

constitute an obstacle to the completion of their mission. Finally, we have captured orders which advocate putting prisoners to death as a matter of principle.

2. For this reason, an addition to the communiqué of the Wehrmacht of 7th October, 1942, is announced ; that, in the future, Germany will resort to the same methods in regard to these groups of British saboteurs and their accomplices—that is to say that German troops will exterminate them without mercy wherever they find them.

3. Therefore, I command that : Henceforth all enemy troops encountered by German troops during so-called commando operations, in Europe or in Africa, though they appear to be soldiers in uniform or demolition groups, armed or unarmed, are to be exterminated to the last man, either in combat or in pursuit. It matters not in the least whether they have been landed by ships or planes or dropped by parachute. If such men appear to be about to surrender, no quarter should be given them on general principle. A detailed report on this point is to be addressed in each case to the OKW for inclusion in the Wehrmacht communiqué.

4. If members of such commando units, acting as agents, saboteurs, etc., fall into the hands of the Wehrmacht through different channels (for example, through the police in occupied territories), they are to be handed over to the Sicherheitsdienst without delay. It is formally forbidden to keep them, even temporarily, under military supervision (for example, in P/W camps, etc.).

5. These provisions do not apply to enemy soldiers who surrender or are captured in actual combat within the limits of normal combat activities (offensives, large-scale air or seaborne landings). Nor do they apply to enemy troops captured during naval engagements, nor to aviators who have baled out to save lives, during aerial combat.

6. I will summon before the tribunal of war all leaders and officers who fail to carry out these instructions—either by failure to inform their men or by their disobedience of this order in action.

CASE No. 3

THE ALMELO TRIAL

TRIAL OF OTTO SANDROCK AND THREE OTHERS

BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS,
HELD AT THE COURT HOUSE, ALMELO, HOLLAND,
ON 24TH-26TH NOVEMBER, 1945.

Killing without trial of a British prisoner of war and of a civilian national of an occupied country. Espionage and war treason. The pleas of superior orders and of superior force.

The accused Sandrock was in command of a party which killed a British prisoner of war and a Dutch civilian who had been living in hiding in the house of a Dutch lady. The accused Schweinberger fired the actual shots, the accused Hegemann and Wiegner assisted. The pleas of superior orders, of "superior force," and of the absence of *mens rea* were unsuccessful.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was a British Military Court convened under the Royal Warrant of 14th June, 1945, Army Order 81/1945, by which Regulations for the trial of war criminals were issued.⁽¹⁾

The Court consisted of Brigadier G. A. McL. Routledge, C.B.E., M.C., M.M., Commander 107 H.A.A. Bde., as President, and, as members, Colonel G. A. de Brauw, Royal Netherlands Army, Lieutenant-Colonel H. A. A. Parker, Lake Superior Regt., Canadian Forces, and Squadron-Leader H. B. Simpson, H.Q. 83 Group, R.A.F.

The Judge Advocate was C. L. Stirling, Esq., C.B.E., Barrister-at-Law, Deputy Judge Advocate General of the Forces.

The Prosecutor was Major A. E. E. Reade, Intelligence Corps, Major Legal Staff, Headquarters, British Army of the Rhine.

The Defending Officer was Major D. L. E. Paterson, R.A., 244/61 Medium Regiment, R.A. (Law Clerk.)

2. THE CHARGE

The accused, Georg Otto Sandrock, Ludwig Schweinberger and Franz Joseph Hegemann, were charged with committing a war crime in that they at Almelo, Holland, on 21st March, 1945, in violation of the laws and usages of war, did kill Pilot Officer Gerald Hood, a British prisoner of war.

⁽¹⁾ See Annex I, pp. 105-10.

The accused Georg Otto Sandrock, Ludwig Schweinberger and Helmut Wiegner, were charged with committing a war crime in that they at Almelo, Holland, on 24th March, 1945, in violation of the laws and usages of war, did kill Bote van der Wal, a Dutch civilian.

It will be seen that Sandrock and Schweinberger were implicated in both charges, Hegemann only in the first and Wiegner only in the second.

3. THE CASE FOR THE PROSECUTION

(i) *The Prosecutor's Opening Speech*

All four of the accused were N.C.O.s serving in a special security detachment, stationed at Almelo, Holland, in March 1945.

