* note 71, at 286

<sup>171</sup> *Id.* at 91-95

military demeanor and his disdain of the region's Swiss, urban and lower class citizens, he soon ostracized the Alsatian population.<sup>172</sup> As Vaughan notes:

Peter von Hagenbach lost no time, after his appointment as Burgundian bailiff in Upper Alsace on 20 September 1469, in demonstrating his intense dislike of the townspeople and of the Swiss. He is supposed to have written to Strasbourg in 1470 ordering them not to proceed to the election of the new *Ammeister*. Instead, 'we will come in person to give you one, who will be neither a butcher nor a baker nor a ribbon merchant; you will have the honour of having for chief the noblest of princes, the duke of Burgundy himself.' Charles the Bold certainly seems to have condoned his bailiff's hostile sentiments and provocative actions.<sup>173</sup>

Vaughn opines that the situation was aggravated by fears of Charles's territorial ambitions in the region and further exacerbated by his administrators' speaking a foreign language. "Unlike the Austrians, the Burgundians were *welsch*, or French speaking foreigners, in a thoroughly Germanic area. Their arrival and the administrative activities which accompanied it, aroused the suspicions and distrust of Charles's ally the imperial *Landvogt* of Alsace, Frederick the Victorious, elector palatine of the Rhine, as well as of two of the most powerful and populous cities on the Rhine, Strasbourg and Basel."<sup>174</sup> Concerns about Charles's desire for land acquisition seemed to reach their peak in September 1473, when he met with Holy Roman Emperor Frederick III in Trier to discuss Charles's possible ascension to the Imperial crown.<sup>175</sup>

Alsatian historian Georges Bischoff, in his piece *Pierre the Good, or the Bold, Lord of Hagenbach, Knight and Bailiff* (preface to Gabrielle Claer-Stamm's biography), adds that, in addition to local fears about Burgundian expansion, the citizens of the Upper Rhine resented Hagenbach's strict administration and his curbing of corrupt practices in the region.<sup>176</sup> He went so far as to add that Hagenbach's administrative reforms, so abhorred by the Alsatians and Rhenians, presaged the structures instituted by Louis XIV two centuries later.<sup>177</sup> Hermann Heimpel notes that Hagenbach went through the territory with an "iron sweeper" – imposing duties, improving castles, establishing a road-police, improving trade and organizing a court system molded after the Burgundian, and reforming cloisters.<sup>178</sup> Certainly, one of Hagenbach's most impressive achievements was in the area of public safety and roads administration. During his tenure, Charles Nerlinger points out, "security on the roads was so good that one could carry across the region gold or silver attached to nothing more than a bundle stick."<sup>179</sup>

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<sup>172</sup> *Id.* at 99

<sup>173</sup> VAUGHAN, *supra* note 71, at 265

<sup>174</sup> *Id.* at 261

<sup>175</sup> *Id.* at 105

<sup>176</sup> Georges Bischoff, *Preface* to CLAERR-STAMM, *supra* note 40, at 8-9 (2004)

<sup>177</sup> *Id.* at 9.

<sup>178</sup> Hermann Heimpel, *Mittelalter und Nürnberger Prozeß* in FESTSCHRIFT EDMUND E. STENGEL ZUM 70. GEBURTSTAG AM 24. DEZEMBER 1949 DARGEBRACHT VON FREUNDEN, FACHGENOSSEN UND SCHÜLERN 444 (1952).

<sup>179</sup> NERLINGER, *supra* note 55, at 148.



Vaughan's narrative indicates that Burgundian problems in the region are well illustrated in the case of the imperial city of Mulhouse. Due partly to Hagenbach's tactics in trying to persuade Mulhouse to place itself under Charles the Bold's jurisdiction, its citizens "had been attacked and robbed, their commercial activities had been disrupted; five Mulhouse women had been stripped and suffered other indignities; an old man of eighty had been hurt. Indeed, it was scarcely safe for them to leave the town at all, still less to work in the neighboring fields."<sup>180</sup> In response, in May 1470, Hagenbach, "in his typically forthright manner," demanded that Mulhouse "should accept in perpetuity the protection of the duke of Burgundy and his successors . . . This plan naturally aroused the instant opposition not only of Mulhouse herself but also of the count palatine of the Rhine."<sup>181</sup> Nevertheless, Burgundian mistreatment of Mulhouse residents continued and Hagenbach made additional demands and threats to force Mulhouse to cede its sovereignty to Charles the Bold.<sup>182</sup> "But though the Burgundian bailiff stormed, threatened, and coaxed Mulhouse in this way, she remained resolute in her opposition to any sort of Burgundian penetration."<sup>183</sup>

Although revisionist descriptions of Hagenbach's conduct may seem more tame compared to that of their predecessors, no one disputes that the blustering bailiff began turning traditional enemies in the region into allies. Nobles and peasants, city dwellers and pastoralists, Austrians and Swiss all turned to one another to complain about the perceived common enemy. This was not lost on Louis XI. By 1470, he had concluded a treaty of alliance with the Swiss Confederation.<sup>184</sup> From that point forward, it was his strategy to encourage the Swiss, Austrians and the free/imperial cities of the Upper Rhine to enter into a grand alliance against Charles the Bold.<sup>185</sup>

Even Vaughan and Kirk would acknowledge that Louis was aided significantly by Peter von Hagenbach himself. Over time, the Alsatian population was subjected to a rising level of insults, threats and occasional physical violence – behavior that in the final months of his service Vaughan describes as "increasingly arbitrary, offensive and indecorous."<sup>186</sup> By way of example, Vaughan provides a list of complaints regarding Hagenbach that was submitted by the town of Basel to the Duke of Burgundy's ambassadors:

When he came into our town for the first time he came to discuss [a delay in] the installment of money owed for the lordship of Rheinfelden, but this did not fall out according to his wishes. So he gave voice to many grossly unreasonable insults both inside and outside the council, in particular that he would prohibit the town from buying goods and do it harm, and if he caught any of our people in his territories he would hang them on the branches.

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<sup>180</sup> *Id.* at 95.

<sup>181</sup> *Id.* at 95-96.

<sup>182</sup> *Id.* at 96.

<sup>183</sup> *Id.*

<sup>184</sup> BARANTE (Vol. IX), *supra* note 52, at 409.

<sup>185</sup> *Id.* at 411.

<sup>186</sup> VAUGHAN, *supra* note 71, at 283.

Item, he then prohibited in general the purchase of goods for the town, afterwards again allowing purchases apart from corn, all against the agreement [made at] Breisach etc.

Item, without any right and against the laws he completely overpowered and captured a person from Strasbourg and held him prisoner in the Crown Hotel. He held him by the ear and he and his servants nearly killed him with naked swords. All this in our town, forcefully, before he was rescued from their hands. He and his people also broke a garland of pearls belonging to the same man from Strasbourg, and took by force a costly silver pipe and returned nothing. All this [was done] by night and in the fog. . . .

Item, he has maintained untruthfully before princes, counts, lords, knights and servants that we have made a present [to him] of the outstanding payments he owes us for the use of the lordship of Rheinfelden, to which we have never agreed and are still not agreeing. In clarification of this, we sent for Herrn Bernhart von Gilgenberg, Peter Rich and Marquart von Schonemberg, who were present when the agreement was made, but he refused and rejected this. He was offered justice on this before the councillors of our gracious lord of Burgundy, but he refused this too and thereupon directed many threatening remarks at the town and mischievously employed his words and deeds so that he brought us a great deal of harm. . . .

Item, he also told our servant Stümpf at Augsburg that the town must pay him some money or he would do so much to it that Herr Peter Rot [the burgomaster] would be stabbed and this would be done when he was in bed.

Item, he also spoke with the said Stümpf here on our Rhine bridge and asked him if he had told us this. [He added much more]; that we kissed calves under the tail, with many suchlike flippant insults.

Item, through such violence, wickedness and willfulness, which he has shown against us in the prohibition of trading and other evil deeds, he has forced us to make him rebates and gifts.

Item, we wrote to him on behalf of our burgesses who had presented themselves for justice before him and our gracious lord of Burgundy's councilors, concerning Anshelm von Maszmunster, and on that account requested his reply. And as our messenger waited for the answer he tore up the letter and said "that is my reply to Basel" . . .

Item, on Good Friday 1473 the bailiff wrote to us requesting a safe conduct. We had our messenger with him on Easter Day with a statement that it was not usual nor was it the practice for the bailiff to ask for or need a safe conduct. Still, since he had asked, so should he have from us free

passage and safe conduct according to his request. Thereupon he answered us that neither we nor our people should wander without his safe conduct in the lands he administered for, one day, if he could get hold of them, he would pickle twenty or thirty of our people in gaol and cut off their hands and feet. He attached no value to our seal, for it was not legal, and he snapped his fingers.

Item, he has often sent word to our people and announced to us that he would bring it about that our town would be flattened, so that the same would happen to it as happened to Dinant. . . .

Item, in front of the chancellor of our gracious lord [the bishop] of Basel, he attacked Herr Peter Rot's good name, with remarks such as that he was not upright and that he was an evil fellow.

Item, at the time when the *Eidgenossen* were here in our town at a conference and he was also here, he gave his people long knives to wear and they went mischievously and defiantly against [the *Eidgenossen*] on the Rhine bridge. At the same time, also before and afterwards, he many times called them scullions. . . .

Item, at the time when our most glorious lord the Roman Emperor was with us in our town, the bailiff was also here, and he untruthfully gave out that we had at that time tried to murder him.

