CASE No. 19

Trial of ERICH KILLINGER and four others

**BRITISH MILITARY COURT, WUPPERTAL,
26TH NOVEMBER-3RD DECEMBER, 1945**

A. OUTLINE OF THE PROCEEDINGS

Erich Killinger, Heinz Junge, Otto Boehringer, Heinrich Eberhardt and Gustav Bauer-Schlightergroll, former officers of the Luftwaffe, were charged with " committing a war crime in that they at or near Oberursel, Germany, between 1st November, 1941 and 15th April, 1945, when members of the staff of the Luftwaffe Interrogation Centre known as Dulag Luft, in violation of the laws and usages of war were together concerned as parties to the ill-treatment of British Prisoners of War." All pleaded not guilty.

The Prosecution claimed that the accused belonged to the German Air Force Interrogation Centre at Oberursel, near Frankfurt. This Centre was known to the German Air Force authorities as Auswertestelle West, but, more widely as Dulag Luft. The function of Dulag Luft was, shortly, to obtain information of an operational and vital nature from the captured crews of Allied machines. The allegation was that excessive heating of the prisoners cells took place at Dulag Luft between the dates laid in the charge for the deliberate purpose of obtaining from prisoners of war information of a kind which under the Geneva Convention they were not bound to give, and that the accused were concerned in that ill-treatment. The Prosecution also alleged a " lack of and refusal of required medical attention " and " in some cases, blows." At first the Prosecutor also claimed that the methods used included prolonged solitary confinement and threats of delivery of the prisoner of war to the Gestapo and of shooting by the Gestapo, "on the basis that the prisoner of war might, because he did not answer sufficiently fully, be a saboteur. " After a consultation with one of the Defence Officers, however, the Prosecutor withdrew the last two allegations. Killinger, Junge and Eberhardt were found guilty and sentenced to imprisonment for five, five and three years respectively. The remaining two accused were found not guilty. The sentences were confirmed by higher military authority.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE CHARGE

The Prosecutor rested his case on the Geneva Prisoners of War Convention of 1929, and in particular Arts. 2 and 5. Art. 5 reads as follows :

" Art. 5. Every prisoner of war is required to declare, if he is interrogated on the subject, his true names and rank, or his regimental number. If he infringes this rule, he exposes himself to a restriction of the privileges accorded to prisoners of his category.

" No pressure shall be exerted on prisoners to obtain information regarding the situation of their armed forces or their country. Prisoners

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who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever.
" If, by reason of his physical or mental condition, a prisoner is incapable of stating his identity, he shall be handed over to the Medical Service." ([1])

Pointing out that the prisoners who passed through Dulag Luft appeared to have had no exercise while there, Counsel quoted Art. 13 of the Convention :

" . . . They shall have facilities for engaging in physical exercises and obtaining the benefit of being out of doors."

During his closing address, one of the Defence Counsel made three submissions regarding the scope of the Convention. The first was that under the Geneva Convention interrogation was not unlawful. The second was that to obtain information by a trick was not unlawful, under the same Convention. The third point was that to interrogate a wounded prisoner was not in itself unlawful unless it could be proved that that interrogation amounted to what could be described as physical or mental ill-treatment. The Court expressed its agreement with these three principles.

It will be noticed that the charge alleged that the accused " were together concerned as parties to the ill-treatment of British Prisoners of War." In connection with this part of the charge-the Prosecutor quoted Paragraph 8 (ii) of the Royal Warrant :([2])

" 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."

