LAW REPORTS OF TRIALS OF WAR CRIMINALS

Selected and prepared by

THE UNITED NATIONS
WAR CRIMES COMMISSION

VOLUME XI

LONDON
PUBLISHED FOR
THE UNITED NATIONS WAR CRIMES COMMISSION
BY HIS MAJESTY'S STATIONERY OFFICE

1949

Price 5s. 0d. net

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One of the aims of this series of Reports is to relate in summary form the course of the most important of the proceedings taken against persons accused of committing war crimes during the Second World War, apart from the major war criminals tried by the Nuremberg and Tokyo International Military Tribunals, but including those tried by United States Military Tribunals at Nuremberg. Of necessity, the trials reported in these volumes are examples only, since the trials conducted before the various Allied Courts number well over a thousand. The trials selected for reporting, however, are those which are thought to be of the greatest interest legally and in which important points of municipal and international law arose and were settled.

Each report, however, contains not only the outline of the proceedings in the trial under review, but also, in a separate section headed " Notes on the Case ", such comments of an explanatory nature on the legal matters arising in that trial which it has been thought useful to include. These notes provide also, at suitable points, general summaries and analyses of the decisions of the courts on specific points of law derived primarily from a study of relevant trials already reported upon in the series. Furthermore, the volumes include, where necessary, Annexes on municipal war crimes laws, their aim being to explain the law on such matters as the legal basis and jurisdiction, composition and rules of procedure on the war crime courts of those countries before whose courts the trials reported upon in the various volumes were held.

Finally, each volume includes a Foreword by Lord Wright of Durley, Chairman of the United Nations War Crimes Commission.

continued inside back cover

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CONTENTS

FOREWORD

The trials reported in this volume have the common feature that they deal with offences against prisoners of war. Offences of that class may seem to involve a departure from the old, simple idea of war crimes, that is, crimes committed in the actual operations of war, battle invasion or the like, but since the Geneva Conventions the rights of prisoners of war to fair treatment and the obligations of the belligerent forces to give effect to these rights have been established, and they are indeed an important branch of the law relating to crimes, and crimes which obviously fall within the category of war crimes. Thus, the extension of the scope of the trials which have been held to punish such crimes has followed inevitably. The trials included here will show how varied may be the application of the Geneva Conventions.

The most striking perhaps historically is the case of the Stalag Luft III, which was a plain case of deliberate murder committed against prisoners of war. They were all airmen who had been captured while taking part in air attacks either against Germany or the occupied countries. They had not committed any offence against the rules of war. Their operations in the air had been in accordance with the recognised rules in that type of warfare. They had, however, made a concerted, determined and ingenious effort to escape from the camp. The report states that of the 80 officers who escaped 50 were captured and shot by the Gestapo, and it is with the fate of those 50 that the case deals. The *esprit de corps* of the British and the German air forces worked so effectively that the Germany military were shocked by the audaciously unjustified murder of those brave and honourable opponents.

The next case I refer to here is the trial of Falkenhorst, which is a very striking case and about which I only want to say two things. First of all, it includes a charge that Falkenhorst passed on to the troops under his command an order to deprive certain Allied prisoners of war of their rights as prisoners of war under the Geneva Conventions, and which was in itself a substantive war crime, obviously in gross defiance of the laws of war, even though there was no proof that it had ever been acted upon. Of that Falkenhorst was found guilty. He was also found guilty on other counts, which charged him with being responsible for the murder of a large number of prisoners of war who were killed after all hostilities on their part had ceased. It is worth noting, though it does not come into the trial, that the practice was constantly acted upon in Germany of handing over to the tender mercies of the German mob, British or Allied airmen who had baled out and been

captured when engaging in the course of bombing raids. That practice is mentioned in Volume VI. It was merely a less formal method of killing these airmen than the method of doing so by the troops or the S.D. as in the case here reported.

Another important case reported in this volume is the case of the Dachau concentration camp. It has not been the intention in this series to report concentration camp cases in general. The Belsen trial, a British one, was very fully reported in Volume II, but there have been many other concentration camp cases. A list of the most important of these will be found in the "History of the United Nations War Crimes Commission and the Development of the Laws of War" on pages 540–542. There were, in addition, numerous lesser trials in which the offences charged were those committed by people employed by the Nazis in the various concentration camps. The Dachau concentration camp case has been exceptionally treated. It is principally noteworthy because of its discussion of the nature and effect of common design, as establishing the criminal liability of the participants in the execution of the design.

I may here observe that in the next volume, which will be Volume XII, there will be reported a very important case of a trial included in the Subsequent Proceedings at Nuremberg, in which questions relating to prisoners of war are further discussed. This is the *High Command Trial*, the trial of Von Leeb and others. I may here also interpose to state that it is intended, in the final volume of these Reports, which will be Volume XV, to set out a general summary of the legal outcome of the trials reported in this series, in addition to some other trials which there has not been sufficient space to report. In this final volume, Mr. Brand will consequently bring together the results of all the trials dealing with prisoners of war rights which have appeared in this series, as part of his larger task.

The remaining cases reported in Volume XI tend to show certain aspects of the law and procedure of war crimes. Matters which may be principally noted are the tendency to relax the laws of evidence, because of the great difficulties in obtaining such evidence as would be competent or admissible in an ordinary common law trial either under British or United States procedure, and the means which are adopted to guarantee a fair trial to the accused. The laws of evidence themselves have been most broadly stated in various Commissions and Directives in the United States; for instance, the court is empowered to accept and act upon any evidence which in the opinion of the court has probative value, subject always to the discretion of the court whether to accept that evidence at all in the particular case and to decide, if it is accepted, what weight should be given to it. That has been a most helpful

provision and the qualifications which attach to the rule are sufficient to prevent it from ever being an engine of repression. As to these cases I need only refer to the two. There is the case of Tanabe Koshiro, an interesting Dutch trial in which the accused was found guilty of exposing prisoners of war to danger and of employing them on war work. The second noteworthy case is that of Franz Schonfeld and others, where the offence charged was the shooting without trial of unresisting members of the British and Dominion air forces who had been captured.

The Annex on Netherlands Law Concerning Trials of War Criminals is worthy of careful examination as illustrating the blending together of the national and the international law which necessarily involves a certain amount of compromise in order that the international laws should be made to work in with the rules of national law. The Annex points out for instance, that, while the Netherlands East Indies war crimes legislation from the outset applied international law directly, as do British Military Courts for instance, the metropolitan Dutch legislation originally treated war crimes as such offences under municipal penal law as were not justified by the laws and customs of war, but later adopted a compromise according to which international law was observed on questions relating to the definition of offences and municipal law relied upon to supply the punishment to be applied.

Dr. Zivkovic has written the Dutch report and Annex, and Mr. Stewart the reports on the Dachau trial, the Stalag Luft III trial, the two Australian trials and the trial of Kurt Maelzer. The report on the Falkenhorst trial has been contributed by an authority on war crimes law who desires to remain anonymous. Mr. Brand, who is editor of the series, has written the report on the trial of Franz Schonfeld and the remaining British cases.

WRIGHT

London, *December*, 1948.

CASE NO. 59

TRIAL OF TANABE KOSHIRO

NETHERLANDS TEMPORARY COURT-MARTIAL,
MACASSAR, 5TH FEBRUARY, 1947

Unnecessarily subjecting prisoners of war to danger. Employing prisoners of war on prohibited work.

A. OUTLINE OF THE PROCEEDINGS

The accused, Tanabe Koshiro, was a 1st Lieutenant of the Japanese Navy, and at the time of the alleged crimes, officer commanding the Sukie (Coast Guard) of 23 Special Naval Base Forces at Macassar, Netherlands East Indies. He was tried for violations of the rules of warfare concerning the treatment of Dutch and other Allied prisoners of war at Macassar.

1. THE CHARGES

The prosecution charged the accused with having " as a subject of the enemy power, Japan, at Macassar, about August, 1944, therefore in time of war," committed two types of offences :

" (*a*) unnecessarily exposed about twelve hundred Dutch, American British and Australian prisoners of war to acts of war " ;

" (*b*) Employed prisoners of war in war work " in that the accused " had an ammunition depot built by prisoners of war at a distance " of approximately 50 yards from the prisoners-of-war camp" and " ordered the depot to be filled with ammunition ".

The prosecution asked the court to find the accused guilty of " intentionally and unnecessarily exposing prisoners of war to acts of war ", and of " employing prisoners of war on war work ", and to convict him to 5 years' imprisonment.

2. FACTS AND EVIDENCE

The accused pleaded not guilty. According to the evidence submitted to the court, which included the testimony of Dutch and Japanese witnesses heard during the proceedings, the facts were as follows :

In July or August, 1944, a large ammunition depot was built opposite the prisoners-of-war camp at Macassar, and was located about 50 yards from the fence surrounding the camp. The depot was built by the prisoners from the camp on the order of the accused. The witnesses heard on this last point included the Japanese commandant of the prisoners-of-war camp. The ammunition stored in the depot was brought by Japanese soldiers belonging to the Sukei (Coast Guard) under the accused's command.

In view of the proximity of the depot, air-raid shelters were built in the camp, but were inadequate. They were made of rotten trunks of coconut palms and old timber, with a covering of thin sheets of old zinc.

3. THE JUDGMENT

The accused was found guilty of both charges, namely, of " unnecessarily subjecting prisoners of war to danger " and of " employing prisoners of war in an unlawful way ". He was sentenced to 7 years' imprisonment.

B. NOTES ON THE CASE(1)

1. THE NATURE OF THE OFFENCES

With regard to the offences for which the accused was sentenced, the court applied rules of international law, as contained in the existing treaties and conventions.

On the count of " employing prisoners of war in an unlawful way " in that they were used on " war work ", the court specially applied Art. 6 of the Hague Regulations respecting the Laws and Customs of War on Land, appended to the IVth Hague Convention concerning the Laws and Customs of War, and Art. 31 of the Geneva Convention relative to the Treatment of Prisoners of War.

The relevant passages of Art. 6 of the Hague Regulations provide as follows :

> " The State may employ the labour of prisoners of war, other than officers, according to their rank and capacity. The work shall not be excessive and *shall have no connection with the operations of the war.*"(2)

In Art. 31 of the Geneva Convention the latter part of the above rule is repeated, and it is specified that it is "in particular" forbidden " to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units."

By applying the above provisions to the facts of the trial and finding the accused guilty of using prisoners on prohibited work, the court decided that the building of ammunition dumps or depots constituted " work connected with the operations of war ". It thus contributed to defining this concept in regard to cases which were not specifically mentioned in Art. 31 of the Geneva Convention as prohibited in particular.(3)

Regarding the charge of exposing prisoners to danger, the court specifically applied Art. 7 of the Geneva Convention, whose relevant passages run as follows :

> "As soon as possible after their capture, prisoners of war shall be evacuated to depots sufficiently removed from the fighting zone for them to be out of danger.
>
> Prisoners shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone."

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(1) For the Netherlands law relating to war crimes, see Annex.

(2) Italics are inserted.

(3) On this question, see further, Vol. VII of these Reports, pp. 43 and 47 and the notes to the *High Command Trial* report in Vol. XII.

The court's findings were " that the presence of the ammunition depot " in the immediate vicinity of the prisoners' camp " constituted a double danger " for the camp and its inmates. It was established that " from the middle of 1944 the Allied air activities in Macassar increased " and that from the beginning of 1945 " the bombing became more frequent and more intensive ". The district of the camp and the depot " was several times the immediate target of allied bombers and fighters". As a consequence " during the allied air activities the said ammunition depot could have been hit with . . . disastrous results" for the prisoners. The second danger, according to the court, was caused by Japanese anti-aircraft artillery guns. They were " placed round and even in the prisoners-of-war camp," so that "the Japanese intentionally incited the allied forces to activity there ". As a result of both allied bombing and Japanese defence " wounds caused by splinters " among the prisoners " were a regular thing ". One prisoner was killed by having his " head smashed by bomb-splinters ". On one occasion a field where " hundreds of prisoners of war were daily employed, was only missed by some tens of yards ".

The court decided that the above circumstances constituted a breach of the rule that prisoners should not be " unnecessarily exposed to danger ".

2. VALIDITY OF RULES OF INTERNATIONAL LAW IN DUTCH LEGISLATION

The legal basis for the Netherlands East Indies courts to implement rules of international law in the sphere of war crimes, derives from Art. 1 of the Netherlands East Indies Statute Book Decree No. 44 of 1946. This provision defines the notion of war crimes and treats it as an offence under international law in the following terms :

> " Under war crimes are understood acts which constitute a violation of the laws and usages of war committed in time of war by subjects of an enemy power or by foreigners in the service of the enemy."

This definition is followed by the enumeration of all the offences contained in the list of war crimes drawn up by the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. In the Decree No. 44, these offences were enumerated only as an example of what constitutes a war crime, so that the latter concept is not limited to them. The 1919 list includes the " employment of prisoners of war on unauthorised work ".

The reference to the " laws and usages of war " is at the same time a reference to the international treaties and conventions or agreements which contain the rules concerning these laws and usages, and was the formal basis on which the court in this case proceeded by applying the relevant provisions of the Hague Regulations and the Geneva Convention.

It should be noted that this legal method of proceeding in war crimes trials carries with it the generally recognised principle that violations of international treaties and conventions entail or may entail individual penal responsibility and penal sanctions.

As explained elsewhere, in Dutch metropolitan law the method is, legally speaking, different. There, as in other continental countries, the questions

of guilt and punishment of war criminals are formally decided on the basis of common law provisions as contained in the penal codes or other texts of municipal law.(1)

When applying provisions of the Hague Regulations and the Geneva Conventions the court considered the question of their validity in respect of Japan and Japanese subjects. It decided that the provisions of the Hague Regulations were applicable because " the enemy power, Japan, as co-signatory to the Hague Convention of 18th October, 1907 " which it ratified, " was bound " by its provisions. As to the Geneva Convention of 1929, concerning the treatment of prisoners of war, which Japan only signed but did not ratify, the court decided that " the said convention must be regarded as containing generally accepted laws of war " to which " Japan is also bound, even without ratification ". In this respect stress was laid on the fact that the Convention contained " a confirmation of general and already existing conceptions of international law " and was the " prevailing international law " accepted by other nations.

3. EVIDENCE OF THE ACCUSED'S PERSONAL GUILT

When deciding upon the accused's personal guilt for both offences, the court proceeded on the ground of circumstantial evidence. It established that there was " no direct proof that he gave the order " for building the ammunition depot by the prisoners in the immediate vicinity of their camp. It found, however, that such orders were to be " deduced " from the following facts :

(*a*) That the prisoners employed on the construction were drafted at the request of the accused's unit, the Sukei (Coast Guard) ;

(*b*) That the Japanese officer in charge, as well as all the Japanese engaged in the construction, belonged to the accused's unit ;

(*c*) That all the Japanese who handled the ammunition were also from the accused's unit.

4. DEGREE OF THE ACCUSED'S RESPONSIBILITY

When considering the punishment to be imposed, the court took into account two circumstances : that the ammunition depot was not actually hit as a result of the allied bombing, and that " the accused's object was not to subject the prisoners of war to danger " but only " to safeguard the combat supplies of his own forces ". It is fair to say that his guilt was, consequently, found to reside in the objective circumstances created by his acts, and not in his criminal intentions.

(1) On this difference, see the Annex to this volume.

CASE NO. 60

THE DACHAU CONCENTRATION CAMP TRIAL

TRIAL OF MARTIN GOTTFRIED WEISS AND THIRTY-NINE OTHERS

GENERAL MILITARY GOVERNMENT COURT OF
THE UNITED STATES ZONE, DACHAU, GERMANY,
15TH NOVEMBER–13TH DECEMBER, 1945

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

Two charges alleged that the accused " acted in pursuance of a common design to commit acts hereinafter alleged and as members of the staff of the Dachau Concentration Camp, and camps subsidiary thereto, did at or in the vicinity of Dachau and Landsberg, Germany, between about 1st January, 1942, and 29th April, 1945, wilfully, deliberately and wrongfully aid, abet and participate in the subjection of civilian nations " (charge 1) and of " captured members of the armed forces " (charge 2) " of nations then at war with the German Reich, to cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities, the exact names and numbers of such victims being unknown but aggregating many thousands. . . ."

2. EVIDENCE FOR THE PROSECUTION

(i) *General conditions in the camp*

Dachau was the first concentration camp to be established in Germany, and was in existence from March, 1933, until April, 1945. The charges, however, cover only the period from January, 1942, to April, 1945. More than 90 per cent. of the prisoners were civilians, the remainder were prisoners of war. None of them had ever been tried by a court of law previous to being sent to a concentration camp. In April,1945, about half of the total population of the camp were Slavs (mainly Russians, Poles and Czechs), the other half consisting of nationals of almost every European country, including Italy, Hungary and Germany. The main camp was equipped for approximately 8,000 inmates. In April, 1945, it contained 33,000. The entire group of concentration camps administered by Dachau and situated in a circle with Dachau in the centre, could accommodate 20,000. It contained 65,000 people in April, 1945.

The result of this overcrowding was that up to three men had to sleep in one bed, the latrines were constantly blocked, hospital blocks were proportionately crowded and prisoners were not segregated when suffering from contagious diseases, but had to share their beds with others not suffering from such diseases. A typhus epidemic was raging at the camp from December, 1944, until the liberation of the camp by American troops in April, 1945. Approximately 15,000 prisoners died of typhus during this period. No adequate measures were taken by the camp administration to

combat this epidemic. The food was grossly inadequate, especially in view of the long hours of work. The prisoners had to work 12 hours a day ; taking into account the cleaning of barracks and very prolonged parades and roll calls, this amounted to a 17–18 hour working day. When American troops entered the camp in April, 1945, a great majority of prisoners showed signs of starvation. Within the first month after the arrival of the American troops, 10,000 prisoners were treated for malnutrition and kindred diseases. In spite of this one hundred prisoners died each day during this first month from typhus, dysentry or general weakness. Clothing was insufficient to protect the prisoners from the cold. Individual clothing was not washed for periods up to 3 months. The prosecution alleged that a large warehouse full of clothing was found in the camp in April, 1945. Apart from the conditions created in the hospital blocks by overcrowding and insufficiency of medical supplies and gross lack of care, these hospitals were the scenes of numerous medical experiments, of which the prisoners were the involuntary victims. Experiments consisting of immersion of prisoners in cold water for periods of up to 36 hours, puncturing the lungs of healthy prisoners, injecting them with malaria bacteria and phlegmon matter in order to observe their reactions, were among the experiments carried out in the camp hospital. Numerous prisoners died as a result of any one of these experiments. Invalid prisoners who were considered incurably ill and those in the advanced stages of emaciation were periodically gathered into large convoys leaving Dachau for an unknown destination. It was common knowledge, according to the prisoners' testimony, that these transports of people were sent elsewhere to be killed. Prisoners were subjected to strict discipline, which was enforced by a system of severe punishments. These punishments ranged from inflicting harder work and longer hours and deprivation of food to beatings, up to 100 lashes, hanging by the wrists for long periods and confinement in the arrest blocks, to the death penalty, which was inflicted mainly for stealing.

In spring, 1942, 6,000–8,000 Russian prisoners of war were killed. Around September, 1944, 90 Russian officers were hanged in the camp. The total death roll is not known. Over 160,000 prisoners went through Dachau in the three years forming the subject of the charges. The number of recorded deaths is 25,000, but there was evidence that thousands of others perished unrecorded.

(ii) *Organisation and Responsibility of the Accused in running the camp*

All concentration camps were administered by the Central Security Office in Berlin, where the Commandants and senior officers of the staff were appointed. The Dachau group of camps contained 85 branch camps which all came under the camp commandant, who held the rank of Lt.-Colonel in the SS. In each camp there was a " Schutzhaft Lager Fuhrer " who was a kind of deputy commandant. Below this deputy commandant was a "Rapport Fuhrer," who was a kind of regimental sergeant-major, usually a senior N.C.O. of the SS. He was the most important member of the staff for disciplinary purposes. Below these were the " Block Fuhrer," who were SS men each in charge of the prisoners in one block (barrack). From the " Block " downwards, the hierarchy consisted of prisoners. There was a " block eldest " in each block, under him a " room eldest " for each room

in the block, charged with maintaining order. These prisoner functionaries were almost always German prisoners selected by the SS, most of them habitual criminals. The commandant was aided by an adjutant and the camp administration generally, including the chief food stores, clothing stores, etc., was directly under the command of his personal staff. Other departments were headed by an officer of the camp staff such as the labour officer, the chief medical officer, and others. The labour officer was an SS N.C.O who had to appoint working parties for various private factories in the vicinity. Each party was escorted by an SS man as a guard and a prisoner called a " Kapo " acted as foreman under this SS guard.

The medical department was in the charge of the chief medical officer with several SS doctors under him, and prisoner doctors to assist them. The political department, which was headed by a Gestapo officer, who received his orders directly from Gestapo headquarters at Munich, but came under the camp commandant for administration, dealt with all intelligence matters, including the compiling of lists for the experiments, and for the convoys of the sick for extermination.

Of the 40 accused, 9 had at one time been camp commandants or deputy camp commandants. Three had been " Rapport Fuhrers," 4 labour officers or deputy labour officers, 5 medical officers, 2 medical orderlies, 3 on the administrative staff of the camp commandant, 4 " Block Fuhrers " as well as being in charge of working parties, one was in charge of the political department, one an adjutant, one an officer in charge of the battalion of guards, one an officer in charge of supplies. Three accused had been guards who had also been in charge of large prisoner convoys during the evacuation from Dachau to other camps in April, 1945. Three were prisoner functionaries. Thus all accused held some position in the hierarchy running Dachau camps. Most of them held important positions as the above list shows.

(iii) *Specific instances of ill-treatment and killings*

There were numerous cases of grave ill-treatment, deliberate beating and starving of prisoners and a great number of cases of killing prisoners by the SS personnel in all camps. In most cases the names of the victims were unknown but the court were asked to take into consideration only those instances where at least the nationality of the victims was known. All those cases of ill-treatment or killing of prisoners of which detailed evidence was given, were attributed to one or more of the accused. The prosecution thus alleged against some of the accused that they held prominent positions in the hierarchy of the camps and were chiefly responsible for the conditions prevailing there, and against some of the accused acts of individual assaults or killings, against most accused, both. The case for the prosecution was that all the accused had participated in a common plan to run these camps in a manner so that the great numbers of prisoners would die or suffer severe injury and that evidence of the numerous indictments of ill-treatment and killings was only introduced to show that each individual accused took a vigorous and active part in the execution of this plan.

3. EVIDENCE FOR THE DEFENCE

There was no divergence between the prosecution and the defence with regard to the organisation of the camp and the position held by the accused

in this organisation. The defences offered by the accused resolved themselves into two parts, those concerning the general conditions and those concerning the allegations of specific ill-treatment and killings. The defence put forward with regard to the general conditions amounted to a defence of superior orders.(1)

The defence pleaded that the camp was established and run on the orders of Himmler and the Central Security Office in Berlin, that rations, clothing, medical and other supplies were in accordance with the standards prescribed by Berlin, and that Dachau was a good camp " as concentration camps go ". Of the defences put forward with regard to specific ill-treatments and killings, some were utter denials, some were denials of the circumstances or the intensity of the ill-treatment and some were explanations, such as that the hanging of the 90 Russian officers was an execution ordered by the Central Security Office, or that it was necessary in the interest of discipline to beat prisoners who had committed thefts.

4. FINDINGS AND SENTENCES

All 40 accused were found guilty and the finding was confirmed in each case. Thirty-six accused were sentenced to death, one to hard labour for life, 3 to hard labour for 10 years. The Reviewing authority commuted 3 of the 36 death sentences, one to hard labour for life, and 2 to 20 and 10 years' hard labour respectively. The sentence of one further accused was reduced by the Reviewing authority from 10 to 5 years' hard labour. The Confirming authority commuted 5 of the remaining 33 death sentences, two of them to 20 years' hard labour and 3 to 10 years' hard labour.

B. NOTES ON THE CASE (2)

1. QUESTIONS OF JURISDICTION AND PROCEDURE

(i) *Jurisdiction*

The defence, in a motion before the beginning of the hearing of the evidence, which amounted to a plea to the jurisdiction,(3) put forward the following three arguments :

(*a*) that the accused were not described as enemy nationals in the charge and as the court had a limited jurisdiction as to the person and a war crime was defined in paragraph 3 of the Circular No. 132 of Hq. USFET dated 2nd October, 1945, as " . . . including those violations of enemy nationals or persons acting with them of the laws and usages of war, of general application and acceptance . . ." the charges disclosed no offence which the court was competent to try ;

(1) For a discussion of the validity of this defence in general, see the references set out on p. 24, note 2.

(2) For the United States law and practice concerning war crimes, see Vol. III, pp. 103–20.

(3) It should be noted that paragraph 6 of the Royal Warrant (Army Order 81 of 1945), prohibits such a plea ; see Vol. I of these Reports, p. 106.

(*b*) that the names and nationalities of the victims were not disclosed in the charge and were mainly unknown and that it therefore could not be seen from the charges whether or not the victims were nationals of nations who were at war with Germany at the material time. If they were not, the court had no jurisdiction to try the accused for any assaults or murders of such nationals ;

(*c*) that the accused were prisoners of war and that Article 63 of the Geneva Convention provides : "A sentence may be pronounced against a prisoner of war only by the same court and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."

The motion was denied by the court. The first argument is erroneous ; though it is usual to describe accused in the charge against them as " enemy nationals " this is not necessary. All accused in this case stated in their direct examination that they were enemy nationals, but even if that had not been the case, the court would have had jurisdiction. The definition quoted by the defence does not purport to be exhaustive, as is shown by the word " including " and the words " or persons acting with them " leaving room for the argument that any neutral or allied nationals who by their conduct had identified themselves with the German staff and their way of running the camp could be tried with them. A British Military Court found 5 Poles guilty of war crimes against Allied nationals in the Belsen trial,(1)—thus upholding the principle that as a war crime is an offence against international law the nationality of the offender is irrelevant in this connection. Professor Lauterpacht advocates that a victorious belligerent should even " try before his tribunals such members of his own forces as are accused of war crimes ".(2)

With regard to the second argument the defence pointed out that in many cases the victims were Hungarians or Roumanians who were enemy nationals or Italians who were enemy nationals until 1943, and that none of them was an American citizen. The prosecutor argued that the gravamen of the charges was the common design to ill-treat and kill the inmates of the camp. Such common design may be proved by giving evidence of any ill-treatment whether the victims in the particular case had been Allied nationals or not. The court permitted evidence of cases of ill-treatment of enemy nationals to be given but it seems that the findings of the court and the sentences could be based on the allegations of ill-treatment and murder of allied nationals alone.(3)

The third argument was dealt with by the Supreme Court of the United States in re Yamashita.(4) The relevant passage from Chief Justice Stone's judgment reads : " . . . but we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence ' pronounced against the prisoner of war ' for an offence committed while a prisoner of war and not for a violation of the laws of war committed while a combatant."

(1) See Volume II, page 150, of this series.
(2) Oppenheim-Lauterpacht, 6th Edition, revised, Volume II, page 458.
(3) Cf. *Belsen Trial*, Volume II of this series, pp. 150 and 155.
(4) 66, Supreme Court Reporter 340, p. 350, and *see* Volume IV of this series, p. 46.

The jurisdiction of the court in this case—as indeed in all concentration camp cases held before such courts as this—can be based on Article 2 of the Ordinance No. 2 of the United States Military Government in Germany which gives military government courts jurisdiction over " all offences against the laws and usages of war." The offences against the laws and usages of war in the Dachau case are, with regard to the first charge, offences against Article 2 of the Geneva Convention (Prisoner of War Convention of 1929), which says that prisoners of war shall " at all times be humanely treated and protected particularly against acts of violence or insults and from public curiosity," as well as against Articles 9–14 (Accommodation, food, clothing and hygiene in prisoner of war camps) and Articles 31 and 33 of the same Convention (conditions of work for prisoners of war). The offences with regard to the second charge are offences against Article 46 of the Annex to the 6th Hague Convention of 1907 which, dealing with inhabitants of occupied territories, says : " family honour and rights, individual life and private property as well as religious convictions and worship must be respected ".

The fact that none of the victims were nationals of the nations trying the case is of no moment. Persons accused of war crimes may be tried by the belligerent power into whose hands they fall, whether that power is the one whose subjects were the victims of the alleged crimes or an allied power. For illustrations of this principle see the trial of the Commandant and staff of the Belsen Concentration Camp by a British Military Court (only a few of the tens of thousands of victims were known to be British subjects) (1) and the Hadamar trial by an American Military Government Court (none of the victims in that case was a citizen of the United States.) (2)

The Judgment " In re Yamashita " can also be quoted as an authority for the above proposition. The charge against General Yamashita was that he " while a commander of armed forces of Japan at war with the United States of America *and its allies*, unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States *and its allies* and dependencies . . . and he . . . thereby violated the laws of war ".(3) In this charge and in the court's decision there may be said to be an implicit recognition of the right of one allied power to try war criminals for offences against the subjects of another allied power.

(ii) *Definiteness of the charges.*

In a motion for an order directing the Convention to make the charges and particulars more definite the defence criticized the charges mainly on two grounds :

(*a*) that the description of the period of time as " between 1st January, 1942 and 29th April, 1945 " in the charges was so vague that they failed to inform the accused with sufficient certainty of the case they would have to answer ;

(1) See Volume II.

(2) See Volume I of this series, pp. 46 *et seq.*

(3) Italics inserted.

(*b*) that the charges were bad for duplicity as each of them disclosed plurality of offences whereas in accordance with paragraph 6, sub-para. 2 of the U.S. Military Government's Manual " each charge should disclose one offence only and should be particularised sufficiently to identify the place, the time and the subject matter of the alleged offence and shall specify the provision under which the offence is charged."

In reply to the first argument the prosecution pointed out that the offences with which the accused were charged were all of a continuing nature and that it was alleged that the common design forming the subject of the charges was in operation from January, 1942, till April, 1945. Being a continuous offence the participation of the individual accused was sufficiently clearly alleged to apprize them of what they were called upon to defend. The argument that only very few of the accused were at Dachau during the whole period from January, 1942, until April, 1945, whereas most of them either arrived later or left earlier than the dates given in the charges, was not used by the defence.

With regard to the second argument, the prosecution said that each charge set forth only one offence, i.e. subjection of prisoners to cruelties and ill-treatment. Only the forms which this subjection took varied, and therefore only a partial description of those forms of subjection was expressed in the charges, but the charges quite definitely alleged participation in the running of the camp, pursuant to a common design which included the subjection of described persons to stated wrongful acts at stated times and places.

The motion was denied.

