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TRIAL BY MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS

of

EBERHARD VON MACKENSEN

and

KURT MAELZER

on

30th NOVEMBER, 1946.

ELEVENTH DAY

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PROCEEDINGS

of a

MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS

held at

THE UNIVERSITY OF ROME

on

30TH NOVEMBER, 1946.

upon the trial

of

EBERHARD von MACKENSEN and KURT MAELZER, German  
Nationals in the charge of the Commander,  
56 Rest and Transit Camp.

ORDERS BY:

LIEUTENANT GENERAL SIR JOHN HARDING.

PRESIDENT

MAJOR GENERAL I.S.O. PLAYFAIR, C.B., D.S.O., M.C.

MEMBERS

LIEUTENANT COLONEL B.C. SEBAG-MONTEFIORE

Durham Light Infantry.

LIEUTENANT COLONEL D.K. HAYMAN

Lincolns.

LIEUTENANT COLONEL R.W. TYRRELL

Oxf. and Bucks.

LIEUTENANT COLONEL P.S. KEEN, M.B.E.

Devons.

JUDGE ADVOCATE

C.L. STIRLING, Esq., C.B.E., K.C., Deputy Judge Advocate General to the Forces.



ELEVENTH DAY

Saturday, 30th November, 1946.

(At 1000 hours the court re-assembles pursuant to adjournment, the same President, Members and Judge Advocate being present)

(The accused are again brought before the court)

SUMMING - UP

THE JUDGE ADVOCATE: May it please the court. In this trial, like any other military court for the trial of war criminals, it is the responsibility of the prosecution to establish beyond all reasonable doubt two main propositions, firstly that the crime set out in the charge-sheet has been proved and secondly that one or other or both of the accused committed it. Let me first of all remind you of the charge: "Committing a war crime in that the accused at Rome, Italy, about the 24th March 1944, in violation of the laws and usages of war, were concerned in the killing as a reprisal of some 335 Italian Nationals in the Ardeatine Caves".

Let me again at the outset of my remarks remind you of the accused. Von Mackensen is a soldier of distinction with a long record of service to his country and I think it my duty to put him before you as a man of probity and rectitude, as far as his reputation in the German Army is concerned. He is equally a man who you will have to consider when you come to dealing with credibility on the basis that unless there is something to the contrary his word should ordinarily be accepted on oath. The other defendant, Maelsner, also has a long record of service to his country and I again feel that I should put forward that he also must have held a high reputation for probity and rectitude in the army in which he served. Mackensen is now, I think, about fifty-seven years of age and Maelsner is a little younger.

At all material times General Mackensen was commanding the 14th Army and fighting a battle of great importance to the German Reich. He had within his territory the open city of Rome and I think you will accept that it was only right that he should wish to have there a population which was passive and not likely to give trouble behind his lines. Maelsner was, as you know, the military commandant of Rome at all material times and the chain of military command seems to have been Maelsner, Von Mackensen, Kesselring. Kesselring was not very far away; he was operating from his headquarters in the vicinity.

I think, gentlemen, I will deal first of all with the question of whether the charge as set out has been proved under the first heading of whether the crime set out there has been committed. You appreciate that there had been certain incidents in Rome; they have been detailed to you and they amount, I think, to some four or five incidents all directed against the German military command, and I think we all agree that those who were guilty of those attacks deserved punishment. It is for you to consider whether in a large city like Rome you have had a picture of a real serious attempt to put the German command at defiance. Do you think that the stories you have heard about these attacks amount to very much and had they laid a foundation which called for a very severe and harsh reprisal? Those are matters you will have to consider, but it is fair, I have no doubt, to say that from a small flame a conflagration may arise. As I understand it, it has been suggested to you that there had been incidents which had been dealt with in quite a humane way, by imposing of curfew, stopping of bicycles and matters of that kind, and so, gentlemen, we come to the 23rd March 1944.

What exactly happened in the Via Ronella in regard to the bomb has never been established in this court. All we know is that it went off and I think you will be satisfied, in spite of the evidence of Kappler, that by the time of the evening of the 24th March thirty-two German soldiers had died. Gentlemen, far from me be it to suggest that that was not a crime against the German Army, a crime which deserved combined punishment upon everybody who was directly or indirectly concerned with it, and it was a matter which should have been looked into and the perpetrators punished. We understand that although investigations were made it was not possible at that time to establish who had been responsible for this bomb outrage. Now, gentlemen, as a result of this outrage the German authorities began to consider what should be done in regard to it and I do not suppose to take up a great deal of your time on this part of the case. It was decided, apparently by Hitler according to the evidence, that there should be what was called a reprisal in the ratio of ten Italians for every German killed.

Gentlemen, I will tell you very shortly what is a reprisal from the point of view of the law as set out in the Manual of Military Law; I will read the relevant passages to you and no doubt they will be the subject of your consideration later on. The first paragraph is 452: "Reprisals between belligerents are retaliation for illegitimate acts of warfare, for the purpose of making the enemy comply in future with the recognized laws of war." "They are by custom admissible as an indispensable means of securing legitimate warfare." "They are not a means of punishment or of arbitrary vengeance, but of coercion." "The illegitimate acts may be committed by a Government, by its military commanders, or by some person or persons whom it is obviously impossible to apprehend, try, and punish. Reprisals are an extreme measure because in most cases they inflict suffering upon innocent individuals. In this, however, their coercive force exists, and they are indispensable as a last resource." "An infraction of the laws of war having been definitely established, every effort should first be made to detect and punish the actual offenders. Only if this is impossible should other measures be taken in case the injured belligerent thinks that the facts warrant them. As a rule the injured party would not at once resort to reprisals, but would first lodge a complaint with the enemy in the hope of stopping any repetition of the offence or of securing the punishment of the guilty. This course should always be pursued unless the safety of the troops requires immediate drastic action and the persons who actually committed the offences cannot be secured."

"Although collective punishment of the population is forbidden for the acts of individuals for which it cannot be regarded as collectively responsible, it may be necessary to resort to reprisals against a locality or community, for some not committed by its inhabitants, or members who cannot be identified. What kind of acts should be resorted to as reprisals is a matter for the consideration of the injured party. Acts done by way of reprisals must not, however, be excessive, and must not exceed the degree of violation committed by the enemy. Reprisals may not be resorted to, or must at once cease, when the enemy gives satisfaction for the illegitimate acts committed by him."