Item, the bailiff has said many times, in front of strangers and inhabitants, that when he wants to he will conquer our town in three days and he will not desist. One day in this town he will lay some people's heads before their feet and cut off the scalps of some and fix them on their houses.<sup>187</sup>

Although these peccadilloes may not merit infamy, even Vaughan admits there could be some validity to the accounts of Hagenbach as engaging in bizarre, psycho-sexual behavior in his administration of the Upper Rhine territories. He notes that these “anecdotes of Hagenbach’s crudities might be dismissed as preposterous if other sources did not bear them out.”<sup>188</sup> In particular, he seems to accept the accounts of one contemporaneous chronicler:

He makes the bailiff boast in public that, before a banquet organized by himself at Breisach on 20 February 1474, he had the pubic hair of his wife and three noblewomen shaved off and given to his cook to pulverize and then sprinkle on the dishes served to the ladies. He claims that on one occasion Hagenbach made his wife publicly exhibit her pudenda and tell the assembled company how many times he had intercourse with her on their wedding night.<sup>189</sup>

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<sup>187</sup> *Id.* at 281-282.

<sup>188</sup> *Id.* at 283

<sup>189</sup> *Id.*

### 3. Hagenbach's Downfall

Regardless of whether one subscribes to the older view of Hagenbach as blood-thirsty monster or the revisionist version of him as tactless bully, one thing is certain: he managed to whip up hatred within the region and unify the citizens of the Upper Rhine in passionate opposition against him. With encouragement from Louis XI, in March-April 1474, the Swiss Confederation, the Austrians and the free/imperial towns entered into an alliance, known as the “League of Constance,” to achieve “the peace of the land” and extricate it “from the tyranny of the duke of Burgundy and his wicked bailiff Peter von Hagenbach.”<sup>190</sup> The first order of business was to redeem Sigismund’s mortgage from Charles the Bold. This was achieved through the funding of the towns of Basel, Colmar, Sélestat, and Strasbourg.<sup>191</sup> Subsequently, Sigismund appointed his own bailiff, Sundgau nobleman Hermann von Eptingen, to replace Hagenbach.<sup>192</sup>

By this point, events were closing in on Peter von Hagenbach and he knew it. He appealed to Charles the Bold for additional troops but the request was denied as Charles had military ventures occupying his troops in other parts of Europe including the Low Countries and Lorraine.<sup>193</sup> Thann had been Hagenbach's headquarters but he feared for his safety there given that its citizens had, from his perspective, plotted against him the previous summer.<sup>194</sup> So he decided to make his stand in Breisach, a walled and more easily defensible town on the Rhine,<sup>195</sup> and he fortified it with a large garrison of Picard and German mercenaries.<sup>196</sup> It was bruited about town that Hagenbach planned to expel the citizens of Breisach and then drown them in the Rhine. There seemed to be a great sense of urgency that League of Constance troops launch an assault against the Burgundians and save Breisach's civilians.

#### a. The Arrest, Inquisition and Torture

In the end, though, it was not the direct action of enemy troops that led to the Burgundian governor's demise. Unfortunately for Hagenbach, Charles the Bold had not provided sufficient funding for the bailiff's tiny garrison and they began to mutiny against their leader on Easter Sunday, April 10, 1474. Vaughan notes that the local citizenry which “had suffered at Hagenbach’s hands the total abrogation of their civic institutions and liberties, encouraged and supported them.”<sup>197</sup> The mercenaries were expelled from the city and Hagenbach was placed under house arrest (he had been living in the house of the Breisach mayor and would remain there for a few days).<sup>198</sup> The day after his arrest he was bound in cords.<sup>199</sup> Three days later he was removed to a dungeon in the public

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<sup>190</sup> *Id.* at 278.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 284

<sup>193</sup> *Id.* at 286; KIRK, *supra* note 54, at 478-479.

<sup>194</sup> *Id.* at 283.

<sup>195</sup> KIRK, *supra* note 54, at 477.

<sup>196</sup> *Id.*

<sup>197</sup> VAUGHAN, *supra* note 71, at 283.

<sup>198</sup> *Id.* See also KIRK, *supra* note 54, at 484.

<sup>199</sup> KIRK, *supra* note 54, at 487.

prison, his body covered in chains, his wrists secured in handcuffs, and his legs set in stocks.<sup>200</sup>

Prison conditions were apparently quite harsh. A note from his jailers in mid-April acknowledges that “the harsh handling of the prisoner seems to be in order . . . so he is not able to escape.”<sup>201</sup> Kirk adds that “three strong men were appointed to watch him day and night” until the arrival of Archduke Sigismund.<sup>202</sup> The latter reached Breisach at the end of April and ordered that instruments of torture be brought there from Basel.<sup>203</sup> Sometime during that week, Hagenbach was interrogated while being subjected to torture on six different occasions.<sup>204</sup> While the interrogation focused on Hagenbach’s conduct as bailiff in Upper Alsace from 1469 through 1474, it also dealt with Charles the Bold’s territorial ambitions, particularly the details regarding his meeting with Holy Roman Emperor Frederick III at Trier in September of 1473.<sup>205</sup>

On May 5, ostensibly because of poor prison conditions, Hagenbach was taken from the dungeon to what was known as “The Water Tower” (on the other side of town) for additional interrogation.<sup>206</sup> When taken out of the prison, he was unable to walk (presumably because of the torture) and had to be transported in a wheelbarrow while onlookers derisively heckled and mocked him.<sup>207</sup> As he was he was being transported, he “cried loudly” and at one point he shouted “murderer.” He was tortured severely on this day – four separate times. He supposedly admitted to his misdeeds and named accessories.<sup>208</sup> Among other things, he is supposed to have admitted that he intended to remove forcibly the citizens of Breisach from the city with the intention of eventually exterminating them.<sup>209</sup> One of Hagenbach’s associates, an official in the Breisach government, was detained and questioned about the bailiff. Pursuant to physical coercion, he admitted that Hagenbach intended to deport the citizens of Breisach and have them exterminated.<sup>210</sup>

## b. The Trial

Now that Hagenbach had confessed to his supposed crimes, what was to follow? In that era, one might have supposed that the prisoner would be summarily executed. He escaped lynch-mob justice on Easter Sunday only thanks to Breisach resident Friedrich

<sup>200</sup> *Id.* at 488. See also EMANUEL VON RODT, *DIE FELDZÜGE KARL DES KÜHNEN, HERZOG VON BURGUND* 221 (Schaffhausen: Hurter 1843).

<sup>201</sup> *Id.*

<sup>202</sup> KIRK, *supra* note 54 at 488.

<sup>203</sup> Hermann Heimpel, *Das Verfahren gegen Peter von Hagenbach zu Breisach (1474)*, 55 *ZEITSCHRIFT FÜR GESCHICHTE DES OBERRHEINS* 321, 346-347 (1942).

<sup>204</sup> *Id.* at 347, 349. In all likelihood, according to Heimpel, the primary torture position consisted of Hagenbach being hanged by his bound hands with rocks tied to his feet. *Id.*

<sup>205</sup> *Id.* at 348-349. See also KIRK, *supra* note 54, at 489

<sup>206</sup> Heimpel, *supra* note 203, at 349; KIRK, *supra* note 54 at 488 (Kirk suggests the prisoner was transferred to the tower because it offered superior torture facilities).

<sup>207</sup> VON RODT, *supra* note 200, at 223.

<sup>208</sup> Heimpel, *supra* note 203, at 348. The record is not entirely clear as to which crimes he would have confessed.

<sup>209</sup> CLAERR-STAMM, *supra* note 40 at 171 (2004)

<sup>210</sup> *Id.* at 171.

Kappelar's decision to arrest him and await instructions from Archduke Sigismund.<sup>211</sup> In his book *Die Feldzüge Karls des Kühnen* (1843), German historian Emmanuel von Rodt relates that, when presented with the situation, Sigismund made a startling decision for the time. Given Hagenbach's position as bailiff to the Duke of Burgundy, Sigismund concluded that he was entitled to an open, public hearing and "his fate would be decided by it."<sup>212</sup> Eminent German historian Hermann Heimpel even notes that the contemplated trial was consistent with other legal actions in late fifteenth century Swabia.<sup>213</sup>

What might have seemed entirely unprecedented, though, was the make-up of the court that would sit in judgment of Peter von Hagenbach. He was not to be tried by a local judge. Instead, numerous representatives of sovereigns from around the region, twenty-eight in all – including sixteen knights, would sit as part of an international *ad hoc* tribunal.<sup>214</sup> As described by jurist Georg Schwarzenberger: "Eight of [the judges] were nominated by Breisach, and two by each of the other allied Alsatian and Upper Rhenanian towns [Strasbourg, Sélestat, Colmar, Basel, Thann, Kenzingen, Neuburg am Rhein, and Freiburg im Breisgau] Berne, a member of the Swiss Confederation, and Solothurn, allied with Berne."<sup>215</sup>

In fact, each sovereign represented a member of the League of Constance (Berne was the only representative of the Swiss cantons).<sup>216</sup> As one contemporaneous account put it, Hagenbach "was judged on behalf of all the members of the alliance."<sup>217</sup> Heimpel elaborates: "The assembly of this court shows that the League of Constance . . . was more than a "political union" in the modern sense of the term; those united saw themselves as a legal community, such as a medieval union, and such entities set up courts for special cases."<sup>218</sup> As Breisach's sovereign, Austria provided the presiding judge."<sup>219</sup>

On May 9, 1474, at 8 a.m., Peter von Hagenbach's "special" case opened for trial before an enormous crowd assembled outdoors in front of the Breisach mayor's residence (not far from the Water Tower).<sup>220</sup> As described by historian John Foster Kirk:

An announcement [of the trial] brought together an immense multitude of people from the cities, towns, and villages of the surrounding territory. Large scows, and other flat-bottomed vessels, with hundreds of passengers, ascended the Rhine from Strasbourg and descended it from Basel. 'Every one,' says the chronicler, wished to be present at the death of the tyrant, traitor, sodomite and ravisher.<sup>221</sup>

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<sup>211</sup> Heimpel, *supra* note 203, at 345.