In August 1944 a member of the Dutch underground brought Pilot Officer Hood to a house occupied by Mrs. van der Wal, a widowed lady who was living with her 20 years old unmarried daughter and with her son Bote, the second victim, who was a young Dutchman hiding from the Germans in order to avoid compulsory labour service in Germany.

Pilot Officer Hood was wearing a civilian overcoat and trousers, but Royal Air Force boots and underwear, with an identity disk and a service watch. After baling out of a burning Lancaster, he had hidden his uniform and parachute and had obtained clothes from a farmer. After a few days with the van der Wals, Hood went to another house in the neighbourhood, whence he returned to the van der Wals on 2nd January, 1945. He lived there until 13th March, 1945.

During the night of 13th-14th March, Dutch Nazi police accompanied by S.S. came to the house, searching for Bote van der Wal, and in the course of the search, they eventually discovered Hood and Bote hiding together. They were both taken to Almelo prison where they were interrogated by the accused Sandrock, who was carrying out the interrogation on the instructions of an S.S. Lieutenant, Untersturmführer Hardegen, the officer in charge of the detachment. (Hardegen was not before the court.)

On the 21st March, 1945, Hardegen told Sandrock that the British airman had been condemned to death and that two men must be detailed to accompany Sandrock to a wood on the outskirts of Almelo, where Hood was to be shot. Thereupon Sandrock gave Schweinberger and Hegemann their orders. They drove to the wood, where Pilot Officer Hood was ordered to get out of the car. Sandrock told him that he had been condemned to death, and, after a few paces, Schweinberger shot him from behind, in the base of the skull, at a distance of about one yard. Hood was partially undressed by Schweinberger on the orders of Sandrock, while Sandrock dug the grave. Hegemann was left standing by the car. Schweinberger stole Hood's wrist watch, and they then carried him to the grave.

On 24th March, 1945, exactly the same procedure was followed in the case of van der Wal, except that on that day Hegemann was not present and Wiegner took his place.

After the liberation of Holland, the graves of both victims were located and the bodies identified beyond all doubt.

In opening the case, the Prosecuting Officer pointed out that superior orders are no defence to the commission of a criminal action, either in British,

International or, for that matter, German law, and he expressed the opinion that it was British law which prevailed in that court, under the Royal Warrant.

The Prosecutor referred to para. 443 of the British *Manual of Military Law*, (1944 text), and pointed out that Hood and van der Wal had never been tried, so that the so-called execution had no connection with any legal process and was in fact cold-blooded murder. After quoting Regulation 8(ii) of the Royal Warrant (see part B of this report) the Prosecutor added that the analogy which seemed to him most fitting in this case was that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot.

The Prosecution submitted documentary evidence establishing the identity of Pilot Officer Hood.

(ii) *The Evidence for the Prosecution*

The facts alleged by the Prosecution were confirmed by a number of witnesses, namely the mother of the second victim, Mrs. Ebelte van der Wal, his sister, Miss Grietje Adriaantje van der Wal, a Dutch prison warder, Jan Hendrick Veldhuis, another Dutch warder, Derk Jan Pasmann, a Dutch detective, Petrus Gerardus van Deursen, and Lt.-Col. N. Ashton Hill, the Commanding Officer of No. 2 War Crimes Investigation Team, who had interrogated the four accused. From the depositions of Mrs. and Miss van der Wal, it appeared, *inter alia*, that they had been informed of the fate of Bote van der Wal only after liberation. Written statements made to Lt.-Col. Hill by the four accused were put in as evidence for the Prosecution^(*). The accused had not been cautioned by Lt.-Col. Hill.

4. THE CASE AND EVIDENCE FOR THE DEFENCE

(i) *Outline of the Defence*

The Defence admitted that the killing actually did take place. Since superior orders in themselves are no excuse, the accused, in the submission of the Defending Officer, were left with two lines of defence; firstly that in the face of superior orders the accused were forced to carry out orders which they might have known to be unlawful; secondly that the knowledge open to the accused of what was and what was not lawful was not what it might appear to a British court. So far as the accused knew, it was quite possible that the two victims were in fact liable to be shot.

(ii) *The Evidence of the Accused Georg Otto Sandrock*

Sandrock, in civilian life a printer, admitted the full truth of the pre-trial statement which he had made. He said that it was perfectly clear to him that he had to carry out every order that was given to him and that no other course of action was possible.