Gentlemen, it is clear that a reprisal is not by way of punishment or atonement; its object is to coerce and prevent further repetition of violation and you will appreciate from what I have read that the law set out there is really for belligerent governments and the difficulty in this case arises because it is not suggested that there was any belligerent government concerned and, therefore, the reprisal was being taken, as I understand it, in the sense of trying to coerce unknown people who might resort to violence not under the control of any government. You would have thought in such circumstances that it was essential to give the fullest publicity to such a state of affairs to warn people who were unknown to the authorities and, when the reprisal had been carried out, to publish it widely so that the coercive force might become effective. I leave it to you on the evidence you have heard here. Was that resorted to; do you find the military giving warning; do you find them clearly stating after the event, "This has been a reprisal, we are putting coercion on; you will see what happens. We are not saying we have carried out a punishment and that these people have atoned for their wrongs"? Gentlemen, it is for you



to consider. Does this so-called reprisal you have heard here bear that out? You have heard the evidence and it is for you to judge.

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Gentlemen, you know that a reprisal, a so-called reprisal, came into force in this appalling way on the afternoon of the 24th March. In my view, gentlemen, in considering whether a reprisal is a proper and lawful one and can be excused according to international law you are entitled to look not only at what the reprisal was to be in its inception but the way it was carried out and what the results were in fact of carrying it out. Gentlemen, you have heard this appalling story of how these unfortunate people - some completely innocent of any crime whatsoever, one of the age of fourteen and a half, some over seventy, from all walks of life - were exterminated on this afternoon in the caves. Gentlemen, you have heard how it was done. It is not for me, a lawyer, but for you as soldiers; was that the way that a proper reprisal should be carried out?

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May*

Further, gentlemen, if you accept the evidence of Kappler there was a shooting of some five people in excess of what had been ordered. If you take another view fifty people were shot in the cave quite outside the ambit of the proposed reprisal. Gentlemen, it is for you to say; even upon the figure five - after all we who have had the misfortune to deal with war crimes have begun to lose all sense of proportion where life is concerned and one might be prone to say, "what does it matter, five lives? well, a mere bagatelle"; but, gentlemen, there is no doubt at all that on that night this reprisal was carried out at least five were killed who were not covered by any order emanating from Hitler and it will be for you to say alone on that apart from anything else whether this was a reprisal carried out in accordance with the laws and usages of war. Gentlemen, as I told you, I am not going to embark upon the military aspects of a reprisal; they are for you. You have heard the whole of the facts and it is for you to say, having heard them, whether there was a reprisal which was within the law as I have read it to you as laid down in the Manual of Military Law. If you are satisfied, gentlemen, using your military knowledge and considering all the evidence, that here there was something which could be excused under the heading of a reprisal then, gentlemen, the case for the prosecution will have collapsed; if they have not established to your entire satisfaction that this reprisal, this shooting, was one which did not conform to the laws and usages of war as you see it then the accused, and both of them, are entitled to be acquitted.

Gentlemen, there is one passage which I would like to read to you and I am taking it from "The Laws of Nations and the Punishment of War Crimes" by Professor Lauterpacht on page 57 which has already been read to you: "While it is imperative that we should bear in mind the limitations upon the prosecution and punishment of war criminals - limitations such as those following from the plea of superior orders, from the controversial character of some of the laws of war, and from the application of reprisals - it is of equal importance that we should not in this matter lose sight of the wood for the trees. These exceptions" - and I suggest to you, gentlemen, they are all present in this case; let me recite them again, the plea of superior orders, the controversial character of the law of reprisals and from the application of reprisals; these are the three exceptions - "These exceptions may make the work of the tribunals more intricate and more responsible, but there is no reason to assume that they will invariably affect the issue. Superior orders may be invoked, uncertainties of the law of war may be relied upon, and reprisals may be cited as an excuse - but that does not mean that when thus appealed to they will confound the ends of justice. They will be subjected to judicial scrutiny. They may be found sufficiently weighty to warrant acquittal; they may be considered in the light of and as having the effect of extenuating circumstances; or they may, upon careful investigation, be brushed aside as a flimsy device to cover the horrors of a war crime. At the same time, it is clear that all these three factors imply a limitation upon the punishment of war crimes which cannot be disregarded consistently with the determination to conduct the trials of war criminals within the limits which law and justice impose".

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Gentlemen, I take it that the case for the prosecution is summed up in that phrase, that they may upon careful investigation be brushed aside as a flimsy device to cover the horrors of a war crime. Gentlemen, as I say, it is for you to decide in the light of the evidence. Have the prosecution established this first broad issue, that the shooting of these people in the cave on that day was a war crime, that it was not a reprisal which can be excused or justified by the laws and usages of war? If you are satisfied of that, and as I have already pointed out it is for you, as military judges who are required to take judicial notice of the laws and usages of war, to decide, as soldiers, as military judges after judicial scrutiny, whether that is a defence to the killing of these 335 people in the cave.

Now, sir, I want to turn and deal with the second main issue and that, I think, is the one which is of particular interest to the defence. I would remind you, gentlemen, and I consider this to be a somewhat important direction to you, that the charge uses the very wide and general term when it says that the accused were concerned in the killing of 335 people. Gentlemen, your common-sense will tell you that in an affair of this kind a large number of people must have been drawn into it and have played some part in it. It is quite clear that those words do not mean that von Mackensen or Maelfzer took any actual physical part in the killing of those people. Equally I do not think those words are intended to cover some person who is playing some minor administrative part in the chain of the military machine which has to be operated to bring about a matter of this kind. I think your common-sense will tell you that it relates to people who had some power to influence the result, some people who can help to bring it about are entitled to stop it, not people with no power at all, and under that heading, gentlemen, you can of course consider what a man actually does or what he refrains from doing when he has a clear duty to act in a certain way.

Now, one of the things you will have to decide is whether Mackensen and Maelfzer can really, when you have considered the whole case, be described as having been concerned in the killing - concerned in that way - and when you have considered that to decide whether they should be punished and were to blame because they were taking part in a killing which was in breach of the laws and usages of war. I think it will be necessary to consider some of the evidence which has been given in this case to decide what part these two officers played in this action so as to decide fairly and honestly whether they were concerned in those killings which resulted on the afternoon of the 24th March. I will use my notes for this purpose but it is, of course, a matter for you to review your own notes if you like and if you do not agree with mine then of course you will act on your own version.