<sup>212</sup> VON RODT, *supra* note 200, at 223.

<sup>213</sup> Heimpel, *supra* note 203, at 338.

<sup>214</sup> GEORG SCHWARZENBERGER, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 463 (1968).

<sup>215</sup> *Id.*

<sup>216</sup> CLAERR-STAMM, *supra* note 40, at 175; KIRK, *supra* note 54, at 494.

<sup>217</sup> VAUGHAN, *supra* note 71, at 285.

<sup>218</sup> Heimpel, *supra* note 203, at 325.

<sup>219</sup> SCHWARZENBERGER, *supra* note 76, at 463.

<sup>220</sup> CLAERR-STAMM, *supra* note 40, at 175.

<sup>221</sup> KIRK, *supra* note 54 at 493-94.

The open air setting was consistent with an old Germanic judicial custom that was still observed at the time.<sup>222</sup> Thomas Schutz, the chief magistrate of Ensisheim, was designated as the tribunal's presiding judge.<sup>223</sup> The nominal trial prosecutor was the new Alsatian bailiff chosen by Sigismund to replace Hagenbach – Hermann von Eptingen.<sup>224</sup> Eptingen, for his part, chose Heinrich Iselin, one of the commissioners from Basel,<sup>225</sup> to present the prosecution's case to the court.<sup>226</sup> Hagenbach had a more difficult time finding counsel. At first he selected an ordinary Breisach burger but this lay person proved incapable of mounting a competent defense.<sup>227</sup> Finally, the other representative from Basel, Hans Army, took on Hagenbach's representation.<sup>228</sup>

The proceedings began when the presiding judge requested the prosecution make its opening statement.<sup>229</sup> According to most accounts, Iselin began dramatically by explaining to the tribunal that Hagenbach had "trampled under foot the laws of God and man."<sup>230</sup> He then read the indictment, consisting of four counts:

1. Murder in relation to the beheading of four citizens of Thann the previous year without any validly rendered judgment in violation of imperial law<sup>231</sup>;
2. Perjury in relation to Hagenbach's oath to uphold the laws of Breisach, which he violated by restructuring certain governmental offices, stripping certain government representatives of their power, illegally quartering soldiers in homes, pillaging and plundering property, and imposing onerous taxes on the town's citizens;

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> Heimpel, *supra* note 65, at 324-25.

<sup>225</sup> KIRK, *supra* note 54, at 435.

<sup>226</sup> CLAERR-STAMM, *supra* note 40, at 175.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Heimpel, *supra* note 65, at 325.

<sup>230</sup> SCHWARZENBERGER, *supra* note 75, at 465. Heimpel disputes that Iselin used the expression "trampled under foot the laws of God and man." See Heimpel, *Mittelalter*, *supra* note 177, at 450 n.1 ("I find nowhere that the prosecutor said: [in English from newspaper article] "Hagenbach's deeds outraged all notions of humanity and justice and constituted crimes under national law" [in German] and that he [in English] "trampled under foot the laws of God and men and had committed what would be called today crimes against humanity."). On the other hand, French historian Prosper de Barante and British historian John Foster Kirk support Schwarzenberger's account of Iselin's opening statement regarding Hagenbach's trampling "under foot the laws of God and man." See BARANTE (Vol. X), *supra* note 52, at 15 ("Pierre de Hagenbach, chevalier, maître d'hôtel de monseigneur le duc de Bourgogne, et son gouverneur dans les pays de Ferrette et Haute-Alsace, aurait dû respecter les privilèges réservés par l'acte d'engagement; mais il n'a pas moins foulé aux pieds les lois de Dieu et des hommes que les droits jurés et garantis au pays.") (emphasis added); KIRK, *supra* note 12, at 435 ("... the accuser demanded that Hagenbach should be adjudged worthy of death, as a murderer, perjurer, and a general *transgressor of the laws both of God and man.*") (emphasis added).

<sup>231</sup> Vaughan notes that the beheadings were in response to an alleged uprising in Thann against the Duke of Burgundy on July 3, 1473. See VAUGHAN, *supra* note 71, at 285.

3. Conspiracy to commit murder in relation to the supposed plot to expel and exterminate the citizens of Breisach;<sup>232</sup>
4. Rape of numerous women and girls in the region, including nuns.<sup>233</sup>

Given these charges, the prosecutor notified the tribunal that he would be seeking a death sentence.<sup>234</sup>

Hagenbach's counsel, Hans Irmey, then gave his opening statement. He began by challenging the jurisdiction of the tribunal. He argued forcefully that the Tribunal was not competent to decide this case "because "only the Duke of Burgundy could be [Hagenbach's] judge and his superior."<sup>235</sup> The tribunal rejected the jurisdictional challenge and found that it was competent to sit in judgment of Hagenbach for the crimes charged.<sup>236</sup>

The prosecution then put on its case-in-chief, which consisted of the testimony of six witnesses who had heard Hagenbach's confession to the crimes charged.<sup>237</sup> After this, Hagenbach asked for a recess and requested that two additional attorneys be added to his defense team. The tribunal then assigned to the Hagenbach team one representative each from Colmar and Sélestat.<sup>238</sup> After Hagenbach conferred with his attorneys, the defense put on its case, which consisted of the following arguments:

1. With respect to the execution of the citizens of Thann, they had tried to rise up in rebellion to the Duke of Burgundy's rule and they were executed pursuant to the orders of the Duke of Burgundy with the consent of Holy Roman Emperor Frederick III;
2. He freely acknowledged that he swore to respect the privileges and rights of the citizens of Breisach but, after that, these citizens swore a new oath of allegiance to the Duke of Burgundy which had the effect of overriding Hagenbach's pledge regarding previously existing rights – the actions he took after the Breisachers swore their new oath of allegiance was pursuant to orders from the Duke of Burgundy;

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<sup>232</sup> The indictment appears not to have used the term "conspiracy" but this was the gist of the charge.

<sup>233</sup> KIRK, *supra* note 54, at 494-95; CLAERR-STAMM, *supra* note 40, at 177; VAUGHAN, *supra* note 71, at 285. For the fourth count of the indictment, the historians do not actually use the word "rape" in describing Hagenbach's transgressions with women in the region. Still, that appears to be the clear import of the charge. See VON RODT, *supra* note 62, at 224-25 (noting that Hagenbach violently mishandled honorable women, including virgins and nuns."). Claerr-Stamm also points out that all the charged conduct was of relatively recent vintage (within the previous year) and did not cover most of the period of Hagenbach's governorship.

<sup>234</sup> CLAERR-STAMM, *supra* note 40, at 177.

<sup>235</sup> VON RODT, *supra* note 62, at 224.

<sup>236</sup> There is no indication that the tribunal elaborated or provided specific reasons for its rejection of Hagenbach's jurisdictional challenge.

<sup>237</sup> VON RODT, *supra* note 62, at 225.

<sup>238</sup> CLAERR-STAMM, *supra* note 40, at 177.



3. Regarding the quartering of troops in the homes of Breisach's citizens, that again was pursuant to an order of the Duke of Burgundy – Hagenbach does not seem to have directly answered the charge that he planned to deport and exterminate the citizens of Breisach;
4. As to the charge of rape, Hagenbach responded that his accusers were just as guilty as he was of that crime. Besides, he argued, he never actually committed violence against the women in question – they had consensual sex with him after he paid them good money.<sup>239</sup>

Based on the fact that all of Hagenbach's conduct was at the behest and under the aegis of the Duke of Burgundy, the bailiff's attorneys renewed their motion to dismiss on jurisdictional grounds – only the Duke could sit in judgment of his servant.<sup>240</sup> In the words of defense counsel Hans Army:

Sir Peter von Hagenbach does not recognize any other judge and master but the Duke of Burgundy from whom he had received his commission and his orders. He had no right to question the orders which he was charged to carry out, and it was his duty to obey. Is it not known that that soldiers owe absolute obedience to their superiors? Does anyone believe that the Duke's *Landvogt* could have remonstrated with his master or have refused to carry out the Duke's orders? Had not the Duke by his presence subsequently confirmed and ratified all that had been done in his name?<sup>241</sup>

After presentation of the defense, the motion appears to have held more sway.<sup>242</sup> Remarkably, the judges seem to have recognized that it was a close call. So persuasive must the defense argument have been that prosecution attorney Heinrich Iselin actually made a motion to withdraw the charges.<sup>243</sup>

In response, a new attorney for the prosecution, Hildebrand Rasp, was appointed and he reasserted the charges of the indictment, arguing as well that Hagenbach confessed to many other crimes that were not even charged.<sup>244</sup> The defense responded that such admissions were invalid as they were the product of torture. Rasp's dubious retort: the admissions were made when Hagenbach was not actually on the rack so they

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<sup>239</sup> CLAERR-STAMM, *supra* note 40, at 177-80.

<sup>240</sup> *Id.* at 180.