During the hearing of the closing addresses for the Defence, the Legal Member of the Court asked the Prosecutor what his attitude would be if the commandant of a prisoner-of-war camp, although completely ignorant of the ill usage of prisoners of war, was negligent in his supervision of his subordinates. Would the Prosecutor say that that made him a party to the ill-treatment, or would he say that in order to make a person a party he must be guilty of more than negligence, and must at least come within the category of an aider and abettor as that phrase is commonly known to English criminal law ? The Prosecutor submitted that a man might be concerned as a party either through intention, where " malice-a designed plan-" was present, or through neglect so acute that the established standards of English criminal law would apply. The standard of negligence

would have to be of such a degree that it was considered criminal, gross, flagrant, " or those other strong terms with which our English law books are familiar."' He agreed with the Legal Member when the latter claimed that the only

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(1) For Article 2 see p. 57.
(2) *See* Annex I, *British Law Concerning Trials of War Criminals by Military Courts*, on pp. 105-l 10 of Volume I of this series.

standard of neglect in accordance with English criminal law which would make a man guilty of a crime of a major nature was the neglect necessary to prove manslaughter, in other words, a recklessness and a complete disregard of the situation. Later during the hearing of the closing of the case for the Defence, the Legal Member announced that the Court had come to a decision on the interpretation of the phrase " were concerned together as parties to the ill-treatment of British prisoners of war. " The Court had agreed that no amount of mere negligence, however gross, could bring a person within the category of a party as defined in the particulars of the charge ; that the word " parties " must of necessity mean that the person concerned must have had some knowledge of what was going on and must have deliberately refrained from stopping such practice ; and that the person, in order to be a party, must come within the category of a principal in the second degree or aider and abettor in the ill-treatment alleged. The words " aider and abettor " and " principal in the second degree " would have the same meanings as in the ordinary criminal law of England. One of the Defence Counsel claimed that there had been no suggestions by the Prosecution, and no evidence, that there was a plan, a method of treatment, and that it was the usual habit or custom of Dulag Luft, as a unit, to perpetrate this treatment. The Prosecutor, in his closing address, argued that each accused was concerned, in his respective capacity on the staff of Dulag Luft, as a party to the ill-treatment of prisoners of war, and concerned with sufficient proximity to make him criminally responsible on the ordinary standards of criminal responsibility in English law, either by being an accessory before the fact, or a principal in the second degree, or a principal in the first degree, or an accessory after the fact. The only difference between the " ordinary tests of responsibility " set out in English Criminal Law and the law to be applied in the present trial lay in Regulation 8 (ii) which Counsel regarded as a " matter of evidence." It was submitted by the Prosecution that, on the balance of the evidence, Regulation 8 (ii) was in point and that the evidence regarding one accused might be treated as evidence against another.

The *Yamashita Trial*,([1]) conducted by a United States Military Commission, contains, *inter alia*, some interesting material on the liability of a Commander for War Crimes committed by his subordinates. On the question of liability for mere inaction, reference should be made to the ***Essen Lynching Case***.([2]) There a German guard was sentenced to imprisonment for five years for failing to intervene while Allied prisoners of war, under his care, were lynched. The question of joint responsibility received some attention in that case, but much more in the ***Belsen Trial***.([3]) There it was generally agreed that before

Regulation 8 (ii) could operate against an accused, it must have been proved that he knowingly took part in a common plan to commit a war crime. An analogy was drawn between the words " concerted action," contained in the Regulation and the legal concept of conspiracy. In the Dulag Luft Case, while the Prosecution argued that Regulation 8 (ii) was relevant, the Court in its ruling was careful to explain the charge wholly in terms of the law relating to parties to a crime (mentioning specifically principals in the second degree, that is to say, aiders

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(1) To be reported in Voiume 1V of the present series.
(2) Volume I of the present series, pp. 88-92.
(3) Volume II, pp. 138-41.

and abettors) without referring to Regulation 8 (ii). It therefore remains possible to assume that a prior conspiracy to commit a war crime must be proved before Regulation 8 (ii) can become effective, and that it is not enough to show that certain accused acted as aiders and abettors.

2. DE MINIMIS NON CURAT LEX

After referring to an exaggerated newspaper account of the offences alleged in the trial one of the Defence Counsel made the following comment :

" The mere use of the words ' war criminal ' conjures up that sort of idea in people's minds, and I am sure that the Court will agree with me when I say that this Court was not convened to punish minor irregularities or infringements of international conventions such as have occurred in every country during six and a half years of the most disastrous war that history has ever known."