(iii) *Motion for severance of the charges*

The defence based this motion on paragraph 7 (*b*) of the United States Manual of Courts Martial, 1928.[1] The main arguments were that there were 40 defendants and that many of them intended to call some of their co-defendants as witnesses and also that antagonistic defences would be offered by various accused which would prejudice all of them. The prosecution, in reply, argued that the defendants were not prejudiced by a joint trial. The essence of the case was a trial of the staff of Dachau Concentration Camp and the nature of offences each being committed in pursuance to a common design was such as to suggest that the defences of the accused were not antagonistic. The court denied the motion for severance of the charges. Witnhrop in his " Military Law and Precedents," page 253, says with regard to Military Commissions : " The granting of a severance at all events is largely a matter of discretion and unless the abuse of it is obviously flagrant, it should not be questioned ".

(iv) *Witnesses' immunity from testifying in war crimes trials*

One witness refused to answer a question because the matter on which he was required to give evidence was a matter which he had sworn not to divulge. The oath referred to was the oath as an official of the government of the

[1] For a similar motion in a trial before a British Military Court, see the *Belsen Trial*, Vol. II, p. 143 of this series.

German Reich. It is a generally recognised rule that the burden of proving that a matter is excluded on ground of privilege is on the person asserting it. It was thus incumbent on the witness in this case to prove that he would be divulging an official secret by answering the question. The chief reason for the protection given to witnesses with regard to official secrets is that the disclosure of them would injure the relationship between the official and the government or injure the State. In this case the oath was an oath of allegiance to the German Reich which no longer exists and there was, therefore, no interest to be preserved or injured. The court did not recognise the immunity of the witness and he was ordered to answer the question.

(v) *The right of cross examination if the accused makes an unsworn statement*

The defence objected to a question, otherwise proper, put by the prosecution to an accused who had taken the stand to make a voluntary unsworn statement. The defence argued that the accused could not be asked incrimina-ing questions in cross examination on such an unsworn statement. The regulations governing the trials before Military Government Courts do not say whether an accused can refuse to answer incriminating questions in cross examination during the course of his unsworn statement, though they provide, contrary to the procedure in Courts Martial that an accused can be cross examined on such an unsworn statement. The accused's objection was overruled by the Court and it seems, thus, that the court held that the accused's right not to incriminate himself is waived as soon as he takes the stand, even if he does so only to make an unsworn statement. The rights of the other side to cross examine seem to be the same as if the witness was giving evidence on oath.

(2) *Questions of Substantive Law*

(i) *Common Design*

(*a*) *The evidence necessary to establish common design*

The charge alleged that the accused " acted in pursuance of a common design to commit the acts hereinafter alleged as members of the staff of Dachau Concentration Camp . . did participate in the subjection of. . . (the inmates) . . . to cruelties and mistreatment ". The charges thus alleged the participation of all accused in a common design to ill-treat the prisoners.

The prosecution rested their whole case squarely on the common design. In his closing address the chief prosecutor said : " If there is no such common design then every man in this dock should walk free because that is the essential allegation in the particulars that the court is trying. As to examination of the specific conduct of each one of the accused, the test to be applied is not did he kill or beat or torture or starve but did he by his conduct, aid or abet the execution of this common design and participate in it ? " To prove this common design, the prosecution adduced evidence that Dachau Concentration Camp was run according to a system which inevitably produced the conditions described by all witnesses, and that the system was put into effect by the members of the camp staff and that every accused was at one time, though not all at the same time, a member of this staff.

To establish a case against each accused the prosecution had to show (1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system, (3) that each accused, by his conduct " encouraged, aided and abetted or participated " in enforcing this system.

The defence never seriously contested the existence of the system and it can be said to be common sense that it was quite impossible to belong to the staff for a substantial time, as all the accused did, without being aware of this system. The main point at issue was, therefore, the third, the connection of the individual accused with the common design. It emerges from the evidence adduced by the prosecution, from the speeches of counsel and from the findings of the court that the prosecution established the guilt of each of the accused in one of two ways :

(*a*) if his duties were such as to constitute in themselves an execution or administration of the system that would suffice to make him guilty of participation in the common design, or,

(*b*) if his duties were not in themselves illegal or interwoven with illegality he would be guilty if he performed these duties in an illegal manner.

An example may best illustrate this. If an accused held the position of a Lagerfuhrer (deputy camp commandant) or a Rapportfuhrer (Regimental Sergeant Major) or of an SS Doctor, this could in itself be said to be sufficient proof of his guilt. If, on the other hand, an accused was in charge of the bath and laundry or merely a guard or a prisoner functionary, then it became necessary for the prosecution to prove that he used this position, not illegal in itself, to ill-treat the prisoners.

The guards and prisoner functionaries (block eldest, room eldest and capos) formed the lowest grade of the hierarchy. The defence denied that members of either category could be called members of the staff.

With regard to the SS guards, the prosecution pointed out that they were the men who stood in readiness to prevent any prisoner from extricating himself from this camp. They were thus aiding and abetting in the execution of the common design. The prosecution quoted from Wharton, " Criminal Law", 12th Edition, Vol. I, page 341. If any perpetrator be " outside of an enclosure watching to prevent surprise or for the purpose of keeping guard while his confederates inside are committing a felony, such constructive presence is sufficient to make him a principal in the second degree. No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of the felony and all take their part in the furtherance of the common design, all are liable as principals ".

As to the prisoner functionaries, the prosecution contended that the expression " staff " was wide enough to include all persons who were engaged in any administrative or supervisory capacity. The test was whether they were appointed by and took their orders from the SS. The evidence showed that both was the case. The court by finding the three guards and the three capos (prison functionaries) amongst the accused all guilty, seems to have upheld the prosecution's contention.

(b) Nature and definition of " Common Design "

The defence argued that the charges were bad in law (1) because the accused were charged with performing various acts in pursuance of a common design and " common design was not a crime ", and (2) that the phrase " common design " was too vague and did not inform the accused of whether or not they had to answer a conspiracy charge. The fallacy of the first argument is that the accused were not charged with common design, but with violations of the laws and usages of war and the manner in which these violations were alleged to have been committed was by participation in a common design to ill-treat and kill the prisoners.

As to the second objection, it appears from the evidence on which the court found the accused guilty and from the arguments put forward by the prosecution that the burden of proof which such a charge placed on the prosecution, though heavier than in a merely joint charge, is less heavy than in a conspiracy charge. The definition of common design referred to in the trial was " a community of intention between two or more persons to do an unlawful act." (Black, Law Dictionary, 3rd Edition, page 367, citing State against Hill, 273, MO 329, 201 SW 5860.)

This definition does not differ materially from the definition of conspiracy given by Kenny (Outline of Criminal Law, 15th Edition, page 335). " Conspiracy is the agreement of two or more persons to effect any unlawful purpose whether as their ultimate aim or only as a means to it." It seems that the court did not find it necessary specifically to distinguish one offence from the other, though there must be a distinction as common design is inherent in the concept of many joint offences, all of which are not included in the general category of criminal conspiracies.

The evidence adduced by the prosecution seems to fall short of showing a conspiracy among the accused in the strictly technical sense of the term. There is no evidence that any two or more of them ever got together and agreed on a long-term policy of ill-treating and killing a great number of the inmates, and then put this agreement into operation. The accused did not all know each other, nor were they all at Dachau at the same time, but as they came and went the system remained and as each of them took over his position, he adhered to the system.

It seems, therefore, that what runs throughout the whole of this case, like a thread, is this : that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute " acting in pursuance of a common design to violate the laws and usages of war ". Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary. The degree of the participation of each accused found its expression in the sentences which ranged from 5 years' hard labour to death.

In the Mauthausen Concentration Camp case,(1) where the facts were basically the same—though the casualty figures were much higher as mass extermination by means of a gas chamber was practised—a United States General Military Government Court announced the following special findings after finding all 61 accused guilty of the charges :

> " The court finds that the circumstances, conditions and the very nature of the Concentration Camp Mauthausen, combined with any and all of its by-camps, was of such a criminal nature as to cause every official, governmental, military and civil, and every employee thereof, whether he be a member of the Waffen SS, Allgemeine SS, a guard, or civilian, to be culpably and criminally responsible."
>
> " The Court further finds that it was impossible for a governmental, military or civil official, a guard or a civilian employee, of the Concentration Camp Mauthausen, combined with any or all of its by-camps, to have been in control of, been employed in, or present in, or residing in, the aforesaid Concentration Camp Mauthausen, combined with any or all of its by-camps, at any time during its existence, without having acquired a definite knowledge of the criminal practices and activities therein existing."
>
> " The Court further finds that the irrefutable record of deaths by shooting, gassing, hanging, regulated starvation, and other heinous methods of killing, brought about through the deliberate conspiracy and planning of Reich officials, either of the Mauthausen Concentration Camp and its attached by-camps, or of the higher Nazi hierarchy, was known to all of the above parties, together with prisoners, whether they be political, criminal, or military."
>
> " The Court therefore declares : ' That any official, governmental, military or civil, whether he be a member of the Waffen SS, Allgemeine SS, or any guard, or civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, or any or all of its by-camps in any manner whatsoever, is guilty of a crime against the recognised laws, customs and practices of civilised nations and the letter and spirit of the laws and usages of war, and by reason thereof is to be punished."

These special findings contain two findings of fact : (1) that the running of the camp was a criminal enterprise, and (2) that every official who was employed or merely present in the camp at any time must have been aware of the common design, i.e. of the criminality of the enterprise ; and a conclusion of law, that every official who was engaged in the operation of this criminal enterprise " in any manner whatsoever ", is guilty of a violation of the laws and usages of war. By this conclusion in the special findings, together with the findings of guilty of all 61 accused in the Mauthausen Concentration Camp trial and of all 40 accused in the Dachau Concentration Camp trial, the United States Military Government Courts seem to have established a rule that membership of the staff of a concentration camp raises a presumption that the accused has committed a war crime. This presumption may—

(1) General Military Government Court of the U.S. Zone, Dachau, Germany, 29th March–13th May, 1946.

inter alia—be rebutted by showing that the accused's membership was of such short duration or his position of such insignificance that he could not be said to have participated in the common design.

(ii) *Special Findings on Group Criminality and Subsequent Proceedings against members of the group*

The directive issued by Hq, USFET, dated 26th June, 1946, provides for the trial of additional participants in mass atrocities when the principal participants have already been convicted.(1)

Paragraph 11 (*b*) (2) of this directive reads : " In such trials of additional participants in the mass atrocity the prosecuting officer will furnish the court with certified copies of the charge and particulars, the findings and the sentence pronounced in the parent case. Thereupon such intermediary military government courts will take judicial notice of the decision rendered in the parent case including the finding of the court that the mass atrocity operation was criminal in nature and that the participants therein acting in pursuance to a common design did subject persons to killings, beatings, atrocities, etc., and no examination of the record of such parent case need be made for this purpose. In such trials of additional participants in the mass atrocity, the court will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof."

The defence counsel in their petitions against the findings in the Mauthausen main trial raised two questions: (*a*) whether a Military court has power to announce any findings beyond the findings of guilty or not guilty of the charge, and (*b*) whether an accused in any subsequent proceedings would be prejudiced by the fact that such findings in the main trial were judicially noticed by the court in the subsequent trials. With regard to the first question, counsel argued that the findings exceeded the allegations of the particulars in the charge and were therefore improper. Winthrop, in his compendious work *Military Law and Precedents* (2nd Edition, Reprint 1920, page 385) says : " It is a peculiarity of the military procedure that a court martial in its judgment is not confined to a bare acquittal or conviction but may characterise or expand the findings or sentence or accompany it with animadversions, recommendations or other remarks . . ."

With regard to the second question, counsel maintained that the special findings were illegal as they constituted a trial *in absentia* of all those members of the camp staff who were not tried in the main trial. This is not the case. In accordance with the special findings any accused in a subsequent trial is—*inter alia*—entitled to an acquittal if he can prove that he was not aware of the criminal nature of the operation or that the nature and the extent of his participation was such that he could not be said to have furthered the common design to any substantial degree. In view of these defences it cannot be said that he had been found guilty *in absentia*.

Paragraph 11 of the directive is a provision somewhat similar to Article 10 of the Charter, defining the constitution, jurisdiction and functions of the

(1) See Volume III, pp. 114 and 117–18 of this series.

International Military Tribunal at Nuremberg.(1) Article 10 says : " In cases where the group or organisation is declared criminal by the tribunal, a competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned." Thus the declaration of the criminality of the Gestapo, SS, SD, etc., in one case and of the criminality of the camp staffs in the other, are binding on courts in subsequent proceedings and cannot be challenged by the accused in such proceedings. But whereas, according to the judgment of the International Military Tribunal(2), the prosecution in subsequent proceedings against members of criminal organisations have to prove that the accused had " knowledge of the criminal purposes or acts of the organisation ", such knowledge is to be presumed against members of the staff of a concentration camp. In the subsequent trials of such members the burden of proof with regard to *mens rea* is placed on the defendant, who has to show that he did not know of the criminal nature of the enterprise.

The paragraph quoted above from the directive of 26th June, 1946, received application in a series of trials held at Dachau in which ex-members of the concentration camp staff were accused of acting in pursuance of a common design to commit atrocities against camp inmates, the finding in the original Dachau Trial that the mass atrocity operation was criminal being accepted by the tribunals conducting these later trials.

(1) Cmd. 6903.
(2) Cmd. 6964, p. 67.

CASE NO. 61

TRIAL OF GENERALOBERST NICKOLAUS VON FALKENHORST

BRITISH MILITARY COURT, BRUNSWICK
29TH JULY–2ND AUGUST, 1946

A. OUTLINE OF THE PROCEEDINGS

The defendant, Nickolaus von Falkenhorst, a German national and former Generaloberst in the German army, was tried at Brunswick before a British Military Court sitting with a Judge Advocate. The defendant was charged with nine charges pursuant to Regulation 4 of the Regulations attached to the Royal Warrant for the trial of War Criminals, dated 6th June, 1945. The charges covered the period from October, 1942, to July, 1944, and were as follows :

1st Charge

Committing a war crime in that he at Oslo, in the Kingdom of Norway, when as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), in an order dated on or about 26th October, 1942, in violation of the laws and usages of war, incited members of the forces under his command not to accept quarter or to give quarter to Allied soldiers, sailors and airmen, taking part in Commando Operations, and, further, in the event of any Allied soldier, sailor or airman taking part in such Commando Operations being captured, to kill them after capture.

2nd Charge

Committing a war crime in that he in the Kingdom of Norway, in or about the month of October, 1942, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of two British Officers and six British Other Ranks, Prisoners of War, who had taken part in Commando Operations, with the result that the said Prisoners were killed.

3rd Charge

Committing a War Crime in that in the Kingdom of Norway, in or about the month of November, 1942, in violation of the laws and usages of war, when as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), was concerned in the killing of fourteen British Prisoners of War.

4th Charge

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of November, 1942, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of nine British Prisoners of War who had taken part in Commando Operations, with the result that the said Prisoners were killed.

5th Charge

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of January, 1943, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command, to the Sicherheitsdienst (Security Service) of Seaman Robert Evans, a British Prisoner of War who had taken part in Commando Operations with the result that the said Seaman Robert Evans was killed.

6th Charge

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of May, 1943, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of one officer, one Non-Commissioned Officer and five Naval Ratings, British Prisoners of War, who had taken part in Commando Operations, with the result that the said Prisoners were killed.

7th Charge

Committing a War Crime in that he at Oslo, in the Kingdom of Norway, when as Commander-in-Chief of the Armed Forces of Norway (Wehrmachtbefehlshaber Norwegen), in an order dated 15th June, 1943, in violation of the laws and usages of war, incited members of the forces under his command not to accept quarter or to give quarter to Allied soldiers, sailors and airmen taking part in Commando Operations, and, further, in the event of any Allied soldier, sailor or airman taking part in such Commando Operations being captured, to kill them after capture.

8th Charge

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of July, 1943, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of one Norwegian Naval Officer, five Norwegian Naval Ratings, and one Royal Navy Rating, Prisoners of War, with the result that the said Prisoners were killed.

9th Charge

Committing a War Crime in that he at Oslo, in the Kingdom of Norway, when as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), in a document dated 19th July, 1944 in violation of the laws and usages of war, ordered troops under his command to deprive certain Allied Prisoners of War of their rights as Prisoners of War, under the Geneva Convention.

To each of the nine charges the defendant pleaded Not Guilty.

In his opening speech, the Prosecuting Officer claimed that during the relevant period covered by the nine charges, the defendant was the Commander-in-Chief (Wehrmachtbefehlshaber) of the German Armed Forces in Norway, which included the Army, Navy and the Air Force. In this capacity the defendant was directly responsible to the OKW (the Supreme Headquarters of the German Armed Forces) in Berlin.

The facts were that during 1941 and 1942, the Allied Forces made a series of raids on Norwegian shipping and vital installations in the territory of Norway which were known as " Commando Raids ". These raids had a certain damaging effect upon the German war effort and to discourage such raids in the future, Hitler himself issued an order dated 18th December, 1942, referred to in this report as the " Commando Order ". This order was received by the defendant, who passed it on to the subordinate military units under his command and also distributed it to the naval and air force commanders in Norway in the latter part of October, 1942. A photostat of the original Commando Order was exhibited in the case, and its contents have been set out here as an authentic version of this well-known order :([1])

Paragraph 1

" For some time our enemies have been using in their warfare, methods which are outside the international Geneva Conventions. Especially brutal and treacherous is the behaviour of the so-called Commandos who, as is established, are partially recruited even from freed criminals in enemy countries. Their capture orders divulge that they are directed not only to shackle prisoners but also to kill defenceless prisoners on the spot at the moment in which they believe that the latter, as prisoners, represent a burden in the further pursuance of their purpose or can otherwise be a hindrance. Finally, orders have been found in which the killing of prisoners has been demanded in principle.

Paragraph 2

" For this reason it was already announced in an addendum to the Armed Forces Report of 7th October, 1942, that in the future Germany in the face of these sabotage troops of the British and their accomplices will resort to the same procedure, i.e., that they will be ruthlessly mowed down by the German troops in combat wherever they may appear.

([1]) See also Volume I, pp. 22–4, and the report upon the *High Command Trial* in Vol. VII.

Paragraph 3

" I therefore Order, from now on all opponents brought to battle by German troops in so-called commando operations in Europe or Africa, even when it is outwardly a matter of soldiers in uniform or demolition parties with or without weapons, are to be exterminated to the last man in battle or while in flight. In these cases it is immaterial whether they are landed for their operations by ship or aeroplane or descend by parachute. Even should these individuals on their being discovered, make as if to surrender, all quarter is to be denied them on principle. A detailed report is to be sent to the O.K.W. on each separate case for publication in the Wehrmacht communique."

Paragraph 4

" If individual members of such commandos working as agents, saboteurs, etc., fall into the hands of the Wehrmacht by other means, e.g. through the police in any of the countries occupied by us, they are to be handed over to the S.D. immediately. It is strictly forbidden to hold them in military custody, e.g. in PW camps, etc., even as a temporary measure."

Paragraph 5

" This order does not apply to the treatment of any enemy soldier who in the course of normal hostilities (large scale offensive actions, landing operations and air-born operations) are captured in open battle or give themselves up. Nor does this order apply to enemy soldiers falling into our hands after battles at sea or enemy soldiers trying to save their lives by parachute after battles."

Paragraph 6

" In the case of non-execution of this order, I shall make responsible before the Court Martial all commanders and officers who have either failed to carry out their duty in instructing the troops in this order, or who acted contrary to this order in carrying it out.

Signed Adolf Hitler."

At the end of a supplementary Order issued by the fuhrer on the same day, namely, 18th October, 1942, Hitler set out to explain to his officers why it had become necessary to issue this Commando Order and this Supplementary Order, and ended with this passage, which constituted an addition to the original order :

" If it should become necessary for reasons of interrogation to spare initially one man or two, then they are to be shot immediately after interrogation."

The prosecution submitted that paragraph 3 was illegal and that it constituted an order to deny quarter to combatant troops.

At the same time that Hitler signed this Order, he issued the supplementary order of the same date already mentioned which was addressed to Commanding Officers only, and in which he stated that the main Order was a counter measure to the partisan activities on the eastern front.

The supplementary order also stated that the system of commando operations was an illegal method of warfare in that if commandos were caught in their operation they immediately surrendered, thereby preserving their lives, and if not so caught, they escaped to neutral countries. The importance of the last paragraph of the supplementary order (quoted above) was stressed by the prosecutor.

The defendant received the Commando Order and the Supplementary Order on or about 24th October, 1942, whereupon he re-issued the order himself. No copy of the actual document so issued by the defendant was available at the trial. The re-issuing of the Commando Order formed the subject matter of the first charge against the defendant.

In the document dated 15th June, 1943, the defendant issued a second document addressed to officers only in which he referred to the original Commando Order of 18th October, 1942, in these terms :

> " Saboteurs. . . . I am under the impression that the wording of the above order " (the Commando Order) " which had to be destroyed, is no longer clearly in mind, and I therefore again bring to particular notice paragraph 3 " (above quoted).

In a later passage in the same document appeared the words : "A further order of the Wehrmacht Commander, Norway, Top Secret, of 26.10.42, since destroyed, lays down : ' If a man is saved for interrogation he must not survive his comrades for more than 24 hours '." The issuing of that document by the defendant was relied upon by the Prosecution to substantiate the 7th charge.

The intervening charges, 2–6 inclusive, and charge No. 8, all dealt with specific instances in which British or Norwegian prisoners of war were killed by German troops in Norway or were handed over to the S.D., with the result that they were killed by that agency. In each case the captured commandos were wearing uniform, with the addition that in the case of those captured and killed as alleged in the third charge, they were wearing ski-ing clothes underneath their uniforms. Further, in each case the commandos were engaged on attacking targets directly connected with the German war effort.

The 9th charge was in respect of a document which the defendant had issued in July, 1944, and was of a different nature from the Commando Order, being an order whereby certain prisoners of war, e.g. Jews, were not to be held in prisoner of war camps but were to be handed over to the S.D.

The evidence produced in support of these charges by the prosecution consisted of the oral evidence of a former German officer, Major-General von Behrens, who served under the defendant at the relevant time and in whose area of command those victims were killed whose death formed the subject matter of the 3rd charge. There was also the oral evidence of Colonel Scotland, who gave formal evidence as to the statements of the defendant made prior to trial, and expert evidence as to the position of the defendant when Wehrmachtbefehlshaber in Norway. The witness giving this last-mentioned testimony stated, *inter alia*, the following :

" His (the defendant's) duties would be to act as the representative of the O.K.W. to pass on any orders which were issued to him by the O.K.W. and these orders through him would reach all branches of the armed forces in Germany. It was in evidence that the Fuhrer's Commando Order had been received by the defendant from the O.K.W."

On this point the witness was asked the following question and gave the answer stated :

Q. "You know the Fuhrerbefehl which is addressed to Norway. Would it be the duty of the Wehrmachtbefehlshaber to forward that on to everybody, whether of the army, navy or the air force : " A. Yes, such an order, coming from the highest authority, his would be the only final channel through which it could reach the armed forces in Norway."

The remaining evidence for the prosecution consisted of documentary evidence in the form of affidavits put in under Regulation 8 (i) (*a*) of the Royal Warrant, most of which dealt with the fate of allied service personnel who were captured on Commando raids and were either shot by the armed forces or handed over to the S.D. and shot by that agency at a later stage.

Although the prosecution did not suggest that any of the victims in the various charges met their death as a result of his direct order, they contended that the evidence showed that the death of the victims or their being handed over to the S.D. and subsequent death was the result of the defendant's re-issuing the Commando Order in October, 1942, and republishing it in 1943, with the amendment to the original order providing that those spared for interrogation should be liquidated within 24 hours.

The prosecution withdrew the fifth charge relating to the victim Seaman Robert Evans in the course of the trial, apparently on the ground that at no time was this prisoner of war in the custody of the German armed forces, but was an S.D. prisoner from the beginning.

The accused was acquitted on charge No. 2, apparently on the ground that the execution of the victims named in that charge was carried out in Germany by the S.D., and also that they were in Wehrmacht custody as long as they were within the defendant's command in Norway.

On all other charges the defendant was found guilty, and sentenced to death. His sentence was, however, commuted to one of life imprisonment.

B. NOTES ON THE CASE [1]

1. THE STRUCTURE OF THE CHARGE SHEET

It will be observed that the nine charges resolve themselves into three groups : (1) charges dealing with the issuing of an illegal order, that is the Commando Order of 1942, its republication in 1943, (2) the charge of issuing the so-called Prisoner of War Order in 1944, (3) the charges claiming that the defendant was concerned in the killing or in the handing over to the S.D. by forces under his command of allied prisoners of war. The defence of the German advocate on this form of the charge sheet is not without interest.

[1] For the British law relating to the trial of war criminals, see Volume I, pp. 105–10.

He pointed out that the defendant was being accused both of issuing an illegal order, and of being responsible for events that occurred as a direct consequence of his issuing that order. That, he contended, was improper and it was analogous to accusing the defendant in the same charge sheet with incitement to murder, and also with the actual murder that took place as a result of his incitement, and he added that such a charge could not be laid by German law. To this is must be said that the law governing this trial was not German law, but that contained in the Royal Warrant, namely, the laws and usages of war and the Army Act and Rules of Procedure thereto. The point that the Defence was making may be looked upon from one angle as substantive, and from another as procedural. It seems to have been decided that the actual issuing of an illegal order by a responsible Commander can be a war crime in itself (1) although no criminal acts were proved to have arisen as a result of that issuing. The procedural point seems to be that a charge sheet should not charge a defendant with the same thing twice, called by a different name or arising from a different grouping of the same facts. The defence advocate did not elaborate this argument, but it would seem that he was trying to suggest that the method whereby the defendant was accused of being " responsible for the killing " or " concerned in the killing " or " concerned in the handing over to the S.D." was the defendant's issuing of the very orders which form the subject of charges 1 and 8 respectively, so that in effect the defence said that the defendant was being charged with the same set of acts twice over. In any event this argument was not accepted by the court and must be treated as having been decided against the defendant.

2. THE DEFENCE OF SUPERIOR ORDERS (2)

This aspect of the case can conveniently be considered under four headings : (*a*) Superior orders as a defence to the charge, (*b*) Superior orders purported to be reprisals as a defence to the charges, (*c*) Duress as a defence, and (*d*) Superior orders as a ground for mitigation of sentence after the finding of guilty.

With respect to the defence of duress, this has rarely been pleaded in war crimes trials and indeed was not in this case now under review.

The circumstances in which duress may be pleaded as a defence to a crime by English law is stated in Kenny's *Outlines of Criminal Law*, 15th Edition, page 84, in these terms :

> " Duress *per minas* is a very rare defence ; so rare that Sir James Stephen, in his long forensic experience, never saw a case in which it was raised. . . . It is, however, clear that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse some crimes that have been committed under the influence of such threats. . . . It certainly will not excuse murder."

Now it is appreciated that in a case such as this, where the order in question emanated from the Fuhrer, who, if he was not always a supreme legal authority in the Reich always represented the supreme physical power, that

(1) See p. 22.

(2) On this question see also Volume V, pp. 13–22, Volume VII, p. 65, Volume VIII, pp. 90–2 and Volume X, pp. 174–5.

this may be looked at as a very severe threat, particularly when one studies the last paragraph of the Fuhrer Order of 18th October, 1942, wherein it is stated that officers failing to comply with the order expose themselves to court-martial. Nevertheless, it would appear on the facts that no threat of the immediate infliction of death or even of grievous bodily harm would have been presented to the defendant in this case. No case is yet known in which the plea of duress has been successfully raised as a complete defence to a charge of committing a war crime, although instances have been proved in the course of trials where, in concentration camps, one prisoner has been forced at the point of a pistol of an SS man to commit an atrocity on another prisoner. Such a grouping of facts is very remote from the circumstances of a German Commander-in-Chief such as the present defendant.

With regard to the defence of superior orders alone, this was urged by the defence and it was dealt with by the Judge Advocate in his summing up to the court. He quoted the passage from the British *Manual of Military Law* which has so often been cited in British war crime trials,(1) and which is based on a well-known passage in Oppenheim's *International Law*, Volume II, 6th Edition, pages 452–3.(2) The court in this case decided that this defence was not open to the defendant and they may have arrived at this decision on either of two grounds, as follows :

(*a*) that they were not satisfied that the defendants did not willingly participate in carrying out the Fuhrer's order relating to commandos ;

(*b*) that as a matter of law the rule of warfare that was violated by the Fuhrer's order is an unchallenged rule of warfare and that the acts of the defendant violated such a rule of warfare and at the same time outraged the general sentiments of humanity.

The question arises whether it should be shown by the prosecution as a matter of proof that the defendant knew that in passing on the Fuhrer's order he was violating an unchallenged rule of warfare and outraging the general sentiments of humanity, or whether it is the case of ignorance of law being no excuse, and provided the defendant passed on the order with full knowledge of the consequences that would ensue if his order were obeyed, then his knowledge of the legal nature of his acts did not enter into the problem. This amounts to whether the standard laid down in Oppenheim's text book is an objective standard or a subjective standard. In all these points the present case must be taken to have been decided against the defendant, although it is not clear on which ground the court placed emphasis in arriving at its decision since in a military court the Judge Advocate merely proffers advice on points of law to the court and does not give a direction in the way that a Judge does to a jury.

Superior orders becomes a more complicated matter when it is joined with the defence that the superior order relied on purported or was thought by the defendant to have been a measure of reprisal by his own government against the enemy (see Professor Lauterpacht's Article in *British Yearbook*

(1) See Volume V of these Reports, p. 14.
(2) *Ibid.*, p. 43.

of International Law, 1944.(1) The defendant in this case, through his counsel, appears to have taken the line in defence that on questions of reprisal he, a soldier, was entitled to assume that the appropriate legal considerations had been entered into by his own government, before they launched the order as a reprisal order which he, as a Commander-in-Chief, was being required to carry out. Before this point can be taken to arise, unless a clean case of reprisal has already been made out, it is thought that the defendant must first show that he had valid reason for believing as a matter of fact that the order he was asked to carry out was intended as a reprisal order and if the court is not satisfied on that initial point, which is a question of the court believing the defence or not, then the legal problems do not really arise. Should a defendant establish, as a matter of fact believed by the court, that he really thought that the order of his government was meant to be a reprisal, then the question arises whether, if his government exercised the right of reprisal on inadequate grounds or in bad faith, then to what extent is the defendant exonerated in carrying out such an order if there is no proof that the defendant knew of the inadequate grounds or the bad faith that purported to give rise to the reprisal by his government.

The question whether such a matter should be dealt with on the actual facts or according to the belief of the accused then becomes very important to the defendant. Whereas as a matter of military knowledge a senior soldier such as the defendant would be deemed to know the outstanding rules of warfare after some 20 years of senior service, and also as a human being to have knowledge of the accepted standards of humanity, it does not necessarily follow that he would know the exact circumstances in which a right to reprisal may be exercised which is not only a controversial matter among lawyers, in legal text books and other publications, but is a very difficult matter to determine in any specific case of reprisals. Possibly the defendant might be expected to know that great care must be exercised before reprisals are launched, but to that he might well say that those at the source from which this order emanated would have the best legal advice that can be obtained and that, as a military commander in a war, he could not be expected to have to go into such questions.