First of all, gentlemen, to deal with Kappler. Kappler is a man of extreme importance in this case. He was, as you know, the senior officer of the SD in Rome and one of the curious features of the case is that all those who had dealings with him prior to this day thought he was a level-headed, sensible, good type of officer who could be trusted. After the bomb was exploded in the Via Rasella he tells you that he went there and he tells you what happened and then he tells you that about 4.30 on the afternoon of the 23rd he saw Maelfzer in his office and he says that Maelfzer was telephoning to the headquarters of the 14th Army - he believed it was to Mackensen - and after this was over he spoke to Mackensen on the telephone and he says he had a very clear recollection of what he said. He said the question was what sort of action by way of reprisal for the attack in the Via Rasella was to be taken and that they were both concerned because an order would be issued from higher authority so they thought that Italians in the ratio of one to ten would be shot as a reprisal for this outrage and he summed up the conversation by saying that it amounted to this, that if it remained the responsibility of von Mackensen to take reprisal action then he would order shooting in the ratio of one to ten - that would be the number to be published - in reality it would be Kappler's task to shoot only so many as were worthy of death.



Kappler is quite emphatic that he was using at all times expressions which were in terms of "worthy of death" and not people who had been sentenced to death by a proper court. He says that he thinks he spoke to von Mackensen about the high number involved and Mackensen asked, "if we should have enough people available" because of that large number and he says (that is Kappler says) that he never assured Mackensen that he had enough death-worthy persons to carry it off or enough persons in any event to carry it out because he did not know at the time. He then says he went back to his office and there was a considerable amount of discussion but about 1900 hours or 2000 hours on the 23rd Major Bohm who was Maelzer's staff officer phoned him and said, "Ten times the number of victims are to be shot within twenty-four hours", and Kappler said, "I had to choose worthy persons and draw up a nominal roll". He says upon that he telephoned to Kesselring's headquarters because of Bohm's order to verify it as he wanted to make sure of it and he then further spoke to his own superior officer General Hauser.

Then, gentlemen, he proceeded to take action in the way that has been described, overnight collecting the necessary people and he is quite emphatic throughout his statement that any orders he got came through military channels, that he was not getting any orders at all through the SD channels or from Lieutenant General Harster or from General Wolff. Having worked in getting these lists he says that he went and saw Maelzer on the 24th about midday; he says he took a nominal roll showing a list of the people he had who had to be used for the reprisal but he did not think Maelzer looked at it very much. He says that he did mention about trying to get fifty people from the Italian police to make up the numbers but he does not think he told Maelzer anything about the Jews. As I understand it Kappler is saying from first to last, "I never told anybody that I had something like 320 people under sentence of death". In fact he says anybody who had any sense at all must have known there could not be such numbers. He says, "I was always speaking about death-worthy persons", and he says, if I understand him rightly, that it was not until noon on the 24th in this conversation that he had with Maelzer that it was finally decided who should carry out this reprisal and he tells you of this meeting about noon when Maelzer was present and Dobrick.

He says that Maelzer told him that he, Kappler, must take the responsibility for the nominal roll; he seemed surprised that people had been released who had been arrested in connection with the outrage and Maelzer asked Dobrick, who was the officer in charge of those police who had been bombed, to do the shooting of these Italians. Dobrick objected to this and "as we could not convince Dobrick" Maelzer, according to Kappler, spoke to the 14th Army, Colonel Hauser Chief of the Staff, and ask for troops. The answer was, "As the police are concerned the police has to do the job", and the result of the interview, as I understand, at the conferences is that Kappler is alleging that he was ordered by Maelzer to carry out the shooting. The shooting took place and a report was made to Major Bohm and Major Bohm in turn appears to have passed it back through the usual military channels going upwards to Kesselring.

Gentlemen, it is for you to decide whether you believe Kappler. I am bound to tell you that in our law any person who is an accomplice, that is somebody who is taking part in the crime, is always looked upon with considerable suspicion and you are warned not to act upon his testimony, although you may do if you like, unless there is some independent corroboration from some other source indicating, corroborating, in some material particular not only that the crime has been committed but that the accused committed it, but in any event in a case such as this where there are allegations and counter-allegations flying about you will carefully scrutinise the evidence of all of these allegations before you accept them.

Gentlemen, it is a curious thing, and you will have to deal with it. Kappler, if the defence are right, was deceiving the Wehrmacht officers with whom he came in touch, and why he should do so is a matter for you to consider,



but, gentlemen, you will appreciate that the order given by Hitler which people seemed to disregard just as they liked was that 530 hostages, Italian hostages, should be taken and shot. You know that according to von Mackensen people should have been shot only who were under sentence of death and therefore you have this rather unusual state of affairs that the reprisal as carried out was neither in accordance with the orders of Hitler nor was it in accordance with the order of von Mackensen.

If you accept the evidence for the defense it was a reprisal conducted entirely according to the way that Kappler thought it should be. Gentlemen, it is for you to say why should this ordinary, reasonable and upright S.D. officer suddenly act in this way? There may be a reason. It has been suggested "perhaps he got some orders, something through SD channels", but the fact does remain that if you accept the evidence of von Mackensen and if you accept the evidence of Kesselring and of Colonel Seelitz that he was actually telling Kesselring on the phone that he was in a position to supply all these people under sentence of death when he knew perfectly well that he could not - that is one of the extraordinary features in the case. Gentlemen, it is for you to decide. Is it likely, is it feasible, that a SD officer could count upon so many acute brains who had spent the whole afternoon dealing with it - not only the commander in chief, not only the army commander, but staff officers of every shape and kind - could he rely upon everyone of them not making the slightest inquiry which would have blown his story to pieces. Well, that is one point which the prosecution keep rubbing home.