3. THE SCOPE OF REGULATION 8 (i) OF THE ROYAL WARRANT

Regulation 8 (i) of the Royal Warrant begins with the following 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 :

Six rules are then set out in clauses (a) to (f) as examples of this general statement, and Regulation 8 (i) ends with the words :

" It shall be the duty of the Court to judge of the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible."

After presenting the oral evidence against the accused, the Prosecutor expressed his intention to put in certain affidavits, relying on clause (a) of Regulation 8 (i), which reads as follows :

" (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 of statements made by or attributable to such witness."

The Prosecutor reminded the Court that he was limiting his allegations to those concerning over-heating, refusal or delay of medical attention and, in some cases, blows. Some of the details in the affidavits (concerning solitary confinement, threats and low diet) fell outside the scope of these allegations but it was not always easy to dissect the documents and read only what was relevant.([1])

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(1) In the **Belsen Trial** (*see* Volume II of this series, pp. 131-3), there were disputes as to the admissibility of certain evidence contained in affidavits. It was pointed out by the Prosecutor that Military Courts were judges both of law and fact and that it was evitable therefore that, in cases of disputes as to admissibility, the Court must, in their former capacity, read an affidavit or have it read to them to decide whether to admit it, and then, if it is to be admitted, weigh its value, acting in their latter capacity. He claimed that Regulation 8 (i) had been framed deliberately to avoid time-wasting disputes as to admissibility of evidence, and to allow the Court simply to decide, after hearing all the evidence, what weight it would place on it. In the Dulag Luft Case, the interpretation of the Prosecutor in the **Belsen Trial** seems to have been tacitly approved and followed.

Among the documentary evidence for the defence appeared part of a B.B.C. War Report which had been referred to in an affidavit. Both were authenticated by a Commissioner for Oaths.

Clauses (b) and (e) of Regulation 8 (i) were invoked by the Prosecutor in tendering as evidence a dated " form of affidavit " completed by a named Lieutenant in the United States forces who described himself as " C. E., Post Engineer," and a dated minute from the United States Deputy Theatre Judge Advocate in London. These clauses run as follows :

" (b) Any document purporting to have been signed or issued officially by any member of any Allied or enemy force or by any official or agency of any Allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof."
" (e) The Court may receive as evidence of the facts therein stated any diary, letter or other document appearing to contain information relating to the charge."

4. THE RELATIVE VALUE OF AFFIDAVIT EVIDENCE

Before the tendering of the affidavit evidence for the Prosecution, the Defence applied for one deponent to be produced in person. The Defence had been given to understand that the British Officer in question would be available for questioning. The Court decided, after hearing argument, that the deponent could not be produced " without undue delay " (in the wording of Regulation 8 (i) (a)), and the President of the Court added the significant statement that " we realise that this affidavit business does not carry the weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a Court, due weight." The President's words may fairly be taken as a reference to the fact that if evidence is given by means of an affidavit the person providing the evidence is not present in Court to be examined, cross-examined and re-examined.

5. STATEMENTS MAY BE PUT IN WITHOUT PROOF OF VOLUNTARY NATURE

During the discussion of the same application the Legal Member asked Counsel for the Defence whether, if an affidavit had been taken by duress (supposing that allegation were made), it would nevertheless be admissible. Counsel agreed that the Defence would be barred from objecting in law to its admission on the ground that the statement was not a voluntary one. The Legal Member then advised the Court that when and if any of the accused were to give evidence in explanation of the giving of their statements, it was relevant and very important that they should tell the Court what their version of the taking of those statements was, and the Court would then decide as to how it affected the veracity of those statements. (It was later revealed that the objection of the Defence was that the statement was pieced together as a result of a series of interrogations which lasted over several days, and that the substance of the statement was obtained by question and answer.)