It would seem that in this case as in others, the defence of superior orders, raised with the question of reprisal, has not been strongly stressed by the defence. It is true that Dr. Müller, the defending counsel in this case, said in his closing address : " In fact, General von Falkenhorst at that time took this measure as a reprisal. . . . I should like to point out that in the beginning it seemed to him as to other officers, to be a measure of reprisal as had been stated by the Fuhrer himself, and, of course he, the accused, was not in the position to verify whether these facts, which have been portended (*sic*) by the Fuhrer were right or not. Whether they were founded or not, he must take them as such as he had got them from the headquarters at Berlin ".

In the summing up of the Judge Advocate, no reference can be found to this point, which is only mentioned, as it were, in passing, by the defence, and it may well be that there were no facts upon which the court could find that the defendant really believed that the Fuhrer Order purported to be a reprisal

(1) Entitled *The Law of Nations and the Punishment of War Crimes.*

order, notwithstanding the fact that in the preface to the Order itself it stated though not in specific terms, that it is a reprisal order, and Hitler and Keitel issued it in that form. As is stated above, once it is rejected as a matter of fact that the defence believed it was a reprisal order, then other more controversial matters do not arise. Possibly there is no more difficult subject in the ambit of the law relating to war crimes than a correct application of the principles in a case where reprisal and superior orders are raised by the defence in respect of one and the same order which the defendant is alleged to have carried out. The whole basis of the wrongfulness of disobeying an unlawful order may fall to the ground because a reprisal is defined as " where one belligerent retaliates upon another by means of otherwise than legitimate acts of warfare in order to compel him and his subjects and members of his forces to abandon illegitimate acts of warfare and to comply in future with the rules of legitimate warfare." (Oppenheim, 6th Edition, Revised, page 446.)

Perhaps it is for this very reason that the laws of war demand that there must be a concurrence of a considerable number of factors before an occasion to exercise the right or reprisal arises. Finally, Article 2 of the Geneva Convention of 1929 forbids measures of reprisal being taken against prisoners of war.

3. COMMANDO OPERATIONS AND SABOTEURS

The defence also relied upon the peculiar nature of commando operations and endeavoured to suggest that they really partook of the nature of sabotage, and therefore might be considered as a form of war treason and here the question of uniform worn by people participating in commando operations becomes, it is submitted, of the greatest importance.

It is thought that an examination of the law relating to war treason will show that acts which were carried out during the war as in this case, under the name of " commando operations " would probably constitute war treason if the members of the forces of the belligerent who carried them out operated in disguise or civilian clothes. Oppenheim states in Volume II of his *International Law*, 6th Edition, on pages 454–5 :

> " War treason consists of such acts (except hostilities in arms on the part of the civilian population, spreading sedition propaganda by aircraft and espionage) committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy. . . . Enemy soldiers—in contradistinction to private enemy individuals—may only be punished for war treason when they have committed the act of treason during their stay within the belligerent's lines under disguise. If, for instance, two soldiers in uniform are sent to the rear of the enemy to destroy a bridge they may not, when caught, be punished for war treason because their act was one of legitimate warfare. But if they exchange their uniforms for plain clothes and thereby appear to be members of the peaceful private population, they may be punished for war treason."

It is suggested that this is the very example that most nearly covers the type of activity committed by the commando troops of the allies during the recent war, as is evidenced in the case now being reviewed.

It will be observed that the question of what is the objective is, for the purpose of the law regarding war treason, not the point, but the question of whether it is committed by members of the armed forces and whether they committed it in uniform. Further, that it is not properly a matter of war crime but of war treason, which nevertheless means that the perpetrators may be tried and punished in the same way as war criminals.

Dr. Müller endeavoured to say that sabotage activity was a development of modern warfare not contemplated by the Hague Regulations of 1907. But the law relating to war treason existed indeed before those regulations, of which one of the most notable cases occurred in 1904, during the Russo-Japanese war, when two Japanese were caught trying to destroy a railway bridge by explosives in Manchuria in the rear of the Russian forces and while they were disguised in Chinese clothes. For this they were tried, sentenced and shot.

It would also seem that the legal advisers of the Fuhrer in the O.K.W. had provided two items of the Fuhrer Order which put it clearly in the category of an illegal order even if it were meant to be an order combatting acts of war treason.

The first provision was that there should be no military courts, for even a war traitor is entitled to a trial, and the second provision was that a commando order was to apply to troops engaged on commando operations whether in uniform or not and therein lay the clear criminality of the order, apparent to every officer who had a working knowledge of the rules of war.

It is not possible to say that troops who engage in acts of sabotage behind the enemy lines are bandits, as Hitler declared them. They carry out a legitimate act of war, provided the objective relates directly to the war effort and provided they carry it out in uniform. The only difficulty in this case on this point lies, in fact, in respect of some of the commando operations which were the subject matter of the charges ; the commando troops may have been wearing uniform with skiing clothes underneath, the intention being that they would carry out the sabotage operation in uniform and then proceed to the Swedish boundary in skiing clothes as civilians. It is not necessary to decide this point for the purpose of this case, because the evidence shows that they were captured in uniform, whether or not they were wearing skiing clothes underneath, and were treated as service personnel by the people who captured them. An interesting point would arise if the commando troops, after having destroyed the installations while they were in uniform, had then discarded their uniform and were then in process of flight as civilians when they were caught by the enemy agencies. Should they then be tried as war traitors, or possibly as spies on the ground that they are clandestinely (as civilians) seeking to obtain information concerning the belligerent in the zone of belligerent operations with the intention of communicating it to the other belligerent ? That would be a question of fact and if it were proved that the defendants were merely fleeing to a neutral country from the scene of their devastation, espionage would not be in point. Strictly, it would seem that if so caught, as mentioned above, they should be apprehended and upon them satisfying the authorities that they were members of the armed forces who had carried out the sabotage they should be placed in a prisoner of war camp and treated rather as troops of a belligerent army

who are fleeing from the scene of operations in disguise. It is not thought that this point has ever been determined in any war crime trial to date.

4. THE ISSUING OF AN ILLEGAL ORDER WITH NO PROOF OF COMPLIANCE. (1)

What is the position where, as in the 9th charge in this case, the accused has been charged with issuing an illegal order, and it is proved either that it was never carried out or that it was impossible to carry it out? This seems to be the circumstances in respect of the order dated 19th July, 1944, whereby certain classes of prisoners of war, namely Jews, were to be transferred to S.D. custody. It was proved that no allied Jewish prisoners were so transferred in Norway, and in fact all prisoners of war, after temporary transit, were sent to Germany. There were, of course, large numbers of Russian prisoners of war in Norway, but they do not appear to have been the subject matter of this case.

A senior officer, when he issues the order, has done all he can to secure compliance, but the question of whether he, the author, faces trial as a war criminal turns on an accident of whether anybody was able to comply with his order or not. The question of the state of mind of the accused when he issued the order becomes important from the point of view of *mens rea*, because if he knew that the order could not be carried out, then no question of criminality should arise. It is only when he thought that it could be carried out but was surprised to find that it could not or was not, that criminality may occur. The fact that the accused was found guilty on the 9th charge is further evidence that it may occur.

5. THE POSITION OF THE DEFENDANT AS COMMANDER-IN-CHIEF, NORWAY

This point is purely one of fact and of military knowledge, and it is not thought that for the purpose of this trial it has any legal interest. The court seems to have decided on the evidence as a matter of fact, that the position of the defendant did seem to give him the power to order all three services in Norway and it was proved that the Commando Order and its variations had been passed down by the defendant to the army, navy and air force in Norway.

6. DENIAL OF QUARTER

It will be remembered that in the text of the Commando Order of 1942, allied commando troops were to be denied quarter in battle or in flight and this seems to be a clear and serious contravention of international law.

On the subject of quarter, it is stated on page 270 of Oppenheim's *International Law*, Vol. II, 6th Edition : "But combatants may only be killed or wounded if they are able and willing to fight and to resist capture. . . . Further such combatants as lay down their arms and surrender or do not resist . . . may neither be killed or wounded but must be given quarter. These rules are universally recognised and are expressly encouraged by Article 23 (*c*) of the Hague Regulations, although fury of battle frequently makes individual fighters forget and neglect them."

(1) See also Volume VIII, p. 90, Volume IX, p. 81, and a comment on the *High Command Trial* in Volume XII.

There are, indeed, certain circumstances in which quarter may be denied as for example as a reprisal for refusal of quarter by the other side. Nowhere in Hitler's explanation to the Commando Order, although he talks in terms of reprisal, does he state that the reason for the Commando Order is that allied troops have denied quarter to German troops. Therefore, it may be taken that the Commando Order was, on the face of it, clearly illegal in this point. The question of denying quarter in flight is a rather more difficult matter, as it will be remembered that the most frequent cause that was given out by the German agencies for the shooting of prisoners of war was " shot in flight " or " shot while trying to escape ". That seems to be a question of fact as to whether or not any given prisoner was trying to escape and whether or not shooting was the only way in which the escape could have been prevented. Such circumstances cannot by any stretch of the imagination have been deemed to have arisen in the way in which the commandos in this case met their death.

CASE NO. 62

TRIAL OF MAX WIELEN AND 17 OTHERS

THE STALAG LUFT III CASE

BRITISH MILITARY COURT, HAMBURG, GERMANY,
1ST JULY–3RD SEPTEMBER, 1947

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The court was presided over by a Major-General and consisted of three army officers and three representatives of the Royal Air Force, in accordance with Regulations 5 (1) of the Royal Warrant.[1] (F.O. 81/1945.)

2. THE CHARGES

All the accused were charged with :

(i) Committing a war crime in that they at divers places in Germany and German occupied territory, between 25th March, 1944, and 13th April, 1944, were concerned together and with SS Gruppenführer Mueller and SS Gruppenführer Nebe and other persons known and unknown, in the killing in violation of the laws and usages of war of prisoners of war who had escaped from Stalag Luft III.

(ii) Committing a war crime in that they at divers places in Germany and German occupied territory, between 25th March, 1944, and 13th April, 1944, aided and abetted SS Gruppenführer Mueller and SS Gruppenführer Nebe and each other and other persons known and unknown, in carrying out orders which were contrary to the laws and usages of war, namely, orders to kill prisoners of war who had escaped from Stalag Luft III.

The other charges were as follows :

(iii) (Against the accused Emil Schulz and Walter Breithaupt) : Committing a war crime in that they between Homburg and Kaiserslautern, Germany, on or about 29th March, 1944, when members of the Saarbrücken Gestapo, in violation of the laws and usages of war, were concerned in the killing of Squadron Leader R. J. Bushell and Pilot Officer B. W. M. Scheidhauer, both of the Royal Air Force, prisoners of war.

(iv) (Against the accused Alfred Schimmel) : Committing a war crime in that he in the vicinity of Natzweiler, occupied France, on or about 6th April, 1944, when Chief of the Strasbourg Gestapo, in violation of the laws and usages of war, was concerned in the killing of Flight Lieutenant A. R. H. Hayter, Royal Air Force, a prisoner of war.

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[1] See Volume I, p. 106.

(v) (Against the accused Josef Albert Andreas Gmeiner, Walter Herberg, Otto Preiss and Heinrich Boschert) : Committing a war crime in that they in the vicinity of Natzweiler, occupied France, on or about 31st March, 1944, when members of the Karlsruhe Gestapo, in violation of the laws and usages of war, were concerned in the killing of Flying Officer D. H. Cochran, Royal Air Force, a prisoner of war.

(vi) (Against the accused Emil Weil, Eduard Geith and Johann Schneider): Committing a war crime in that they in the vicinity of Schweitenkirchen, Germany, on or about 29th March, 1944, when members of the Munich Gestapo, in violation of the laws and usages of war, were concerned in the killing of Lieutenant H. J. Stevens and Lieutenant J. S. Gouws, both of the South African Air Force, prisoners of war.

(vii) (Against the accused Johannes Post, Hans Kahler and Artur Denkmann) : Committing a war crime in that they in the vicinity of Roter Hahn, Germany, on or about 29th March, 1944, when members of the Kiel Gestapo, in violation of the laws and usages of war, were concerned in the killing of Squadron Leader J. Catanach, D.F.C., Royal Australian Air Force, Pilot Officer H. Espelid, Royal Air Force, Flight Lieutenant A. G. Christensen, Royal New Zealand Air Force, and Pilot Officer N. Fuglesang, Royal New Zealand Air Force, prisoners of war.

(viii) (Against the accused Oskar Schmidt, Walter Jacobs and Wilhelm Struve) : Committing a war crime in that they in the vicinity of Roter Hahn, Germany, on or about 29th March, 1944, when members of the Kiel Gestapo, in violation of the laws and usages of war, were concerned in the killing of Pilot Officer H. Espelid, Royal Air Force, Flight Lieutenant A. G. Christensen, Royal New Zealand Air Force, and Pilot Officer N. Fuglesang, Royal New Zealand Air Force, prisoners of war.

(ix) (Against the accused Erich Hermann August Zacharias) : Committing a war crime in that he in the vicinity of Moravska-Ostrava, occupied Czechoslovakia, on or about 29th March, 1944, when a member of the Zlin Grenzpolizei, in violation of the laws and usages of war, was concerned in the killing of Flying Officer G. A. Kidder, Royal Canadian Air Force, and Squadron Leader T. G. Kirby-Green, Royal Air Force, prisoners of war.

All the accused pleaded not guilty to the charges brought against them.

In the Prosecution's interpretation, the first two charges were charges of conspiracy against all the accused jointly for participation in the killing of 50 Royal Air Force officers who were shot between 25th March and 13th April, 1944. Charges 1 and 2 were not alternative charges. In charges 3–9 six groups of accused were each charged with the killing of one or several officers of the R.A.F. and Dominion Air Forces. Every accused with the exception of Max Wielen figures in one of these charges, no accused figures in more than one.

3. THE CASE FOR THE PROSECUTION

On the night of 24th–25th March, 1944, 80 officers of the Royal Air Force and other Allied Air Forces who were prisoners of war at the prisoners of war camp Stalag Luft III at Sagan, in Silesia, escaped from that camp through an underground tunnel. The escape had been carefully planned and the officers, furnished with partly civilian clothes and false papers, fanned out in all directions in an effort to reach the borders of the Reich, mainly France and Belgium in the west, Czechoslovakia in the south and Denmark in the north. 80 officers escaped from the camp through an underground tunnel. Four were recaptured shortly afterwards in the vicinity of the camp, 76 got away. Only 3 of these 76 reached home safely. 15 were returned to Stalag Luft III and 50 were shot by the Gestapo and of the remaining 8, 4 were sent to a concentration camp, 3 were held by the Gestapo headquarters in Czechoslovakia, and of one, the witness had not heard anything at all.

The German authorities were perturbed by the escape, and the Head of the Criminal Police at Breslau, in whose area it had occurred, ordered a " Grossfahndung " in accordance with the regulations on important escapes. This was a nation-wide hue and cry and meant that every policeman and quasi-policeman in Germany and occupied Europe had the task of looking for the escaped officers, whose photographs were published in the German Police Gazette. On 26th March the news of the escape reached Hitler at Berchtesgarten and after consultations with Goering, Keitel and Himmler, he gave the verbal order that " more than half of the escapees " were to be shot. The order was eventually issued from the R.S.H.A. (Reichs-Sicherheits-Haupt-Amt, the German Central Security Office), by teleprint to the various regional Gestapo headquarters which it concerned. The teleprint itself could not be produced, but in the recollection of the witness Mohr, who had repeatedly dealt with it in his department (Amt 5) at the Central Security Office, it read something like this :

> " The frequent mass escapes of officer prisoners constitute a real danger to the security of the State. I am disappointed by the inefficient security measures in various prisoner of war camps. The Führer has ordered that as a deterrent, more than half of the escaped officers will be shot. The recaptured officers will be handed over to Amt 4 for interrogation. After interrogation the officers will be transferred to their original camps and will be shot on the way. The reason for the shooting will be given as ' shot whilst trying to escape ' or ' shot whilst resisting ' so that nothing can be proved at a future date. Prominent persons will be exempted. Their names will be reported to me and my decision will be awaited whether the same course of action will be taken."

The chart at page 52 illustrates the chain of command within the branches of the Central Security Office and the way the order, once given by Himmler, was carried out, can be followed on this chart. It was sent by teleprint to all Gestapo regional headquarters through Amt 4 and to all Kripo (Criminal Police) regional headquarters through Amt 5. It was thus the task of the Kripo (Criminal Police), headed by Amt 5 at the Central Security Office, to apprehend the escaped officers and on recapture to select more than half of them to be handed over to the Gestapo " for interrogation ", i.e. to be

shot. It was the task of the Gestapo to take the escaped prisoners of war over from the Kripo and to carry out the shooting. As soon as the news of the recapture of some prisoners of war was reported by the local Kripo to the Central Security Office at Berlin, Amt 5 gave out orders to the Kripo regional headquarters to hand over these prisoners to the Gestapo and Amt 4 gave out orders to the regional headquarters of the Gestapo to take over a certain number of enemy prisoners of war to be shot and to report the killing to Berlin. The orders were given out by teleprint to the Kripo and Gestapo regional offices throughout the country.

Charges (iii)–(ix) relate to the shooting of 12 officers carried out by six Gesptao regional headquarters, Saarbrucken, Karlsruhe, Strasbourg, Munich, Kiel and Zlin frontier police. All the accused in charges (iii)–(ix) were members of the staff of these six regional headquarters, ranging from officers commanding down to duty drivers. Identical orders were given to these six regional headquarters and the execution of these orders followed the same pattern in each case. In every case the officer commanding received orders from the Central Security Office in Berlin. He then made the necessary arrangements for their execution. The party carrying out the shooting usually consisted of either the Commanding Officer himself or another officer detailed by the Commanding Officer to be in charge of the party, of one or more Gestapo officials as escort and of a driver. Those detailed were briefed by the Commanding Officer as to their duties and pledged to absolute secrecy by hand-shakes and by a reminder of the SS oath to the Führer. They then set out at night in one or more cars to fetch the prisoners from the local goal where they were handed over by the Kripo. After a short drive the car stopped by the roadside, the excuse being always that the prisoners wanted to relieve nature. The place selected was always near a crematorium. The driver or another man remained by the car to see that no cars or passers-by would stop in the vicinity. The other Gestapo officials would take out the prisoners and kill them by shooting them in the back, usually only a short distance from the road. The bodies were inspected by the nearest doctor, who issued a death certificate, and then cremated and the urns sent to the Kripo regional headquarters at Breslau for onward transmission to Stalag Luft III, as set out in the orders. After the shooting a report was sent by the regional Gestapo headquarters concerned to Amt 4 saying : " Orders carried out, prisoners shot whilst trying to escape ". A few weeks afterwards when the German authorities had learned from a statement made by the British Foreign Secretary in the House of Commons that the news had leaked out, an official from each of the Gestapo headquarters concerned was summoned to Amt 4 in Berlin or received a message to the effect that their reports had to be re-written as they were all identical. They had to be made " more realistic " and more varied because a visit from the Protecting Power was to be expected and the representatives of the Protecting Power would almost certainly want to see the scene of the shooting and would also require a description of what had occurred.

Based on these facts, the prosecution alleged " that these 18 accused were concerned with their masters in Berlin, General Müller and General Nebe and with other persons known and unknown—and, of course, that includes Hitler, Himmler and Kaltenbrunner—in the killing of prisoners of

war who had escaped from Stalag Luft III " and that they were acting for a common purpose.

So far as *mens rea* is concerned, the prosecutor based his case on the fact that owing to the " Grossfahndung " (the nation-wide search), notified to every police headquarters, all policemen in Germany must have known that prisoners of war were at large and that therefore the accused, being members of the Gestapo, could not be heard to say that they did not know the identity of the prisoners they went out to kill.

The position of Max Wielen, who was officer commanding the Kripo regional headquarters at Breslau, differs from that of the other accused in that :

(1) he was only charged with his participation in the general conspiracy (charges (i) and (ii)) and not with participating in any of the particular murders (charges (iii)–(ix)) ;

(2) he was the only Kripo official in the dock, all the other accused being members of the Gestapo ;

(3) he was the only one among the accused who was called to Berlin personally and was shown the Hitler order ;

(4) the escape occurred in his area, 36 out of the 76 officers who had escaped were recaptured in his area and 27 of them were handed over by the Kripo under his command to the Gestapo and shot.

When informed of the mass escape from Stalag Luft III, which was in his police area, Wielen ordered the " Grossfahndung " and the central control of this nation-wide search remained in his hands until its completion. As a result of the search nearly half of the escapees were captured in his area and it was therefore natural and logical that the central authorities in Berlin should seek his co-operation when dealing with the execution of the Hitler order.

Wielen was then summoned to the RSHA, where General Nebe showed him the order signed by Kaltenbrunner and instructed him to put nothing in the way of the Gestapo carrying out their task.

Kripo regional headquarters at Breslau was to furnish the list of the ringleaders of the escape to enable General Nebe to select the victims (" more than half of 80, in accordance with the Hitler order "). This list was sent to the RSHA by Wielen's headquarters. General Nebe selected the names of those to be shot to make up " more than half " of the 80, to comply with Hitler's orders. He put some cards on one pile with remarks like " He is still very young, he may live " and some on another pile with remarks like " He is married but has no children, it will get him ". After Wielen's return from Berlin he contacted his opposite number in the Gestapo in Breslau, Dr. Scharpwinkel, and informed him of the Hitler order.

At that time some of the officers recaptured in the Breslau area were removed from Sagan gaol to Goerlitz gaol, further away from Stalag Luft III, to which they should have been returned. This was done, in the prosecution's submission, to concentrate the prisoners and facilitate the handing over to the Gestapo of those to be shot.

Having seen the Hitler order and having been briefed by General Nebe, Wielen knew that the handing over of any one of these prisoners to the Gestapo was tantamount to handing them to their executioner. Yet, 27 out of 36 were handed over, it is to be assumed on Wielen's orders, and subsequently shot by the Gestapo. The nine officers not handed over, of whom the witness Wing Commander Marshall was one, were returned to Stalag Luft III.

The urns containing the ashes of the murdered officers from all over Germany were sent to Wielen's office. From there they were forwarded to Stalag Luft III with the explanation that these prisoners had been shot whilst attempting to escape. Wielen was thus covering up the actions of the Gestapo.

After the news of the shooting of the 50 R.A.F. officers had been given out in the House of Commons, Wielen was summoned, together with Scharpwinkel, to a conference in Berlin with General Müller and General Nebe. There, the orders for the whitewashing of these shootings were given and the details of the faked reports were settled. In the prosecution's submission, Wielen would not have been asked to attend this conference on a Top Secret matter if he had not played an important part in the earlier stages of the affair, looking after the Kripo side, whereas Scharpwinkel was looking after the Gestapo side of it. There was, in the prosecution's submission, perfect co-operation between the Gestapo and the Kripo on the top level at the RSHA, i.e. between General Müller and General Nebe, and it was an irresistible inference that unless there had also been such co-operation on the next lower level between regional headquarters of the Gestapo and Kripo, the smooth execution of the Hitler order would have been impossible.

4. THE CASE FOR THE DEFENCE

The defence contended that in order to prove his case the prosecutor had to prove :

(i) that all the accused knew that 80 prisoners of war had escaped from Stalag Luft III in Sagan ;

(ii) that all accused knew that Hitler had given the order that 50 of these 80 prisoners of war would be shot ;

(iii) that all accused knew that the prisoners whom they were accused of having killed were some of those officers who had escaped from Stalag Luft III ;

(iv) that in view of this knowledge they were aware of the fact that the shooting of these British officers was illegal ;

(v) that they had the power to prevent this shooting.

To establish points (i) and (ii) the prosecution had relied mainly on two facts :

(*a*) that in view of the nation-wide search published in the Police Gazette, every member of the Gestapo must have had knowledge of the escape of the prisoners and the Hitler order, and

(*b*) on the teleprints which were sent out by the RSHA to all Gestapo regional headquarters.

As to the Police Gazette, this was a publication to facilitate the apprehension of criminals or escapees. Since such apprehension was the job of the Kripo (Criminal Police) and not of the Gestapo, most Gestapo officials would not be concerned with this Gazette and therefore would not read it. Also, the special issue of the Gazette was published on 28th March, 1944; the shooting with which the accused were charged occurred between 29th and 30th March, 1944. Bearing in mind the state of communications in Germany at that time, and the constant allied bombardment, the relevant copy of the Police Gazette could not have reached the accused many hundreds of miles away from Berlin in two or three days. The prosecution's arguments that every policeman or quasi-policeman in Germany must have known that there was a " Grossfahndung " on had been refuted by the witness General Westhoff, who stated in cross-examination that the number of prisoners who escaped in 1943 amounted to 4,200, and by the witness Mohr, who testified that 5 or 6 nation-wide searches took place in 1943 and that there had already been 2 or 3 such searches in 1944, previous to the one after the Stalag Luft III escape. Thus, these searches were such a common occurrence that the overworked Gestapo officials did not take much notice of them.

As to the teleprints, counsel for the defence argued that, supposing even that they were sent to and received by all heads of Gestapo regional headquarters concerned, the prosecution had failed to prove that they were communicated to all the individuals accused by their commanding officers. On the contrary, the evidence produced by the prosecution showed that some of the accused were not informed of the teleprints, some were even deliberately misled about the contents of these teleprints by their commanding officers. The fact that the teleprints were marked " Top Secret " showed that they were designed for the officers commanding regional headquarters only, and not to be communicated to such junior officials as were some of the accused.

The defence maintained that the prosecution had clearly failed to prove point (iii), i.e. that the accused were aware of the identity of the prisoners they were to shoot, partly because of the clothes the prisoners of war were wearing for purposes of camouflage, partly because of their day-long treks across country, causing them to look more like tramps than like British officers. In view of these facts, the accused assumed or believed when they were told, that these escapees were saboteurs, spies or enemy agents found in civilian clothes and that it was not only legal but necessary in the interest of German security to shoot them and that they therefore raised no objections when they were ordered to take them over from the Kripo and carry out the executions. The handing over of these prisoners by the Kripo to the Gestapo was not suspicious in itself, since interrogations dealing with foreigners, saboteurs and agents were outside the sphere of the Kripo and came within the proper field of the activities of the Gestapo.

The defence pointed out that there was no connection between the different local Gestapo officers and officials in carrying out the shooting. They did not know of each other's activities, e.g. the members of the Kiel Gestapo did not know what members of the Munich Gestapo at the other end of Germany were doing on 29th April, 1944, the day on which all but one of the alleged murders were committed. " The accused prepared nothing, planned nothing, plotted nothing. They had no consultations among them-

selves nor with their colleagues in the Kripo, nor with their superiors in Amt 4 in Berlin." Thus, " every factor was lacking from which collaboration and participation in a common plan or conspiracy could be deduced which would bear out the prosecution's contention that they were together concerned or that they were aiding or abetting the commission of the alleged crimes. The very thought that two SS Generals, Mueller and Nebe, on the one hand, and two simple drivers like the accused Denkmann and Struve on the other hand, should have planned something together is absurd and contrary to all principles of a dictatorship, with its strict discipline and blind obedience to orders ".

With regard to the accused Wielen, the defence pointed out that if there had been a conspiracy, the conspirators were Hitler and Himmler, who had committed suicide, Goering and Keitel and Kaltenbrunner, who had been sentenced to death by the International Military Tribunal at Nuremberg, General Mueller, who was dead, and General Nebe, who was executed for complicity in the attempt on Hitler's life in July, 1944, and Scharpwinkel, who was in Russian custody. Instead of all these, the accused Wielen was in the dock alone as a scapegoat.

Referring to the case for the prosecution, point by point, the defence case was as follows :

To organise a nation-wide search and to re-arrest escapees was his duty as a Kripo officer and was in accordance with international law. That the whole search and the scheme for the recapture should be centred at Breslau was logical in the circumstances and showed no special participation or eagerness on the part of Max Wielen.

He was summoned to Berlin by his superior officer, General Nebe. The evidence shows that he was called not to obtain his co-operation, but to eliminate the possibility of his resistance. Nebe stated categorically that the responsibility for the execution of the Hitler order lay with the Gestapo and threatened Wielen with an SS court martial should he make trouble. It was not proved that Wielen had ever received a written order.

As to the list of ringleaders, such a list was requested by the RSHA. It was compiled by the investigating Gestapo officials and only contained a few names. It was sent through ordinary staff channels and therefore passed through the regional headquarters at Breslau, but it was never a list of " officers to be shot ". The only long list of names in existence was a list of " officers shot " compiled after the execution of the 50 officers and forwarded to Stalag Luft III with the urns.

Mohr's evidence proved that Nebe based his selection of the 50 officers, not on any list from Wielen, but on the officers' index cards showing their age and family ties obtained from the Central Registry of Prisoners of War.

On his return from Berlin, Wielen telephoned Scharpwinkel, but there is no evidence that he gave any orders for handing over any of the 36 prisoners in his area, or any of the prisoners outside his area, to the Gestapo. Scharpwinkel acted on the orders received from his superiors at Amt 4. The Gestapo fetched the officers from the prisons. Since every Gestapo official

could demand the handing over of prisoners from the police for interrogation as of right, there would have been no need to give any orders to the Kripo for handing the prisoners over and there was no evidence that Wielen ever gave such orders.

That the urns with the ashes of the dead officers should be collected at Breslau regional headquarters of the Kripo for onward transmission to Stalag Luft III for a military burial means only that they were sent through ordinary staff channels and does not reflect on Wielen.

About the conference in Berlin, the prosecution witness Mohr said :

> " I have never been able to find out why Wielen was asked for this meeting at all. Our presence was absolutely useless. The whole thing was nothing but the chief of Amt 4 verbally giving orders to the chief of the Gestapo at Breslau " and further " Nebe said to Mueller that the Kripo could do nothing in this matter."

As to Wielen's acts of omission : even by sacrificing his life, Wielen could not have prevented the shooting of these 50 officers after they had been ordered by Himmler and agreed to by Goering and Kietel.

5. SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate advised the court to disregard the first two charges. He said : " The real gravamen of the accusation against the accused apart from Wielen is what they did when they were present or when they were ordering these shootings. If they are not guilty of that, is it likely that you will find them guilty of the first and second charge ? In my view it is because the prosecution say they did what is set out in the charges (iii)–(ix), that they bring them into charges (i) and (ii)."

With regard to the accused Wielen the Judge Advocate said that there could be no doubt that Wielen went to Berlin and there learned from his General, General Nebe, the contents of the Hitler order. " It is clear that Wielen is telling you that he did not see any way out and he goes back to Breslau and as far as I can see he is not going to take any steps that lie within his power to make the handing over of these officers to the Gestapo difficult."