If he had not carried out the orders, he might have been responsible himself and have been executed, and, besides, his family in Germany would have been responsible for his deeds. His Commanding Officer, Hardegen, had made this point clear to him. "If the Lieutenant says that this man has been condemned to death, I have to carry out the order," he said. During

(*) These statements and the other exhibits are not available to the Secretariat of the United Nations War Crimes Commission.

the examination and cross-examination of Sandrock, it was pointed out by the Defence that the statements he (and, for that matter, the other accused) had made quite willingly, both to the Dutch investigating officers and to Lt.-Col. Hill, showed that they felt no guilt.

Counsel for the Prosecution, on the other hand, caused the accused Sandrock to read the German provisions about the carrying out of death sentences which obviously had not been complied with in the case of Hood and van der Wal.

The Judge Advocate summed up the attitude of the accused as not suggesting that this was an execution which was carried out in the way it ought to have been done; what the witness was saying and all he was saying was that he was told to do this by his superior officer and that he had done it.

(iii) *The Evidence by the other three accused*

The accused Schweinberger, in civilian life a builder, testified that Hardegen, in taking over the command of the unit, had made a "welcome" speech and threatened all of them that if anybody wanted to leave the unit, he would be put into a concentration camp, and his family would get into trouble. In the Dutch prison he had actually signed the book confirming that he had taken van der Wal from the prison. Sandrock asked him (Schweinberger) whether he could execute a man and he answered: "If I must," and asked who had ordered it. He was told that the order came from Hardegen. He had shot both victims in the neck with a revolver. He also admitted that he removed the clothes and the watch.

The accused Hegemann, in civilian life a factory owner employing 100 people, and the accused Wiegner, in civilian life a teacher in a secondary school, admitted in evidence the part they had played, namely waiting near the car, and preventing people from coming near while the shooting took place.

(iv) *The Defence witness, Kuckuk*

This witness, a commissar of police with the army rank of captain, had served in the Gestapo Dienststelle at Almelo, under Hardegen who had only the rank of a lieutenant. He had been present when, on 21st March, 1945, Sandrock entered Hardegen's office, full of emotion, and said that he would not do "that" because he was not a hangman's assistant. Hardegen got angry, swore at him and said that he insisted that Sandrock carry out the order. After Sandrock had gone, Kuckuk asked Hardegen what Sandrock should do, but Hardegen did not give any explanation; he only said: "When I have given an order, I insist on its being carried out, and if there is one more man who does not carry out my order, I will shoot him." On 7th May, 1945, at the time of the capitulation, all the people in the Dienststelle had been collected and Hardegen in a way said goodbye to them, adding: "I will have to get away from here because everything that has been done under my command is my responsibility. I am in danger and that is why I have to go."

(v) *The Closing Address for the Defence*

The closing address of the Defending Officer again pleaded "superior force" arising out of the circumstances in which the accused found them-

selves. He read Article 29 of the Hague Regulations, containing the definition of a spy. He quoted paragraph 164 of Chapter XIV of the British *Manual of Military Law*, according to which an officer or soldier who is discovered behind the enemy's lines dressed as a civilian may be presumed to be a spy, and paragraph 172, according to which concealing a spy may be made the subject of a charge and is equally punishable with other war crimes. According to paragraph 445 of Chapter XIV of the British *Manual of Military Law*, the aiding of enemy prisoners of war to escape is an example of war treason, and is punishable by death, as a war crime. Counsel admitted that even a spy may not be sentenced to death without a trial, but that if one is held and the sentence of death is passed, failure to carry out incidental provisions, such as sending information to the protecting Power, or to the next of kin, need not necessarily be construed as a crime or even a sign of a guilty conscience. Ignorance of law is no excuse, but the maxim only applies in limited fields. It cannot be made to apply to everybody over every branch of the law.