In the trial of Eberhard Schöngrath and six others([1]) the Legal Member advised the Court that it was empowered to receive a written statement,

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(1) To be reported in full in a later Volume in the present series.

even though no caution had been administered, provided the Court was satisfied that the statement was made voluntarily. In the, **Belsen Trial** the accused Aurdzieg pleaded that a confession by him which was placed before the Court was not made voluntarily. The Prosecutor, however, countered this argument by pointing out that below the accused's signature appeared an account and description by Aurdzieg of the persons who were working with him.([1]) Speaking of the affidavits of **Irma Grese**, the Prosecutor submitted that the provisions regarding the cautioning of accused had no application in Military Courts. It was not necessary for the Prosecution to satisfy the Court that Grese's were voluntary statements. The Royal Warrant was drawn up with the deliberate intention of avoiding legal arguments as to whether evidence was admissible or not. They were drawn widely to admit any evidence whatsoever and to leave the Court to attach what weight they thought fit to it when they had heard it. By " authentic " was signified " genuine."

The Judge Advocate said that the affidavits were not, in his view, analogous in any way to the statements or documents which came under Rule of Procedure 4 in the case of a Field General Court Martial.([2])

The result seems to be that the Defence cannot prevent a statement from 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 conclusion seems to be supported also by a ruling of the Court in the trial of Hans Renoth and Three Others.([3])

6. SIGNIFICANCE OF AFFIDAVIT EVIDENCE IN RELATION TO RULES OF PROCEDURE 40 (C) AND 41 (A)

The British Royal Warrant provides in Regulation 3 that, except in so far as therein otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army shall be applied so far as applicable to the Military Courts for the trial of war criminals. These rules are contained in the British Army Act and the Rules of Procedure made under the Act by an Order in Council, the latter being a piece of delegated legislation enacted by the Executive in 1926 (S.R. & 0. 989/1926).

Counsel for Eberhardt indicated that the only evidence which the accused intended to call, apart from going into the witness box himself, was evidence by affidavit. Whereupon the Legal Member advised the Court that evidence given by affidavit was " evidence apart from the accused himself." It would therefore cause Counsel to lose the last word in the case from the point of view of addressing the Court. It was also evidence which entitled him, if he wished to open his case before he called his evidence.

In delivering this advice, the Legal Member was making tacit reference to Rules of Procedure 40 (C) and 41 (A) which run as follows :

" (C) If the accused states that he wishes to give evidence as a witness himself but does not intend to call any other witness to the facts of the case, the procedure, whether or not he is represented by counsel or by an officer subject to military law, will be as follows :

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(1) *See* Volume II pp. 68 and 116.
(2) *See* Volume II: pp. 135-6.
(3) To be reported in a later volume in the present series.

(i) The accused will give evidence immediately after the close of the evidence for the prosecution.
(ii) The accused may, if he wishes, call witnesses as to his character.
(iii) The prosecutor may then make a final address for the purpose of summing up the evidence for the prosecution and commenting on the evidence of the accused.
(iv) The accused or counsel or the defending officer (as the case may be) may then make

a closing address in his defence."

" 41 (A). If the accused states that he wishes to give evidence himself and to call witnesses to the facts of the case, the procedure whether or not he is represented by counsel or by an officer subject to military law, will be as follows :

(i) The accused or, if he is represented by counsel or by a defending officer, then such counsel or defending officer may make an opening address for the defence.
(ii) The accused will give evidence as a witness, and call his other witnesses, including, if he so desires, witnesses as to character.
(iii) After the evidence of all the witnesses has been taken, the accused or counsel or the defending officer (as the case may be) may make a closing address.
(iv) The prosecutor may reply."

These provisions, intended primarily for District Courts Martial, are made applicable, " so far as practicable " to Field General Courts Martial (and so to Military Courts) by Rule 116, which states :

" 116. Where during the course of a trial any doubt arises as to the procedure to be followed in connection with the calling or recalling or questioning of witnesses, or the order in which such witnesses are to be examined and addresses are to be made by the prosecutor or by or on behalf of the accused, the provisions of the foregoing rules relating thereto shall, so far as practicable, apply as if the field general court-martial were a district court martial."