The Judge Advocate pointed to an early statement made by Wielen in which the latter said that Amt 5 sent a copy " for the information " of the Kripo containing a list of officers who were to be shot by the Gestapo so that the Kripo would know about it when the officers were asked for. Wielen later denied this statement. The Judge Advocate said " Gentlemen, it seems to me an irresistible inference that this scheme of Hitler's to shoot secretly these 50 officers could not go through without the connivance and co-operation of the Kripo and the Gestapo and, Gentlemen, why should that cease when you come down to the lower stage of the ' Leitstellen (regional headquarters) level ' ? Is it not going to be equally effective to say ' When we come down to the Leitstelle Breslau, we must ensure that Scharpwinkel and Wielen work together ? If they do not, then it won't work smoothly

and there is a risk of secrecy being allowed to be interfered with and that, Gentlemen, as I see it, is the real case for the Prosecution."

6. FINDING AND SENTENCE ON CHARGES (i) AND (ii)

The Court found all accused with the exception of Wielen not guilty of the first and not guilty of the second charge.

The accused Wielen was found guilty of the first and of the second charge and sentenced to life imprisonment.

7. EVIDENCE ON CHARGES (iii)–(ix)

The essential features of the evidence are the same in all six cases : The receipt of the Hitler Order by the Officer Commanding the Regional Headquarters, the orders given and the arrangements made for the execution of this order, and the actual shooting of the prisoners in which the accused participated under the leadership of the Commanding Officer himself, or of an officer appointed by him. A further common feature was that the prosecution's case rested entirely on the depositions made by the accused. The general line of the defence was that some of the depositions were obtained under duress and therefore none of them should be relied upon. In court the accused (with the exception of Gmeiner and Schimmel, who had only given orders) all admitted that they were present when the airmen were shot. The issues to be decided by the court, therefore, were : (1) what part the individual accused played in the shooting of the prisoners, and (2) whether they knew that the prisoners were prisoners of war. The sixth case formed an exception to the abovesaid, inasmuch as there was some independent evidence and the accused pleaded in his defence that the prisoners tried to escape and were shot in the attempt.

(i) *The Saarbrücken Gestapo Case* (*Killing of Squadron Leader Bushell, R.A.F., and Pilot Officer Scheidhauer, R.A.F.*)

(3rd Charge)

Accused : Emil Schulz and Walter Breithaupt.

Dr. Spann (now dead), who was Officer Commanding the Gestapo regional headquarters at Saarbrücken, received a teleprint from the RSHA on the night of 28th/29th March, 1944, to the effect that two British officers, who were in the local gaol, had to be taken out and shot. He collected for this purpose two members of his staff, the accused Schulz, who was on night duty, and the accused Breithaupt who, as the officer in charge of transport, slept in the room above the garage. The three men fetched the prisoners, drove out on to the autobahn, stopped the car there, the prisoners were taken out and Spann fired two shots at them from behind. Both prisoners collapsed and then he ordered Schulz to fire. Schulz, on his own evidence, fired twice, once without aiming in his excitement, and the second time delivering the *coup de grâce* to the second officer who was on his knees. Breithaupt did not fire. The prosecutor suggested that he acted as an escort and was informed of the purpose of the journey by Schulz, as Schulz stated in his sworn deposition, whereas Breithaupt himself gave evidence to the effect that he only acted as a driver and only learned of the purpose of the journey from Dr. Spann when they arrived at the scene of the shooting.

(ii) *The Strasbourg Gestapo Case (Killing of Flight Lieutenant Hayter, R.A.F.)*

(4th Charge)

Accused : Alfred Schimmel.

Schimmel was the Commanding Officer of the Gestapo regional headquarters at Strasbourg. He was a lawyer and his rank was equivalent to that of Lt.-Colonel. About 6th April, 1944, some officers of the local Kripo brought a British officer, a prisoner of war, to his office to hand him over to the Gestapo. Later in the day Schimmel received a teleprint from General Mueller, his superior at Amt 4, saying that the British prisoner of war handed over to him by the Kripo was to be shot. The teleprint then gave the essentials of the Hitler order. Schimmel rang up Mueller and remonstrated with him, but when the latter threatened him with an SS court martial, Schimmel gave in and detailed two of his officials, Diesner and Hilker, to take Flight Lieutenant Hayter out on the autobahn in the direction of Breslau and shoot him. Next morning they reported the execution of the order and Schimmel sent a teleprint to General Mueller to inform him accordingly. A few weeks later the report had to be re-written on General Mueller's orders, to make it " more realistic " in case there should be an enquiry by the Protecting Power.

Schimmel had the report re-written and sent Hilker, one of the two men who had shot Hayter, to Amt 4 to deliver the report personally.

Diesner and Hilker were not before the court. Of Schimmel, the Judge Advocate said in his summing up : " If you detail people and make all arrangements and if you have the power to stop it if you like to take the risk, can you say that Schimmel was not concerned in the killing in a way which was really something more than just passing on an order ? "

(iii) *The Karlsruhe Gestapo Case (Killing of Flying Officer Cochran, R.A.F.)*

(5th Charge)

Accused : Josef Gmeiner, Walter Herberg, Otto Preiss and Heinrich Boschert.

Gmeiner was the Commanding Officer at regional headquarters of the Gestapo at Karlsruhe. He was a lawyer and his rank the equivalent to that of Lt.-Colonel. About 31st March, 1944, he received a teleprint from Amt 4 ordering that the British airman held by the Karlsruhe Kripo was to be shot. The teleprint contained all the essential points of the Hitler order. Gmeiner then ordered the three men whom he had chosen to carry out the order to his office and told them : " Herberg, you know all about it and you are responsible for seeing that the matter is carried out in the way that you have suggested to me. You, Boschert, will drive the car and be at Herberg's disposal, and you, Preiss, will carry out the shooting ". He then pledged all present to secrecy by handshakes. The shooting was carried out according to this plan.

Gmeiner's defence was that he only acted as a conduit pipe passing on the order received from Amt 4 to Herberg. Herberg's defence was that he tried to evade, but could not as it was Gmeiner's order. Preiss' defence was

that he did not know that Cochran was an escaped prisoner of war and also that he acted under duress. Boschert's defence was that he was only the driver —though later he became Gmeiner's adjutant—and that he never even took his pistol out of its holster, but was turning the car round whilst Preiss shot the prisoner, and learned only afterwards that Cochran was a prisoner of war.

Summing up, the Judge Advocate said : " Gmeiner is making and checking over the arrangements and deciding exactly what people will do. He is not merely saying ' do this ' and leaving it to Herberg, but on his own showing he is allotting the tasks. There can be no doubt that Herberg was in charge and that Preiss shot Cochran. Whether or not Boschert was a party with full knowledge, is a matter which you will carefully consider later on. But the case for the prosecution is that they were all jointly concerned in this crime and that Boschert was not only a driver but was present and was acting as a guard and as an escort to make sure that the unfortunate officer was killed ".

(iv) *The Munich Gestapo Case (Killing of Lieutenant Stevens and Lieutenant Gouws, S.A.A.F.)*

(6th Charge)

Accused : Emil Weil, Eduard Geith and Johan Schneider.

Schaefer, the Commanding Officer of the Gestapo regional headquarters at Munich, received a teleprint with the Hitler order on the night of 29th March. It was after duty hours, and he sent his car to collect some of his staff. The car returned with his second in command, Schermer, as well as Geith and Schneider. They were joined by Weil, who was the duty officer. After a short conference with his second in command, Schaefer summoned the others and explained to them that on orders from the RSHA two captured British prisoners held at Kripo headquarters were to be shot. He briefed them in accordance with the Hitler order. It was decided that Schneider, who had a tommy gun, should do the shooting and that Schermer should be in charge of the party. All participants were pledged to secrecy by hand-shakes. The order was executed according to the plan. Schneider shot both prisoners near the autobahn when ordered to do so by Schermer. Geith and Weil stood by. Schermer, the second in command of the headquarters, was not before the court. Schneider's defence was that he thought the two prisoners were looters and desperadoes. Geith's defence was that he did not hear the orders given by Schaefer at the conference. Weil, whilst admitting that he heard Schaefer's orders at the conference, thought that the prisoners had been tried by a tribunal and convicted.

(v) *The Kiel Gestapo Case (Killing of Pilot Officer Espelid, R.A.F., Flight Lieutenant Christensen, R.N.Z.A.F., Pilot Officer Fuglesang, R.N.Z.A.F., and Squadron Leader Catanach,* D.F.C., *R.A.A.F.)*

(7th and 8th Charge)

Accused : Johannes Post, Hans Kahler and Artur Denkmann (7th charge); Oskar Schmidt, Walter Jacobs and Wilhelm Struve (8th charge).

Fritz Schmidt was the Officer Commanding the regional headquarters of the Gestapo at Kiel. On 29th March, 1944, he summoned the six accused to his office at the headquarters and told them : " I have to acquaint you with a Top Secret matter. It is an order from the Führer. Four prisoners, who are with the Kripo at Flensburg, will be shot at a place determined by me. They are enemy agents who were condemned to death and have tried to escape to Denmark. You, Major Post, will go to Flensburg and interrogate the prisoners. It is not expected that they will make any statement. You will leave Flensburg by car and shoot them at a pre-arranged spot. Oskar Schmidt will see that the cremation is carried out and all formalities complied with. For the firing, service pistols will be used, but you will shoot from behind between the shoulders. If, contrary to expectations, an escape should be made, service rifle will be used as pistols will not be sufficient. Kahler, you get a rifle and ammunition. The drivers will keep the road clear of curious passers-by. Post, you will be officer in charge and will be responsible for seeing that the orders are carried out in the way which I have indicated ".

No special task was allotted to Jacobs. The party set off to Flensburg and shortly interrogated the four prisoners there ; Post ordered that each member of the party was to shoot the prisoner he interrogated. When they left Flensburg, Post and Kahler were in one car driven by Denkmann, with Catanach as the only prisoner. During the journey this car got separated from the other and arrived at the pre-arranged place first. Catanach was taken out, led through a gate into a field and shot. Post stated that Kahler's rifle misfired, and he had to give the prisoner the *coup de grâce* himself, whereas Kahler denied having fired at all. Denkmann stood by the car.

Then the other car arrived with the second party, of which Oskar Schmidt was in charge, with Jacobs as an escort and Struve as a driver, and with the remaining three prisoners. Post was waiting for them at the gate. The three prisoners were led into the same field and shot. Post and Jacobs admitted having fired the shots at them, and Post stated that Oskar Schmidt also fired, but Schmidt denied this. Struve the driver remained with his car. Then they all drove back and Post reported to the Commanding Officer. At some later date the report had to be re-written and it was suggested by the Commanding Officer and Post that the report should say that Denkmann and Struve shot one prisoner each as they tried to run away, but both were indignant and refused to sign. The defence of Post and Jacobs was that they were misled by their Commanding Officer as to the identity of the airmen and thought they were spies and saboteurs. They admitted, however, that when Catanach was interrogated he stated that he had been in the R.A.F. Kahler's defence was that he hung back as Post and the prisoner left the car and never fired at all. Oskar Schmidt gave evidence to the effect that he never fired and that he was reported by Post to the Commanding Officer for failing to obey orders and was rebuked. The defence of the two drivers, Denkmann and Struve, was that they were conscripted into the Gestapo and were not members of it, and that they had nothing to do with the whole affair and were merely driving their cars. Struve admitted having been at the Commanding Officer's conference whereas Denkmann was the only one of the six accused who denied taking part in the conference. The Judge Advocate, summing up, said : " If people are all present, aiding and abetting one another to carry out a

crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort whilst these people were shot, they are all in law equally guilty of committing that offence, though their individual responsibility with regard to punishment may vary ".

(vi) *The Case of the Zlin Frontier Police (Killing of Flying Officer Kidder, R.C.A.F., and Squadron Leader Kirby-Green, R.A.F.)*

(9th Charge)

Accused : Erich Zacharias

Ziegler, the Officer Commanding the Zlin Frontier Police, summoned the accused Zacharias and one Knüppelberg to his office on 29th March, 1944, and told them that two British officers had been caught in the neighbourhood.

Then the evidence by the accused differs from the evidence for the prosecution. The prosecution relied on a deposition made by Zacharias and on an affidavit sworn by a man called Kiowsky, who was their driver, according to which Ziegler told Zacharias and Knüppelberg that the two prisoners were British officers and prisoners of war and were to be shot on orders from Berlin, and that Knüppelberg and his driver were to take one prisoner out in their car, and Zacharias and his driver Kiowsky were to take the other prisoner in their car and that both prisoners were to be shot.

The defence maintained that Zacharias' deposition was not a voluntary statement, but was made under duress and that Kiowsky's affidavit could not be relied upon as he was really an accomplice who had been charged with murder and tried by the Czech Government. The court should therefore rely on Zacharias' evidence in the witness box, which was to the effect that the Commanding Officer told them that the two officers were saboteurs and spies, and had to be shot on orders from Berlin, and that, however, they did not have to carry out this order since the two officers made a determined attempt to escape, so that he and Kiowsky had to shoot them in carrying out their duty as a military escort.

The Judge Advocate, in his summing up, pointed out that it was a matter for the court to decide whether the statement was a voluntary one, and also what weight to attach to the statement of the driver Kiowsky, who could not be cross examined. If the court came to the conclusion that both carried no weight, they would have to consider whether the story of Zacharias in the witness box was plausible or whether it should be disbelieved.

8. FINDINGS ON CHARGES (iii)–(ix)

All accused (with the exception of Wielen) were found guilty of the charges (iii)–(ix) brought against them.

9. SENTENCES ON CHARGES (iii)–(ix)

Emil Schulz, Walter Breithaupt (3rd charge), Alfred Schimmel (4th charge), Josef Gmeiner, Walter Herberg, Otto Preiss (5th charge), Emil Weil, Eduard Geith, Johan Schneider (6th charge), Johannes Post, Hans Kahler (7th charge), Oskar Schmidt, Walter Jacobs (8th charge) and Erich Zacharias (9th charge) were sentenced to death by hanging. Heinrich Boschert (5th charge)

was sentenced to death by hanging, his sentence, however, was commuted to life imprisonment by the Confirming Officer.

Artur Denkmann (7th charge) and Wilhelm Struve (8th charge) were sentenced to 10 years' imprisonment.

B. NOTES ON THE CASE

1. THE JOINT CHARGES

The Prosecutor alleged that all 18 accused had joined in a general conspiracy to kill 50 officers.(1) He rested his case on the notoriety of the Sagan escape in view of the nation-wide hue and cry, on the publication of it in the Police Gazette and on the uniformity of the orders received by the various Commanding Officers of the regional headquarters. The two main arguments for the defence were a legal and a factual one (i) that there could be no conspiracy between military superiors and their subordinates, and (ii) that there was no evidence of any connection between the accused or of any co-operation between their various regional headquarters.

The Judge Advocate did not deal with these arguments or give any reason for his advice to the court to disregard the first two charges, but it is clear that the first argument is not sound. This argument was rejected in the Nuremberg judgment when dealing with the conspiracy between major war criminals :

> " The argument that such common planning cannot exist when there is a complete dictatorship is unsound. The plan, in the execution of which a number of persons participated, is still a plan even though conceived by only one of them, and those who executed the plan do not avoid responsibility by saying that they acted under the direction of the man who conceived it." (2)

As to the second argument, it seems that the court found that though there was evidence that the members of every group of accused were together concerned in the killing of the officers handed over to them, and were therefore guilty of one of the charges (iii)–(ix), there was not enough evidence beyond that to show that they knew what had been planned in Berlin or what was happening outside their region and therefore, *a fortiori*, not enough evidence that they were together concerned in the killing of 50 out of the 80 escaped officers.

In the case of Max Wielen, unlike that of the other 17 accused, there was evidence of his participation both in the preparation and in the concealment of the crime. It seems that, basing its conclusions on this additional evidence which was not available against the other accused, the court found him guilty of being concerned, together with Generals Nebe and Mueller, in the killing of the 50 officers.

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(1) It should be noted that none of the charges in this trial were charges of conspiracy as such. It is worth recalling that in his summing up in the trial of Georg Tyrolt and others, before a British Military Court, Helmstedt, Germany, from 20th May–24th June, 1946, the Judge Advocate said that : " There is nothing magic about a joint charge except that it enables you to try more than one person at one time. . . ."

(2) *British Command Paper.* Cmd. 6964, p. 43.

Regarding charges (iii)–(ix), the Judge Advocate thus defined the term " concerned in the killing " : " I do not think the prosecution can ask you to consider a case of a minor official who was concerned with some administrative matter. What they had in mind is that the persons concerned must have been part of the machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid."

By finding the accused Schimmel and Gmeiner guilty, the court indicated that being " concerned in the killing " does not necessarily require the presence of the accused on the scene of the crime, since both Schimmel and Gmeiner gave instructions to their subordinates but were not present at the shooting. This has been held by the courts in previous war crimes trials.(1)

The degree of participation may vary within the term " concerned in the killing." Whereas all participants were found guilty whether they had given the order or fired the fatal shot themselves or acted as an escort or kept off the public, the prominence of the part they played found expression in the sentences. Whereas the Commanding Officer who gave the order and the men who fired the shots or acted as escorts were sentenced to death, the two drivers, Struve and Denkmann, were sentenced to imprisonment for 10 years.(2)

2. THE PLEA OF SUPERIOR ORDERS

This defence was relied on by all accused in view of the order from Hitler. It was also relied upon by some of the junior ranks amongst the accused, who pleaded that they acted under orders from their Commanding Officers. The defence quoted paragraph 47 of the *German Military Penal Code* :

> " If in the execution of an order relating to service matters the penal law is violated, the Commanding Officer is solely responsible. Nevertheless, the subordinate obeying the order is subject to a penalty as an accomplice : (1) if he transgressed the order given, (2) if he knew that the order of the Commanding Officer concerned an action, the purpose of which was to commit a general or a military crime or misdemeanour."

Counsel argued that paragraph 47, sub-paragraph (2), required positive knowledge of the illegality of the order on the part of the accused, and that the accused in this case had no such positive knowledge, though they may have had doubts as to the legality of the order.

The Judge Advocate, after quoting extensively from Professor Lauterpacht's article in the *British Year Book of International Law*, 1944, read paragraph 433 of Chapter 14 of the *Manual of Military Law* ; (3) and with regard to the last sentence of that paragraph that the accused could not escape liability " if in obedience to a command they committed acts which both violated unchallenged rules of warfare and outraged the general sentiment of

(1) See for instance Volume V of this series, pp. 45–53.
(2) For a similar case on degrees of participation, see the *Almelo Trial*, Volume I, p. 43.
(3) See Volume I, p. 18.

humanity ", the Judge Advocate said : " I think there can be no doubt apart from any other matter, that none of the accused in this case would be outside those concluding words, if he really knew that he was taking part in the killing of recaptured prisoners of war who had done nothing else but escape." (1)

This case seems to furnish a practical illustration of the contention that if any other interpretation of the plea of superior orders were to prevail only a very small number of high ranking persons, if anyone at all, could be punished for flagrant breaches of international law. Since the orders for the killing in this case were given by the Head of the State himself, only he could have been punished for the murder of the 50 officers.

3. THE PLEA OF DURESS

Counsel for the defence submitted that to support a plea of duress the threat need not be immediate but may be one of future injury. Counsel quoted a case before the German High Court (R.G.E. 66, page 98) where two defendants charged with perjury pleaded that before giving evidence in criminal proceedings against a political organisation, they had been threatened by the members of that organisation with serious physical injury at some future date if they told the truth. The plea was successful and the two accused were acquitted.

The Prosecutor in his closing address quoted paragraph 10, Chapter 7, of the *Manual of Military Law* :

> "An act may also be excused if committed by a person acting in subjection to the power of others providing that he is compelled to act as he does by threats of death or serious physical injury continued during the whole time that he so acts and that the part taken by him in the unlawful act or acts is throughout strictly a subordinate part."

He argued that with the exception of the two drivers it could not be said that any of the accused had played a strictly subordinate part.

The Judge Advocate, quoting from Archbold's *Criminal Pleadings* (1943 Edition, page 19), said : " The same principle which excuses those who have no mental will in the prepetration of offences protects from the punishment of the law those who commit crimes in subjection to the power of others and not as a result of an uncontrolled free action proceeding from themselves. But if a merely moral force is used as threats, duress of imprisonment, or even an assault to the peril of his life in order to compel the accused to kill, this is no excuse in law."

4. THE LLANDOVERY CASTLE CASE

In this trial, as well as in many other war crimes trials (2) the decision in the above case was quoted, both by the Prosecutor and by the defence.

The case was cited by the prosecution to support the proposition that the plea of superior orders provides no excuse in international law, but

(1) As to the defence of Superior Orders generally, see p. 24, note 2.

(2) See also Volume I, p. 19 ; Volume II, pp. 106 and 107.

only goes to mitigation of punishment. The defence tried to distinguish the *Llandovery Castle Case* by saying that in that case the court found " as a fact " that the accused were fully aware that the firing on survivors by a U-boat was a crime, and therefore the court held that they were responsible under paragraph 47/2 of the *German Military Penal Code.* If, however, the accused, as in the Stalag Luft III case, had no such positive knowledge of the criminality of their action, they must be acquitted.

It may thus prove useful to analyse shortly the judgment in the *Llandovery Castle Case* which was tried before the German Supreme Court at Leipzig in July, 1921. The judgment is in its entirety based on German municipal law.

(i) *The Facts*

The " Llandovery Castle " was a British hospital ship which was sunk by a German submarine. The submarine commander, in an attempt to eliminate all traces of the sinking, gave orders to fire on the life boats. All persons in two of the three lifeboats were killed. The Commander, Patzig, was not on trial, the two accused being both lieutenants on board the submarine.

(ii) *The Plea of Superior Orders*

The court, applying paragraph 47 of the German *Military Penal Code,*[1] said in its judgment : " Patzig's order does not free the accused from guilt. It is true that according to paragraph 47 of the *German Military Penal Code,* if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable the superior officer issuing such an order is alone responsible. According to sub-paragraph (2), however, a subordinate obeying such an order is liable to punishment if it was known to him that the order of his superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favour of the military subordinates that they are under no obligation to question the order of a superior officer and they can count upon its legality, but no such confidence can be held to exist if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases, but this case was precisely one of them for in the present instance it was perfectly clear to the accused that killing defenceless people in the lifeboats could be nothing else but a breach of the law."

" In estimating the punishment, it is in the first place to be borne in mind that the principal guilt rests with the commander, Patzig, under whose orders the accused acted. They should certainly have refused to obey the order. This would have required a specially high degree of resolution. This justifies the recognition of mitigating circumstances in determining the punishment under paragraphs 213, 49 and 244 of the *State Penal Code.* A severe sentence must, however, be passed ".

(iii) *Absence of* Mens Rea *as a Defence*

The court pointed out that any violation of the law of nations in warfare is a punishable offence, so far as in general a penalty is attached to the deed.

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[1] See p. 46.

The killing of enemies in war is in accordance with the will of the State that makes war (whose laws as to the legality or illegality on the question of killing are decisive) only insofar as such killing is in accordance with the conditions and limitations imposed by the law of nations. The fact that his deed is a violation of international law, must be well known to the doer, apart from acts of carelessness in which careless ignorance is a sufficient excuse. In examining the question of the existence of this knowledge, the ambiguity of many of the rules of international law, as well as the actual circumstances of the case, must be borne in mind because in war time decisions of great importance have frequently to be made on very insufficient information. This consideration, however, cannot be applied to the case at present before the court. The rule of international law which is here involved is simple and is universally known.

(iv) *The Defence of Duress*

This defence was rejected in the judgment in the following words : " The defence finally points out that the accused must have considered that Patzig would have enforced his orders, weapon in hand, if they had not obeyed them. This possibility is rejected. If Patzig had been faced by a refusal on the part of his subordinates he would have been compelled to desist from his purpose as then it would have been impossible for him to attain his object, the concealment of the torpedoing of the ' Llandovery Castle.' This was quite well known to the accused who had witnessed the affair. From the point of view of necessity (paragraph 52 of the *Penal Code*) they could not then claim to be acquitted."

It would seem therefore that the decision supports two propositions : (1) that according to German law the maxim *Respondeat superior* does not apply to cases where the order involves the violation of a rule of international law, if that rule is " simple and universally known " ; (2) that the plea of duress or necessity will not succeed if the accused, by refusing the orders of his superior officer could have forced him to desist from his illegal purpose.

The first proposition shows that on the question of superior orders German law is roughly in line with international law as conceived in other countries, and thus serves to refute the argument put forward by several counsel in the Stalag Luft III case that by applying paragraph 443 of the British *Manual of Military Law*, British Military Courts apply *ex post facto* legislation, if there were indeed any force in this argument at all, in view of the fact that the *Manual of Military Law* is not a legislative instrument, but a War Office publication intended to acquaint army officers with those branches of the law with which they may have to deal in the execution of their duty.

The second proposition seems to be a valuable one. The judgment leaves the question open whether in a case where the military superior forces the military subordinate at pistol point to obey his illegal orders, the combined defences of superior orders and duress would avail the accused. But the court made it clear that these two defences will not avail the accused if no such threat has actually been uttered and where the accused by refusing the illegal order could have frustrated the intention of his superior officer to keep the crime that has been or is about to be committed secret. This secrecy and the absence of actual threats from essential elements of most cases of clandestine

killings of prisoners of war or enemy civilians on orders of a higher authority which so frequently are the subject of trials before military courts.(1) It would appear from the judgment in this case that also acording to German law—not only according to English law—the defence of duress does not avail the accused in such cases.

5. THE DEFENCE OF LEGALITY UNDER MUNICIPAL LAW : THE CONFLICT BETWEEN MUNICIPAL LAW AND INTERNATIONAL LAW.

The defence argued that according to the law prevailing at the time of the offence in Germany, any order emanating from the Head of the State was a legal order. Disobeying this Hitler order would have been a criminal offence according to German law. On the other hand, obeying the order was an offence according to international law. International law must not place the subject in an insoluable dilemma where he has only two possible courses of action, both of which are criminal, thus leaving him no " way out ". In order to be able to say that a person has committed an offence, there must be an alternative course open to him which does not constitute an offence. Some writers, according to counsel, take the view that in any conflict between municipal law and international law, municipal law is supreme and commands the undivided loyalty of all citizens, but—whatever view is taken of this question—in the sphere of criminal law, the individual must be protected and a man who has no " way out " cannot be punished.

The Judge Advocate did not deal with this argument and the court by finding all accused guilty, obviously held it invalid. It would seem that whatever view is taken once the conflict between municipal and international law arises, the main weakness of the argument lies in the fact that one of its premises, i.e. that the action of the accused were legal under German law, is very doubtful. Though some of the philosophers and propagandists of Hitler Germany insisted that the Führer's word was law, there does not seem to be any statute or decree—and there was no evidence produced in this trial—to the effect that a spoken command of the Head of the State had legal force or, as some counsel suggested, could replace the finding and sentence of a court of law. Assuming the legality under municipal law was established, the trend of legal opinion is that international law must prevail over municipal law and courts in recent years have treated this defence in a way similar to that of superior orders.(2)

6. THE ABSENCE OF *Mens Rea* AS A DEFENCE

This defence was raised in two different ways : (1) amounting to a mistake of law, i.e. the defendants were not aware of the illegality of their action. In a case like this the maxim *ignorantia iuris non excusat* certainly applies.

(1) See *Almelo Trial*, Volume I, p. 35 ; *Jaluit Atoll Case*, Volume I, p. 21, *Dreierwalde Case*, Volume I, p. 81.

(2) See Volume V, pp. 22–4. Cf. for instance Article 6 of the Charter of the International Military Tribunal : " The following acts or any of them are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility . . . (*c*) crimes against humanity . . . whether or not in violation of the domestic law of the country where perpetrated." As to an attempt to reconcile the dilemma in which the subordinate is placed, see Gluck, *War Crimes, Their Prosecution and Punishment*, pp. 155–156, and Volume III of this series, p. 64.

Professor Lauterpacht in the *British Year Book of International Law*, 1944, page 76, says : " No person can be allowed to plead that he was unaware of the prohibition of killing prisoners of war who had surrendered at discretion ; " (2) amounting to mistake of fact, i.e. the accused did not realise that the prisoners were prisoners of war, they thought that they were spies and saboteurs. The Prosecutor in his closing address said that if the court found that the accused acted in such a belief they should acquit them. The Prosecutor in this trial obviously felt confident that he had proved beyond reasonable doubt that the defendants knew these prisoners to be prisoners of war and therefore apparently to facilitate the argument, reduced it to an issue of fact : " Did the defendants know or did they not know that the prisoners they killed were prisoners of war ? " The implication, however, that the accused would have been entitled to an acquittal if they had reasonable grounds to believe that the persons they killed were spies or saboteurs, is not correct. Even a spy is entitled to a trial. In case these prisoners had been spies, the relevant question would have been whether they had been given a regular trial. It was said by the Judge Advocate in the Almelo Trial that the decisive question was " whether the accused honestly believed that the men they shot had been tried according to law and that they therefore believed that in shooting them they carried out a lawful execution ".(1)

The Judge Advocate, in summing up, pointed out that in this case it must have been obvious from the circumstances to the meanest intelligence that this was not a lawful execution.

7. CIVILIANS AS WAR CRIMINALS

Counsel for the defence argued that war crimes could only be committed by combatants or, in exceptional cases, by non-combatants when they exercise governmental functions in occupied territories. Against this argument the Prosecutor quoted paragraph 441 of Chapter 14 of the *Manual of Military Law* : " The term ' war crime ' is a technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders."

The decision of the court supports the rule that anybody who commits a war crime can be punished by a military court, regardless of his status.(2)

8. CORROBORATION

Both the Prosecutor and the Judge Advocate pointed out that the prosecution's case was to a large extent based on the uncorroborated evidence of an accomplice or of accomplices and that one accused cannot corroborate another. Both warned the court of the danger of acting on the uncorroborated testimony of an accomplice, but added that the court could convict on such evidence if they were clearly satisfied that the evidence given was true. By so doing, the Judge Advocate applied *mutatis mutandis*, and on the plane of international law a rule of practice followed in English criminal courts, that it is the duty of the Judge to caution the jury as to the danger of conviction

(1) See Volume I of this series, p. 44.

(2) For other examples see *Zyklon B. Case*, Volume I, p. 103 ; *Essen Lynching Case*, Volume I, pp. 82–92, and *Hadamar Trial*, Volume I, pp. 46–52.

on the evidence of an accomplice without some corroboration in a material particular which connects the prisoner with the witness's story.(1)

9. VOLUNTARY NATURE OF CONFESSIONS

Counsel for the accused Zacharias objected to a deposition made by his client being admitted as evidence on the grounds that it was obtained by duress. The accused Zacharias alleged that he was put in fear of severe physical injury as well as struck by an interrogating officer.

The Judge Advocate quoted Regulation 8 (i) of the Royal Warrant (A.0./81, ix 1945) : " . . . A military court convened under these regulations may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, and notwithstanding such statement or document would not be admissible as evidence in proceedings before a Field General Court Martial."