If you accept the evidence of Kappler then it becomes a serious matter with regard to the credibility of Seelitz, of Kesselring, of Mackensen and of Maerker. Gentlemen, it is for you to decide, is there to be found in the evidence matters which indicate whether the story of Kappler is true? There are some which the prosecution has drawn your attention to; one of them is that Maerker himself has agreed that there was a discussion as to the use of troops for the shooting and this is borne out by von Mackensen and it seems to bear out, if you accept that interpretation that Kappler is claiming, that at noon on the 24th it had not yet been said what was to be done and who was to do it. Gentlemen, again there is a question that it is admitted that General Hauser had been told at some time on this day or the next day that Kappler was having difficulties in finding the number of people required, and I think von Mackensen said that he heard of this but that he had also heard that it had been smoothed out. Gentlemen, I do not want to detain you any longer with the case of Kappler; you have seen him, you have heard him, and to sum up I think he is saying this: "From first to last I never assured anybody that I had enough people under sentence of death; I knew I had not. Whatever I did on this occasion was as a result of any rate of orders which were passed to me through military channels. I received them in that way and I reported them and I take blame for the killing but for nothing more. I merely did what I was told by the military authorities".

Well gentlemen, that in short is the story of Kappler. Do you think that if you accept it either in whole or in part that it goes to prove that von Mackensen or Maerker were concerned in this killing in a blameworthy way? In the case of Maerker, gentlemen, there can be no doubt at all that he was having a discussion in his room with Kappler and only a few hours before this unfortunate cavalcade set out for the tomb, and are we going to believe, even although he says that he could not give any orders to Kappler or even question what he did because he was an SD man - does it seem likely that a lieutenant general under whom Kappler had to serve in certain respects would refrain from asking him an ordinary sort of question, "Who are you going to take; how are you going to kill all these people; are you going to use firing squads?" - asking all these questions which could be asked, if not officially, unofficially and one of the questions you will have to ask yourselves later on is whether Maerker and these other officers who were concerned with it, that the only explanation of their conduct is that they deliberately did not ask questions because they did not want to hear and be brought into matters which they disliked.

Responsibility  
in answer

One thing is crystal-clear if you accept the evidence of Kappler that these Wehrmacht officers, whatever their motive was, and it may be a humane one, that they were interfering with the order they had received from Hitler and if they were interfering then, gentlemen, you must presumably see that whatever you are interfering with is carried out properly and not leave it and do nothing about it. One of the questions no doubt you will ask yourselves is why, when a clear order is given by Hitler which had to be carried out by the SD, the Wehrmacht did not do exactly what they were told and say, "This is nothing to do with us. There are your orders quite clearly; we pass them on and we finish by having merely played an administrative part". So much for the witness Kappler.

I do not think that I need refer to many of the Italian witnesses. Alianello did say that on the 23rd March he had a telephone conversation with Kappler and he told him about the incident in the Via Rosella and told him to report the next morning and then he was told next morning that the orders were coming from Kesselring and that ten Italians were to be killed for every German. Kappler said he was working all night selecting 270 persons and the numbers had been selected according to the seriousness of the offence and another group had been provided by German headquarters. It is quite clear that presumably the reference there was to the handing over of people by Dr. Winden.

I do not propose to refer you to any other evidence until we come to that of General Harster. He says that Kappler came under General Maizner for affairs affecting the security of the city of Rome. You have heard Maizner's account of that; it is for you to decide. He says that he was telephoned by Kappler on the night of the 23rd March and he said he had a report and Kappler said he believed that 14th Army had issued the order. He kept on saying that the ratio one to ten was insisted upon and the time for carrying it out was also insisted upon. Kappler said he had no other way out but to take a number of Jews into his charge. Harster says he did not give him any orders about the Jews one way or the other but Kappler did tell you that he had already spoken to the army about his difficulty of drawing up the list and that the army were pressing that it should be done and he said for that purpose he would understand the army to be the 14th Army.

Gentlemen, Kappler does not appear to have told Harster that there had been some agreement that the full number should not be shot but that the full number should be announced. Harster said that was not reported to him. Gentlemen, there is nothing in the evidence of Harster which suggests he was interfering in the matter and giving orders to Kappler how this should be carried out. I am not going to deal with any of the other Italian witnesses but I will come to Colonel Beolitz.

Beolitz was a staff officer at headquarters and no doubt he struck you as an intelligent officer and he has given you an account of what was happening at Kesselring's headquarters on the afternoon of the 23rd when the report was made to him. He says there were a large number of conversations on the telephone all over the place; it had been reported to him exactly what had happened in Via Rosella and he says that emanating from Hitler came wild sorts of suggestions that thirty or fifty people should be shot as a reprisal. At any rate after a considerable amount of discussion he says that an order was issued about ten o'clock at night to the 14th Army at a time presumably when Kesselring was back - he had been away in the earlier evening - "Italian hostages in the ratio of one to ten for each German soldier killed have to be shot; carry out by SD". He said it was made clear that troops should not be charged with carrying out the execution because this was a matter which related to the main task of the SD, and when he was asked "if it was relating to the SD why did it not go through SD channels?" he said, "It was not sent through SD channels because the matter was raised by the army and involved units in the army command". He tells you that and corroborates that he was listening on a telephone when, as Kesselring says, he was rung up by Kappler and his version of the conversation on the phone which he heard was that



Kappler offered the field marshal a sufficient number of men sentenced to death to make up the ratio of one to ten. Gentlemen, he tells you what happened in the headquarters. You saw him and you heard him and if you believe that important telephone conversation was heard by him then it is quite clear that Kappler was actually misleading, and deliberately misleading, Kesselring on the telephone.

Gentlemen, the next witnesses which I have to deal with - I will take them in order - are von Mackensen, Kesselring and then Maelsen. Von Mackensen's version is that on the 23rd March the outrage was reported to him by General Hauser shortly after it occurred and that he heard that there were about twenty-eight victims. He tells you that it was also reported to him by Maelsner and the matter was then sent on and reported to Kesselring. He tells you quite frankly that from his experience of what had been happening in Rome he did not think that mild methods would keep Rome quiet. He said he did not agree with the burning of the quarter as suggested by Hitler, that it was inhuman and would not have any proper effect. He then said in his opinion the only measure was shooting of people with mental contact with the resistance movement and he would not be a party to the shooting of innocent people. By innocent people I suppose he meant people who had nothing to do with the shooting or had not been under a sentence of death. He said that he had a conference in the afternoon and we went through this conference in some detail. He said it was between 5.20 and 7.30 on the afternoon of the 23rd March, that General Hauser was present when Kappler attended and that there was the army judge there and he said he had a conference because the matter was so complicated and could not be discussed on the telephone. He says that Kappler suggested that persons to be shot in the ratio of ten to one should be taken who were in custody and who had been sentenced by a proper court.