<sup>241</sup> SCHWARZENBERGER, *supra* note 75, at 465.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

were made freely.<sup>245</sup> Several new witnesses were then called to testify and they corroborated that Hagenbach did not make the confessions during torture.<sup>246</sup>

Nevertheless, Rasp advanced an alternative argument. Even if the confessions were deemed tainted, Hagenbach had committed the crime of "*lèse-majesté*." In other words, by testifying that Charles the Bold and Holy Roman Emperor Frederick III had ordered conduct by Hagenbach that was manifestly in violation of the law, he slandered these leaders.<sup>247</sup> It was not possible, he concluded, that they could have given Hagenbach such orders.<sup>248</sup>

Hagenbach defense counsel Hans Army then called for an adjournment of the trial.<sup>249</sup> He wanted time to serve the Duke of Burgundy with interrogatories asking whether, in fact, he had given Hagenbach the orders as asserted by the defense.<sup>250</sup> In the annals of the law, this was a watershed moment. If the judges had granted the continuance motion and sought to verify the factual accuracy of Hagenbach's testimony regarding the Duke's directives, the defense of obeying superior orders would have been implicitly reaffirmed. Instead, the Tribunal made history. It found an adjournment unnecessary.<sup>251</sup> Even if Hagenbach had received orders to commit the charged conduct, he should have known such orders were patently illegal.<sup>252</sup> As described by jurist Georg Schwarzenberger: "In an interlocutory judgment, the Tribunal refused this request [for an adjournment] on the grounds that to accept the defense put forward by, and on behalf of, Hagenbach, would be contrary to the law of God, and that his crimes were established beyond doubt."<sup>253</sup>

The parties having rested their cases, the Tribunal retired and deliberated for some time. According to Charles Nerlinger:

The President of the tribunal then addressed the judges and asked if they found Peter von Hagenbach guilty. The judge representing Strasbourg, Peter Schott, rose and asked that he and the other judges be allowed to retire and deliberate on the weighty issue they were asked to resolve. They remained for a long period in deliberations, more than one of them undoubtedly aware that his sense of confidence regarding the bailiff's guilt had been shaken. Finally, they returned and in hushed silence they

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<sup>245</sup> Heimpel, *supra* note 65, at 331. Of course, that does not even touch on the fact that any such additional criminal conduct was not even charged.

<sup>246</sup> KIRK, *supra* note 54, at 498.

<sup>247</sup> CLAERR-STAMM, *supra* note 40, at 180. The crime of *lèse-majesté* consists of affronting the dignity of the monarchy. See Frank Munger, *Globalization, Investing in Law, and the Careers of Lawyers for Social Causes: Taking on Rights in Thailand*, 53 N.Y.L. SCH. L. REV. 745, 770 n. 109 (2008/2009) ("The critical element is an affront to the monarchy, usually through speech, rather than the veracity of the representation. The crime has long since ceased to be meaningful in Europe, but continues to play a role in Thai politics.")

<sup>248</sup> CLAERR-STAMM, *supra* note 40, at 180.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> SCHWARZENBERGER, *supra* note 75, at 466.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* See also CLAERR-STAMM, *supra* note 40, at 182.

declared slowly, one after the other, that Peter von Hagenbach was guilty and sentenced him to death.<sup>254</sup>

According to John Foster Kirk, a herald advanced and, standing in front of Hagenbach, declared his degradation from the order of the Knights of St. George's Shield.<sup>255</sup>

"Another functionary followed, who, with a glove of mail, struck him a blow upon the right cheek."<sup>256</sup>

### c. The Execution

The Tribunal had not specified in what manner the sentence would be carried out. The judges permitted Hagenbach to be heard on this issue. Given that the manner of his execution would likely shape the way posterity viewed his legacy, the heretofore stoic *Landvogt* suddenly became emotional.

[The prisoner] lost, for the first time, the firmness and composure which he had manifested throughout the day, and which had been rendered the more conspicuous by the contrasted spectacle of his enfeebled and emaciated frame. His head sank upon his chest. His red eyes, instead of their customary flashes of menace and derision, sent forth from their deep recesses a glance of timid supplication. 'Have pity,' he whispered, 'and execute me with the sword!' Strange to say, the appeal was not disregarded. Each member of the court, as he was called upon by name, gave his voice that Hagenbach should die by the sword.<sup>257</sup>

Hans Army, for his part, fought hard for his client to the last. He renewed his motion to adjourn the proceedings to seek verification from the Duke that he had given his bailiff the supposed orders that gave rise to the charged crimes.<sup>258</sup> This final appeal was rejected.<sup>259</sup> It was 4 p.m. and the trial was over.<sup>260</sup>

Preparations were then made for the execution. The judges rode on horseback at the head of a long, torch-illuminated procession toward a field just outside of town.<sup>261</sup> The condemned man was marched on foot at the center of the cavalcade, a confessor holding a crucifix before his eyes as he strode beside him.<sup>262</sup> Apparently, the role of executioner was quite coveted and seven headsmen (from as many different towns) vied for the privilege.<sup>263</sup> The honor was ultimately bestowed on Colmar's official, a "short man with a short sword."<sup>264</sup>

<sup>254</sup> NERLINGER, *supra* note 55, at 131.

<sup>255</sup> KIRK, *supra* note 54, at 499.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 499-500.

<sup>259</sup> *Id.* at 500.

<sup>260</sup> CLAERR-STAMM, *supra* note 40, at 182.

<sup>261</sup> KIRK, *supra* note 54, at 500.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

On the scaffold, Hagenbach made his last public announcement:

I am not concerned about my life; I have risked it enough on the field of battle. But I lament that the blood of many an honest man should be shed on my account. For assuredly my noble master, the Duke of Burgundy, will not suffer this deed to go unavenged. I regret neither my life nor my body: I ask only that you forgive me for having done what I have been sentenced for and for other things even worse than that. Those of you for whom I served as governor for four years, please forgive what I have done through lack of wisdom or through malice. I was only human. Please pray for me.<sup>265</sup>

The disgraced knight then bequeathed his gold chain and sixteen horses to a religious house in Breisach. He asked that this provision be honored by the profligate Sigismund. His hands were then tied, he genuflected, said another short prayer and finally placed his head on the block. The executioner's blade then sliced through the air and found its mark. Five years to the day after Charles the Bold signed the treaty of St. Omer, Burgundy was officially expelled from the Sundgau and its governor was dead.

#### 4. The Aftermath

Kirk reports that, when hearing of Hagenbach's execution, the Duke of Burgundy "fell into a paroxysm of rage."<sup>266</sup> Nevertheless, he failed to take immediate action.<sup>267</sup> By summer, though, he was ready for reprisal measures. In August, Burgundian troops, led by Peter's brother Stefan von Hagenbach, conducted a raid in the Sundgau region wherein they looted, pillaged and burnt everything in their path.<sup>268</sup> They murdered and displaced a large number of Alsatian residents and took children to be sold and enslaved.<sup>269</sup>

This incursion might be considered the opening salvo in a protracted conflict between Charles the Bold and the League of Constance, known to history as the "Burgundian Wars."<sup>270</sup> The hostilities culminated in three decisive battles. The Duke of Burgundy drove into modern-day Switzerland but his forces were defeated by Confederate troops at the Battle of Grandson in March 1476.<sup>271</sup> Within three months, Charles the Bold had gathered a new army and marched yet again into Swiss territory. But he would lose once more in the June 1476 Battle of Morat (or Murten, in German).<sup>272</sup> Finally, in January 1477, Swiss troops fighting with an army of the Duke of Lorraine beat Charles in the Battle of Nancy, the war's decisive engagement.<sup>273</sup> Charles himself had

<sup>265</sup> CLAERR-STAMM, *supra* note 40, at 186.

<sup>266</sup> KIRK, *supra* note 54, at 502.

<sup>267</sup> *Id.* at 503-04.

<sup>268</sup> VAUGHAN, *supra* note 71, at 285.

<sup>269</sup> KIRK, *supra* note 54, at 505-06.

<sup>270</sup> THE CAMBRIDGE ILLUSTRATED ATLAS OF WARFARE: THE MIDDLE AGES -- 768-1487 150 (Cambridge University Press 1996).

<sup>271</sup> VAUGHAN, *supra* note 71, at 375-378.

<sup>272</sup> *Id.* at 390-395.

<sup>273</sup> *Id.* at 429-432.

taken the battlefield with his troops outside the walls of Nancy and his badly mutilated body was found in a ditch three days after the defeat.<sup>274</sup> Such was the fate of the last of the Valois Dukes of Burgundy.

When Charles the Bold died in battle without sons, Louis XI declared the Duchy extinct, and he absorbed into the French crown its territorial portion lying in modern-day France.<sup>275</sup> The Burgundian Low Countries possessions were ultimately transferred to the Habsburgs (via the marriage of Charles the Bold's daughter, Mary, to Archduke Maximilian of Austria).<sup>276</sup> This gave rise to two centuries of hostilities between France and the Habsburgs (Spain/Austria) over possession of these lands.<sup>277</sup> And two major conflagrations followed – the Thirty Years' War and the War of the Spanish Succession.<sup>278</sup>

#### IV. FINAL ANALYSIS

##### A. Who Was Peter von Hagenbach?

In life, Peter von Hagenbach played a significant role in bringing about the fall of the House of Burgundy, which ultimately led to a seismic realignment of the European balance of power.<sup>279</sup> In death, he has traditionally been portrayed as evil incarnate and the subject of the world's first international atrocity trial. But is his infamy deserved? And should his legacy take on such mythic proportions? As with most matters related to Hagenbach, it is hard to say with certainty.

But the traditional view seems more consistent with the available evidence. That said, a reasonable argument can be made that any insights into Hagenbach's character and actions during his time as bailiff must be parsed sequentially. Put another way, the Hagenbach of 1469 was not the Hagenbach of 1474. Revisionist historians have emphasized the relative dearth of bad press for Hagenbach during the first years of his Alsatian administration. And that makes sense. At the beginning of the relationship between Hagenbach and the Duke's new subjects, everyone was apparently on his best behavior (and during that early period, Hagenbach was often away from Alsace still engaging in military service for the Duke).<sup>280</sup> But over time, the local citizenry grew weary of Hagenbach's insults, his aristocratic animosity toward townspeople and the bourgeoisie, his boorish behavior, and his use of increasingly more strong-arm tactics to raise revenue and exert control over the region for Burgundy. And it did not help that he was perceived as linguistically and culturally foreign – a feudally oriented francophone in

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<sup>274</sup> *Id.* at 432.