He went on to say : " In view of this, I am prepared to advise the court that if they are satisfied by the evidence of Lieutenant-Colonel Scotland that a confession was in fact made and you think to examine it will assist in proving or disproving the charge, against Zacharias, then you may admit it ". "At a later stage in my view, it would be proper if Zacharias wishes to do so, to give his version of how this confession was obtained, and when you have heard him, that may detract or add to the weight of the statement."

The decision of the court to admit Zacharias' statement is in line with other decisions by military courts.(2) In practice in trials under the Royal Warrant the defence cannot object to the court receiving in evidence a confession by an accused on the grounds that it was not made voluntarily. The defence is, however, entitled to call evidence to prove the involuntary nature of the confession and it is thus left to the court to decide what weight they eventually place on such a confession.

(1) *R. v. Baskerville* (1916), 2.K.B. 658.

(2) See Volume III, p. 71 and Volume II, pp. 135 ff.

ANNEX TO CASE NO. 62

R.F.S.S.
Chief of the S.S. — HIMMLER (Committed Suicide).

R.S.H.A.
(Central Security Office).
Chief : KALTENBRUNNER, (Sentenced to death by the International Military Tribunal).

Amt. 4. (Dept. 4)
(Gestapo)
Chief : General Müller, (Believed dead)

Amt. 5. (Dept. 5)
(Kripo)-(C.I.D.)
Chief : General Nebe (Killed after 20th July, 1944 attempt on Hitler's life).

Regional Headquarters :
BRESLAU
Commanding Officer : *Max Wielen*

Regional Headquarters :

Frontier Police :

	BRESLAU	SAARBRUCKEN	STRASBOURG	KARLSRUHE	MUNICH	KEIL	ZLIN
Officers Commanding :	Scharpwinkel (in Russian Custody)	Spann (dead)	*Schimmel* (accused)	*Gmeiner* (accused)- Off. i/c. Faber, (?) Off. i/c. Special Dept. *Herberg* (accused)	Schaefer (?) Off. i/c. Schermer (dead)	Fritz Schmidt (?)	Ziegler (?)
Officials :		*Schulz* (accused) *Breithaupt* (accused) and others.	Diesner (?) Hilker (?) and others.	*Preiss* (accused) *Boschert* (accused)	*Weil* (accused) *Geith* (accused) *Schneider* (accused) and others.	*Post* (accused) *Kähler* (accused) *Franz Schmidt* (accused) *Jacob* (accused)	*Zacharias* (accused) Knuppelberg (?)
Drivers :						*Denkmann* (accused) *Struve* (accused)	

This chart shows the chain of command within the Security Police Forces. Only those Regional Headquarters and those officers and officials mentioned in this trial are shown. A question mark under a name indicates that the official is wanted but has not yet been apprehended.

CASE NO. 63

TRIAL OF LIEUTENANT GENERAL KURT MAELZER

UNITED STATES MILITARY COMMISSION,
FLORENCE, ITALY, 9TH–14TH SEPTEMBER, 1946

A. OUTLINE OF THE PROCEEDINGS

(1) THE CHARGE

The accused was charged with " . . . exposing prisoners of war . . . in his custody . . . to acts of violence, insults and public curiosity."

(2) THE EVIDENCE

Some time in January, 1944, Field Marshal Kesselring, commander-in-chief of the German forces in Italy, ordered the accused who was commander of Rome garrison to hold a parade of several hundreds of British and American prisoners of war in the streets of the Italian capital. This parade, emulating the tradition of the triumphal marches of ancient Rome, was to be staged to bolster the morale of the Italian population in view of the recent allied landings, not very far from the capital. The accused ordered the parade which took place on 2nd February, 1944. 200 American prisoners of war were marched from the Coliseum, through the main streets of Rome under armed German escort. The streets were lined by forces under the control of the accused. The accused and his staff officers attended the parade. According to the Prosecution witnesses (some of whom were American ex-prisoners of war who had taken part in the march), the population threw stones and sticks at the prisoners, but, according to the defence witnesses, they threw cigarettes and flowers. The prosecution also alleged that when some of the prisoners were giving the " victory sign " with their fingers the accused ordered the guards to fire. This order, however, was not carried out. A film was made of the parade and a great number of photographs taken which appeared in the Italian press under the caption " Anglo-Americans enter Rome after all . . . flanked by German bayonettes." The accused pleaded in the main that the march was planned and ordered by his superiors and that his only function as commander of Rome garrison was to guarantee the safe conduct and security of the prisoners during the march, which he did. He stated that the march was to quell rumours of the German defeat and to quieten the population of Rome, not to scorn or ridicule the prisoners.

(3) FINDINGS AND SENTENCE

The accused was found guilty and sentenced to 10 years' imprisonment. The sentence was reduced to three years' imprisonment by higher military authority.

B. NOTES ON THE CASE

(1) THE CONSTITUTION OF THE COURT

The defence pleaded that the court was improperly constituted, as the accused was being tried by officers of inferior rank and that this procedure

violated the Article of War No. 16. This Article provides " . . . In no case shall an officer, where it can be avoided, be tried by officers inferior to him in rank." This plea was rejected by the court.

United States Military Commission derive their jurisdiction from the " Common Law of War[1]." This law requires that the accused be given a fair trial without specifying in any way the nature of such trial. The power to set up a Military Commission to try war crimes is inherent in the powers of a commander in the field. Such Military Commission is bound by the rules and restrictions imposed by the sources of its authority, in this case these rules were the " Regulations for the Trial of War Criminals for the Mediterranean Theatre " 23rd September, 1945, circular No. 114. As these regulations contain no restrictions as to the composition of the court, Article of War 16 does not apply.

Chief Justice Stone dealt with the question of applicability of the United States Articles of War to War Crimes Trials in his judgment in *In re Yamashita*[2]. In this case the petitioner contended that Article 25 of the U.S. Article of War had neen violated by the admitting of depositions in a capital case and Article 38 by the admitting of hearsay and opinion evidence. The Judgment says : " We think that neither Article 25 nor Article 38 is applicable to the trials of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates ' the persons . . . subject to these articles '. . . . . In general, the person so enumerated are members of our own army and of the personnel accompanying the army. Enemy combatants are not included amongst them." The judgment points out that military commissions are authorised to try two classes of persons " to one of which the Articles of War do, and to the other of which they do not, apply in such trials. . . . Being of this latter class petitioner cannot claim the benefit of the Articles which are applicable only to the members of the other class."

The Royal Warrant for the Trial of War Criminals before British Military Courts provides for trials by officers of equal or superior rank to that of the accused but does not make this compulsory. Regulation 5 says : " If the accused is an officer of the naval, military or air forces of an enemy or ex-enemy power, the convening officer should, so far as practicable, *but shall be under no obligation to do so*[3], appoint or detail as many officers as possible of equal or superior relative rank to the accused." In fact many ex-enemy officers were tried by British and American Military Courts constituted of officers inferior in rank to the accused.

(2) INFRINGEMENT OF THE GENEVA CONVENTION

The march through Rome was a violation of Article 2, sub-paragraph 2 of the Geneva Convention which says " They " (prisoners of war) " shall at all times be humanely treated and protected particularly against acts of

(1) See Volume I, pp. 111.

(2) See Volume IV, pp. 45–46 of this series.

(3) Italics inserted.

violence, from insults and from public curiosity." The charge was obviously framed in accordance with this regulation. There can be no doubt that the prisoners of war were exposed to public curiosity. According to the defence witnesses they were protected from insults and violence by the German troops who lined the streets. According to the prosecution witnesses, the German troops failed to protect them from such insults and violence. The court found that the accused in whose care the prisoners were at the time, and who had ordered and attended the march, was guilty of a war crime.

CASE NO. 60

TRIAL OF LIEUTENANT-GENERAL BABA MASAO

AUSTRALIAN MILITARY COURT, RABAUL,
28TH MAY–2ND JUNE, 1947

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGE

The charge alleged that the accused " while commander of armed forces of Japan . . . unlawfully disregarded and failed to discharge his duty as a . . . commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes . . ."

2. THE EVIDENCE

The accused was General Officer Commanding the 37th Japanese Army in Borneo from December, 1944, until the cessation of hostilities. At the time when the accused assumed command of the 37th Army there were about a thousand British and American prisoners of war in a prisoner of war camp at Sandakan. These prisoners were moved from Sandakan to Ranau (a march of 165 miles over extremely difficult country) in two parties. One went in December, 1944, and the other in May, 1945. Owing to the very meagre rations that the prisoners had been receiving over a long period, their state of health in December, 1944, was very poor. The order for the march had been given before the accused took over command of the 37th Army, but the accused admitted that he was aware of the conditions of the prisoners and that he ordered a reconnaisance of the country through which the prisoners were to march. He failed to alter the orders for the march after this reconnaisance. During the march a great number of prisoners died as a result of the hardships they had had to suffer, many were severely ill-treated and some who could not keep up with the marching column were shot by the guards on orders from the officer in charge of the party, who was an officer subordinate to the accused.

The accused received a report of this march early in 1945, in spite of which report he ordered the evacuation of the remaining 540 prisoners over the same route in May, 1945. This second march proved even more disastrous than the first. Only 183 prisoners reached Ranau and of these another 150 died there shortly after their arrival. By the end of July, only 33 of the whole party were alive. They were killed on 1st August, on the orders of an officer who was under the command of the accused.

With regard to the two marches the defence pleaded that the evacuation of the prisoner of war camp at Sandakan was an operational necessity as the camp was near the seashore and an allied landing was to be anticipated. Allied troops did in fact land there in July, 1945, after the camp had been evacuated. The defence also pointed out that the Japanese army were themselves short of food and medical supplies and many of the guards died

on the march as a result of the same hardships which the prisoners had suffered. This was not denied by the prosecution.

The accused gave evidence of the measures he had taken to secure provisions and medical supplies for the second march and said that he had done his best to provide for the prisoners. With regard to the killing of the 33 survivors at Ranau on 1st August, he claimed that by that time Ranau was cut off from his headquarters as a result of the allied landings and that he therefore could no longer exercise any effective control over the officers there who had previously been under his command. He gave evidence that he did not hear of this murder until after the cessation of hostilities.

3. THE FINDINGS AND SENTENCE

The accused was found guilty and sentenced to death by hanging. The sentence was executed.

B. NOTES ON THE CASE

1. RESPONSIBILITY OF A COMMANDER FOR CRIMES COMMITTED BY TROOPS UNDER HIS COMMAND

The abstract of evidence contained three charges.(1) The first and second charged the accused with giving orders for the two marches in January and May, 1945, and the third with " failing to discharge his duty as a commander to control the members of his command whereby certain of the members of his said command murdered a number of . . . prisoners of war." (2) The Prosecutor stated in his opening address that although these three charges had been superseded by one overall charge against the accused covering the period from December, 1944, to June, 1945, " the prosecution's case was based on the same facts underlying the three original charges, and the accused had to answer the same case no more and no less."

With regard to the accused's responsibility for the casualties that resulted from the two marches (charges 1 and 2 in the abstract of evidence) the prosecution could thus base their case on the fact that the accused had ordered these marches being aware of the prevailing conditions and must thus be held responsible for the natural consequences of his actions. It has been held in the trial of General Dostler by a United States Military Court (3) and in many other war crimes trials that a commander who could be shown to have ordered a violation of the laws and usages of war was guilty himself of such a violation.(4).

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(1) According to the Rules of Procedure for Australian Courts Martial a commanding officer must—if he decides after hearing a charge that this charge ought to be tried by a court martial—adjourn the case for the purpose of having the evidence reduced to writing. The evidence of all witnesses for and against the accused is then recorded in his presence and the accused can add to it his own testimony if he so wishes. This record is called summary of evidence or—in the case of an officer where there is no summary of evidence—an abstract of the evidence. (Rules of Procedure 4, paras. A to H and Rule of Procedure 9A).

(2) These three Charges in the abstract of evidence were replaced at the beginning of the trial by the one charge quoted on page 56.

(3) See Volume I, pp. 22–34.

(4) For a classification of such trials and of trials where a commander was held responsible for violations of the laws and usages of war not ordered by him, see Volume IV of this series, pp. 84 *et seq.*

With regard to the accused's responsibility on the third charge in the abstract of evidence, i.e. the killing of the 33 survivors at Ranau, on 1st August, 1945, the position is different, as in this case there was no evidence that these murders had been ordered by the accused.

The Judge Advocate said in his summing up : " It can be argued that the killings were the result of the marches. Indeed, they could not have occurred without the movement of the prisoners but they were not, I feel, a natural result of these marches. It is therefore for the court to consider whether they were due to the failure of the accused in his duties as a commander."

The prosecution based their case on this issue on the general duty incumbent upon a commander to control his troops and his particular duties *vis-à-vis* prisoners of war. The Prosecutor said in this closing address :

> " It is a well-settled rule of international law that a commander of Armed Forces at War has a duty to control the conduct of the members of his command, and that if he deliberately, or through culpable negligence, fails to discharge that duty, and as a result of such failure members of his command commit war crimes, he is guilty of a violation of the laws and usages of war."
>
> " In this case the accused had an undoubted duty to ensure that prisoners of war were treated in accordance with the requirements of international law."
>
> " . . . No individual commander has any right to do what he likes with prisoners of war who may for the time being be in his control. He has a positive legal duty to ensure that all members of his command treat them according to law. In view of the evidence tendered by the prosecution I submit that it has been proved beyond any possible doubt that the accused failed to discharge that duty."
>
> " In these circumstances the only defence open to him is that the failure resulted from circumstances beyond his control or from a mere inadvertence not amounting to culpable neglect. I submit that in view of the evidence such a defence is impossible."

The Judge Advocate advised the court in his summing up that the duties of a commander which the accused was charged with having violated, were laid down in the following articles of the Hague and Geneva Conventions :

(1) Article 1 of the Annex to the Hague Convention (1907) laying down as a condition which armed forces must fulfil in order to be accorded the rights of lawful belligerents. " They must be commanded by a person responsible for his subordinates ".

(2) Article 4 of the same convention laying down that " . . . prisoners of war must be humanely treated ".

(3) Article 2 of the Geneva Convention (1927) which says that " prisoners of war are in the power of the hostile government but not in the individual or formations which captured them. They shall at all times be humanely treated and protected particularly against acts of violence from insults and from public curiosity."

Having thus described the law upon which the duties of a commander rests, the Judge Advocate quoted the majority judgment delivered by Chief Justice Stone in *In re Yamashita* : " It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violations are to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."

It is obvious that before finding the accused guilty of having failed in his duty to control his troops, a court must decide what are the duties of a particular commander with respect to the exercise of control over troops under his command. With regard to the extent of these duties, the Judge Advocate again quoted *In re Yamashita* : " These provisions plainly impose on petitioner who . . . was military governor . . . as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."

The court, by finding the accused guilty, may have held that he did not " take such measures as were within his power and appropriate in the circumstances " to protect the 33 prisoners of war who were killed by troops under his command. On the other hand, as the prosecution preferred only one charge covering three distinct sets of facts, and the finding of the court could therefore be supported by holding the accused responsible for either or both of the two marches resulting in the death of many prisoners without holding him responsible for the killing of the 33 prisoners at Ranau on 1st August.

It seems, however, from the speeches and the above quoted passage of the Judge Advocate's summing up that in this case, as in other cases before Australian courts, the existence of the duty of a commander as outlined in *In re Yamashita* was looked upon as well established in international law, and the failure to discharge this duty as a war crime. No hard and fast rule can be said to have been established with regard to the extent of this duty, and future courts will have to be guided by the nature of the accused's military command as well as by the strategical situation and the circumstances in which he had to exercise his command. These two considerations seem to be indicated by the Yamashita judgment in the words " such measures as were *within his powers and appropriate in the circumstances*". (1)

In another trial before an Australian Military Court at Mortai in January, 1946, Major-General Endo Shimichi was convicted of " neglecting to issue or enforce . . . proper orders . . . to provide for the treatment of prisoners of war . . . held by force under his command . . . by reason of which neglect the prisoners of war were unlawfully killed . . . by forces under his command. . . ."

The accused pleaded that he had issued orders to treat the prisoners of war correctly, but that in spite of these orders nine members of the Royal

(1) Italics inserted. For a report on this trial see Volume IV, of this series, pp. 1–96.

Australian Air Force, who were prisoners of war, were murdered by his troops. It seems that he was convicted of having failed to enforce the orders he had given. He was sentenced to five years' imprisonment.

Lt.-General Artachi Hatazo was convicted on a similar charge by an Australian Military Court at Rabaul in April, 1947, and sentenced to imprisonment for life. Offences committed by his troops with which he was charged as the responsible commander included the murder of Australian and Chinese prisoners of war as well as the murder and ill-treatment of members of the native population of occupied territory.

2. *Mens Rea*

It appears that in cases of criminal liability of a commander for offences committed by his troops, *mens rea* may be evidenced in one of two ways :

(*a*) *Intention.* There may be direct evidence of such intention of the commander if he directly participated in the crime or commanded it to be perpetrated (1) or such intention may be inferred from some orders issued by him.

(*b*) *Criminal Negligence.* This may appear as wilful negligence if the commander is aware of atrocities being committed by his troops and fails to prevent them,(2) or it may be constituted by the performance of a field commander's duties with such culpable neglect as to display indifference as to whether or not offences are committed by the troops.(3)

The Judge Advocate said in his summing up : " In order to succeed the prosecution must prove . . . that war crimes were committed as a result of the accused's failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully disregarding them, not caring whether this resulted in the commission of a war crime or not."

3. AFFIDAVIT EVIDENCE

It is of interest to note that all the evidence for the prosecution was documentary. Most of the documents handed to the court by the prosecution were extracts from the proceedings of courts which had tried officers under the command of the accused general who were charged with offences committed as a result of his orders. The evidence for the defence was also mostly documentary. The accused elected to give evidence but his evidence consisted mainly in handing to the court a written statement of his case. He was not cross-examined.

4. THE BINDING FORCE OF THE GENEVA CONVENTION

It was suggested by the defence that the regulations of the Geneva Convention did not apply to the accused as Japan was not a signatory of this convention. The Judge Advocate advised the court that this was

(1) An example is the accused's responsibility for the second march (originally the 2nd charge in this case).

(2) An example is the first march (originally the first charge in this case).

(3) The murder of the 33 survivors (originally the third charge in this case) is an example of this degree of negligence.

immaterial " as the law applied in this court is that of England as embodied in Australian law". According to the view usually taken on this question the rule which forbids the ill-treatment and killing of prisoners of war is much older than the Geneva Convention and recognised by the usage of all civilized nations and that the relevant Articles of the Geneva Convention were, therefore, only declaratory of existing law by which the Japanese forces were bound, regardless of whether their government had ratified the Geneva Convention or not.(1)

A similar argument was put up by the defence in the trial of the major German war criminals by the International Military Tribunal at Nuremberg. In this case not the invader but the invaded country was not a signatory to the Geneva Convention and it was pleaded that thus the invader was not bound by it in his actions towards the members of the forces of the invaded country. The International Military Tribunal pointed out in its judgment(2) that " . . . the argument in defence of the charge with regard to the murder and ill-treatment of Soviet prisoners of war that the U.S.S.R. was not a party to the Geneva Convention is quite without foundation".(3)

(1) In certain United States trials the prosecution put in evidence that Japan had agreed to abide by the Geneva Convention in its dealings with *United States* prisoners of war ; see Volume V, p. 71.

(2) *British Command Paper*, Cmd. 6964, p. 48.

(3) See also Volume VII, pp. 43–4.

CASE No. 65

TRIAL OF TANAKA CHUICHI AND TWO OTHERS.

AUSTRALIAN MILITARY COURT AT RABAUL,
12TH JULY, 1946

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGE

The three accused were charged with the ill-treatment of prisoners of war. They were convicted and sentenced to terms of imprisonment varying from 6 months to 2 years.

2. THE EVIDENCE

The evidence for the prosecution, which was entirely documentary, showed that the accused, who were non-commissioned officers of the Japanese forces guarding the prisoners, had on two occasions severely ill-treated them by tying them to a post and beating them with a stick until they lost consciousness. The beatings were administered for alleged infringements of camp discipline by the prisoners of war. In each case the ill-treatment was aggravated by the fact that the accused, after beating the prisoners, cut off their hair and beards and in one instance forced a prisoner to smoke a cigarette. The prisoners were Indians, of the Sikh religion, which forbids them to have their hair or beards removed or to handle tobacco.

B. NOTES ON THE CASE

The regulations which can be invoked to support the findings and sentences are the following Articles of the Geneva Convention :

(1) Article 2 : Prisoners of war shall " at all times be humanely treated and protected, particularly against acts of violence, from insults and public curiosity."

(2) Article 3 : " Prisoners of war are entitled to respect for their persons and honour . . ."

(3) Article 46, para. 3 : " All forms of corporal punishment, confinement in premises not lighted by day light and in general all forms of cruelty whatsoever, are prohibited."

(4) Article 54 : Imprisonment is the most severe disciplinary punishment which may be inflicted on prisoners of war.

The ill-treatment of prisoners of war has repeatedly been held to be a violation of the recognised laws and usages of war in general and of various Articles of the Geneva Convention (1929) in particular. This trial constitutes a novelty in so far as the court seems to have extended the protection usually given to prisoners of war in respect of attacks against life and limb to attacks on their religious feelings.

The following articles of the Hague and Geneva Conventions can be invoked as protecting the religious rights of prisoners of war :

(1) *Article* 18 *of the Hague Convention* (1907) :

Prisoners of war shall enjoy complete liberty in the exercise of their religion including attendance at the services of their own church, on the sole condition that they comply with the police regulations issued by the military authorities.

(2) *Article* 16, *para.* 1 *of the Geneva Convention* (1929) :

Prisoners of war shall be permitted complete freedom in the performance of their religious duties, including attendance at the services of their faith, on the sole condition that they comply with the routine and police regulations prescribed by the military authorities.

CASE No. 66

TRIAL OF FRANZ SCHONFELD AND NINE OTHERS

BRITISH MILITARY COURT, ESSEN,
JUNE 11TH–26TH, 1946

A. OUTLINE OF THE PROCEEDINGS

Franz Schonfeld, Albert Roesener, Karl Paul Schwanz, Karl Otto Klingbeil, Michael Rotschopf, Karl Brendle, Hans Harders, Eugen Rafflenbeul, Werner Koeny and Karl Cremer were charged with committing a war crime in that they, " at Tilburg, on the 9th July, 1944, in violation of the laws and usages of war, were concerned in the killing of " a member of the Royal Air Force, a member of the Royal Canadian Air Force and a member of the Royal Australian Air Force. All pleaded not guilty.

Harders was shown to have been in charge of an office (*Dienststelle*) of the German Security Police at 's Hertogenbosch, Holland, the purpose of which was to track down and suppress the Dutch Resistance Movement. Under his orders came one Hardegan, who was not among the accused, but who had been in charge of squads who went out to make arrests. Under Hardegan's directions came various persons including all the remaining accused.

It was shown that, on Hardegan's orders, three cars left the *Dienststelle* building on July 9th, 1944, containing between them all of the accused except Schonfeld, Klingbeil, Harders and Koeny. The cars proceeded to a house in Tilburg, 49 Diepenstraat, which was then raided by certain members of the party. During the raid, the three airmen, who were in hiding, were shot by Rotschopf. There was no evidence that the victims had been armed.

Miss Leoni van Harssel testified that she and a fellow member of the Dutch Resistance Movement who had been known as Aunt Coba,[1] and who had taken into hiding the three Allied flyers, had been interned by the Germans, and while in internment Aunt Coba had told the witness that on July 9th, 1944, at about 11.15 to 11.30 a.m., she went to the door of Diepenstraat 49, her home, in answer to a ring. A man entered, bearing a weapon. She followed him into the house and saw the three pilots with their hands raised, being backed through the kitchen door. She could not follow further because other Germans had entered the house, but she heard shooting.

Mr. Nico Pulskens, whose house was opposite that of Aunt Coba, stated that on the morning of 9th July, 1944, at about 11.0 to 11.15 a.m. he had

[1] The latter had died before the opening of the trial. Evidence of her statements was admitted in Regulation 8 (i) (a) of the Royal Warrant, which provides : " (a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the Court, unable so to attend without undue delay, the Court may receive secondary evidence as statements made by or attributable to such witness."

called on Aunt Coba and seen three English pilots. The latter were carrying no arms and were dressed in civilians clothes. Shortly afterwards he returned to his own house and heard shots and groans from the direction of Aunt Coba's house. Looking in that direction from his own house, he saw a man in a blue raincoat " threatening with a sten gun," the shooting continued until the groaning of the victims ceased. He identified Rotschopf as the man who performed the shooting.

Mrs. Pulskens stated that, looking from her upstairs window she saw a man in Aunt Coba's back yard at about 11 a.m. on 9th July, 1944, firing a series of shots at the already prostrate bodies of two Allied pilots, whom the witness had seen in Aunt Coba's house the previous day.

Another prosecution witness, Mr. Van Eerdewyke, identified Rotschopf as the man whom he had seen just after 11 a.m. on July 9th, 1944, shooting two persons in Aunt Coba's back yard. The witness had seen the events from the upper window of the next house. Rotschopf fired perhaps a hundred shots and was seen to kick the victims when they were on the ground, critically wounded. The witness claimed to have seen more than two other persons in the yard, besides Rotschopf, during this time, perhaps three others. He saw one of the bodies afterwards and it was terribly maimed.

The accused Harders claimed that he did not concern himself with the precise reason for any individual use of the cars belonging to the *Dienststelle* beyond making certain that the petrol was only being used for official purposes ; Hardegan was in charge of squads which went out to make arrests.

The evidence showed that Harders was not present at the scene of the offence, and there was no proof that he gave any of the accused any orders regarding their duties in the Tilburg mission.

Rotschopf claimed that his orders were to arrest persons of a Resistance group but of whom he had received no description. His instructions from Hardegan at Tilburg were to pass through the house and secure the back of it. According to his evidence, while passing through the living room with his sten gun under his overcoat, he saw three persons in civilian clothes at a table. When he reached the yard behind the house, he saw three men running towards him. When they ignored his shouts of " Halt. Hands up," he shot at them and they fell immediately. Cremer then came over the wall from the right, Hardegan and possibly Roesener from the left.

Rotschopf admitted that, in his view, the three men died as a result of his firing. He said that he did not know that the three men were members of the Allied Forces and that " We did not go there to murder them." He denied backing the men into the yard and there shooting them in accordance with a concerted plan. He admitted that his gun was loaded when he entered the house but he denied that the three pilots surrendered. Rotschopf said : " I saw no other way out, and I considered myself under pressure." Hardegan had told him that if he was attacked he should use his gun, as the persons to be arrested might be armed. He said he did not think that if he had merely pointed the gun at the men it would have stopped them. He said that the events all happened suddenly, and his act was done in self-defence.

The accused Schwanz, according to his own account, was ordered simply to drive the car containing Roesener, Rotschopf and the captured Dutchman, to Tilburg. He did not know that anyone was to be arrested until he got to Tilburg.

Schwanz, according to the evidence, was the first to enter the house. Here he claimed to have seen three civilians and asked who they were. They gave no reply but rose and ran away. Schwanz stated that he then heard a call of " Hands up " and the sound of shots being fired. He became afraid and ran into the street where he remained with his car.

Roesener maintained that he had questioned a Dutchman who was arrested in the early hours of 9th July, 1944, and that he understood from the answers given that in a house in Tilburg there were armed Allied airmen in civilian clothes.

According to Roesener, Hardegan had ordered him to keep himself in readiness for arresting airmen in Tilburg. After an abortive search of one house in which Cremer accompanied him, he was ordered by Hardegan to proceed with Cremer to a house on the left of the house in front of which Rotschopf and Schwanz were standing, in order to guard the back yard of the latter building.

He affirmed : " We did not go to murder English flyers. There was no plan to murder." Upon going into the backyard of the house entered by himself and Cremer, Roesener claimed that he heard shots, and he then helped Cremer over the wall. He himself came out into the Diepenstraat after some minutes, and entered house No. 49 Diepenstraat where he met Hardegan in the back living room, who gave him the order to arrest the witness Van Eerdewyke and the order to inform the Dutch police in Tilburg that three airmen had been shot in the house No. 49 Diepenstraat while trying to escape, and to instruct them to take care of their transportation and burial. This order was carried out by Roesener.

Cremer claimed that he was told during the journey that the object was to raid the headquarters of a Resistance Movement, some members of which, including the Dutchman in the leading car, had been captured during the night.

After unsuccessfully searching one house, Cremer, according to his evidence, was ordered to enter the house next to that in which the shooting took place. While he was there, he heard a male voice shouting something like an order, and then a few shots. Roesener helped him over a wall and he saw Rotschopf in the next yard with three bodies which appeared to be dead. Rotschopf looked astonished and later explained to him that the three men had intended to attack him, and that this was why he shot them.

Cremer denied shooting at any of the victims and claimed that the object of the mission was to make arrests.

Rafflenbeul claimed that he merely received orders from Hardegan to drive the third car to Tilburg. The car contained only himself. At Tilburg, Hardegan told him to park the car in a side street and wait until the others returned with the arrested people who were to be taken away in the car. He did so park his vehicle and waited with it until the party returned.

Brendle, the driver of another of the cars, claimed that he was not told the purpose of the mission and was merely told to follow the leading car, and later, on arrival at Tilburg, to watch over the Dutchman. This he did until the party returned.

The evidence connecting Klingbeil with the offence proved to be very shadowy, as was recognised by the Judge Advocate in his summing up. There was also some positive evidence that in fact he was not in Tilburg on 9th July, 1944.

The evidence showed that the accused Schonfeld had not in fact been in Tilburg on 9th July, 1944 ; nor was there any direct evidence to support the proposition that it was on his recommendation as a Kriminal Sekretär that the squad left the *Dienststelle* for Tilburg.

Nor did the evidence indicate that the accused Koeny had been implicated in the events of 9th July, 1944, at Tilburg.

The Defence argued that no plan to commit murder had been proved. The Prosecution, on the other hand, maintained that " this was a concerted action to murder three British pilots, three people who were known to be British pilots and that they, having surrendered to the accused Rotschopf, were in fact murdered in accordance with the plan."

Much of the argument of Counsel concerned the inferences to be drawn from circumstantial evidence. Thus, the Defence pointed out that Rotschopf was a war-wounded person who was subject to fits, and who had been posted to the *Dienststelle* to perform office work. Schwanz also was primarily an office worker. The Defence drew the conclusion that neither could have been chosen for the task had it been intended to involve killing people. The Prosecution, on the other hand, emphasised that Rotschopf had had considerable experience of street fighting in Russia which would make him a suitable person to send on a killing mission, and that since Schwanz spoke fluent Dutch he could make enquiries without arousing suspicion. Again, the Prosecution produced evidence to show that Rotschopf's firing had been divided into two bursts, with a short period intervening. This would tend to show that the killing was intended, but the Defence claimed that it was due to spasmodic muscular movements to which Rotschopf was alleged to be subject.