He suggested that if he had not a sufficient number of people of this sort to shoot less and to report the shooting of the full number to headquarters. I do not remember why Kappler referred to the agreement which had been made between Hauser and Kesselring at Munich; I do not propose to go into that. "I had a doubt if Kappler had 320 people sentenced to death and so I said to him, 'How is it that you have so many persons sentenced to death in your prison?' and then he says this, that Kappler gave him the explanation that the population of Rome was a dense one and that he had been keeping people under sentence of death in order that they might be interrogated. Kappler was then asked, according to Mackensen, if there were not pleas for mercy pending because I understand that von Mackensen wanted them to be dealt with but he was told that it was not possible to have such pleas in the circumstances.

Now, gentlemen, he summed up the whole thing by saying, "It was agreed that the people to be shot should be in the ratio of one to ten but only such persons as were already sentenced to death and less should be shot if you, (Kappler) have not the necessary number in your prison as you tell me; I will report the full number to higher authority but between us it remains understood that less people will be shot". This was in exact accordance with Kappler's suggestion. The ratio did not seem too high to him. The measure had to be severe in order that the reprisal should succeed. Gentlemen, that is Mackensen's version of his conference with Kappler and I leave it to you to decide whether you can accept what learned counsel said, that you can reconcile the two stories of von Mackensen and Kappler. I should have thought that with an intelligent man like Kappler and an intelligent man like Mackensen it would have been impossible to have a conference at which a legal adviser was present, that one could be talking about those who were merely sentenced or awaiting trial - worthy of death - and the other talking only quite strictly of people condemned to death by a proper court.

Gentlemen, that is Mackensen's recollection of the evidence. We have not heard what Hauser's version is or what the military judge's version is. Kappler has given you his version but he is not at all sure, though he will not deny it, that he was ever present at such a conference, but he does emphatically deny that he ever had a telephone conversation with Kesselring.

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Hackensen goes on to say he had an order to shoot Italians in the ratio of ten to one from Kesselring as hostages, probably before the conference he has been speaking about. He got this on the phone and he understood the orders were in effect to collect innocent people and shoot them, but an annex to the order was, "Execution of this order not anything to do with the Wehrmacht but to be done through the SD". He said this order was written down by the army judge and he took it down to Meisner's office and Hackensen signed the order. He says that the gist of the order he sent down to Meisner was, "Shooting in the ratio of one to ten; execution of measure by SD. Take only people in custody of Kappler already sentenced to death".

He says that this was a Fuhrer order and it was his duty to pass it on to the SD. He agrees that General Hauger told him that Kappler had some difficulty about the number but these difficulties had been overcome. He apparently did not inquire or take any action about that. He agrees that after the shooting he took it upon himself to send a false report of what had happened to Kesselring. He was told officially that the order for the shooting had been carried out. Gentlemen, I do not think I can help you very much about that. You will have to sum it up in your own minds later but it appears to me that Hackensen is saying, "I had this arrangement with Kappler; it was quite clear we were going to have the effect of a reprisal by saying the full number had been shot but if there were not enough persons sentenced to death then we should put out a false report but I would be no party whatsoever to the shooting of people who had not been sentenced to death". Gentlemen, it is for you to say: Can you reconcile that with the evidence of Kappler? They seem to me difficult to explain on the ground that there was some misunderstanding between them but that is entirely a matter for you.

Next we had the evidence of Kesselring and he was apparently away from his command headquarters when the incident was reported to him. He also apparently took the view that he would not kill innocent people and that he had always had the opinion that he would not shoot innocent people even although it was necessary for a military reprisal; he would not have anything to do with hostages. He said that he heard about the incident in the Via Rosella about seven or eight o'clock on the night of the 23rd March. He said that everybody seemed very excited. He said at that time no orders had been received from Hitler by the time he had come back. He went into the matter and then he says that he was very worried but fortunately some time in the evening Kappler called him up on the phone and there was a conversation lasting about a minute and he says that Kappler was very elated because he could say that he was able to furnish the number of those who had to be shot out of those people properly sentenced to death, and then the field marshal added, "I thanked him from the bottom of my heart because it relieved my soul". The prosecution say it would have been better, when it was such a burden upon his soul, if he had ordered his staff to make sure the arrangement was properly carried out in the manner he had agreed with Kappler. At any rate the evidence of the field marshal is that he was assured by Kappler himself upon the phone that the reprisal could be carried out with the prescribed number out of people properly sentenced to death. He tells you that eventually an order came from Hitler which was to this effect: "The ratio should be one German killed to ten Italian hostages; immediately carry out the order. Field Marshal Kesselring should act this time thoroughly". Kesselring said, "I had to carry out this order as it was directed to me by Hitler".

Now, gentlemen, I am not going to make any great point that Field Marshal Kesselring in the witness box seemed to get a little confused as to detail; that is quite reasonable after a long time, but I think you will be satisfied that what he eventually was saying was, so far as he saw it, he was getting an order from Hitler to pass on Hitler's order and that it was to be carried out by the SD. He says that he understood that 14th Army had told him, Kesselring's staff that if there were not sufficient condemned persons a less number would be shot. He says he never talked to General Hackensen himself on this matter



but he was surprised about the 300 death sentences. He also says that so far as the reprisal was concerned he had had no military reprisals before and that he had not given any warnings to the citizens of Rome that reprisals might be taken. He says that in a conversation, I think it was with General Jodl, it was made quite clear to him that he must depart from his usual humane methods and carry out Hitler's order quite distinctly.

*Inquiry  
affirms*

Finally he mentioned the question of the inquiry which he ordered by General Zeiling and you know what the result of that was; it was reported that all the people who had been killed were criminals. I do not propose to go into that but again it is another curious feature of the case; that anybody making the slightest inquiry should have made such a report seems very extraordinary. Now, sir, there as I understand it in very short form you have the evidence of Kesselring.