<sup>275</sup> GEORGE RIPLEY AND CHARLES ANDERSON DANA, *THE AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE* 451 (New York: D. Appleton and Co. 1873).

<sup>276</sup> CARLOS RAMIREZ-FARIA, *CONCISE ENCYCLOPAEDIA OF WORLD HISTORY* 683 (New Dehli: Atlantic Publishers and Distributors, Ltd. 2007).

<sup>277</sup> *THE ENCYCLOPAEDIA BRITANNICA*, VOL. 12, HOUSE OF HABSBERG 789 (11th Ed. 1910).

<sup>278</sup> *Id.*

<sup>279</sup> See VAUGHAN, *supra* note 71, at 255 (" . . . the course of events and with it the entire destiny of Charles the Bold and of Burgundy was decisively affected by the attitudes and antics of Peter von Hagenbach [who] made a [great] impact on history. ").

<sup>280</sup> See CLAERR-STAMM, *supra* note 40, at 112.

a germanophone region then developing a merchant class and trending toward urbanization. By 1473-1474, uneasy relations between a restive population and its by-now desperate bailiff deteriorated to such a degree that Hagenbach was arrested, tried and executed.

Revisionist historians also point out that Hagenbach was attempting to enact administrative reforms to help modernize the region and make it run more efficiently. But for that he needed the proper personnel and materiel. Revisionists contend that, in large part, Charles the Bold's failure to provide him with that is what led to his lieutenant's downfall. The old guard, on the other hand, believed firmly that Hagenbach's own follies, namely his tyrannical, capricious and violent methods, precipitated his demise.

But these superficially competing explanations can perhaps be reconciled. The Duke's financial and logistical support of Hagenbach's administration was indeed lacking. But that does not tell the whole story. With few resources at his disposal, Hagenbach may have chosen to fulfill his duties in a progressively violent and arbitrary manner so as to rule more effectively by fear. He did not have the personnel necessary to quell an increasingly restive population – perhaps terror was used to compensate for this.

Consistent with this view, as resources were choked off even further during the final months of his satrapy, Hagenbach's intimidation tactics escalated until spiraling out of control in 1474. The historical record permits such an inference. The bulk of specific allegations against the Burgundian bailiff are from his final year in power. It would make sense then, that the charges lodged against him at trial were related to conduct of recent vintage. Seen in this light, we can understand that the citizens of the Upper Rhine were at first only berated, taxed and put upon. They were likely terrorized and violated only toward the end. In the words of historian Ruth Putnam: "It is in this period of Hagenbach's life that the stories of gross excess are told . . . his personal passions . . . were permitted to run riot and he spared no wife nor maid to whom he took a fancy."<sup>281</sup>

What evidence supports the view that the good burghers of Alsace were the victims of Sir Peter's violence? Their treatment of the wayward knight after his arrest is most revealing in this regard. While torture may have been commonplace in ordinary criminal inquisitions of the time,<sup>282</sup> the severity of torment inflicted leads one to believe it was inspired by and directed at the kind of mass, depraved criminality of which Hagenbach has traditionally been accused.<sup>283</sup> Significantly, in this regard, in addition to enduring horrific torture, he was stripped of his knighthood. Degradation of knighthood was exceedingly rare in the Middle Ages and reserved only for the most extreme and infamous crimes.<sup>284</sup>

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<sup>281</sup> PUTNAM, *supra* note 64, at 380. As mentioned previously, rape, as opposed to murder, appears to have been Hagenbach's preferred weapon of terror and atrocity.

<sup>282</sup> See JOHN H. LANGBEIN, *PROSECUTING CRIME IN THE RENAISSANCE: ENGLAND, GERMANY, FRANCE 155-57* (New Jersey: The Lawbook Exchange, Ltd. 2005); Rinat Kitai-Sangero, *Detention for the Purpose of Interrogation as Modern "Torture"*, 85 U. DET. MERCY L. REV. 137, 156 (2008).

<sup>283</sup> On the other hand, it would appear the torture ended once Hagenbach "confessed" to his crimes.

And there is other evidence to suggest Hagenbach's culpability for atrocities. Most telling perhaps is the trial record itself. Hans Irmay, it must be remembered, mounted a valiant and spirited defense to the very end. And yet the record does not reveal his even attempting to refute the charge that Hagenbach planned to exterminate the citizens of Breisach<sup>285</sup> or that he murdered the four petitioning residents of Thann. At most, he offered the rejected defense of superior orders. Nor did Irmay (or Hagenbach, for that matter), directly deny the rape charges (merely objecting that taking women in this fashion was common practice and/or he had paid for services rendered).<sup>286</sup>

Did Hagenbach slaughter thousands of innocent civilians in concentrated liquidation campaigns? There is no evidence to suggest he did – he was not a fifteenth century proto-Nazi. But the record suggests that he terrorized the local population by murdering civilians, raping numerous women and conspiring to commit a large-scale massacre in Breisach. It should be noted that the rape charges are the most persuasive as there are numerous examples and they were never directly refuted.

And Hagenbach's back story further validates this view of him. He was the product of a Burgundian ducal culture that was steeped in and glorified violence – the reflection of its bellicose chief, Charles the Bold (known to his enemies as Charles the Terrible).<sup>287</sup> The duchy was in almost a permanent state of war with one enemy or another during Charles's reign.<sup>288</sup> Charles the Bold's Burgundy was in the practice of laying siege to towns and routinely killing civilians who resisted – Liege, Dinant, Neuss – all were subjected to horrific violence by Burgundian troops and Hagenbach played a leading role in the first two.<sup>289</sup> And within that violent culture, Hagenbach was Charles's

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<sup>284</sup> See Noble Dynasty, *Knighthood*, available at <http://www.nobledynasty.com/knighthood.htm> (last visited Aug. 2, 2011) ("In extreme cases . . . a knight . . . could lose his honor by formal degradation – a public ceremony in which his accoutrements were taken from him."); Jeri Westerson, *Getting Medieval: Degradation of Knighthood*, available at [http://www.getting-medieval.com/my\\_weblog/2006/12/degradation\\_of\\_.html](http://www.getting-medieval.com/my_weblog/2006/12/degradation_of_.html) (last visited Aug. 2, 2011) ("It's something in the history of chivalry that doesn't often come up").

<sup>285</sup> Émile Toutey provides a plausible explanation for why Hagenbach would have wanted to murder the citizens of Breisach. Hagenbach was aware of other towns that had plotted to kill him during the previous year and, when requesting entry to create defensive fortifications in anticipation of an attack by the League of Constance, he had already been denied admittance with his troops into Thann and Ensisheim. He was only able to gain entry into Breisach because his mercenaries were already present there. Given the animosity shown him in these other towns and the previous conspiracy to kill him, Hagenbach did not want to take any chances. Killing Breisach's citizens would have permitted him to use the town as a defensive fortification without the risk of an uprising from its citizens. TOUTEY, *supra* note 61, at 136-137.

<sup>286</sup> It seems quite implausible to accept that women of the cloth, supposedly among Hagenbach's victims, would accept payment for sexual services.

<sup>287</sup> See Hugh Chisolm, *ENCYCLOPAEDIA BRITANNICA* 824 (1910) (describing Charles as "violent, pugnacious . . . treacherous"); *THE NEW INTERNATIONAL ENCYCLOPAEDIA*, Vol. V, 73-74 (1920) ("He was of a fiery, ambitious and violent disposition.").

<sup>288</sup> See BRUCE D. PORTER, *WAR AND THE RISE OF THE STATE* 29 (New York: Free Press 2000) (" . . . Charles the Bold . . . waged a decade-long war (1467-1477) aimed at carving out a separate Burgundian Kingdom . . .").

<sup>289</sup> *EUPEDIA'S BELGIUM GUIDE*, *Dinant*, available at <http://www.eupedia.com/belgium/dinant.shtml> (last visited Aug. 7, 2011) (describing the siege as "the darkest moment in local history" wherein the "city was completely pillaged and burnt down"); MARK TWAIN, *PERSONAL RECOLLECTIONS OF JOAN OF ARC* (San Francisco: Ignatius Press 1989) (describing the "unspeakable atrocities which Charles the Bold inflicted upon the men

fiercest, most loyal lieutenant. In that regard, Sir Peter's steadfast reliance on superior orders at trial speaks volumes.