The Defence maintained that it was most unlikely that the victims would be led outside into the open air if the intention were to shoot them, and the Prosecution on their part used the fact that the victims were later cremated as a significant fact.

The Judge Advocate in his review of the evidence, said that, in view of the nature of the duties of the accused in Holland, no particular significance attached to the fact that all the accused were dressed in civilian clothes or to the fact that they were all armed. The Court might, however, ask " in the light of subsequent events why Rotschopf carried a sten gun ".

Six of the accused were found not guilty, namely : Klingbeil, Brendle, Harders, Rafflenbeul, Koeny and Schonfeld.

Four were found guilty and sentenced to death by hanging, namely : Roesener, Schwanz, Rotschopf and Cremer.

These findings and sentences were confirmed by higher military authority.

B. NOTES ON THE CASE

1. THE COMPLICITY OF ROESENER, SCHWANZ AND CREMER IN THE OFFENCE

It was clearly established that the killings were carried out by Rotschopf alone, yet three others were also found guilty of being " concerned in the killing ". This circumstance constitutes the question of major interest in the trial.

Regulation 8 (ii) of the Royal Warrant, of 14th June, 1945, as amended, under which war crime trials by British Military Courts are held,[1] was deemed by the Prosecutor in his opening address to be " very relevant in this case." It provides as follows :

> " Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime. In any such case, all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court."

In his summing up the Judge Advocate stressed, however, not this rule of evidence, but a rule of English substantive law :

> " In our law if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them, in carrying out the purpose, kills a man, it is murder in all who are present, whether they actually aid or abet or not, provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.
>
> " If the original object is lawful, and is prosecuted by lawful means, yet in the course of its prosecution one of the party kills a man, whilst those who aid and abet the killer in the act of killing may, according to the circumstances, be guilty of murder or manslaughter, yet the other persons who are present at the killing, and who do not actually aid or abet it, are not guilty as principals in the second degree.
>
> " You will therefore ask yourselves the question : What was the object of this assembly in or about Diepenstraat 49 ? Was it an assembly to commit murder, or was it an assembly to effect arrests ? If the former, did the members of the assembly know the purpose for which they were there, and if the purpose was the crime of murder, did they participate in the design to murder ?
>
> " If the court take the view that the object of the visit to Diepenstraat 49 was in its origin lawful, that is to say, to effect arrests, and was being carried out by lawful means, but that, in the course of its prosecution, Rotschopf killed the three men, but that the others did not aid or abet such killing, then no doubt the court would find them not guilty of the

[1] See Volume I of this Series, pp. 105–110.

charge of ' being concerned in the killing.' If the court were to find, however, that any one of them did aid and abet Rotschopf in the act of killing, then no doubt the court would arrive at a different finding."

It will be noted that the Judge Advocate pointed out that if the rule regarding " common design " were found to be applicable the others who were present would be guilty of murder *whether or not they aided or abetted the offence.*

Nevertheless, the Judge Advocate went to some pains also to expound the law concerning parties to an offence in relation to a charge of being " concerned in " a killing.

He began by exempting from responsibility in the present type of case persons whose activities related to the time after the commission of the offence : " Conduct on the part of an accused subsequent to the death, while it may throw light on the nature of the killing and the reason for it, that is to say whether it was justifiable or a crime, cannot by itself be regarded as constituting the offence of ' being concerned in the killing ', or any degree thereof."

The Judge Advocate then proceeded to set out the law relating to accessories, and aiders and abettors, as follows :

"An Accessory before the Fact to Felony is one who, though absent at the time of the felony committed, doth yet procure, counsel, command or abet another to commit a felony.

" If the party is actually or constructively present when the felony is committed, he is an aider and abettor. It is essential, to constitute the offence of accessory, that the party should be absent at the time the offence is committed. A tacit acquiesence, or words which amount to a bare permission, will not be sufficient to constitute this offence.

" If the accessory orders or advises one crime and the principal intentionally commits another ; that is to say that the principal offender is ordered to burn a house and instead commits a larceny, a theft, the accessory before the fact will not be answerable in law for the theft. If, however, the principal commits the offence of murder upon A—and you may think that this is important—when he has been ordered to commit it upon B, and he does that by mistake, the accessory will be liable in respect of the murder upon A.

" The accessory is, however, liable for all that ensues upon the execution of the unlawful act commanded ; that is to say, if A commands B to beat C, and B beats C so that he dies, A is accessory to the murder of C. There must be some active proceeding on the part of the accessory, that is, he must procure, incite or in some other way encourage the act done by the principal.

"A principal in the first degree, of whom you have already heard mention in this case, is one who is the actor, or actual perpetrator of the fact. It is not necessary that he should be actually present when the offence is consummated, nor, if he is present, is it necessary that the act should be perpetrated with his own hands. If the agent, that is the perpetrator, is aware of the nature of his act—even if the employer

is absent—he is a principal in the first degree. If the employer is present, the agent, that is the person who commits the act, is liable as a principal in the second degree.

" Those who are present at the commission of an offence, and aid and abet its commission, are principals in the second degree.

" The presence of a person at the scene of the crime may be actual in the sense that he is there, or it may be constructive. It is not necessary that the party should be actually present, an eye-witness or ear-witness of the transaction ; he is, in construction of law, present, aiding and abetting if, with the intention of giving assistance, he is near enough to afford it should occasion arise. Thus, if he is outside the house, watching, to prevent a surprise, or the like, whilst his companions are in the house committing a felony, such a constructive presence is sufficient to make him a principal in the second degree . . . but he must be near enough to give assistance. There must also be a participation in the act ; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony. It is not necessary, however, to prove that the party actually aided in the commission of the offence ; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present, aiding and abetting."

Whether the principle of " common design " were applied or whether the rules regarding accessories and aiders and abettors alone were found to be in point, it was clear that if Rotschopf were found not guilty the other accused could not be found guilty. The Judge Advocate made this clear : " Rotschopf, of course, is the axle upon which the wheel of this case turns. If Rotschopf is to be expunged from this case altogether on the basis that he has committed no crime then automatically it must follow that the other accused are equally not guilty." Of Schwanz, Cremer and Roesener he said : " Your decision in the cases of these accused must primarily depend upon your decision in the case of Rotschopf. If you find Rotschopf guilty, then you must consider whether his guilt must be shared in some degree by those others, who were near at hand ready to afford him assistance."

Of Harders, who was absent from the scene of the shooting and who was later found not guilty, the Judge Advocate made the following remarks :

" In English law, a person can be held responsible in law for the commission of criminal offences committed by others, if he employs them or orders them to act contrary to law. He would, in such circumstances, be criminally responsible for the crimes of his employees whether he was present or not at their commission. Criminal responsibility might also arise, in the case of a person occupying a position of authority, through culpable negligence, for example, if Harders had reasonable grounds for supposing that his men were going to indulge in committing a war crime against their opponents,

—whether they be Dutch Resistance opponents or Allied airmen opponents —and in fact they did so, and he failed to take all reasonable steps to prevent such an occurrence. I think, if such a doctrine were to be invoked in this case, the court, before acting upon it to the detriment of Harders would require to be satisfied that Hardegan, prior to leaving for Tilburg on 9th July, 1944, had apprised Harders that it was their intention to murder any suspicious characters they found. In any event, the court would have to be satisfied that the crimes alleged were the natural result of the negligence of the accused; in other words, that a direction from Harders, given at the correct time, would have prevented any unjustifiable killing taking place."

The Military Court did not of course state its reasons for deciding as it did. It may be safely said, however, that, in finding Roesener, Schwanz and Cremer guilty in addition to Rotschopf, the Court was following one of three possible courses :

(i) The Court may have found that the three accused were principals in the second degree in the murders committed by Rotschopf as principal in the first degree, in that they, for instance, prevented the escape of the victims ;

(ii) The Court may have found that the three accused were acting in pursuance of a common plan to commit murder, and were therefore liable for the offence even though the actual killing was committed by Rotschopf ; or

(iii) The Court may have found these rules of substantive law inapplicable, but may yet have applied the rule of evidence set out in Regulation 8 (ii) of the Royal Warrant, which is quoted above.[1] An examination of the text of this provision shows that, in order for effect to be given to it, the following circumstances must prevail :

(*a*) there must be evidence that a war crime was the result of *concerted action*, but it is not said that the aim of such action must be illegal or that it must be the commission of the offence which was in fact committed ;

(*b*) the war crime must have been in some way the *result* of such concerted action, though, again according to the strict letter of the Regulation, not necessarily the intended result.

In the present case, (*a*) it was shown that there had been a plan at the very least to make arrests, and (*b*) the killing was the result of such a plan in the sense that had the raid never taken place the murder would not have been committed. The Court may therefore have taken the view that the evidence against Rotschopf could, under Regulation 8 (ii), be taken as *prima facie* evidence against the other three who were found guilty, and that the evidence produced in defence of the three men was not strong enough to rebut the presumption that they too were responsible for the crime.[2]

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[1] See p. 68.

[2] The scope of Regulation 8 (ii) received considerable attention in the course of the *Belsen Trial* (see Volume II of this series, pp. 138–41).

2. THE LAW APPLIED BY THE COURT

During the trial, rules of English law were quoted, particularly by the Judge Advocate, in connection with the possible liability of various accused either as principals in the second degree or under the doctrine of "common design." It may safely be said, however, that the intention was not to try the accused for offences against English law but simply to amplify and define the charge against them and the war crimes which they may have committed. As has been said in the notes to an earlier trial in this series of Reports(1): "In the present state of vagueness prevailing in many branches of the law of nations, even given the fact that there are no binding precedents in International Law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of International Law."

The Permanent Court of International Justice was empowered, under Article 38 (3) of its Statute (as is now the International Court of Justice under Article 38 (*c*) of its Charter), to apply the "general principles of law recognised by civilised nations." Professor Gutteridge, in discussing this power, has said that: "All systems of law are incomplete in varying degree, but the problem of filling in the gaps is, perhaps, more acute in the case of the law of nations than in that of private law owing to the absence of an international legislature having power to remedy any deficiencies which may be discovered."(2)

It would not be hard to show that, for instance, the rules of English law regarding complicity in crimes, which are frequently quoted in war crime trials before British Military Courts, will be "found in substance in the majority" of systems of civilised law.(3)

Writing in 1944 of the war crime trials which were then envisaged rather than actual, Professor J. L. Brierly expressed the opinion that:

"In practice courts will probably follow more or less closely the definitions and the procedures of their own municipal law, and in so doing they will be well within the latitude that the laws of war allow. But again that will not mean that they follow their own municipal law because that is the law which they are bound to apply; it will mean that in the absence of exact definition contained in the laws of war the municipal definition is likely to be the best available guide to the rule that natural justice requires them to apply."(4)

No lawyer of the Anglo-Saxon countries would have any proviso to make to Professor Brierly's view set out above. It must be added, however, that the continental practice is to require that an accused war criminal shall be shown either to have committed a breach of the municipal law of

(1) The *Jaluit Atoll Case*, held before a United States Military Commission in the Marshall Islands, 7th–13th December, 1945; see Volume I, p. 80. For other examples of the introduction of municipal law concepts into war crimes proceedings, see pp. 75 and 76–77 of the present Volume and pp. 60, 68–69 and 79–80 of Volume III.

(2) *British Yearbook of International Law*, 1944, p. 2.

(3) Professor Gutteridge prefers this as the interpretation of the words "general principles of law recognized by civilized nations" rather than the requirement that a principle should "exist in identical form in every system of civilised law"; *op cit*, pp. 4–5.

(4) *The Norseman*, May–June 1944, p. 169.

the country whose courts are conducting the trial, which breach was not justified by the laws and customs of war,[1] or (which amounts to the same thing) to have committed a breach of the laws and customs of war which also constituted an offence under that municipal law.[2]

3. THE STATUS OF THE VICTIMS

There was a conflict of opinion between Prosecution and Defence as to whether the accused knew that the victims were baled-out Allied airmen, or whether instead they regarded them as enemy or Dutch agents or spies since they were wearing civilian clothes.

The status of the victims could have made no difference to the liability of the accused in this trial, however, since even had the former been spies their summary shooting would have been contrary to Article 30 of the Hague Convention, which provides that :

> " Article 30. A spy taken in the act shall not be punished without previous trial."

Counsel for Rotschopf put forward the following argument : " The witness Van Bruggen has testified that two of the pilots . . . discarded their uniforms at her place and dressed themselves in mufti. As was established later, they carried Dutch identity papers and went under the protection of the Dutch Resistance Movement. They renounced the protection of uniform and consequent treatment in case of capture. . . . By wearing civilian clothes the three men renounced the protection afforded them by a uniform and in the case of arrest had to expect to be treated as members of the illegal Underground Movement." Their discarding their uniform " made them participants in the Underground Movement and put them in conflict with the police even if at the moment they had carried out no actual attacks."

It is submitted, however, that whether the airmen lost the protection of the Geneva Prisoner of War Convention[3] by wearing civilian clothing or not, they were still entitled to a trial.[4]

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(1) For instance see Volume III, pp. 53–4, regarding the French practice.

(2) For instance see Volume III, p. 81, regarding the Norwegian practice.

(3) See Volume I of this Series, pp. 29–30.

(4) On the essential elements of the right to a fair trial, see Volume V, pp. 73–7, and Volume VI, pp. 100–4.

CASE NO. 67

TRIAL OF JOHANNES OENNING AND EMIL NIX

BRITISH MILITARY COURT, BORKEN, GERMANY
21ST AND 22ND DECEMBER, 1945

A. OUTLINE OF THE PROCEEDINGS

Oenning, an ex-Hitler Youth of 15 years, and Nix, an ex-policeman, were accused of having committed a war crime in that they " at Velen, Germany, on the night of 25/26 March, 1945, in violation of the laws and usages of war, were concerned in the killing " of a named Royal Air Force Officer, a prisoner of war. Both pleaded not guilty.

It was alleged that Nix told Oenning and a military policeman to take the prisoner away and to do what they liked with him. The latter was then shot, and if Oenning was not proved to have fired the fatal shot he was a party to the crime and present at its commission, and did fire a shot. The body was then secretly buried, Oenning digging the grave.

Nix was found not guilty. Oenning was found guilty and sentenced to eight years' of imprisonment, after his Counsel had pleaded, in mitigation, that the youth had grown up under Nazi régime and was a victim of its influence. These findings were confirmed by superior military authority.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE CHARGE

The Prosecutor made reference to the 1929 Geneva Prisoners of War Convention in support of his case. Defence Counsel quoted paragraph 108a of Chapter XIV (*The Laws and Usages of War on Land*) of the British *Manual of Military Law*, which reads as follows :—

> " 108a. Prisoners of war may be fired upon if they offer violence to their guard or to any of the captor's forces or officials, or if they attempt to give active assistance to their own forces, or if they attempt to escape ; but a previous summons to desist and to surrender should be given if possible."

The previous summons to desist, said Counsel was not obligatory. He claimed that there was evidence to show that the prisoner had in fact attempted to escape.

For the argument that it would be lawful under International Law to shoot a prisoner of war if the person shooting " did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape," attention is drawn to a quotation from the summing up of the Judge Advocate in the *Drierwalde Case*, in Volume I of this series, p. 86. In the notes to that Case (p. 87) it was said that it was accepted

State practice to regard it as lawful to shoot at escaping prisoners ; paragraph 108a is one example of this acceptance.(1)

2. EXTENT OF COMPLICITY IN WAR CRIMES

The Prosecution claimed that the accused Oenning was responsible as a principal for the crime of shooting a prisoner of war ; and that the accused Nix was responsible at the very least as an accessory both before and after the fact.

Defence Counsel argued that, before Nix could be convicted as an accessory before the fact, it must be proved either that he assisted in the commission of the crime or was near enough to the scene of the offence to assist if necessary ; or that there was a common intent between the accused and the third party to commit the offence ; or that Nix instigated the killing. In Archbold's *Criminal Law*, at p. 1441, an accessory after the fact was defined as one who " knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon," for instance by removing the evidence of guilt.

These arguments constitute further examples of the introduction of Municipal Law concepts into war crime proceedings, one process whereby the body of International Law is augmented. This common practice has received comment in the notes to the *Jaluit Atoll Case*, in Volume I of this series, pp. 79–80.(2) Other references to alleged varying degrees of complicity in war crimes are to be found in the same volume at pp. 90, 92, 103 and 114 and frequently in subsequent volumes. Again in the *Jaluit Atoll Case*, the Prosecution claimed that the custodian of prisoners of war who handed them over to the executioners, knowing that they were to be executed, was an accessory before the fact. The Prosecution's argument was that he aided and abetted in the commission of the offence. The custodian was sentenced to ten years' imprisonment.

(1) See also Volume VII, p. 61.

(2) And on p. 72 of the present volume.

CASE NO. 68

TRIAL OF HANS RENOTH AND THREE OTHERS

BRITISH MILITARY COURT, ELTEN, GERMANY,
8TH–10TH JANUARY, 1946

A. OUTLINE OF THE PROCEEDINGS

Hans Renoth, Hans Pelgrim, Friedrich Wilhelm Grabowski and Paul Herman Nieke, at the time of the alleged offence two policemen and two customs officials respectively, were accused of committing a war crime, "in that they at Elten, Germany on 16th September, 1944, in violation of the laws and usages of war, were concerned in the killing of an unknown Allied airman, a prisoner of war." All pleaded not guilty.

It was alleged that a British pilot crashed on German soil, and after emerging from his machine unhurt was arrested by Renoth, then attacked and beaten with fists and rifles by a number of people including the other three accused. Renoth stood aside for a while, then shot the pilot.

All the accused were found guilty. Renoth was sentenced to death by hanging, and Pelgrim, Grabowski and Nieke to imprisonment for 15, 10 and 10 years' respectively. The sentences were confirmed and put into effect.

B. NOTES ON THE CASE

1. THE NATURE OF THE OFFENCE ALLEGED

The case for the Prosecution was that there was a common design in which all four accused shared to commit a crime war, that all four accused were aware of this common design and that all four accused acted in furtherance of it. This was denied by the Defence. Here, as in the *Essen Lynching Case*,[1] several persons who contributed to the death of a prisoner of war were all held responsible for his murder, though not punished alike.

The Prosecutor referred the Court to a passage in Archbold, 31st edition, p. 863, which he regarded as relevant : " If a man is suffering from a disease, which in all likelihood would terminate his life in a short time, and another gives him a wound or hurt which hastens his death, this is such a killing as constitutes murder (according to Hale) or at the least manslaughter." If Renoth by his shot shortened the life of the pilot, even if only by a matter of seconds, then that constituted murder in English criminal law. Counsel submitted that it also constituted a war crime under the laws and usages of war.

Counsel for Pelgrim, Grabowski and Nieke claimed that these accused were present and witnessed the beating but took no active part to stop it or to help the pilot. That, he submitted, did not constitute a crime. To prove an offence against these men it was essential that the Prosecution

[1] See Volume I, pp. 88–92.

should have proved that the accused acted in concert with the persons who committed the offence and aided and abetted them to commit that offence. Mere presence as such as not sufficient to find a man guilty as a principal in the second degree.

The Prosecutor, however, quoted from page 1429 of Archbold the following words : " It is not necessary, however, to prove that the party actually aided in the commission of the offence ; if he watched for his companions in order to prevent surprise, or remained at a convenient distance in order to favour their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, he was, in contemplation of law, present aiding and abetting ". The very presence of the accused, all of them officials, would constitute sufficient moral encouragement to make them liable, even accepting their story that their part was not an active one.

It is impossible to say conclusively whether the court found that the three accused took an active part in the beating or whether they were liable under the doctrine set out by the Prosecutor ; it is nevertheless interesting to compare that doctrine with the rule applied in the *Essen Lynching Case*, which made punishable as a war crime the inaction of a soldier who allowed prisoners under his care to be lynched. The *ratio decidendi* would not, of course, be the same in the two cases.

2. THE DEFENCE OF SUPERIOR ORDERS ([1])

Renoth claimed to have received orders from a superior officer which caused him to shoot the prisoner. The Prosecutor quoted as relevant the following amendment to paragraph 443 of Chapter XIV of the *Manual of Military Law* : " The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime ; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."

A footnote to the new text, he pointed out, read as follows : " See section 253, page 453, Vol. II, *Oppenheim's International Law*, 6th Edition, 1940, Ed. by Lauterpacht. The statement which appeared prior to this amendment was based on the 5th edition of *Oppenheim's International Law*, Vol. II, at page 454, which was, however, inconsistent with the view of most writers

([1]) See also p. 24, note 2.

upon the subject, and also with the decision of the German Supreme Court in the case of *The Llandovery Castle* (Annual Digest of Public International Law Cases, 1923–1924, Case No. 235 : (1921) Cmd. 1422, page 45) ".

The Prosecutor claimed that there could be no doubt that shooting at a pilot in this case was an act which both violated the rules of warfare and outraged the general feelings of humanity. The Court rejected the defence.

3. FURTHER APPLICATION OF RULES OF PROCEDURE 40 (C) AND 41 (A) [1]

During the examination of Pelgrim, Counsel for the Defence drew his attention to a rough sketch of the district of the alleged offences. The Defence did not ask for it to be put in as evidence, but the President pointed out that, if the Prosecution insisted, the sketch could be put in as an exhibit, in which case the Defence would forfeit their right to the last word. The piece of evidence is not recorded as having been put in, but Counsel called several defence witnesses and in the event the Prosecutor delivered the last speech.

In the trial of Arno Heering,[2] Defence Counsel, having called no evidence apart from that of the accused, delivered the last address.

4. ADMISSIBILITY OF UNAUTHENTICATED AFFIDAVITS

The Prosecutor proposed to tender pre-trial statements purported to be signed by three of the accused. He was unable to produce the officer who was present when they were taken but submitted that Regulation 8 (i) [3] was sufficiently wide in scope to make this action permissible, that provision having the effect of abrogating the ordinary rule of evidence that it is on the Prosecution to prove that a statement made by an accused person was taken freely and voluntarily and not under duress. Once the evidence was admitted it would be for the court to decide on the weight to place on it. The decision of the court was to use the wide powers given to it and to accept the statements as evidence by the Prosecution.[4]

Later, all three accused stated under cross-examination that they had made the affidavits in question and had made them voluntarily.

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[1] Cf. Volume III, pp. 72–3.

[2] See pp. 79–80.

[3] Regulation 8(i) of the Royal Warrant opens with the words :

" At any hearing before a Military Court convened under these Regulations the Court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court-Martial, and without prejudice to the generality of the foregoing in particular . . . ."

Certain of the illustrative rules which follow this general provision have been quoted in Volume III, pp. 70–1.

[4] See also p. 83.

CASE NO. 69

TRIAL OF ARNO HEERING

BRITISH MILITARY COURT, HANOVER,
24TH–26TH JANUARY, 1946

A. OUTLINE OF THE PROCEEDINGS

Heering was accused of having committed a war crime " in that he between 24th January, 1945, and 24th March, 1945, when a member of the guard company with a column of prisoners of war on a march from Marienburg to Brunswick did, in violation of the laws and usages of war, ill-treat " two named members of the British Army " and other British and Allied nationals ". The plea was one of not guilty. The accused admitted that he was actually in charge of a column of prisoners of war who were being evacuated from a camp. It was alleged that he failed to provide the prisoners with sufficient food, adequate billets or any medical supplies, and that he marched them excessive distances and actively ill-treated them.

The Court found the accused guilty of the charge, but omitting therefrom the names of the British soldiers and altering " and other British and Allied nationals " to " a British national ". In view of the fact that he had been detained as an accused person since 27th August, 1945, the Court sentenced Heering to one day's imprisonment. The sentence was confirmed.

B. NOTES ON THE NATURE OF THE OFFENCE ALLEGED

The Prosecutor drew the Court's attention to Articles 2, 11, 12, 18 and 54 of the Geneva Prisoners of War Convention of 1929. He submitted that the column of march described in the trial was to all intents the same and in the same position as a prisoner of war camp. All the duties set out fell on the shoulders of the accused.

The provisions from the Convention which the Prosecutor quoted were the following :

> "Art. 2. Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.
>
> They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.
>
> Measures of reprisal against them are forbidden."

> "Art. 11. The food ration of prisoners of war shall be equivalent in quantity and quality to that of the depot troops.
>
> Prisoners shall also be afforded the means of preparing for themselves such additional articles of food as they may possess.
>
> Sufficient drinking water shall be supplied to them. . . .
>
> . . . All collective disciplinary measures affecting food are prohibited."

"Art. 12. Clothing, underwear and footwear shall be supplied to prisoners of war by the detaining Power. The regular replacement and repair of such articles shall be assured . . ."

"Art. 18. Each prisoner of war camp shall be placed under the authority of a responsible officer . . ."

"Art. 54. Imprisonment is the most severe disciplinary punishment which may be inflicted on a prisoner of war . . ."(1)

During his closing address, the Prosecutor pointed out that the accused had admitted giving orders in the presence of British prisoners to his guards to shoot prisoners who left the column of march after ordering them to halt three times. Presumably if a man suffering from dysentery left the column to relieve himself and did not halt, he would be shot. He claimed that as the prisoners, reduced in health and many of them sick, might very well be considerably mentally disturbed by a threat of this kind, the accused's words amounted to gross ill-treatment, and were contrary to Article 2. Although admitting that the accused did go on to say that there was an understanding between him and his guards that no shooting should take place, he claimed that his words constituted a threat of an act of violence which could not be construed as humane treatment. There was no question of their trying to escape. The Legal Member pointed out that the words complained of were used to the guards, not to the prisoners, and that mere words could not constitute an assault. Applying the analogy of the rules and principles applied in the Divorce Court in regard to the question of mental cruelty, he thought that the Prosecutor would have to prove first that there was something in the nature of mental cruelty, and secondly that there was some interference with health or well-being in consequence of it. The Prosecutor claimed, in reply, that threats of that description issued to men in the condition in which the prisoners were at the time were quite likely to produce extremely bad results in their health.

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(1) Similarly, in the trial of Shoichi Yamamoto and others by an Australian Military Court at Rabaul, 20th–27th May 1946, several accused were found guilty of "ill-treatment of prisoners of war between Sandakan and Ranau between 29 January, 1945 and 28 February, 1945 compelled prisoners of war in their charge to march long forced marches under difficult conditions when sick and underfed as a result whereof many of the said prisoners of war died". The offence proved took place when about 450 prisoners of war were being moved from one camp to another.

That the protection of the laws and customs of war attaches to prisoners of war wherever they may be is further proved by the trial of Kishio Uchiyama and Mitsugu Fukuda by an Australian Military Court at Singapore, 18th–29th April, 1947. Here the accused were found guilty of " Committing a war crime in that they on the high seas between 4 July, 1944 and 8 September, 1944 on a voyage from Singapore to Moji (Japan) aboard the s.s. " Rashin Maru " as officer in charge and non-commissioned officer second in charge respectively of a draft of Allied prisoners of war for whose well-being they were responsible were in violation of the laws and usages of war together concerned in the inhumane treatment of the said prisoners of war thereby contributing to the physical and mental suffering of the said prisoners of war."

CASE NO. 70

TRIAL OF WILLI MACKENSEN

BRITISH MILITARY COURT, HANNOVER,
JANUARY 28TH, 1946

A. OUTLINE OF THE PROCEEDINGS

Willi Mackensen, formerly Hauptmann, was accused of having committed a war crime in that he " on dates between 20th January, 1945, and 12th April, 1945, in violation of the laws and usages of war, was concerned with others, not in custody, in the ill-treatment of Allied prisoners of war on a forced march from Thorn in Poland to the Hannover area in Germany, as a result of which ill-treatment at least 30 prisoners of war died ".

It was alleged that the accused was in charge of the column in question, that the prisoners had little food, no cooking facilities, no heating in billets and no medical supplies, and that one prisoner was wounded and another shot dead.

The accused pleaded not guilty, but during the evidence for the Prosecution he changed his plea to one of guilty. He was found guilty and sentenced to death by hanging. The sentence was confirmed.

B. NOTES ON THE PLEA OF GUILTY

Regulation 3 attached to the Royal Warrant specifically exclude from application to war crime trials certain Rules of Procedure made pursuant to the Army Act. Among these appears Rule 35 (D) which reads as follows :

> " (D) A Plea of ' Guilty ' shall not be accepted in cases where the accused is liable, if convicted, to be sentenced to death, and where such plea is offered a plea of ' Not guilty ' shall be recorded and the trial shall proceed accordingly ".

Rule 38, which is not excluded by Regulation 3, runs as follows :

> " 38. The accused may, if he thinks fit, at any time during the trial, withdraw his plea of ' Not guilty ', and plead ' Guilty ', and in such case the court will at once, subject to a compliance with Rule 35 (B), record a plea and finding of ' Guilty ', and shall, so far as is necessary. proceed in manner directed by Rule 37 ".

Rule 38 is not (though 35 (B) and 37 are) among those Rules, applicable to District Courts-Martial, which are made applicable by Rule 121, " so far as practicable " to Field General Courts-Martial and so to war crime trials ; the Court decided nevertheless to allow the accused to change his plea.

Rule 35 (B) contains the following safeguards :

> " (B) If an accused person pleads ' Guilty ', that plea shall be recorded as the finding of the court ; but, before it is recorded, the president, on behalf of the court, shall ascertain that the accused understands the

nature of the charge to which he has pleaded guilty, and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence that the accused ought to plead ' Not guilty '."

In the present instance, the Legal Member made certain that the accused agreed to the truth of the various particulars contained in the charge, that the accused realised that the Court would have no alternative but to find him guilty, and that the accused had discussed the matter with his Counsel.

Rule 37, to which reference is made by Rule 38, sets out the procedure to be followed on the recording of a plea of guilty. Paragraphs (B) and (C) thereof contain the following provisions :

" (B) After the record of the plea of ' Guilty ' on a charge (if the trial does not proceed on any other charges) the court shall receive any statement which the accused desires to make in reference to the charge, and shall read the summary or abstract of evidence, and annex it to the proceedings, or if there is no such summary or abstract, shall take and record sufficient evidence to enable them to determine the sentence, and the confirming officer to know all the circumstances connected with the offence. This evidence will be taken in like manner as is directed by these rules in the case of a plea of ' Not guilty '."

" (C) After evidence has been so taken, or the summary or abstract of evidence has been read, as the case may be, the accused may make a statement in mitigation of punishment, and may call witnesses as to his character."

Explaining the position to the accused the Legal Member stated : " Mackensen, I must tell you this, that on a plea of guilty there is a difference in the procedure, and that instead of hearing evidence from witnesses in the ordinary way the Prosecutor will lay before the Court sufficient facts to help the Court to come to a decision on the merits of the case. The Prosecutor will either read from documents which give evidence previously taken on oath or he will summarise the facts of the case. There will be no opportunity, of course, for any of the evidence to be questioned, and the Court will therefore act essentially on those facts which the Prosecutor will lay before it."