The Defence put forward the plea of superior force, qualified in two ways. First, the existence of superior force had been proved by the evidence of Kuckuk and of various of the accused, that superior force was a matter of life and death to them and possibly of life and death, but certainly of liberty, to their families. Superior force could compel the accused to commit an act which they might have known or should have known to be unlawful and might also have debased their judgment as to what was lawful and what was not lawful. The second qualification was that the accused, with their limited view of the facts, had reason to believe that the victims were guilty. If an Englishman was connected with the Dutch underground, there was a certain amount of reason for supposing that he was engaged on espionage. Van der Wal had given refuge to an enemy; therefore it would appear that in his case, at any rate, there was an obvious case of war treason. Sandrock could also reasonably plead that Hood was a spy. The accused were absolutely lacking in the intention to commit a crime; if they did commit a crime it was negligence and nothing more. This would transform murder into manslaughter.

5. THE CLOSING ADDRESS FOR THE PROSECUTION

The Prosecution contended that the sequence of events in this case was scarcely in dispute. All the accused were fully conscious of the irregularity of what they were doing. Was there a soldier in any army, the Prosecutor asked, who had not heard of a firing party, who had not some general idea of the formalities proper and necessary before the lawful sentence of death could be carried out on anybody?

The Prosecutor suggested to the military members of the court that the handling of a revolver with any accuracy at point blank range in the dark was one of the most difficult of military accomplishments. It was not acquired without practice. The evidence was that Schweinberger had had very little ordinary revolver practice on the range. The court might draw their own conclusions as to why Schweinberger was selected for this task, when they knew the accuracy with which he shot two men in the back of the neck.

The essence of this case was that neither Hood nor van der Wal were ever tried for any offence. The court must exercise its ordinary common sense as to whether any of the accused even believed that such a trial could have taken place when they saw that first Hood and then van der Wal were left sitting in an office for several hours under no escort except such guard as was afforded by various personnel of the Dienststelle coming in and out in the course of their various duties.

One of the accused had alleged that after the retreat of the Germans in France in 1944, the regulations were suspended and provisions were made for the summary execution of suspects by the German security service. If these regulations, in flagrant violation of International Law, were made by an enemy when he found himself in a tight corner and on the verge of defeat, they were certainly no answer to the charge. Counsel reminded the court of the relevant passages in the *Manual* as to superior orders and added that he could quote several authorities, but that he would like to read only one brief passage, inasmuch as it put the same principle in slightly different words. It was an authority which the accused might have good reason to know. Counsel went on to quote from an article by Dr. Goebbels published in a German newspaper on 28th May, 1944, the following words: "No international law of warfare is in existence which provides that a soldier who has committed a mean crime can escape punishment by pleading as his defence that he followed the commands of his superiors. This holds particularly true if those commands are contrary to all human ethics and opposed to the well-established international usage of warfare."

6. THE SUMMING UP OF THE JUDGE ADVOCATE

(i) *The charge concerning the killing of Pilot Officer Hood*

The Judge Advocate stated that there was no dispute that Pilot Officer Hood was taken and killed by a shot in the back of the neck, that the shot was fired by the accused Ludwig Schweinberger, and that with him taking part in the execution, were the accused Sandrock and Hegemann. There was no dispute that all three knew what they were doing and had gone there for the very purpose of having this officer killed. If people were all present together at the same time taking part in a common enterprise which was unlawful, each one in his own way assisting the common purpose of all, they were all equally guilty in law. The party was under the command of Sandrock and in that sense he was probably directing the course of events in the wood. The killing was a war crime because it was in violation of the accepted laws and usages of war. If the court was satisfied of that, they had before them a case which came clearly within the scope of Regulation 1 of the Royal Warrant, which defines a war crime as "a violation of the laws and usages of war committed during any war in which His Majesty has been engaged since 2nd September, 1939."

The Judge Advocate asked whether there was any evidence upon which the court could find that, on the night of 21st March, 1945, these three men or any of them honestly believed that this British officer had been tried according to the law, and that they were carrying out a lawful execution.

If the court was satisfied that this was not so, then it would be clearly quite right to reject any defence that might have been put up under that

heading. On the other hand, if the court felt that circumstances were such that a reasonable man might have believed that this officer had been tried according to law, and that they were carrying out a proper judicial legal execution, then it would be open to the court to acquit the accused.

The Judge Advocate read to the court paragraph 443 of the XIVth chapter of the British *Manual*, adding that the case for the Prosecution was that the court should infer that the accused were not really averse to carrying out these orders, and that the court should accept not that they were deliberately being forced to do something against their will, but that they were prepared to accept this order, carrying it out as assistants to the S.S. Lieutenant.