And it is not to be overlooked that a criminal disposition was apparent even before Hagenbach cast his lot with Charles the Bold. The reported kidnapping of Marquard Baldeck, the Swiss banker for whom Hagenbach demanded ransom, is telling in that regard. As noted previously, Hagenbach supposedly demanded ransom from Baldeck's family and the scheme was scuttled only when Philip the Good ordered Baldeck released without any extortion payment. Hagenbach also seems to have fabricated a murder plot against Charles the Bold, which he falsely pinned on a court rival to have him eliminated.<sup>290</sup>

Add to this Hagenbach's contempt for the emerging bourgeoisie and townspeople, as well as a deep animosity toward the Swiss, and his stewardship of the Upper Rhine represented the perfect storm. By 1474, he had indeed become the scourge of the Sundgau. In this regard, it is interesting to note Burgundy expert Richard Vaughan's insight that, in fact, it may have been Hagenbach driving policy and tactics in Charles's Alsatian territory, not the other way around:

Many of Hagenbach's activities were undertaken at [Charles's] express command, though often as a result of representations made to him by Hagenbach in the first place. It is possible, for example, that Charles only agreed to sign the treaty of St. Omer on Hagenbach's persuasion. In the duke's letters to Hagenbach of 8 August 1470 he orders him to undertake the siege and conquest of Ortenberg castle, 'in accordance with your memorandum (*advertissement*)', which seems to imply that Charles was here acting on detailed advice to take Ortenberg sent him by Hagenbach. As to other mortgaged places, the bailiff wrote to Charles describing how he had seized possession of Landser and seeking the duke's approval, which was given on 6 January 1474. . . . On 26 December 1470 he wrote congratulating Hagenbach on taking Ortenberg . . .<sup>291</sup>

Finally, it should be pointed out that Hagenbach may be responsible for atrocities in the region, even if he personally did not commit or order or was unaware of all of them. In particular, the Picard and Wallon mercenaries he hired toward the end of his reign had a well known reputation for being unruly, violent and hostile toward the local Alsatian population.<sup>292</sup> French historian Emile Paul Toutey, for example, describes Picard soldiers engaging in mass rape of Breisach's women toward the very end of

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and women and children of Dinant"); VAUGHAN, *supra* note 71, at 40 (explaining that Charles the Bold "sacked Dinant and demolished Liège"); NICHOLAS MICHAEL, *ARMIES OF MEDIEVAL BURGUNDY 1364-1477* (Oxford: Osprey Publishing 1983) (explaining that at the halfway point of a year-long siege, "the gates of Neuss had been reduced to rubble by Charles's 229 guns [and] everything down to the last rat had been eaten.") .

<sup>290</sup> See VAUGHAN, *supra* note 71, at 255.

<sup>291</sup> *Id.* at 99.

<sup>292</sup> ÉMILE PAUL TOUTEY, *CHARLES LE TÊMÉRAIRE ET LA LIGUE DE CONSTANCE* 102 (Hachette 1902).



1473.<sup>293</sup> These troops may have acted on their own initiative but Hagenbach was their superior and, at the very least, he bore command responsibility. And this may also have contributed toward the writing of Hagenbach's black legend.

## **B. Was the 1474 Breisach Proceeding History's First International War Crimes Trial?**

Those who critique Georg Schwarzenberger's conclusion that the Breisach Trial was Nuremberg's precursor, spearheaded by German historian Hermann Heimpel,<sup>294</sup> are supported in this view by two fairly straightforward and superficially compelling arguments: (1) the trial was not "international" because those who sat in judgment of Hagenbach owed their allegiance to the same sovereign – the Holy Roman Empire; and (2) no war crimes were implicated as the "war" between Burgundy and the League of Constance had not yet officially begun. Looking at each of these points a little more carefully, however, tends to vindicate Schwarzenberger.

### **1. An "International" Trial?**

Nominally, the trial was presided over by a group of judges representing different political entities (primarily city states, such as Strasbourg and Basel) in the Upper Rhine region. The argument that the trial was not international in nature hinges on the assertion that each of the entities represented was incorporated into a larger political superstructure -- the Holy Roman Empire, which had been founded by Charlemagne in the year 800.<sup>295</sup> But is this a credible claim? Many historians are of the view that, by the late Middle Ages, the Holy Roman Empire had "ceased to be an effective entity."<sup>296</sup> In particular:

[Consisting of] more than 300 principalities . . . the Holy Roman Empire emerged from the Middle Ages a weak and fragmented entity. Even the fabled Hohenstaufen Emperors were unable to prevent the emerging sovereignty of territorial princes . . . The Holy Roman Empire, however splendid its name, was unified in name only. Aptly described by Voltaire as neither holy, nor Roman, nor an empire, this historical atavism was moribund long before its final dissolution . . .<sup>297</sup>

In this sense, by 1474, perhaps it is more accurate to describe the Holy Roman Empire as something more akin to an intergovernmental organization with hundreds of independent member states. Could it be rightly compared, for example, to the modern Commonwealth of Nations, which consists of sovereign states that were formerly part of the British Empire?<sup>298</sup> If so, the men who sat in judgment of Peter von Hagenbach clearly represented sovereign entities, not imperial subjects.

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<sup>293</sup> *Id.* at 101.

<sup>294</sup> See Heimpel (*Mittelalter*), *supra* note 177, at 449.

<sup>295</sup> See, e.g., Heimpel, *id.*

<sup>296</sup> WORLD AND ITS PEOPLES, GERMANY AND SWITZERLAND 318 (New York: Marshall Cavendish Reference 2009).

<sup>297</sup> RODERICK STACKELBERG, HITLER'S GERMANY: ORIGINS, INTERPRETATIONS, LEGACIES 26 (London: Routledge 1999).

On the other hand, it must be pointed out that the murder charges were based on "imperial law." That indicates the Holy Roman Empire may have been a bit more than the modern equivalent of the British Commonwealth. Might it look more like the European Union, for example? Even if that is the case, it does not necessarily diminish the sovereign status of the political entities represented at Breisach that day. To analogize in modern terms, an ad hoc tribunal using European Union law to resolve an issue – but not convened by or operating explicitly under the authority of the European Union – would not signify that the individual European states participating in the Tribunal (France and Germany, for example) had lost their sovereignty. In this regard, it cannot be ignored that the Tribunal was convened by Sigismund, the Archduke of Austria, not by Emperor Frederick III.<sup>299</sup>

## 2. A "War Crimes" Trial?

Regardless of its international nature, the other key issue is whether the Hagenbach inquest can be properly characterized as a "war crimes" trial. Telford Taylor summarized the argument against calling it a war crimes trial in his *Ministries Case* opening statement: "The acts of which he was accused were not committed during actual hostilities or in time of war and, therefore, under our modern terminology would be akin more to crimes against humanity than to war crimes."<sup>300</sup> But Taylor's statement may be erroneous on both factual and legal grounds.

First, from a factual perspective, by April 1474 a state of hostilities did arguably exist between the Duchy of Burgundy and the League of Constance principalities and city-states. The League was formed in March 1474 with the primary purpose of expelling Burgundy from the region. Not coincidentally, at about the same time, Hagenbach took up fortifications in Breisach and prepared for an attack – he knew a state of hostilities existed. Indeed, House of Valois expert Richard Vaughan concludes that there was an "authentic armed revolt against Charles the Bold [in] Alsace in April 1474 . . ."<sup>301</sup>

Second, from a legal perspective, even assuming Burgundy was not officially at war with the League by April 1474, it is still arguable, under modern conceptions of the law of war, that Hagenbach engaged in war crimes. According to law of war expert Yoram Dinstein, "belligerent occupation may be carried out without any hostilities either preceding or following it."<sup>302</sup> Dinstein then elaborates: "If the occupation of the territory of State A (in whole or in part) by State B is suffused with coercion, the occupation is

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<sup>298</sup> See BBC News, *Profile: The Commonwealth*, available at [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/1554175.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/1554175.stm) (last visited July 31, 2011). In fact, two members of the Commonwealth were not formerly part of the British Empire – Mozambique and Rwanda. *Id.*

<sup>299</sup> As Heimpel points out, "The staffing of the court was noble-Austrian." Heimpel (*Mittelalter*), *supra* note 171, at 446.

<sup>300</sup> *Ministries Case*, *supra* note 11, at pages 96-97.

<sup>301</sup> VAUGHAN, *supra* note 8, at 403.

<sup>302</sup> YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 31 (Cambridge University Press 2009).

belligerent and the relationship between States A and B shifts from peace to war (even in the absence of hostilities)."<sup>303</sup>

In the case of the Burgundian occupation of Alsace, it had clearly turned coercive during the first part of 1474. For one, funded by the League of Constance, Sigismund had paid off his debt and he and his League allies sought to reclaim the Alsatian lands held by Charles the Bold as collateral pursuant to the Treaty of St. Omer. Consistent with this, Sigismund appointed a new bailiff for the region, Herman Eptingen. The population's entreaties to Charles the Bold to remove Hagenbach had fallen on deaf ears and Hagenbach clearly perceived rebellion in his midst during those final months of service to the Duke. In addition to the defensive fortifications at Breisach, Hagenbach's claim he extra-judicially killed the citizens of Thann on grounds of rebellion attests to this.

Nevertheless, in the absence of a more detailed bill of particulars, we cannot know with certainty which of Hagenbach's charged crimes took place during this period of coercion. In fact, it is difficult to identify the precise date on which the occupation could be safely described as "coercive." Nor is it clear whether a coercive occupation in 1474 existed in the same manner and degree in each of the Alsatian territories occupied by Charles the Bold where any of Hagenbach's charged crimes may have occurred. And so, as is true with so much else in this case, no definitive conclusions are possible.

### C. Crimes against Humanity?

But perhaps it is well to reconsider Telford Taylor's analysis that Hagenbach was charged and convicted of misdeeds akin to the modern formulation of crimes against humanity. For ICL purposes, along with the rejection of the superior orders defense, this could be the trial's most significant legacy. Modern experts routinely quote prosecutor Heinrich Iselin's opening charge that Hagenbach had "trampled under foot the laws of God and man." But where is that supported in the historical record? Hermann Heimpel contends it is nowhere to be found in the original source materials.<sup>304</sup> Of the non-contemporaneous historians, Prosper de Barante appears to be the earliest quoted source of Iselin's most famous words. And from that source, succeeding generations of historians have quoted one another, in echo chamber fashion, as support for Iselin's weighty utterance. But what exactly are the words used in Barant's treatise? The relevant passage follows:

On 4 May 1474, after having been subjected to interrogation, [Hagenbach] was, on the orders of Herman Eptingen, Duke Sigismund's governor, brought before his judges on Breisach's town square. His countenance was firm, that of a man who does not fear death. Henrich Iselin, of Basel, then addressed the court as Herman Eptingen's representative, acting on behalf of Duke Sigismund and the country. He spoke *more or less* in these terms: "Peter von Hagenbach, knight, chief steward of his lord the

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<sup>303</sup> *Id.* at 35.