After the Prosecutor had quoted from a number of affidavits, the accused expressed his desire neither to call witnesses, nor to give evidence himself, as to his character ; his Counsel delivered a closing speech in mitigation of punishment. The Court then delivered sentence.

CASE NO. 71

TRIAL OF EBERHARD SCHOENGRATH AND SIX OTHERS

BRITISH MILITARY COURT, BURGSTEINFURT, GERMANY
FEBRUARY 7TH–11TH, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused, Eberhard Schoengrath, Erwin Knop, Wilhelm Hadler, Herbert Fritz Willi Gernoth, Erich Lebing, Fritz Boehm and Friedrich Beeck, all former Kriminal Sekretärs or members of the SS, were charged with " committing a war crime, in that they at Enschede, Holland, on 21st November, 1944, in violation of the laws and usages of war, were concerned in the killing of an unknown Allied airman, a prisoner of war." The offence alleged was the shooting of an Allied airman who had descended by parachute from his plane.

Subject to confirmation, all the accused were found guilty, five were sentenced to death by hanging, and two to imprisonment for fifteen and ten years. These sentences were confirmed by superior military authority.

B. NOTES ON THE CASE

1. STATEMENTS MAY BE PUT IN WITHOUT PROOF OF CAUTION ADMINISTERED

The present trial, like the Belsen Trial, gave rise to a discussion of the question whether a pre-trial statement made by an accused could be admitted as evidence if no caution had been administered to the accused prior to his making this statement.

The general outcome of the decision of the courts in the Belsen Trial, the Killinger Trial, the present trial and the Trial of Hans Renoth[1] is that the defence cannot prevent a statement being put in as evidence by denying its voluntary nature, but is free to attack the weight to be placed on it. In practice therefore the court will always ascertain whether or not a statement is made voluntarily in order to assess its evidential value. This position affords an illustration of the tendency, noticeable not only in British war crime trials, and due to the exceptional conditions under which war crime trials are held, to go some way towards ridding courts of the more technical rules of evidence and leaving them free to admit a wide range of evidence and then to decide what weight they will place on each item. The Prosecutor in the Belsen Trial claimed that the Regulations made under the Royal Warrant were drawn up with the intention of avoiding legal arguments in court as to whether evidence was admissible or not. They were drawn widely so as to admit any evidence whatsoever and to leave the court to attach what weight they thought fit to it when they had heard it.

(1) See Volume II, pp. 135–8, Volume III, pp. 71–2, and pp. 78 of the present Volume.

2. A SUBMISSION BY THE DEFENCE OF NO CASE TO ANSWER

A footnote to page 644 of the *Manual of Military Law* states that :

> " It is open to the accused, his counsel or defending officer, at the close of the case for the prosecution, to submit that the evidence given for the prosecution has not established a *prima facie* case against him and that he should not, therefore, be called upon for his defence. The court will consider this submission in closed court and, if they are satisfied that it is well founded, must acquit the accused. This submission may be made in respect of any one or more charges in a charge-sheet."(1)

Thus in the present trial, the Defence submitted that there was no case to answer because the Prosecution had brought no evidence to show that the shot airman was in fact an Allied airman, and the crime which the accused were charged with committing was that they at Enschede, Holland, on the 21st November, 1944, in violation of the laws and usages of war, were concerned in the killing of an unknown Allied airman, a prisoner of war. The shooting of a man by a German did not of necessity prove that he was an Allied airman. The Prosecutor replied in the following terms : " In 1944 most people, especially if they were in the Services, even though they might not be experienced in aircraft recognition were fairly familiar with the aircraft of the respective sides. The evidence in this case, and it has not been disputed at all by the Defence, is that a bomber which was flying west over Holland, which was a theatre of operations, was shot or brought down. All the people who were on the spot made to capture the airman. The airman, we know, when interrogated was unable to speak German, and there is evidence from at least one witness that he muttered something about " America " or " Canada " at some stage. It is very well known that most Continental people make relatively little distinction between British and Americans. All these accused, who were members of the Security Service, took it for granted that it was an Allied bomber and the airman accordingly an Allied airman." He submitted that it would be straining commonsense too far to suppose that this bomber was in some mysterious way a neutral bomber which was proceeding on a mission from Germany over Holland at that time and in those circumstances.

The Court over-ruled the submission of the Defence.

3. CROSS-EXAMINATION OF AN ACCUSED REGARDING OFFENCES NOT MENTIONED IN THE CHARGE

During the cross-examination of one of the accused, the Prosecutor began to question him regarding the shooting of six innocent men on a date and at a place other than those mentioned in the charge. He claimed that this course was legal in view of the cases *R. v. Geering*, *Makin v. Attorney-General for New South Wales*, and *R. v. Smith*, which were " referred to in Note 2 on page 76 of the Manual," and in view of Rule of Procedure 80 (D) (iii).

The following sentence appears in p. 76 of the *Manual of Military Law* : " Again, where women or children have been murdered, to rebut the defence of accident or to prove design, evidence has been admitted to prove that

(1) This is simply an adaptation of a similar rule of procedure followed in English Criminal Law. See Kenny, *Outlines of Criminal Law*, Fifteenth Edition, pp. 569–70.

other women or children living with the accused have died under similar suspicious circumstances, or have suffered from similar symptoms." To this sentence appears the following footnote : " *R. v. Geering* (1849) 18 L.J. (M.C.) 215, several cases of arsenic poisoning in a house. *Makin v. A.G. for New South Wales* L.R. (1894) A.C. 57 ; previous deaths of other nurse children. *R. v. Smith* (1915) 11 Cr. App. Rep. 229, three " wives " dying in succession in the same way." The Prosecutor in explaining his cross-examination said of the accused : " This man says more or less that he was a chance spectator of one murder. I am now going to put it to him that he in fact was one of the men detailed to be present when a very similar crime was committed on a previous occasion, to establish a systematic course of conduct in which he participated, so that he cannot be so innocent as he is trying to make the Court think today."

The Prosecutor claimed that, since all of the accused were incriminating one another, he was entitled to rely also on Rule of Procedure 80 (D), which provides that :

" 80 (D). The accused when giving evidence may be asked any question in cross-examination, notwithstanding that it would tend to criminate him as to the offence charged, but shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless— . . . .

(iii) he has given evidence against any other person charged with the same offence."

He made a general submission. He pointed out that several of the accused, both personally and through their Counsel, had attacked two others of their number by suggesting that they were present and took some part in the mal-treatment of the airman by shackling him when he was going to be taken out in the car to be shot. The Prosecutor continued : " That entitles me, in my submission, to cross-examine them on their systematic course of conduct as members of this Kommando on occasions other than the present one ; otherwise they are surely in the position of saying : ' This crime was ordered by one superior officer and carried out under the supervision of his subordinate by other people in the Kommando, but I knew nothing of this sort of thing ; I was very shocked and I protested.' If you then find that these same men were constantly taking part in executions of hostages or civilians, whoever it may be, does not that throw some light on the question of their guilt or innocence on the occasion in question, even though one man's job was only to dig a hole or report that a hole had been dug ? "

The Court ruled that the Prosecutor could ask the questions which he desired to ask, but that he must be careful, in asking them, to avoid as far as possible causing the accused by his answers to implicate any other of the accused.(1) The Prosecutor thereupon requested the accused to describe his own role in the incident in question, while not mentioning the names of any others of the accused.

(1) The cross-examination of an accused by the Prosecutor in a joint trial before a British Military Court *follows* that by Counsel for the other accused.

ANNEX

NETHERLANDS LAW CONCERNING TRIALS OF WAR CRIMINALS

I. INTRODUCTORY NOTES

1. THE BASIC PROVISIONS

The trial of war criminals before Dutch Courts is regulated by two sets of rules. One set relates to the trials held by *metropolitan* Dutch courts, and the other to those conducted by courts of the *Netherlands East Indies.* In each of the two geographical areas concerned rules were enacted by the respective governments, the rules of Holland relying mainly on existing provisions of Dutch common penal law and those of the Netherlands East Indies on novel provisions introducing in the sphere of war crimes numerous exceptions to the Netherlands East Indies Penal Code.

(a) *Metropolitan Rules*

Metropolitan rules are prescribed by a number of Decrees enacted by the Netherlands Government between 1943 and 1947.

Matters of substantive law are regulated by the Extraordinary Penal Law Decree of 22nd December, 1943 (Statute Book of the Kingdom of Netherlands No. D.61) as amended by Statute Book No. H.204 of 27th June, 1947 and Statute Book No. H.233, of 10th July, 1947. As was stressed in its preamble, this Decree was enacted having regard to " the security of the State," which " made it urgently necessary to lay down extraordinary penal rules " in order to render possible " the trial of certain acts committed during the time of the present war, which acts were gravely deserving of punishment." This extraordinary legislation was made applicable by explicitly suspending the effect of Article 1 of the Dutch Penal Code, which prescribes that no act may be punished without a provision preceding its commission. In this manner the rule " Nullum crimen, nulla poena sine lege," which is traditional in modern continental penal law, was discarded in view of the emergency which had dictated the enactment of the special legislation.(1)

A Decree of 29th May, 1945 (Statute Book No. F.85) which deals with functions of the Netherlands Commission for the Investigation of War Crimes contained a definition of the concept of war crimes, which was replaced by a later definition given in Article 27a of the Extraordinary Penal Law Decree D.61.

The jurisdiction, composition and procedure of the courts competent to try war criminals, as well as other related matters of procedural law, are regulated by three Decrees, two of 22nd December, 1943 (Statute Book

(1) Art. 1 of the Dutch Penal Code reads : " No act is punishable except in virtue of a legal penal provision which preceded such act. Should there be a change in the legislation after the date on which the crime was committed the provision most favourable to the accused shall then be applied."

No. D.62 and D.63) and the third of 12th June, 1945 (Statute Book No. F.91), as amended by Statute Book No. H.206 of 27th June, 1947. Following the course of many other countries, the task of conducting war crimes trials in Holland fell on special courts of law. Five special courts in the first instance, and one Special Court of Cassation were instituted. These courts were formed soon after the liberation of Holland and, after some developments concerning their jurisdiction in the sphere of war crime trials, they have conducted such trials under the Extraordinary Penal Law Decree D.61.

(b) *Rules of the Netherlands East Indies*

Trials of war criminals in the territories belonging to the Netherlands East Indies are regulated by several decrees which were enacted in 1946 by the Lieutenant Governor-General within his constitutional powers.

The Statute Book Decree No. 44 of 1946 contains the definition of war crimes and is known as the " Definition of War Crimes Decree." The Statute Book Decree No. 45 of 1946 lays down rules of substantive law and is known as the " War Crimes Penal Law Decree." The Statute Book Decree No. 46 of 1946 defines the courts competent to conduct war crime trials and is known as the " Legal Competence in Respect of War Crimes Decree." It is an amendment to the Statute Book Decree No. 173 of 1934, which prescribes the rules concerning the competence of the Military Judge sitting in ordinary courts-martials (" Competence of the Military Judge Decree "). The latter courts were made competent for war crime trials in the first instance. Finally, rules of procedure, rules of evidence and other subjects of procedural law are regulated by the Statute Book Decree No. 74 of 1946, known as " War Crimes Penal Procedure Decree."

II. PROVISIONS OF SUBSTANTIVE LAW

2. NETHERLANDS LEGAL APPROACH TO WAR CRIMES TRIALS

The study of the Dutch metropolitan and East Indies legislation shows certain differences between the two in the general legal approach made towards the questions of guilt and punishment of war criminals. It also shows a development in this respect in Dutch metropolitan law and to some extent a hesitant attitude as to the choice to be made between different legal approaches.

As they evolved in various countries, the laws concerning the punishment of war crimes, generally speaking, took two different lines of approach. One was followed by some Continental countries, such as France and Norway, and consisted in treating war crimes as offences of common penal law which were not, at the same time, justified by the laws and customs of war.[1] There the approach was made through the municipal law, as a rule through the system of the Penal Codes concerned. The other was followed by countries such as Great Britain, the U.S.A., Canada and Australia, that is by countries in which the common law is not codified and consists largely of customary rules and judicial precedents. There the approach was made by taking as a direct source of the rules relevant for the punishment of war crimes, those contained in international law and

[1] On the point see Annexes I and II in Volume III of this series.

provided by the laws and customs of war. The approach was one of independence from municipal law, and at the same time one according to which municipal courts exercise jurisdiction over international offences as well as over those of municipal law.

The Netherlands East Indies legislation took this latter course from the outset, whereas the metropolitan Dutch legislation originally took the first course, but underwent a development at the end of which the original course was still preserved to the extent to which the category of punishment is concerned, whereas rules of international law were made applicable in respect of the nature and substance of the acts punishable by Dutch courts as war crimes or crimes against humanity.

(a) *Metropolitan Law*

(i) *Initial Stage*

The field of war crimes was first affected by an Extraordinary Penal Law Decree, enacted on 22nd December, 1943 (Statute Book No. D.61). The purpose of the Decree was to regulate the trial of offences committed in Holland or outside Holland against Dutch citizens or Dutch interests, during the war of 1939–1945. To this end rules were prescribed according to which some effects of the existing penal law provisions were altered so as to enable the imposition of severer penalties than in time of peace, and also so as to permit the punishment of certain offences not adequately covered by the existing municipal law. An analysis of these rules will be found later. The following general rule was laid down in Article 1 of the Decree :

> " The provisions of this Decree are applicable to crimes committed during the time of the present war and before 15th May, 1945 and described in ' . . . (there follows a list of Articles of the Dutch Penal Code and Military Penal Code) . . . ' and in Articles 26 and 27 of this Decree."

Articles 26 and 27 added two new types of offences to those of the common penal law, as will be seen later in more detail. The Articles listed from the Penal Code and Military Penal Code included, among other offences, crimes against the safety of the State, recruitment for foreign service, and failure to answer a call-up for military service. They also included a series of other common law offences if, by committing them, the accused had " used or threatened to use the power, opportunity or means which were given him by the enemy or by the circumstance of the enemy occupation." The offences affected by this special circumstance comprise acts of violence ; destruction of or damage to property by arson, explosion or other means ; acts against public safety or health ; deprivation of liberty ; murder and manslaughter ; ill-treatment and bodily injury ; rape ; corruption by bribery ; misuse of public authority ; theft and pillage ; receiving or buying stolen goods, and the like.

This list of municipal law offences was meant to cover crimes perpetrated by Dutch citizens themselves, and thus to deal with common criminals, quislings and traitors. In the light, however, of the development that took place subsequently, it was also apparently meant to deal with war crimes, which were deemed to be covered by common law provisions.

It would, thus, appear that at this stage, Dutch legislation took the view that war crimes were punishable by Dutch courts insofar as they fell within the scope of Dutch municipal law.

(ii) *Intermediary Stage*

After the liberation of the Netherlands the trial of a German war criminal gave rise to an important decision of the Dutch Special Supreme Court (Special Court of Cassation), which in turn led to the introduction of a new provision in the Extraordinary Penal Law Decree of 22nd December, 1943.

The accused, one Ahlbrecht, was tried as a war criminal before the Special Court at Arnhem and was found guilty of manslaughter according to Article 287 of the Dutch Penal Code. He was sentenced to death on 19th June, 1946. The accused appealed to the Special Court of Cassation and his sentence was quashed on 17th February, 1947 on the ground that there was no legal basis for the trial of war criminals by Dutch courts in the existing municipal law.

The Court of Cassation ascertained(1) that " the Special Court thought that in the case now being considered it had found a legal basis in Article 287 of the Penal Code (manslaughter) read in conjunction with Article 1 . . . and Article 11 of the Extraordinary Penal Law Decree (Statute Book D.61), but the Court of Cassation cannot share this opinion." (Article 11 of the Extraordinary Penal Law Decree increases the maximum punishment prescribed in Article 287 of the Penal Code from 15 years imprisonment to the death penalty). According to the Court of Cassation, " this view proceeds from the mistaken train of thought that international law would give the Netherlands jurisdiction over all members of the enemy forces and officials who committed . . . acts in this country which would be construed as coming under any act described and made punishable in the Netherlands Penal Code." The Court gave two main reasons for its rejection of such an attitude. First, it stressed that it would be " unreasonable to try foreign soldiers and officials according to Netherlands rules which were not written for them, instead of trying them by those rules written for them which govern warfare." The latter were rules of international law, and in this connection the Court of Cassation stated that " it could no longer be said that, from the point of view of international law, the Kingdom of the Netherlands lacked legal competence over enemy war criminals." The court was, however, of the opinion that " as the Netherlands law now stood," the Dutch judge did not " possess legal competence over enemy war criminals." The second reason was that the existing Netherlands penal legislation was " inadequate " for the trial of war criminals. This appeared " from the fact that several extremely serious violations of the laws of war could not even be squeezed under the provisions of the Penal Code."

The Special Court of Cassation reached the conclusion that " the jurisdiction over members of the enemy occupying forces on account of a violation of the rules of war, which the Netherlands derive from international law, has not yet been laid down in any law such as would be necessary to make

(1) Quotations are from text published in " Grotius 1940–1946," Dr. M. W. Mouton, *War Crimes and International Law*, 's-Gravenhage, 1948.

this jurisdiction effective," and that, for this reason, " the Netherlands judge has, for the time being, no jurisdiction over members of the enemy armed forces and enemy organisations attached to same, who violated the laws or customs of war in this country."

It thus appeared that, in the view of the highest judicial authority in the Netherlands in this field, the jurisdiction of Dutch courts in regard to war crimes could not be founded on common penal law provisions, and that consequently no foreigner could be sentenced for war crimes under these provisions. Trials were to be conducted and punishments imposed under the rules of international law, appropriately made effective in Holland by express provisions of municipal law.

(iii) *Introduction of Article 27-a*

As a result, the Minister of Justice submitted a bill to the Parliament which was to meet the points raised by the Court of Cassation and render possible the trial of war criminals under proper legal standards, as understood and defined by the Court. An amendment was suggested to the Minister's draft bill, and the bill so amended become law on 10th July, 1947, and entered into force on 26th July. It introduced a new Article, 27-a, in the Extraordinary Penal Law Decree of 22nd December, 1943.

The new provision made explicitly punishable " war crimes or crimes against humanity " and referred for their definition to the descriptions contained in Article 6 (*b*) and (*c*) of the Charter of the International Military Tribunal at Nuremberg. It was by this link that rules of international law were introduced within the purview of Dutch national jurisdiction. The interesting point, however, is that by doing so the Dutch legislator did not abandon entirely the principle according to which the primary source of law concerning the punishment of war crimes lay in Dutch municipal law. This was done in regard to the category of the punishment to be imposed in each case constituting, under the rules of international law, a war crime or a crime against humanity. The following rule was laid down in this respect : when the crime involved contained " at the same time the elements of an act punishable according to Netherlands Law " the maximum punishment was that provided against that act in Dutch municipal law. If, however, a war crime or a crime against humanity did not, it was further stated in Article 27-a, contain the elements of an act punishable under Dutch municipal law, the punishment to be imposed was that prescribed " for the act with which it (i.e. the war crime or crime against humanity) shows the greatest similarity."(1)

The effect of the answer thus provided by Article 27-a to the points raised by the Special Court of Cassation in regard to the relationship existing between municipal law and international law respectively, and the punishment of war crimes, appears to bear the features of a compromise. From the viewpoint of the prevalence of international law, as stressed by the Court of Cassation, the compromise is apparent in that, insofar as punishment is concerned, Dutch courts are referred to rules of municipal law and are, in this connection, to find a legal basis in the Netherlands penal law provisions.

(1) For text of Art. 27-a, see p. 92,

From the viewpoint of the prevalence of municipal law as maintained in respect of the punishment, the compromise is reached in that the criminal nature of the act or acts tried is not assessed under the standards of Dutch municipal law, but under those of the laws and customs of war as expressed in Article 6 (*b*) and (*c*) of the Nuremberg Charter. In this manner prevalence was in the last resort given to international law, yet in a specific relationship with municipal law.

As a result of the introduction of Article 27-a, Article 1 of the Extraordinary Penal Law Decree was amended so as to include the new provision.

(*b*) *Netherlands East Indies Law*

A different approach was made in the Netherlands East Indies legislation.

Article 1 of the Statute Book Decree No. 44 of 1946 contains a definition of war crimes which was from the outset divorced from the Netherlands East Indies common law. The definition, which will be analysed later, is that war crimes are violations of the laws and customs of war. This concept was illustrated by the enumeration of all the violations contained in the list of war crimes drawn up by the 1919 Commission on Responsibilities,[1] and by the addition of several more violations as understood and formulated by the East Indies legislators. In the definition no reference of any kind was made to Netherlands East Indies common law, so that the Judge is required to decide upon the issue on the basis of international law as reproduced in the definition of the said Decree.

This principle is somewhat tempered, though not in the least altered, by an official " Explanation " No. 15031 of 1946, issued by the Department of Justice in respect of the decrees enacted by the Lieutenant Governor-General for the Netherlands East Indies. Making reference to the above Decree No. 44 of 1946, as well as to the Decrees suspending or modifying the effect of common law provisions in the sphere of war crimes, the " Explanation " contains the following statement :

> " In spite of the reference to the laws and customs of war in the definition of war crimes and except when a deviation from the general Netherlands East Indies Penal Code has been established by decree expressly for war crimes, the Netherlands East Indies existing criminal laws . . . remain in principle applicable to war crimes."

The above statement is meant in the first instance to stress the fact that general principles and rules of the Netherlands East Indies common penal law were valid in the sphere of war crimes to the extent to which they were not departed from in the special war crimes legislation. The latter made many such departures, some instances of which will be found later. But, on the other hand, the above statement reflects also the further feature that, as underlined in the same explanation, " the Judge in assessing the gravity of the war crimes which have been committed will find a guide in the Netherlands East Indies provisions " of common penal law. There is little doubt that this includes the category of punishment to be imposed, as in the case of the metropolitan law. It is, however, significant that by contrast to the

[1] Officially known as Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.

latter, there is no provision which compels the Netherlands East Indies Judge to refer back to common penal law in order to find an offence containing the same or similar elements. This leaves him with far greater freedom than the metropolitan judge in selecting the punishment he finds most appropriate according to the merits of the case, and places him in a position similar in this respect to that of a British or American judge.

(3) *The Definition of a " War Crime "*

(*a*) *Metropolitan Law*

As previously explained, Article 27-a of the Extraordinary Penal Law Decree of 22nd December, 1943, introduced the concept of war crimes in Dutch municipal law. Its relevant passages read as follows :

> " 1. He who during the time of the present war and while in the forces or service of the enemy state is guilty of a war crime or any crime against humanity as defined in Article 6 under (*b*) or (*c*) of the Charter appended to the London Agreement of 8th August, 1945, promulgated in Our Decree of 4th January, 1946 (*Statute Book* No. G.5) shall, if such crime contains at the same time the elements of an act punishable according to Netherlands Law, receive the punishment prescribed for such act.
>
> " 2. If such crime does not at the same time contain the elements of an act punishable according to the Netherlands law, the perpetrator shall receive the punishment prescribed by Netherlands law for the act with which it shows the greatest similarity."

In this manner, the definition of the concept of war crimes in the wider sense, which includes that of crimes against humanity, was achieved by referring to the definitions of the Nuremberg Charter. Article 6 (*b*) and (*c*) of the Charter read :

> " (*b*) *War Crimes* : Namely violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity ;
>
> " (*c*) *Crimes against Humanity* : Namely, murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

By combining the texts of Article 27-a of the Extraordinary Penal Law Decree and Article 6 of the Nuremberg Charter, the concept of war crimes in the wider sense emerges as an offence under international law which is committed by a person in the forces or service of the enemy of the Netherlands, and the punishment of which is determined by the penalties prescribed for identical or similar offences in Dutch common penal law.

Prior to the enactment of Article 27-a another definition of war crimes was given in a decree of 29th May, 1945 (Statute Book No. F.85), which instituted the Netherlands Commission for the investigation of war crimes and laid down the rules under which such investigation was to be conducted. This definition contained elements similar to those deriving from Article 27-a and was couched in the following terms :

> " Under war crimes shall be understood in this Decree facts which constitute crimes considered as such according to Dutch law and which are forbidden by the laws and customs of war and have been committed during the present war by other than Dutchmen or Dutch subjects."

In some respects the above definition was narrower than that of Art. 27-a which took its place in Dutch metropolitan law. One of the differences is that crimes against humanity were not included, as the reference to the laws and customs of war is limited to war crimes in the narrower sense. Another difference is that Article 27-a speaks of persons " in the forces or service of the enemy state ", which may be interpreted so as to include Dutch subjects in addition to foreign nationals. Article 1 of the War Crimes Commission's Decree explicitly excluded Dutch citizens from the range of perpetrators and limited its scope to aliens only. As this definition was replaced by that of Article 27-a, these limitations disappeared with the enactment of Article 27-a.

(*b*) *Netherlands East Indies Law*

As already stressed, in the Netherlands East Indies the definition of war crimes was made independent of the Netherlands East Indies common law and is directly a reproduction of the international law concept. In addition, it is limited to war crimes in the narrower sense.

The definition is given in Article 1 of the Netherlands East Indies (hereinafter referred to as N.E.I.) Statute Book Decree No. 44 of 1946, whose main part runs as follows :

> " Under war crimes are understood acts which constitute a violation of the laws and usages of war committed in time of war by subjects of an enemy power or by foreigners in the service of the enemy."

This definition is followed by an enumeration of all the offences contained in the list of war crimes of the 1919 Commission on Responsibilities, as amplified by the United Nations War Crimes Commission in 1944. Five more offences were added and formulated by the Dutch East Indies legislation itself. The offences from the original 1919 list are as follows :

1. Murder and massacres.
2. Systematic terrorism.(1)
3. Putting hostages to death.
4. Torture of civilians.
5. Deliberate starvation of civilians.
6. Rape.
7. Abduction of girls and women for the purpose of enforced prostitution.

(1) This offence was included under item 1 of the 1919 list, so that the latter had, in its total number of classified offences, one item less than the above N.E.I. list.

8. Deportation of civilians.
9. Internment of civilians under inhuman conditions.
10. Forced labour of civilians in connection with the military operations of the enemy.
11. Usurpation of sovereignty during military occupation.
12. Compulsory enlistment of soldiers among the inhabitants of occupied territory.
13. Attempts to denationalise the inhabitants of occupied territory.
14. Pillage.
15. Confiscation of property.
16. Exaction of illegitimate or of exorbitant contributions and requisitions.
17. Debasement of the currency and issue of spurious currency.
18. Imposition of collective penalties.
19. Wanton devastation and destruction of property.
20. Deliberate bombardment of undefended places.
21. Wanton destruction of religious, charitable, educational and historic buildings and monuments.
22. Destruction of merchant ships and passenger vessels without warning and without provision for the safety of the passengers and crew.
23. Destruction of fishing boats and of relief ships.
24. Deliberate bombardment of hospitals.
25. Attack and destruction of hospital ships.
26. Breach of other rules relating to the Red Cross.
27. Use of deleterious and asphyxiating gases.
28. Use of explosive or expanding bullets and other inhuman appliances.
29. Directions to give no quarter.
30. Ill-treatment of wounded and prisoners of war.
31. Employment of prisoners of war on unauthorised works.
32. Misuse of flags of truce.
33. Poisoning of wells.

The offence which was inserted following the extension of the above list by the United Nations War Crimes Commission [1] is :

34. Indiscriminate mass arrests for the purpose of terrorising the population whether described as taking of hostages or not.

The additional offences introduced by the Netherlands East Indies legislator are as follows :

35. Ill-treatment of interned civilians or prisoners.
36. Carrying out of or causing execution to be carried out in an inhuman way.
37. Refusal of aid or prevention of aid being given to shipwrecked persons.
38. Intentional withholding of medical supplies from civilians.
39. Commission, contrary to the conditions of a truce, of hostile acts or the incitement thereto, and the furnishing of others with information, the opportunity or the means for that purpose.

These additions were made chiefly with a view to dealing with types of offences committed by Japanese war criminals repeatedly and on a large scale.

[1] For the listing of this additional offence see *History of the United Nations War Crimes Commission and the Development of the Laws of War*, London, H.M.S.O., 1948, Chapter VIII, pp. 170–172.

It can be observed that, so far as civilians are concerned, item 35 would appear to be covered by item 8 of the 1919 list of war crimes, which is described as " internment of civilians under inhuman conditions ".

The above enumeration was made only *exempli causa*, thus not limiting the field of war crimes to the cases listed.

4. ADDITIONAL CRIMES IN DUTCH METROPOLITAN LAW

The offences reviewed in the preceding pages include a well-defined set of acts punishable under both Dutch municipal law or international law.

To these recognised offences, the Dutch East Indies legislation has added, as has been seen, several more violations of the laws and customs of war. Two other types of offences were introduced in the common penal law of metropolitan Holland. One deals with exposing other persons to persecution, and the other with certain offences against private property. Although there is, so far, no report that these two classes of offences were considered by Dutch courts in war crime trials, they are worth noting since it would be possible for Dutch courts to hold the view that certain war crimes are identical or similar to them, in connection with the rule concerning the selection of the punishment which was previously explained with reference to Article 27-a of the Extraordinary Penal Law Decree D.61.

(*a*) *Exposing to persecution*

Article 26 of the Extraordinary Penal Law Decree of 22nd December, 1943, makes punishable any person

> " who during the time of the present war intentionally exposes another person to being tracked down, to persecution, to loss or restriction of liberty, or to any penalty or measure by or on behalf of the enemy."

Quislings or traitors, who assisted the enemy in a private or official capacity, are treated as enemies. Punishments vary according to the consequences of the exposition to any of the acts enumerated. In case of loss of liberty for more than a month, the penalty is imprisonment not exceeding 10 years. If the offence has resulted in " severe bodily injury," the penalty is imprisonment not exceeding 20 years, and may be increased to life imprisonment. If the result is death or if the victim is missing and presumed dead, the perpetrator may be punished with imprisonment up to 20 years or for life, or with the capital punishment, death. In all other cases the punishment is imprisonment not exceeding 5 years.

At the same time Article 26 excludes from punishment persons who had exposed other persons to any act of persecution indicated, " with the intention of carrying out instructions lawfully given " during the war by the Queen of the Netherlands or the Dutch Government on her behalf, or " serving the general interest ". Decision on these points is left to the discretion of the courts.

The offence of exposing someone to an act of persecution, as defined in the above provision, includes acts of denunciation. For what the above Article 26 calls " exposing " someone to " being tracked down, persecution, loss or restriction of liberty, or any penalty or measure " against the victim, is and in fact was in most cases achieved by means of denunciation.