7. POSSIBILITY OF A SECOND RE-EXAMINATION OF WITNESSES

During the hearing of the evidence for the accused, the Defence stated that, while they fully understood that, in accordance with Rule of Procedure 85 (A), the Court or any Member might address a question to a witness, the questions put to the witnesses for the defence by the Court had been, in their submission, in the nature of a lengthy cross-examination. In view of this the Defending Officers asked that they might be granted a right of re-examination at the conclusion of such questioning, The Legal Member advised the Court that there was not right by either Rule of Procedure or by the Royal Warrant for Defending Officers to re-examine their witnesses after the Court or any Member of the Court has asked any questions. There was an inherent right in any Member of a Court to ask any questions he thought fit, It was, however, always at the discretion of a Court to give the Defending Officer an opportunity of asking questions about any new matter which had not already been brought up either by the Prosecution or the Defence and which had been introduced as a result of the questions of any Member of the Court. The President of the Court ruled that, should

any Member of the Court submit a witness to a thorough re-examination, the Defence would be given a chance to re-examine.

Rule of Procedure 85 (A), to which reference was made provides that :

" 85 (A): The president, the judge-advocate (if any) and, with permission of the court, any member of the court may address a question to a witness while such witness is giving his original evidence and before he withdraws."

This provision also falls within the scope of Rule 116, quoted above.

8. RIGHT OF COUNSEL TO CALL HIMSELF AS WITNESS

Before calling evidence on behalf of Bauer, his Counsel applied for permission to appear himself in the witness box, if necessary, to give evidence on the way in which he came into possession of certain documents which he wished to enter. The Legal Member suggested that the Counsel should call his other evidence first and that if there was then any matter which was not, plain from that evidence, Counsel would have a perfect right to call himself as a witness and to give evidence on oath concerning the circumstances in which certain matters came into his knowledge, if such a matter was relevant to the defence. Counsel subsequently went into the box to describe how he had collected certain documents from the accused's wife at his home.

9. WITNESS ALLOWED WRITTEN MEMORY AIDS

A witness for the Prosecution was allowed by the Court, in describing a building, to refer to notes made during his visit to the building.([1])

On the other hand in the **Belsen Trial**, the defence witness Gertrud Neumann was found to have in her possession, while in the witness box, a typewritten copy of a statement which she had previously made to Counsel defending one of the accused. The Prosecutor protested that : " What we want to hear is the witness's recollection and not something from a type-written statement." The Court ruled that witnesses should give their spontaneous recollection and should not refresh their memories from any document. Similarly, in **the trial of 'Major Karl Bauer and six others**,([2]) Counsel for Bauer applied to the Court for permission for that accused, in giving evidence to " use certain notes of evidence and statements which he wishes to make." Raür had assured Counsel that he had made the notes during the course of the trial. The Judge Advocate, however, said that it was " unusual for a witness to have notes in the witness box," and advised. the Court that " he should not be provided with notes unless some specific point arises."

10. THE QUESTION OF TRANSLATIONS OF EVIDENCE

Presumably since they were ex-members of an interrogation centre the accused all had a knowledge of English. The Court, after receiving a

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(1) This is an illustration of the rule described on pp. 89-90 of the *British Manual of Military Law* which states : " A witness may not read his evidence or refer to notes of evidence given by him, but he may while under examination refresh his memory by

referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court consider it likely that the transaction was at that time fresh in his memory. . . ”
(2) To be reported in full in Volume IV of the present series.

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reassurance on the point from the Defence, permitted the non-translation of the oral evidence from English into German, while at the same time stating that a translation would be provided should any accused ask for it.([1])

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(1) For further discussion on the question of translations of evidence, *see* Volume I of this series, pp. 65-66, and Volume II, p. 145.