<sup>304</sup> See Heimpel, *Mittelalter*, *supra* note 177, at 450 n.1.

Duke of Burgundy, and the Duke's governor in the territory of Ferrette and Upper Alsace, should have respected the privileges he swore to protect when taking his oath of office; but not only did he violate the rights pledged and guaranteed in this country, he trampled under foot the laws of God and man."<sup>305</sup>

And where exactly did Barante himself find evidence of Iselin's peroration? Barante's treatise offers no clues – there is no specific citation in support of the text (or approximate text). Consistent with Heimpel's conclusion, my research has not unearthed reports of that exact language in contemporaneous accounts.<sup>306</sup> There are hints of it, however, in the journal of Basel's diarist Johannes Knebel, the most frequently quoted contemporary chronicler (and, according to historian Charles Nerlinger, "the most reliable source").<sup>307</sup> For example, Knebel quotes Iselin in his opening statement as follows:

And after the tribunal was summoned, Heinrich Iselin in the name of Hermann Eptingen began to lay charges against Peter von Hagenbach and he set forth four articles against him. First, that in the previous year, that is [1473], in [Thann], he caused four citizens, upright and honest men, to be decapitated without tribunal or justice, *and so had acted against the law of the divine emperors*.<sup>308</sup>

Knebel has Iselin go on to say:

Also, he had overwhelmed by force and against their will many married women, maidens, even nuns in the state of Brisacensis and had done the same things *against God, justice, and all honesty* not only there, but also in many other towns and villages.<sup>309</sup>

Thus, while Knebel's Iselin quotations allude to Hagenbach's acting "against the law of the divine emperors" and "against God, justice, and all honesty," with specific

<sup>305</sup> BARANTE (Vol. X), *supra* note 52, at 14-15 (emphasis added) – author's translation. "More or less" might also be translated as "approximately." The original French text reads as follows: Pierre de Hagenbach, chevalier, maître d'hôtel de monseigneur le duc de Bourgogne, et son gouverneur dans les pays de Ferrette et Haute-Alsace, aurait dû respecter les privilèges réservés par l'acte d'engagement; mais il n'a pas moins foulé aux pieds les lois de Dieu et des hommes que les droits jurés et garantis au pays."

<sup>306</sup> In addition to Knebel's diary and the previously mentioned *Reimchronik* (see note 35 *supra*), Richard Vaughan cites *Die Berner-Chronik* by Schilling and *Die Strassburgische Chronik* by Trausch. See VAUGHAN, *supra* note 8, at 262 n. 1. The author has not read the latter two, which are not widely available and kept in locations not currently accessible to the author. Of course, it is possible Barante relied on the manuscripts of Schilling or Trausch but this seems unlikely given that he cites to neither in his treatise.

<sup>307</sup> NERLINGER, *supra* note 55, at 127 n.1. Some consider Knebel the sole source of reportage on the trial. John Foster Kirk refers to Knebel as "the chronicler." KIRK, *supra* note 54, at 494 (emphasis added).

<sup>308</sup> KNEBEL, *supra* note 78, at 86 (emphasis added). The original Latin reads: "Et iudicio bannito cepit Heinricus Ysenlin nomine domini Hermanni de Eptingen balivi contra dominum Petrum de Hagenbach querulare et quatuor articulos contra eum proposuit: [1] primo: quod anno preterito, videlicet 73, in Tannis quatuor cives, probos et honestos viros, absque iudicio et justicia fecisset decapitari, unde *contra legem divorum imperatorum* fecisset." Dr. Scott Farrington translated the Latin into English.

<sup>309</sup> KNEBEL, *supra* note 78, at 86-87 (emphasis added). The Latin reads: "Multas eciam in civitate Brisacensi mulieres maritatas, virgines, eciam moniales vi oppressisset et contra ipsarum voluntatem, et similia non solum ibi, verum eciam in multis aliis opidis et villis *fecisset contra deum, justiciam et omnem honestatem*. As before, Dr. Scott Farrington translated the original Latin into English.

respect to the first and fourth counts of the indictment, they do not have Iselin generally charging Hagenbach with "trampling under foot the laws of God and man."

The discrepancies can perhaps be explained, though. First, according to Hagenbach biographer Gabrielle Claer-Stamm, Barante constructed his Hagenbach history, at least in part, relying on another old chronicle kept by a prominent architect of Strasbourg, Daniel Specklin.<sup>310</sup> Barante indicates in his book that Specklin's manuscript was compiled based on the contemporaneous accounts of a certain M. Golbéry, an official of the Alsatian city-state of Colmar.<sup>311</sup> Unfortunately, the portion of the Specklin chronicle dealing with Hagenbach (the entire year 1474, for that matter) was lost in a fire after the Strasbourg library holding it was shelled in 1870 by German troops during the Franco-Prussian war.<sup>312</sup> As a result, it is quite possible that Barante's rendering of the Iselin-opening derives from the missing portion of the Specklin manuscript (to which, for example, twentieth century historian Hermann Heimpel would not have had access).

There may be yet another simple explanation. Barante essentially acknowledged that he was only paraphrasing Iselin (qualifying his reporting of Iselin's words as "approximate" or "more or less" – "*à peu près*" in French). Given the admitted loose transcription, there is arguably enough consistent language in Knebel to reconcile the slightly different language in Barante. In this regard, the notion that Barante was a less than careful historian is reinforced by an obvious mistake two sentences before the recounting of Iselin's opening statement. In particular, Barante introduces the section by informing readers that Sir Peter's trial took place on "4 May 1474."<sup>313</sup> It is universally acknowledged that Sir Peter von Hagenbach was tried and executed on the *ninth* of May 1474, not the fourth. Ironically, given its future impact on the development of international criminal law, a potentially minor transcription error in a Burgundian side-plot may be the most significant legacy of Barante's mammoth ten-tome history of the Burgundian House of Valois!<sup>314</sup>

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<sup>310</sup> CLAER-STAMM, *supra* note 71, at 186 ("... Barante ... relied on the chronicle of Daniel Specklin, which has disappeared.")

<sup>311</sup> BARANTE (Vol. IX), *supra* note 52, at 405 n. 1.

<sup>312</sup> CLAER-STAMM, *supra* note 71, at 186. *See also* RODOLPHE REUSS, LES COLLECTANÉES DE DANIEL SPECKLIN, CHRONIQUE STRASSBOURGEOISE DU XVIÈME SIÈCLE (Strasbourg: Librairie J. Noiriel 1890); Internet Archive, *La Cathédrale de Strasbourg: Notice Historique et Archéologique* (Paris 1910), available at [http://www.archive.org/stream/lacathedraledes00delauoft/lacathedraledes00delauoft\\_djvu.txt](http://www.archive.org/stream/lacathedraledes00delauoft/lacathedraledes00delauoft_djvu.txt) (last visited Aug. 1, 2011) (Specklin left a manuscript that was partially destroyed in a fire of the city's library during the 1870 bombardment and that was published in retrievable fragments by Mr. Rod. Reuss . . .") (Translation of French into English by the author).

<sup>313</sup> BARANTE (Vol. X), *supra* note 52, at 14.

<sup>314</sup> Another possible source of the phraseology is suggested by historian Ruth Putnam. She explains that the anti-Burgundian alliance sent Emperor Frederick III a letter in August 1474 explaining why Sigismund had reasserted dominion over the mortgaged Alsatian territories. In particular, she recounts the letter informed the Emperor that Charles the Bold's "appointed lieutenant had been peculiarly odious and had broken the laws of God and man. . ." Putnam, *supra* note 64, at 394 (emphasis added). To support this, Putnam cites to page 442 of the 1902 treatise CHARLES LE TÊMÉRAIRE ET LA LIGUE DE CONSTANCE by French historian Émile Paul Toutey. But the cited language in French reads as follows: "Il a inquiété gravement les prêtres, dans leurs corps et dans leurs biens, hontusement outragé des femmes et des filles, fait passer de vie à trépas beacoup d'innocents, contre Dieu et le droit, sans acun jugement." ÉMILE PAUL TOUTEY, CHARLES LE TÊMÉRAIRE ET LA LIGUE DE CONSTANCE 442 (Hachette 1902) ) (emphasis added). The author translates this passage as follows: "He seriously harassed the priests, with respect to both their persons and

Even if we can chalk up Barante's inadvertent proto-formulation of crimes against humanity (via Iselin) to a transcription error, Hagenbach was arguably guilty of our modern understanding of the offense all the same. The Rome Statute of the International Criminal Court defines crimes against humanity as a series of heinous acts, such as murder or rape, committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."<sup>315</sup> As with war crimes, legal analysts could quibble about exactly when Hagenbach committed various acts of murder, rape and other crimes in relation to a widespread and systematic attack (or whether he had knowledge of the attack). But as most of the crimes charged at the Breisach Trial were committed in and around a period of hostility between Burgundy and the Alsatian polities, the requisite nexus between Hagenbach's individual transgressions and a widespread/systematic attack can likely be established.<sup>316</sup> Similarly, given that he was in charge of the forces engaging in the widespread/systematic attack, it is not a stretch to impute knowledge to him of any such attack.