Lastly there is the evidence of General Maizler. He says that he came on the scene of the explosion very soon and he reported it to the 14th Army. He says he spoke with Mackensen and then you have this conversation which has been the subject of so much discussion. You will remember that Maizler made a statement, of which you have a copy, on the 9th October 1946 and the prosecution attach considerable importance to it because they say it rather bears out the story which Kappler has told you. This is the version he then gave at that time, "After having arrived at my office I phoned General von Mackensen and reported to him about this incident. This was about 4.15 hours in the afternoon. I would like to make it clear that I think before speaking to General von Mackensen I spoke briefly with Colonel Hauser and reported also to him about this affair. I remember well my conversation with General von Mackensen". They are his own words - "I remember well my conversation with General von Mackensen. After I had reported on the incident von Mackensen asked me what I thought had to be done in the way of punishment and I answered that at that moment I had no suggestions to make. Von Mackensen insisted, however, that I said what kind of punishment had to be adopted and I therefore referred to the examples of Paris, Brussels and Nantes which were in the way of reprisals. I would like however to make it clear that at that conversation nothing was laid down and Mackensen told me I would get a definite ruling later. Shortly after this Mackensen phoned me again and asked me what people I had available for the reprisal to be taken. I stated that I had none and that I did not intend to arrest anybody as hostages but mentioned that there might be people available who had acted against the security of the German Army. Von Mackensen stated that only persons already under arrest for actions against the German laws would be considered but no hostages. As von Mackensen had no direct link with SD headquarters I phoned Kappler personally and told him what von Mackensen had said.

Gentlemen, it is for you to decide; is there a word there which says that Mackensen was insisting that only people would be considered who had been sentenced to death, or is he merely saying people who are in arrest? It is for you to decide but if you take the view that people who were in arrest and had not been sentenced to death were to be considered does that not corroborate the story of Kappler? It is for you to decide.

Then later, gentlemen - you have already had your attention directed to it - he says, "I wish to add that when I received orders for transmission to Kappler von Mackensen also said that 320 victims had to be recruited from people who had been arrested for a crime which would carry the death penalty or at least fifteen years imprisonment. This detail of the order I passed on to Kappler together with the rest of the order and at the same time I made it clear to Kappler that I had received it on orders from Mackensen and had not given it myself". The prosecution make great play of it. They say, what greater corroboration can you have than from Maizler on the 9th October; he, Mackensen and Kappler were all agreeing that people should be considered, not only those who had been sentenced to death but those who were in arrest and we had that rather unhelpful discussion in which Maizler was asked whether, as an educated and sensible person holding the rank of Lieutenant General, he must not have

understood the difference between people in arrest awaiting trial and those sentenced to death. Gentlemen, for what it is worth the prosecution ask you to say that when Maelsner was in Pisa he was saying something which is direct corroboration of the story told by Kappler and is quite inconsistent with the story told by Mackensen. Now he has come here - and I think it is obvious, though I make no suggestions whatsoever, that there has been opportunity for the people to discuss it - that he comes along and explains it. He tells you that he got this wrong; you should not attach the meaning I have suggested. He says the reference to 15 years ago in answer to a question and that Mackensen said he must not use people of that kind. I do not want to detain you with all these matters of fact; you have heard them all and it is for you, when you come to decide this case, to decide them. You can if you like accept the version Maelsner has given on oath from the witness box or you can, if you prefer it, accept that which he says in his statement; it is entirely a matter for you. He says that he did get a written order from Mackensen; I think he says he never saw it but he heard it and it was to the effect that, "300 persons are to be shot. The execution and choosing of these persons is solely the task of the SD", and then he says he passed on the message to Kappler.

He agrees that there was a meeting but he gives rather a different version. He says that when he was talking to Dobrick, "I said to Dobrick, 'I am astonished that you did not get the order to shoot these people'" but Dobrick said that his people were not trained for it but he does agree that at Kappler's request, although he had been told it was a matter for the SD, he did ring up General Hauser and ask for troops but General Hauser reminded him it was a matter for the SD. You have heard the evidence of these officers. I do not think I need elaborate it any further. You have heard it and you have to decide what impression it leaves upon your minds. You as soldiers are best able to decide whether what they did was right or wrong from a military point of view and from the point of view of the Laws and Usages of War.

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As I understand it, although I am not very clear on this point, General von Mackensen is not relying very much upon a so-called defence of superior orders. I think he finds himself somewhat in a difficult position. He says, "I did not carry out the order of my superior at all; I am not saying I carried out his order and therefore I am going to say I should not be blamed". What I think he is saying is, "I got this order; I had to follow it but I tried to modify it and I thought I had modified it in a more humane way", and at any rate, gentlemen, if he is raising a defence of an order from a superior, well, gentlemen, you will consider that. I am not quite sure really whether General Maelsner is equally raising that defence because his case is a very brief one indeed. He says, I had nothing to do with this at all in my official character as commandant of Rome. It was just passed to me and I passed it on and when I asked General Mackensen what I had to do he told me that I had nothing to do with it at all, that it was a matter for the SD".

Gentlemen, I think it only right that I should give you the direction which is always given in a case where a defence of superior orders is raised. You will no doubt consider it if you feel that is part of the defence which has been put before you. "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. A different view has occasionally been adopted in military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle. 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; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in



themselves sufficient to divest the act of the stigma of a war crime. However, subject to these qualifications, the question 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. To limit liability to the person responsible for the order may frequently amount, in practice, to concentrating responsibility on the head of the State whose accountability, from the point of view of both international and constitutional law, is controversial."

Gentlemen, I have drawn your attention to certain matters of law, I have drawn your attention to some of the features of the evidence and it will soon be your task to decide your finding in this case. Let me again remind you, I invite you in the light of the evidence first of all to consider was this a reprisal which is excused or justified in its inception, or the way it is carried out, by the Laws and Usages of War? If you are satisfied that that is so both the accused must be acquitted. On the otherhand if you are satisfied that this reprisal amounts to a war crime, that it was in breach of the Laws and Usages of War, then gentlemen, I would invite you coolly and calmly and judicially to go through the whole of the evidence and say whether the part taken by either or both of these accused was such as to deserve punishment in the sense that they were concerned in bringing about this war crime. It is not for the accused to establish their innocence, it is for the prosecution to prove their case and if there is a reasonable doubt, then gentlemen, of course, the accused are entitled to be acquitted. If you think that one man was concerned in a way deserving of punishment but the other was not that finding should be reflected in your verdict.