The place of denunciation in the field of war crimes was studied by the United Nations War Crimes Commission. Reports submitted to it by member-governments, including Holland, were to the effect that in many cases civilians had fallen victims of war crimes as a direct result of denunciation that they were hostile to members of the Nazi occupying authorities or to Nazi ideology or that they were Jews. As a consequence such civilians were subjected to persecutions of all kinds, and invariably without any other guilt than that of being allegedly anti-Nazis, or Jews. After thorough study, the War Crimes Commission reached the decision that if it could be proved that, by giving information, the denunciator had become " a party to or accomplice in " the act of persecution which had followed his denunciation, he was guilty of a war crime. According to the Commission, this was the case if the informer knew that his denunciation would lead to a war crime, and either intended to bring about this consequence or was recklessly indifferent with regard to it.

A similar and legally even stricter solution was adopted in France. By an Ordinance of 31st January, 1944, concerning the Suppression of Acts of Denunciation, the fact of denouncing someone to enemy or quisling authorities in regard to facts and circumstances determined by the Ordinance [1] was made a crime punishable in itself, irrespective of whether the act of denunciation was or was not followed by the commission of a war crime.

The above Dutch provision is thus another contribution to the solution of this type of case. It should, however, be observed that, though including acts of denunciation, it is not limited to them. The formula of Article 26 refers to persecutions which have resulted from any act, and not only those of denunciation. Such are, for instance, cases in which the offender has acted by giving advice as to the treatment to be imposed upon a group or class of inhabitants, such as Jews, without necessarily denouncing any particular individual of that group or class. Such are, further, cases where measures of persecution were introduced by a person who has not himself taken part in their imposition. One could easily multiply other examples in which persons were " exposed " to persecution without being denounced.

(*b*) *Offences against property.*

Article 27 of the Extraordinary Penal Law Decree of 22nd December, 1943, provides as follows :

> " He who during the time of the present war intentionally makes or threatens to make use of the power, opportunity or means, offered him by the enemy or by the fact of the enemy occupation, unlawfully to injure another in his possessions or unlawfully to benefit himself or another, shall be punished with imprisonment not exceeding 15 years ".

As can be seen the offence consists in " unlawfully injuring another in his possessions " or in " unlawfully benefiting " oneself or somebody else at the expense of a third person. It thus adds up to other offences against property, such as physical damage, theft or pillage, which are all covered by both Dutch municipal law and international law, and is a wider form which includes any mode of injury or of misappropriation of property that does not

[1] See Volume VII of this Series pp. 71–72.

fall within any of the existing categories. Its main qualification is that it is committed by abusing or misusing power, means or opportunities, offered by the enemy or the fact of its occupation.

5. JURISDICTION OVER OFFENCES COMMITTED OUTSIDE DUTCH TERRITORY

Both metropolitan and Netherlands East Indies law lay down the principle that their provisions regarding war crimes are applicable to persons who had committed their crime not only in Dutch territory, but also abroad, on foreign territory.

Article 4 of the Extraordinary Penal Law Decree of 22nd December, 1943, for metropolitan Holland, prescribes :

> " The Netherlands penal law applies to any person who, outside the realm in Europe, is or has been guilty of :
>
> (1) A crime described in . . . Articles 26, 27, 27-a . . . if the act has been committed against or in connection with a Dutch citizen or a Netherlands legal person or if any Netherlands interest is or could be harmed thereby ".

This includes war crimes and crimes against humanity as defined in Article 27-a of the Decree. The above provision completes the definition of war crimes as we saw it in connection with Article 27-a and Article 6 of the Nuremberg Charter. The complementary element consists in that it is specified that the jurisdiction of Dutch courts is restricted to cases in which the victims of war crimes are Dutch citizens or the interests harmed are those of the Netherlands State.

Article 3 of the N.E.I. War Crimes Penal Law Decree (Statute Book No. 45 of 1946) runs as follows :

> " The Netherlands East Indies Statutory Penal Provisions with regard to war crimes are applicable irrespective of the place where the crime is committed."

6. PROVISIONS REGARDING ATTEMPTS, COMPLICITY AND CONSPIRACY

Special provisions of both metropolitan and Netherlands East Indies law were introduced in order to alter the effects of general penal law regarding attempts, complicity and conspiracy in the sphere of war crimes.

In metropolitan law this was done in respect of all the crimes punishable under Article 1 of the Extraordinary Penal Law Decree of 22nd December, 1943, as amended in July, 1947, by the introduction of Article 27-a. Therefore, in addition to war crimes and crimes against humanity, which came within the terms of Article 1 after the amendment, it applies also to the other offences covered by that Article.

Article 12 of the Decree of 22nd December, 1943, lays down the rule that attempts to commit or complicity in a crime punishable under Article 1 are liable to the same penalties as those prescribed for the crime itself. Decision on whether the same penalty will be imposed is left to the discretion of the courts.

This has altered the effects of Articles 45 and 49 of the Penal Code and of Articles 49 and 50 of the Military Penal Code. According to the former the

maximum penalty for attempt and complicity is reduced by one-third of the punishment prescribed for the crime. Where the punishment is imprisonment for life the maximum is 15 years of imprisonment. The Military Penal Code fixes the same maximum for attempts at or complicity in a crime punishable with death.

Article 15 of the Decree of 22nd December, 1943, provides that " conspiracy in any of the crimes mentioned in Article 1 shall be punished equally with the crime ". It thus made, in case of conspiracy, the imposition of the same penalty mandatory. A rule was added to the effect that a conspirator who notifies the authorities of the existence of the conspiracy before it is known to them, so as to make possible the prevention of the crime, will not be prosecuted. This does not, however, apply to the chief instigator of the conspiracy.

The effect of these provisions on war crimes is that, in case of attempt, complicity or conspiracy, the judge may, in assessing the punishment to be applied under the provisions of the Penal Code as prescribed by Article 27-a of the Extraordinary Penal Law Decree, impose the maximum penalty provided against the crime itself.

Similar consequences were brought about in the Netherlands East Indies legislation. Article 5 of the Statute Book Decree No. 45 of 1946 reads as follows :

> "An attempt at or complicity and conspiracy in a war crime are equally punishable with the crime itself."

Conspiracy is defined in Article 88 of the N.E.I. Penal Code as a situation where " two or more persons have agreed to commit a crime ".

The equal punishment of individuals guilty of attempt, complicity or conspiracy is added to the rule regarding the punishment of perpetrators of a war crime, which is settled under the general terms of Article 55 of the N.E.I. Penal Code. In addition to individuals who actually commit the crime, the latter treats as perpetrators those " who cause it to be committed or are accessories to it ", and also those " who by gifts, promises, misuse of authority or position, force, threat or deceit or by the provision of opportunity, means or information, deliberately provoke " the crime. By contrast to this, Article 56 of the N.E.I. Penal Code restricts the concept of accomplice to " those who intentionally assist in the crime " or who " intentionally provide the opportunity, means or information for the commission of the crime".

Article 86 of the N.E.I. Penal Code, which was made applicable to war crimes by the N.E.I. Statute Book Decree No. 45 of 1946, provides that " where a crime in general or a crime in particular is mentioned " in the N.E.I. Penal Code, " complicity in an attempt to commit that crime is included provided that the contrary does not result from any other provision " of the Penal Code.

7. SUPERIOR ORDERS

The generally accepted rule in contemporary international law, that the fact of having committed a war crime upon superior orders does not in itself relieve the perpetrator from penal responsibility, was adopted in the N.E.I. Statute Book Decree No. 45 of 1946.

Article 1 of the Decree suspended the effect of Article 51 of the N.E.I. Penal Code in the field of war crimes. The latter provides that, as a rule, a subordinate is not punishable for a crime committed in the execution of the official order issued by the competent authority. By making this rule inoperative in the sphere of war crimes, the N.E.I. legislator removed what he considered to be an obstacle to holding a subordinate responsible.

The issue in the metropolitan law is not so clearly defined. In the decision of the Special Court of Cassation of 17th February, 1947, previously referred to, the Court included in its recommendations regarding legislative measures which, in its opinion, were required in order to provide a legal basis for the trial of war criminals, the adoption of the " provision regarding Superior Orders which was accepted in Article 8 of the Charter belonging to the London Agreement ". The latter reads as follows :

> " The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

In the law of 10th July, 1947, by which the Extraordinary Penal Law Decree of 22nd December, 1943 was amended in order to make possible the trial of war criminals on the legal basis recommended by the Special Court of Cassation, no provision was inserted regarding superior orders, and the above recommendation was thus not followed up.

The position with superior orders in Dutch common penal law is the same as in the N.E.I. Penal Code. Article 43 of the metropolitan Penal Code provides as follows :

> " Not punishable is he who commits an act in the execution of an official order given him by the competent authority.
>
> "An official order given without competence thereto does not remove the liability to punishment, unless it was regarded by the subordinate in all good faith as having been given competently and obeying it came within his province as a subordinate."

The fact that this provision was not suspended in the field of war crimes, as was the case in the N.E.I. legislation, as well as the reasonable assumption that the metropolitan legislator must have taken into consideration the Supreme Court's recommendation before passing the law of 10th July, 1947, leaves room for at least two possible interpretations. One would be that the Dutch legislator did not agree with the rule of Article 8 of the Nuremberg Charter, and for this reason maintained Article 43 of the Penal Code effective. The other possible interpretation, which seems more likely to correspond with the Dutch legislator's views, is that the latter did not think it advisable to alter a principle of common penal law for the sake of war crime trials, which are limited in time and scope, and thought at the same time that the rule of Article 43 was elastic enough to achieve the same consequences as Article 8 of the Nuremberg Charter.

It will indeed be noticed that the rule of Article 43 revolves around the concept of *competent* authority and *competent* order. A subordinate is not held responsible on condition that he had acted upon an " official " order

of the " competent " authority. On the other hand, liability to punishment is not removed if the " official order was given without competence " unless the subordinate had acted in " all good faith " as to the competence involved. The concept, as can be seen, remains to be defined, and therefore lends itself to various ways of interpretation on the part of the courts. One of the possible interpretations would be to hold the view that no authority is competent to issue orders for the commission of crimes, and that, consequently, any such order is " incompetent ". That would, however, still leave open the question of the degree of responsibility of the subordinate, as it does under Article 8 of the Nuremberg Charter which allows for mitigation of punishment according to the accused's *mens rea.* Article 43 of the Dutch Penal Code stresses this important element by taking into account the existence or absence of the subordinate's " good faith " as to whether or not the order originated from the " competent " authority.

8. RESPONSIBILITY OF PERSONS IN AUTHORITY

Connected with the effect of the plea of superior orders upon the guilt of subordinates, is the question of the responsibility of the superiors who issued the orders.

In Dutch metropolitan law the liability of superiors falls under the general terms of Article 47 of the Dutch Penal Code, which provides the following :

> "As perpetrators of a punishable act (the following) shall be punished :
>
> (1) Those who commit the act, *cause it to be committed,* or are accessories to it ".(1)

The same provision is contained in Article 55 of the N.E.I. Penal Code. Whereas the terms " cause it to be committed " clearly cover the case of a superior giving orders upon which a crime is perpetrated, it was thought advisable to introduce specific rules for cases in which superiors were implicated otherwise than by issuing express orders. These latter cases were those of persons in authority who had neglected to undertake measures which would have prevented or reduced the possibilities for a subordinate to perpetrate a crime, or who had knowingly tolerated such crimes to be committed.

In Dutch metropolitan law, this question was solved in Article 27-a paragraph 3 of the Extraordinary Penal Law Decree of 22nd December, 1943. The latter prescribes that " any superior who deliberately permits a subordinate to be guilty " of a war crime or crime against humanity is liable to the same punishment as the perpetrator.

A similar provision is contained in Article 9 of the N.E.I. Statute Book Decree No. 45 of 1946, which reads :

> " He whose subordinate has committed a war crime shall be equally punishable for that war crime, if he has tolerated its commission by his subordinate whilst knowing, or at least must have reasonably supposed, that it was being or would be committed."

(1) Italics are inserted.

A law of 1947 (N.E.I. Statute Book No. 16) amended the above rule by the insertion of an additional provision extending the effect of Article 9 to superiors " not being subjects of a hostile power or foreigners in the service of the enemy," that is to Dutch citizens or subjects of the Netherlands East Indies. This extension made the rule applicable to traitors and quislings, in addition to war criminals proper.

(The relevant general rule as laid down by Article 6, last paragraph, of the Nuremberg Charter was the following :

> " Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit . . . crimes are responsible for all acts performed by any person in execution of such plan.")

9. RESPONSIBILITY OF CRIMINAL GROUPS

Article 10 of the N.E.I. Statute Book Decree No. 45 of 1946 contains a special rule regarding responsibility of a group of individuals involved in the commission of war crimes. It reads as follows :

> " 1. If a war crime is committed within the framework of the activities of a group of persons in such a way that the crime can be ascribed to that group as a whole, the crime shall be considered to have been committed by that group, and criminal proceedings taken against and sentences passed on all members of that group.
>
> " 2. No penalty shall be imposed on the member for whom it is proved that he had taken no part in the commission of the war crime."

This provision deals with what became known, under the rules of the Nuremberg Charter, as " criminal groups " or " organisations."

Among the provisions defining the jurisdiction of the International Military Tribunal at Nuremberg, Article 9 of the Charter prescribed the following :

> " At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation."

The effects of such a declaration was defined by Article 10 of the Charter. According to it, one of the effects is that a member of a group declared criminal may be brought to trial " for membership " before national, military or occupation courts—the latter being those in operation in Germany. Another effect is that in any such trial, " the criminal nature of the group or organisation " so declared by the International Tribunal " is considered proved and shall not be questioned."

The solution supplied by the N.E.I. legislation, is not identical with that of the Nuremberg Charter. The latter implies a declaration of criminality of the group prior to the trial of its members, which declaration is at the same time the limit of the International Tribunal's jurisdiction in the sphere of criminal groups. The Tribunal does not adjudicate on the individual guilt of the members and does not pronounce sentences on them. Under

the rules of the N.E.I. Decree No. 45 no declaration of criminality precedes the trial of members of the group. The trial is conducted as soon as " a war crime," which means even a single war crime committed only once by the group " can be ascribed to the group as a whole." The effect of such a finding is in one respect, however, similar to that of a declaration under the Nuremberg Charter. All members may be sentenced if one or more have been proved to have committed the crime. The exception concerns members for whom it was " proved that they had taken no part in the crime." This latter solution coincides with the general ruling made by the International Military Tribunal at Nuremberg concerning the manner in which subsequent courts are deemed to estimate the personal responsibility and guilt of individual members of a criminal group, and according to which innocent members are not to be punished.(1)

10. DEFENCES OF THE ACCUSED

The N.E.I. War Crimes Penal Law Decree (Statute Book No. 45 of 1946) explicitly maintained in force several provisions of the N.E.I. Penal Code dealing with certain circumstances in which the perpetrator of a crime is considered not responsible and guilty. These circumstances include cases such as mental deficiency and self-defence, which have similar effects in penal laws of all civilised nations. One of these circumstances, however, deserves special attention as it may and in fact did intervene in war crime trials. It concerns war crimes committed under duress or by necessity, in which the perpetrator had acted under compulsion.

Article 40 of the Dutch Penal Code provides as follows :

> " Not punishable is he who commits an act to which he has been forced by necessity."

Another provision is contained in Article 48 of the N.E.I. Penal Code, which provides :

> " Is not punishable he who commits a crime under duress."

The above provisions are relevant in cases of a crime being committed upon the orders of a superior or as member of a criminal group, and may thus intervene as a factor of exoneration of guilt in the above circumstances.

11. PUNISHMENTS.

(a) *Metropolitan Law*

One of the main effects of the Extraordinary Penal Law Decree of 22nd December, 1943 was to increase the penalties of common law as applicable to the offences covered by its Article 1. As will be recalled, the jurisdiction over war crimes was determined by Article 27-a so as to make them punishable with the penalties prescribed for common law offences. The maximum penalties to be imposed were the maxima prescribed for offences with whose elements a war crime either coincided or else showed the greatest similarity.

(1) For details on this point, as well as on the rules, concerning criminal organisations and punishment of their members, see *History of the U.N.W.C.C. and the Development of the Laws of War*, H.M. Stationery Office, London, 1948, pp. 289–343, and the notes to the *Greifelt Trial*, Volume XIII of this series.

Article 11 of the Extraordinary Penal Law Decree increased the penalties of common law in the following terms :

" He who is guilty of a crime to which the provisions of this Decree apply may be sentenced :

(1) To the death penalty, imprisonment for life or imprisonment not exceeding twenty years if a penalty of fifteen years imprisonment is prescribed in the Penal Code for that crime ;

(2) To imprisonment for life or imprisonment not exceeding twenty years if a penalty of less than fifteen years but exceeding seven years and six months imprisonment is prescribed in the Penal Code for that crime ;

(3) To double the penalty if a penalty not exceeding seven years and six months but exceeding two years and six months imprisonment is prescribed in the Penal Code for that crime ;

(4) To imprisonment not exceeding five years if a penalty of two years and six months or less or detention is prescribed in the Penal Code for that crime."

The Judge is empowered to impose, in addition or in place of other penalties, a fine not exceeding 100,000 guilders. Where the accused has enriched himself by misusing circumstances, the fine may be increased to the treble amount of the sum with which the accused had enriched himself.

(b) *Netherlands East Indies Law*

In accordance with the legal approach made in the Netherlands East Indies towards war crimes, as a result of which the punishment of the latter was not, in the letter of the law, made dependant on common law provisions. Article 4 of the N.E.I. War Crimes Penal Law Decree (Statute Book No. 45 of 1946) prescribed in a general manner the punishments which the courts were allowed to impose. It reads as follows :

" He who has been guilty of a war crime shall be punished with the death penalty, or imprisonment for life, or imprisonment for not less than 1 day, and not more than 20 years."

It was left to the discretion of the courts to decide which of these punishments was to be imposed in each case.

III. PROVISIONS OF PROCEDURAL LAW

Rules concerning Dutch courts for war crimes trials, their composition, jurisdiction and procedure, are divided into the same two sets as provisions of substantive law. There are rules for metropolitan Holland and rules for the Netherlands East Indies. As they do not follow an identical pattern, they are reviewed separately. One more reason for treating them separately lies in the fact that the metropolitan law is mainly based on the existing penal law provisions, with comparatively few departures introduced by the decrees previously mentioned, whereas in the Netherlands East Indies more substantial and numerous alterations were made. For this reason the latter have had to be commented upon more fully and required more space than the metropolitan law.

12. METROPOLITAN LAW

(a) *Courts trying alleged War Criminals*

Under the two decrees of 22nd December, 1943 (Statute Book No. D.62 and 63) and the Decree of 12th June, 1945 (Statute Book No. F.91) as amended by Statute Book No. H.206 of 27th June, 1947, referred to in the beginning of this Annex, several special courts were instituted for trials in the first instance and one Special Court of Cassation for appeals thereto. These courts were set up with jurisdiction over the offences covered by the Extraordinary Penal Law Decree D.61 of 22nd December, 1943. As a result, and after the question of war crimes was cleared by the insertion of Article 27-a, these courts became competent to try war criminals in addition to individuals guilty of other offences under the terms of Article 1 of Decree D.61.

(b) *Special Courts in the First Instance*

Number and Composition

A total of 5 courts in the first instance were set up, one in each of the following places : Amsterdam, Leeuwarden, the Hague, Arnhem and 's-Hertogenbosch.

Each court is composed of three judges, two of whom are civil judges and the third a military judge. Originally they were composed of 5 members.

Every court has, as a rule, several panels, in which case every panel has three judges. Some of the panels are located outside the headquarters of the court, in view of the number of trials which are to be conducted locally. Thus, the Leeuwarden Special Court has one panel in Groningen and another in Assen.

Each court or panel, as the case may be, has prosecutors and clerks. Prosecutors of courts in the first instance are subordinated to the Prosecutor of the Special Court of Cassation in all matters regarding the implementation of the law.

Rules of Procedure and Evidence

The rules of procedure and evidence are, in principle, those of the common law, but some departures have been made in regard to the exceptional type of the trials. The rights of the accused are fully protected. He has the right to choose defence counsel, and one is appointed by the President of the Court if the accused does not make such choice. The indictment must be made known to the accused at least 10 days before the trial, and he has the right to be acquainted with the tenor of all the documents concerning the case, as well as to call witnesses and experts.

The relative competence of the court over persons to be tried is determined according to the area in which the accused resides or is kept in custody. The latter is generally kept in custody in the area in which he had committed the alleged crime.

(c) *The Special Court of Cassation*

Composition

The Special Court of Cassation in the Hague has four panels, two with four civil judges and one military judge, and two with two civil and one military judge.

Jurisdiction

The court is called to hear any appeal in cassation made against decisions of the courts in the first instance. It quashes sentences of the first courts in the following cases :

(1) In case of neglect of procedural provisions.

(2) In case of wrongful application or violation of the law. Wrongful application of the law comprises the imposition of a punishment which did not correspond to the gravity of the crime, to the circumstances in which it had been committed, or to the person and the personal circumstances of the defendant.

3. Where the competence of the first court was transgressed.

Right of Appeal in Cassation

Appeal in cassation may be made by the prosecutor of the Special Court in the first instance without restrictions, and by the accused only in one of the following cases :

(a) when the punishment is death or imprisonment exceeding 6 years ;

(b) if the sentence was pronounced after the case was forwarded to a Special Court by the Special Court of Cassation ;

(c) if the prosecution has made appeal in cassation.

In all other cases the accused must have the permission of the Special Court in the first instance to make appeal in cassation.

Procedure and Decisions

The court can hear the accused in person. In practice the accused always appears in person.

The Court may decide on further investigation, or it may quash the judgment of the first court.

Further investigation is decided upon whenever the court finds that more data is required concerning the circumstances in which the crime was committed, or concerning the person of the accused. In case of doubt, it may order medical examination of the accused with regard to his mental condition. Cases for further investigation are referred back to the first court which pronounced the sentence.

As already mentioned sentences are quashed in case of neglect of procedural provisions, of wrongful application or violation of substantive law, and of transgression of judicial competence. In the last two types of cases the Court of Cassation pronounces a new sentence itself, and in the first type it forwards the case either to the same first court or to any other Special Court in the first instance it designates.

(d) *Re-trial*

Re-trial of a case finally concluded takes place when new facts become known which, if they were known before the judgment, would have led to acquittal, dismissal of the case, or to application of a lighter penal provision.

(e) *Pardon*

The crown can grant a pardon. The court which pronounced the final sentence advises as to whether pardon should be granted.

13. NETHERLANDS EAST INDIES LAW

(a) *Courts trying alleged war criminals*

In the Netherlands East Indies jurisdiction over war crimes trials was given to the existing military courts, that is to courts-martial.

This was, technically, achieved by amending N.E.I. Statute Book No. 173 of 1934 concerning the " Legal Competence of the Military Judge." The amendments were made by the Lieutenant Governor-General's Decree No. 46 of 1946. The Jurisdiction of the Military Judge, which is regulated by Article 3 of Law No. 173, was extended to cover " war crimes, where or by whom committed." These in turn fall under the terms of Article 10 of N.E.I. Statute Book No. 173 which prescribes that " punishable acts committed by those who come under the jurisdiction of the military judge " are dealt with by " courts-martial."

The types of courts-martial involved are determined in the " Revised Military Legal Procedure " (N.E.I. Statute Book No. 112, 1945, as amended by N.E.I. Statute Book No. 126) whose general provisions were made applicable to war crime trials with certain amendments by Statute Book No. 47 of 1946.

There are ordinary courts-martial, field general courts-martial, and temporary courts-martial. The latter appear to be in practice the only ones to be used for war crime trials.

Ordinary Courts-Martial

Ordinary Courts-Martial are the regular Dutch East Indies military courts. They are set up by the Governor-General, in the number and places which he determines.

An ordinary court-martial is composed of a civil lawyer as president and four officers appointed by the commander of the garrison where the court is established. The officers must hold a rank above that of a 2nd lieutenant and must have reached 25 years of age. They remain in office, as a rule, for not less than one year. The president is appointed by the Governor-General and must also have reached the age of 25.

In view of the fact that many war crimes in the Netherlands East Indies during the war 1941–1945, were committed against the victims of other Allied nations, special provision was made to the effect that Allied officers were eligible as members of the courts in cases concerning victims of their nationality. Appointments are made by the Director of Justice for the

Netherlands East Indies. Similar special authority was given for the appointment of regular members from among the ranks of a given service, such as Air Force, Navy or Fleet Air Arm, in particular cases requiring the functions of an officer from the service affected.

Every ordinary court-martial is assisted by a public prosecutor, who is a civil lawyer above the age of 25. He is appointed by the Governor-General. Each court has also a secretary, who is an officer appointed by the garrison commander concerned, and a suitable number of clerks and other personnel.

Field General Courts-Martial

Field general courts-martial are established only in time of war. They are set up either by the Governor-General or by the commanding officer designated by him. They may be appointed for the duration of the war, or for a certain length of time, or for a specific case, as the needs of the service may call.

They consist of one president and two members, all officers, including the president. The latter must be a senior officer. President and members may be drawn from whatever unit or army service.

Temporary Courts-Martial

Temporary Courts-martial are appointed in territory where a state of siege has been declared, and their functions are limited to that period. They also consist of one president and two members, all officers. The president may be a junior officer if it is not possible to appoint a senior officer. For the rest, the above-mentioned rules concerning ordinary courts-martial apply also to temporary courts-martial.

(b) *Rules of Procedure*

The rules of procedure concerning the hearings before the court and its delivery of the judgment are similar for all three types of courts-martial. They follow the general principles of modern penal procedure as applied by continental countries.

After the proceedings concerning evidence are completed, the prosecution is entitled to alter such charges as it finds necessary in face of the facts and evidence produced. It is in particular allowed to bring forward additional charges likely to warrant severer punishment.

These proceedings are followed by a final address of the prosecutor, who is called upon to state specifically the sentence which should, in his opinion, be pronounced. The accused is entitled to reply to the prosecutor's address in person or through counsel. If the prosecutor wishes to make further statements in connection with the defendant's reply, he is entitled to do so, but the accused is in every case allowed the last word.

(c) *Rules of evidence*

Rules of evidence are, according to Article 73 of the Statute Book Decree No. 74 of 1946, those of common law, with certain departures provided specifically for courts-martial.

Among those relevant in war crimes trials, comes the rule that the judge may recognise as legal evidence " all documents produced at the sitting and all statements wherever made." He is allowed to " ascribe to them such conclusive strength as he thinks they may possess, if, in his opinion, the particular circumstances under which the war crime was committed or in which a piece of evidence would have to be furnished, would form an obstacle to the further production of evidence or would result in an inadmissible delay in the termination of the case, should this further evidence have to be produced."

(*d*) *Rights of the Accused*

In addition to his rights deriving from the rules of procedure reviewed above, the accused enjoys two more specific rights.

He has the right to be represented by and choose counsel for defence. If he declines to designate counsel, one is assigned to him by the president of the court. The accused is, however, entitled to make a choice at any time after a counsel has been assigned to him in which case the counsel of his choice takes the place of the one assigned. With the president's permission several counsel may appear. The law defines who may be chosen or assigned as counsel and limits the choice to the following classes : barristers practising in the Netherlands East Indies ; officers of the Army and Navy not serving on the court as members or secretaries ; retired officers of the Army or Navy ; or any other person who has been given permission to appear as counsel by the president of the court.

Another right of the accused is to challenge any member of the court on the ground of lack of impartiality. Article 38 of Statute Book Decree No. 74 of 1946 reads as follows :

> " If a defendant has any reason to think that the president or one of the members of a court-martial might not be a suitable judge in his case on the grounds of hatred, enmity or for any other reason, he shall be allowed to place the reason for his objection with due respect before the court-martial and request a challenge."

The decision on the challenge is taken at the discretion of the court and in the absence of the member involved. When the challenge is admitted, the member is replaced by a substitute.

(e) *The Judgment*

The contents of the judgment to be delivered by a court-martial are determined by Article 79 of the Statute Book Decree No. 74 of 1946. Every judgment must contain :

(1) The name and surname of the accused, his age, place of birth, office held by him and his regimental roll number ;

(2) The reasons for the verdict and the description of the offence, together with a statement on the circumstances which, in accordance with the law, give rise to a severer or lighter punishment being awarded.

(3) The provisions of the law applied and the punishment imposed.

(4) The names of the judges and the secretary, and also the reasons which may have made it impossible for one or more judges to be present at the promulgation of the sentence or to sign the judgment.

(5) Decisions concerning all the accused implicated in the same case and sentenced at the same time are to be given in one and the same judgment.

Every judgment must be pronounced within 14 days of the close of the proceedings, and this must be shown in the text of the judgment.

The court is entitled to acquit the accused under the following rule (Article 75) of the Decree :

> " If it has not been convinced by the legal evidence that the act with which the accused is charged was committed by him, or holds the view that the act or acts are not punishable, or considers on other grounds that no right to criminal proceedings exists in the case."

(f) Confirmation of the Sentence

In virtue of the amendments made in respect of war crimes within the body of the N.E.I. common penal law, there is no appeal against judgments of the N.E.I. courts-martial. Other safeguards were, however, prescribed.

Judgments of courts-martial are subject to a confirmation of the sentence by the commanding general of the area concerned.

Every judgment must be presented to the commanding general for a " fiat " of execution. In case of death penalty the commanding general is to refer the matter to the Governor-General for decision as to whether pardon should be granted. In time of war, however, if contact with the Governor-General is completely severed, the commanding general may give the fiat of execution on his own responsibility, if he considers it imperative.

The commanding general may disagree with the sentence and decline the fiat of execution. The case is then referred back to the court for re-examination, and the court may alter the sentence. If the court decides to maintain its sentence, the commanding general is entitled to suspend its execution and must refer the matter to the Governor-General. In case of agreement with the court, the Governor gives instruction to the Commanding General to grant the fiat of execution, in which case the latter is under the obligation to do so. In case of agreement with the commanding general, the Governor refers the case to the Supreme Military Court for final decision.

(g) Petition for Mercy and Pardon

Against judgments of any courts-martial the accused is entitled to lodge a petition for mercy, including cases in which the sentence is imprisonment for a term or for life.

The petition is considered by the Supreme Court, and has the effect of postponing the execution of the sentence. It is to be submitted within eight days of the promulgation of the sentence. Advice on whether the petition should be accepted or rejected is given jointly by the courts-martial,

the prosecutor and the Supreme Court. In the following cases advice is given by the Supreme Court only after hearing the Attorney-General :

(1) If the penalty is death ;

(2) If the court considers that important questions of policy in regard to prosecutions are at stake ;

(3) If the Attorney-General has previously informed the court of his desire to be heard in the case.

Exceptionally, in time of war, a petition regarding a sentence other than death, does not have the effect of postponing the execution of the sentence.

Each case is finally decided by the Governor-General, who grants or rejects the petition for pardon after consideration of the opinion of the Supreme Court.

When the penalty is death and the accused has not made petition for mercy, the execution of the sentence is suspended automatically to enable the Governor-General to decide on whether pardon should be granted.

(87288) Wt. P.2320 3/49 Hw. PRINTED IN GREAT BRITAIN

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