## V. CONCLUSION

In illuminating the hidden history of the 1474 Breisach Trial, this piece has attempted to identify and resolve certain vertical and horizontal dissonances in Hagenbach scholarship. With respect to the former, this has amounted to an exercise in historiographic and historical archeology. The recent attention lavished on the case by ICL experts is informed by a cartoonish conception of the defendant – an ultra-violent, sexually depraved monster who ran amok for years along the Upper Rhine and terrorized its population. Consistent with that interpretation, the authorities who captured and tried him engaged in a righteous and visionary justice enterprise. They came out on the winning side of a Manichean struggle that gave birth to ICL and ennobled its pedigree.

Digging deeper, though, one finds a very different narrative developed initially by nineteenth century historians and embraced by most of their twentieth century confreres. They saw Hagenbach as a would-be administrative reformer whose efforts were thwarted by xenophobic subjects and a parsimonious superior. In trying to transform a fragmented archipelago of city-states into a cohesive governmental entity, Hagenbach was despised because he threatened an ingrained culture of seigneurial privilege and parochial complacency. In his efforts to redeem property put in hock by Sigismund, he likely reinforced views of Burgundy as excessively acquisitive and bent on conquest (this was exacerbated by Charles's own efforts to accede to the imperial throne). And in levying taxes to pay for good government, Hagenbach stoked local fears of financial servitude and ruin. But in doing the Duke's bidding, he did not have the Duke's support. And so he was left to flounder, his undoing hastened by his admitted crass and prurient behavior.

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possessions, shamefully offended women and girls, and put to death many innocent persons, *against God and the law*, without judicial sanction." Putnam's translation seems a stretch and the language quoted by Toutey is not even close to Barante's formulation of " *les lois de Dieu et des hommes*." Even if Putnam's translation is accepted, it is quite possible that letter's authors were merely quoting Iselin's words at trial.

<sup>315</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, reprinted in 1 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records (1998), art. 7.

<sup>316</sup> Given the widespread and systematic attack, Heimpel's assertion that the trial involved only garden variety charges of murder and rape is ill considered. See Heimpel, *Mittelalter*, *supra* note 177, at 450.

They point out that his trial, a marketplace spectacle based on torture-extracted confessions, was little more than drumhead justice. It was akin to executing Charles the Bold in effigy. Peter von Hagenbach may not have been the most adroit governor and perhaps he did manifest contempt for the rising merchant and urban classes. But, the revisionists would contend, his final deserts were not just at all.

Digging deeper still, the bottom layer of historiography consists of the journalistic rough draft and the first generations of historians that followed. It is largely consistent with the modern ICL expert view but without the larger historical perspective and legal focus. And it is more regionally tinged and archaic. This layer is at once more reliable, given its contemporaneity or relative proximity, and less reliable, given the inherent biases of its initial chroniclers and the disproportionate influence they exerted on sixteenth through eighteenth century historians.

But this piece has demonstrated that each layer is not necessarily inconsistent with the others. In fact, there are many points of convergence. And it is there that a unified, coherent narrative can be stitched together. Hagenbach *was* course and confrontational. But he was also hardworking and loyal and wanted to do right by his master. His entire career had been built on pleasing Charles the Bold. He undoubtedly meant to reform and upgrade the administration of his Alsatian fiefdom. And consequently resentment of the bailiff grew over the years as he pushed while the Alsatians pulled. Hostilities boiled over in 1473 and matters came to a head in 1474. Charles's loyal lieutenant with a criminal past and odd sexual predilections felt increasingly boxed in and he eventually lashed out. The almost exclusive procedural focus of his defense at trial strongly supports accounts of the resulting crime spree.

It should also be noted that modern Hagenbach scholarship is characterized by a certain horizontal dissonance as well – between jurists and historians. Given the historical points of convergence just noted, however, these two schools ought to find common ground too. Certain views of the revisionist historians concerning the Hagenbach judicial proceedings are not without merit. The Breisach ad hoc tribunal may not have been a kangaroo court but it bears no resemblance to the well-oiled machine of modern international criminal justice administration. The defendant was hideously tortured for days before the trial. He was given no notice of the charges or allegations against him in advance of the hearing. He had no time to speak with a lawyer before standing in front of the judges. The proceeding itself was held on a market square in a circus atmosphere and concluded within a matter of hours. He was not able to call his most important (and only) witness to the stand – Charles the Bold. And there is no indication of a high burden of proof or that any such burden even rested with the prosecution. The Breisach Trial was certainly not the paragon of due process.

On the other hand, this was the late Middle Ages – centuries removed from our modern notions of due process. Torture was part of standard pre-trial procedure at that time. And the trial itself seems relatively fair for that era. Hagenbach was represented by a zealous advocate in Hans Irmy and he was given two additional lawyers of his choice. There is as well a flip side to the "public spectacle" aspect of his trial -- transparency.

Hagenbach could have been summarily condemned in front of a secretive Star Chamber but his trial was held in public (and that was consistent with local custom). He was able to confront witnesses called against him. He had twenty-eight finders of fact (compared to twelve in the modern jury system). And Charles the Bold, his sole designated witness, was not allowed to testify because the defense of superior orders was rejected *ab initio*. As well, the proceedings lasted from early in the morning until late at night – which could equate to two or three modern court days. There seems to have been significant deliberation among the twenty-eight judges suggesting that a consensus was cobbled together after carefully sifting through the evidence. In an age of witch-hunts, trials by ordeal, the Star Chamber, and the Inquisition, this was an exceedingly fair trial.<sup>317</sup>

And in many ways it seems inappropriate to use twenty-first century ICL terminology to analyze a fifteenth century judicial proceeding. But if that terminology is used, this piece has demonstrated that the Breisach Trial has many of the hallmarks of a modern international atrocity adjudication. As a threshold matter, regardless of anything else, it is the first recorded case in history to reject the defense of superior orders. In itself, that distinction invests the trial with universal historic importance in the development of atrocity law.

But has the Hagenbach inquest left a larger legacy? Is it the world's first international war crimes trial? Did it bequeath us the first primitive formulation of crimes against humanity? As this piece has demonstrated, given the relatively circumscribed writ of the Holy Roman Empire by the late fifteenth century, it is not unreasonable to classify the trial as "international." And Burgundy's hostile occupation of the Sundgau in the first part of 1474 means Hagenbach's transgressions may arguably be recognized in contemporary terminology as war crimes. Moreover, the bailiff's apparent widespread and systematic attack against the Alsatian civilian population (most clearly via rape and murder) – made with his commander's knowledge of the attack – seems to qualify as crimes against humanity as it is understood today.

Whether, on that fateful Monday morning in the spring of 1474, Heinrich Iselin spontaneously and intuitively attempted to vocalize the raw concept of a new kind of atrocity crime – offenses violating "the laws of God and man" – may never be known for sure and, in any event, is beside the point. Since the modern birth of international criminal law in 1945, experts have *perceived* that the Swiss procurator articulated a new juridical concept that morning -- crimes against humanity. That perception has undoubtedly had an influence, however subtle or attenuated, on the modern development of ICL. And it has lent the subtle sanction of ancient pedigree to jurists attempting to blaze new trails with respect to ICL theories of liability, defense, and procedure. This

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<sup>317</sup> See STEPHEN J. HARRIS & BRYON LEE GRIGSBY, MISCONCEPTIONS ABOUT THE MIDDLE AGES 223 (2008) ("[Torture] was allowed after 1480 in witchcraft trials . . . large witch hunts peaked from 1580 to 1650, well into the humanist Renaissance . . ."); ROBERT BARTLETT, THE NATURAL AND THE SUPERNATURAL DURING THE MIDDLE AGES 28 (Cambridge University Press 2008) ("The underlying concept of trial by ordeal was not a random test but a carefully staged ritual in which God would give his verdict, and *iudicium Dei*, 'judgment of God', was in fact a standard medieval term for 'ordeal.'"); JUDY HAILS, CRIMINAL EVIDENCE (5th ed. Thomson Wadsworth 2005) ("In the Middle Ages, glaring abuses of the trial process, such as the Star Chamber and the Inquisition, developed.").



piece has shown that though they might be grounded in inaccurate or superficial understandings of history, modern perceptions of the trial are at least not based on unsubstantiated myth. Perhaps this piece will disabuse ICL of its one-dimensional portrait of Hagenbach as history's consummate bogeyman. But it should also enhance appreciation for the important semiotic and iconographic space the Breisach Trial now inhabits in transnational legal discourse.

The case did set an epochal precedent. Nothing in history leading up to that moment in 1474 would have suggested the remarkable course of action taken by Sigismund. It is tempting to see that decision as an historic anomaly that would not be repeated for centuries to come. But on closer inspection, Sigismund's choice to hold a trial before an international court fits well within the historical narrative of that era.

It was a time of religious and political disintegration. The Holy Roman Empire was fading into irrelevance and the Catholic Church was on the verge of losing its European hegemony. It was the eve of the nation-state – a unique moment when the old collective structures were dying and the new ones had yet to be born. Given the interstitial political turbulence, the time was ripe for a plural approach to law enforcement in the cosmopolitan geographic center of Europe. Hagenbach's inter-regional depredations, which helped forge a rare pan-Germanic consensus, provided the perfect forum to experiment with international justice during that fragmented time. The Westphalian order, already on the horizon, would foreclose any such future experiments until Nazi brutality put a chink in the Westphalian armor and inspired an unprecedented transnational justice operation in the wake of a truly global war. In that sense, although on much different scales, Breisach and Nuremberg have much in common. And should the nation-state ever manage to reassert its absolute supremacy again, Breisach will undoubtedly be on the lips of future international jurists seeking, as before, to end impunity at the expense of sovereignty.