Gentlemen, these are matters which I think could not be decided more fittingly than by officers who have taken up the profession of arms, and I know you will be quite fair and if you think that this reprisal is one which could have been believed to be one that was according to law and there were reasonable grounds for it, that these officers were taking proper precautions, that they were accepting advice from lawyers, then gentlemen, you would hesitate long to convict, but what I believe is the real substance of this, and I think perhaps it is a matter that could not be better summed up than by what I have put to you in the case for the prosecution - and the case they have to prove - that what you have heard here is merely a flimsy device put forward to get rid of the horrors of that terrible war crime.

Gentlemen, there is not much more I wish to say except only this, the case has been put to you most clearly by the defending officers, German officers, and I think they have made it quite clear to you what is the defence put forward and the Court are indebted to them for having attempted to assist in the administration of justice.

Gentlemen, very shortly you will be considering your finding and the last thing I have to say to you is this, though no doubt it is quite unnecessary in a case of this kind; in your deliberation it will be difficult for you to banish from your sight that terrible word picture which was painted by Kappler of the scenes in that cave on the afternoon of the 24th March. A boy, old men, 335 persons with their hands tied behind their backs were taken, with no time hardly to make peace with their Maker, hardly time for any of that, to say goodbye to their friends and relatives and no time to put their worldly affairs in order, out to that cave. They were made to kneel and their life was shot out of them by bullets in that way. That, gentlemen, is a picture which might well call for retribution and this court has not been without such cries during the course of this trial but you, sir, with your members, will never forget that this court is here for the one purpose only of administering justice and not vengeance. I will now ask you, sir, to close the court to consider your findings.

THE PRESIDENT: The court has been grateful to the public for the way it has behaved ever since I spoke to them last Monday. The trial is reaching its final stages and it is essential that the members of the court should be able to concentrate upon their duty and therefore I must request that the public will continue to help the court by maintaining silence. The next stage is that the court will adjourn to consider its finding. I cannot say for certain what time the court will re-open but I can say for certain that it will not be before 2.30.

(At 11.40 hours the court is closed)

(At 14.30 hours the court re-opens)

(The accused are again brought before the court)

THE PRESIDENT: Let the two accused stand up.

THE JUDGE ADVOCATE: I am directed by the court to announce the following findings and to say that they are subject to confirmation by the appropriate military authority.

The court find you, Eberhard von Mackensen guilty of the charge.

The court find you, Kurt Meisner, guilty of the charge.

THE JUDGE ADVOCATE: Major Forest, will you tell learned counsel that if they have any evidence as to character to put before the court the court will first hear that and after that they may, if they like, make a speech in mitigation. Colonel Halse, before we hear the defence is there anything that you wish to put before the court?

COLONEL HALSE: I have a previous conviction at a war crimes court against the accused Meisner.

THE JUDGE ADVOCATE: What is the form of it?

COLONEL HALSE: It is a certificate of the American Claims Service to the effect that General Meisner was tried by a court.

THE JUDGE ADVOCATE: Have you shown it to the defence?

COLONEL HALSE: Yes.

THE JUDGE ADVOCATE: Do they agree?

DR. CHRIST: I just hear that the sentence has not yet been confirmed.

COLONEL HALSE: I was going to say that; the accused has been found guilty and the finding has been announced but it has not yet been confirmed by the convening officer.

THE JUDGE ADVOCATE: I do not think we can treat it as a conviction because it may not be upheld. The court will disregard this because I am prepared to advise that a conviction which has not been confirmed is not a conviction. Now, is there any evidence as to character?

DR. KEILER: I do not ask for any witnesses, any character witnesses, but I would like to tell the court that Field Marshal Kesselring expressed his clear regret that he could not testify here in front of the court for the good character of Generaloberst von Mackensen and I would like to put in two affidavits, one from Kesselring and the second from a British subject, Crowther.

THE JUDGE ADVOCATE: Will you hand them in first? Are they in German?



DR. KELLER: In English.

(Affidavit by Kesselring is marked "Exhibit 15",  
signed by the President and attached to the  
proceedings)

(Affidavit by Growther is marked "Exhibit 16",  
signed by the President and attached to the  
proceedings)

(Exhibits 15 and 16 are read)

THE JUDGE ADVOCATE: Would Dr. Christ like to call any evidence and then both  
defence counsel could make their addresses or would Dr. Keller prefer to  
furnish his address before we go to Dr. Christ?

DR. KELLER: I would prefer to make my final address now. What I have to say  
is in the hands of the interpreter and if it pleases the court he will read  
it to you and with the permission of the court I should prefer that it should  
be read only in English.

THE INTERPRETER: "May it please the court. I have fought together with General-  
oberst von Mackensen in those last few days for his honour and for the honour  
of a German soldier. I must say the learned prosecutor was very fair in his  
task and I must say that I was helped by the fairness of this court. I was  
helped by my two British liaison officers and lastly but not least by all of  
the interpreters. Nevertheless I must say that I could not fight entirely in  
the way as I would have wished to do in the interest of my client. Firstly I  
must point out that the whole court procedure of this court is very different  
from our German court procedure; then, as the court knows, I am a prisoner of  
war and my freedom of movement was rather limited and therefore I could not  
put all the evidence in the interests of my client at the disposal of this  
court which I would have done if I had been entirely a free man and of course  
it is a fact that your British officers, in spite of your past intentions,  
are unable for the moment to understand us German officers entirely.

I have lost this fight. I hope you will not be angry either with  
Generaloberst von Mackensen or with myself that your verdict of guilty, which  
I am quite sure you were considering very carefully, that we cannot agree that  
this verdict is the right one, a verdict which says that my client was  
concerned with the crime which was committed on the 24th March 1944. Gentle-  
men, you know the slogan of every officer who loves his honour, "Honour lost,  
everything lost". I have the special demand of Generaloberst von Mackensen  
to convey to you, gentlemen, not to make any application for clemency; you  
could not save him from dishonour by arriving to a verdict of not guilty;  
save him from dishonour by granting him the clean death of a soldier - death  
through shooting. What this man was, how is character, whom you found guilty  
was judged by his last superior officer, Field Marshal Kesselring, also from  
a man who is a citizen of your own country, was clearly testified through the  
two affidavits which have been put to the court.

(The German text of the speech in mitigation by Dr.  
Keller is marked "Exhibit 17", signed by the President  
and attached to the proceedings)

THE JUDGE ADVOCATE: Will Dr. Christ call any evidence if he wants any and then  
address afterwards in the same way?

DR. CHRIST: I propose to put in three affidavits and then, as a last witness for  
the character of my client, call Father Ivor Paneratus. The three affidavits  
are in English and German.

(Affidavit by Friedrich Karl Fabian is marked  
"Exhibit 18", signed by the President, and  
attached to the proceedings)

(Affidavit of Colonel von Heimendahl is marked "Exhibit 19", signed by the President and attached to the proceedings)

(Affidavit of A. Kesselring is marked "Exhibit 20", signed by the President, and attached to the proceedings)

(Exhibits 18, 19 and 20 are read)

FATHER IVOR PANCRAZUS is called in and, having been duly sworn is examined by DR. CHRIST as follows:

- Q You know General Maelzer? A. Yes. (Indicating the accused).
- Q Did you have some dealings with him? A. I belonged to the Jesuits and of course I had nothing to do with the National Socialist Movement; in fact my whole ideology is hostile to that movement. In October 1943 I was ordered to go to Proinary and I was teaching there theology and also to help the Italian population which suffered all the misery of war. Later on I became a high liaison officer with the German authorities.
- Q How often did you have dealings with General Maelzer? A. I met a few times in the beginning, in November 1943 when he took over his post as military commander of Rome.
- Q What is your judgment concerning the character of Maelzer? A. In my opinion General Maelzer's character has a very good side. He is more of a paternal nature and is even something of a child in mind but of course I have heard that he is quite apt to lose his temper but he was always very friendly towards myself. Examples: He was always friendly if I wanted to talk to him. The first time when I had the wish to meet the general he talked to me for an hour and fifteen minutes and he devoted all this time to me although officers and other officials and dignitaries were waiting outside for a conference.

THE JUDGE ADVOCATE: He must really give us some short estimate of the character of General Maelzer. We cannot listen to these reminiscences, all we want from him is to say whether this accused was an upright, honest officer, or something of that kind.

DR. CHRIST: Can you give us any details of what General Maelzer had done for the welfare of the Italian population of Rome? A. I went in 1943 to General Maelzer and asked him to operate in this extreme calamity in which Rome was at that time. There was only supplies of bread until the 6th November at that time because many refugees concentrated in this town. General Maelzer listened to us and did everything he could to help us. He telephoned immediately to the official who was concerned with it to prepare him that we are coming.

Q What was his position with regard to the Vatican? A. I can only say that Maelzer did everything to satisfy the Pope.

Q Concerning his religion, was he very religious or was he not? A. I remember when I first went to see him, I told the court that this first visit lasted for a long time, the general spoke also about his soul to me and he said that he is always concerned whatever he is doing because he knows that a day will come when of course he has to answer for whatever he had done before and that he is content to dying in such a way that is eternal desire to go to Heaven should be fulfilled.

(The witness withdraws)

DR. CHRIST: The court found Maelzer guilty. I cannot know of course what are



the details of the court's reasoning. I am certain that the court cannot have arrived to the idea that in the character of Maelzer they find somebody who is a blood-thirsty murderer. No; rather I would say he is a soft-hearted and kind man who is ready to help whenever he can. The court knows that through his work, the care for the welfare of Rome, through his readiness to help them whenever he could, he gained the sympathy of very large circles of the Roman population. I do not want to reiterate again to you, gentlemen, all the details of General Maelzer's work for the Roman population. I do not think that you gentlemen are in any doubt concerning this matter. He has been a soldier for the last thirty-two years. He is an officer and his character is a good one, and we have heard that he was quite conscious about his eternal responsibility concerning all his actions. It is a tragic event that he had the right idea after the incident in the Via Rosella, that people convinced him not to act on this, his right idea, and do something which would have avoided any loss of life. He was certain that the decision made by his own superior officers would not touch the lives of innocent people and that is the only thing how he got mixed into the whole affair.

I would like to stress once more, gentlemen, that Hitler distrusted the German Wehrmacht and out of this distrust he took away every opportunity of supervision of the S.D. organization by the Wehrmacht. We can see here in the person of my client, General Maelzer, a victim of the very unfortunate chain of commands which went down from the highest Army command. He knew that he was an officer and he had to obey orders. That is the only reason why he passed on an order which came from the highest German command, nay from Hitler himself. He passed this order on to the S.D., he acted only because he was deeply convinced about the legality of this order. I am quite certain that you gentlemen of the court, in assessing the sentence after having found in your verdict that my client is guilty, I am certain that you will consider all these matters that I have put before the court. Therefore I apply to the court that they should, in the case of General Maelzer who has been now a prisoner of war for the last eighteen months, that they should judge him mildly and give him a light prison sentence.

THE JUDGE ADVOCATE: Do learned counsel feel that they have put everything before the court that court ought to know before they consider their sentence?

DR. KELLER: I myself have not the feeling that I can say everything to this court which I should have done in the interests of my client and the reasons for this are known to the court.

DR. CHRIST: I am exactly in the same position as General Richter Keller.

THE PRESIDENT: The court will now adjourn to consider the sentences.

(At 15.20 hours the court is closed)  
(At 16.05 hours the court re-opens)

THE PRESIDENT: Let the accused be brought before the court.

(The accused are brought before the court)

THE JUDGE ADVOCATE: I am directed to announce the sentences of the court and at the same time to say that like the findings they are subject to confirmation by the appropriate superior military authority. The sentence of the court in the case of you, Eberhard von Mackensen is that you suffer death by being shot. The sentence of the court upon Kurt Maelzer is that you suffer death by being shot.

(The accused and escort leave the court)

THE PRESIDENT: The official business is over but I have one short announcement to make. The court expresses its gratitude to the Italian authorities for making this building available for the trial and to the director for his courteous assistance; also to the members of the Carabinieri and the Italian Police who have helped with the arrangements in court.