(ii) *The charge concerning the killing of Bote van der Wal*

Very much the same kind of case was put forward in regard to the killing of Bote van der Wal on the night of the 24th March, 1945. The same point arose, the Prosecution saying that Sandrock, Schweinberger and Wiegner were committing a war crime, that they were not really acting under force of superior orders and that they were really willing executants of the order to kill Bote van der Wal.

7. VERDICT AND SENTENCE

Sandrock and Schweinberger were found guilty on both charges, Hegemann on the first charge and Wiegner on the second charge.

Sandrock and Schweinberger were sentenced to suffer death by being hanged, Hegemann and Wiegner were sentenced to imprisonment for 15 years.

The sentences were confirmed by the Commander-in-Chief, British Army of the Rhine, on 12th December, 1945, and the sentences of death imposed on Sandrock and Schweinberger were put into execution at Zuchthaus Hameln on 13th December, 1945.

B. NOTES ON THE CASE

1. QUESTIONS OF JURISDICTION

In British Municipal Law the jurisdiction of the court was based on the Royal Warrant of 14th June, 1945, Army Order 81/1945.^(*)

Regulation 4 of the Royal Warrant provides that, if it appears to an officer authorised under the Regulation to convene a Military Court that a person then within the limits of his command has, at any place whether within or without such limits, committed a war crime, he may direct that such person, if not already in military custody, shall be taken into and kept in such custody pending trial in such manner and in the charge of such military unit as he may direct. The commanding officer of the unit having charge of the accused shall be deemed to be his commanding officer for the purpose of all matters preliminary and relating to trial and punishment.

From this it follows that it makes no difference to the jurisdiction of the Military Court from the point of view of British law, whether the alleged crime had been committed within or without the limits of the convening

(*) See Annex I, p. 105.

officer's command. Although in the present case the crime had been committed on Dutch territory, there was no necessity to investigate whether the territory in question was within the limits of the command of the British officer who convened the military court, it being sufficient for the establishment of the jurisdiction that the persons of the accused were at the time of the initiation of proceedings within those limits.

As far as International Law is concerned, British jurisdiction was established in view of the fact that one of the victims had been a member of the British Armed forces. The accused Wiegner had not taken part in the crime committed against the British airman; he was charged with a crime committed on Dutch territory against a Dutch citizen. In respect of this accused, British jurisdiction could be based on any one or more of the following reasons:

- (a) That under the general doctrine called Universality of Jurisdiction over War Crimes, every independent state has in International Law jurisdiction to punish pirates and war criminals in its custody regardless of the nationality of the victim or the place where the offence was committed;
- (b) that the United Kingdom has a direct interest in punishing the perpetrators of crimes if the victim was a national of an ally engaged in a common struggle against a common enemy; and
- (c) that by the Declaration regarding the defeat of Germany and the assumption of supreme authority with respect to Germany, made in Berlin on the 5th June, 1945,^(*) the four Allied Powers occupying Germany have assumed supreme authority. The jurisdiction of the British Court could, therefore, also be based on the fact that since the unconditional surrender of Germany and the Declaration of Berlin, Great Britain has been one of the four allied Powers who are the local sovereigns in Germany and are entitled to exercise jurisdiction over German subjects throughout the world (Principle of Personality).

An agreement between the Dutch and British authorities, which is referred to in the Preamble to the Dutch Law-Decree of 23rd August, 1944 (No. E.66) concerning the jurisdiction of Allied Military Courts, was the basis for the conducting of this trial by a British Military Court on Dutch territory.

The fact that a crime had been committed on Dutch territory and that one of the victims was a Netherlands national, was obviously the reason why the convening officer appointed a Netherlands Officer as a member of the Court.^(*)

2. RULES OF PROCEDURE AND RULES OF EVIDENCE^(*)

By virtue of Regulation 8 (i) of the Royal Warrant, the court admitted in evidence, *inter alia*, pre-trial statements made by the accused to a British investigating officer.

^(*) (1945) Cmd. 6648; see also notes on Case No. 1 of this series, *supra*, p. 13.

^(*) As to mixed Inter-Allied Military Courts, see Annex I, paragraph V, at p. 106.

^(*) See Annex I, pp. 107-8.

3. QUESTIONS OF SUBSTANTIVE LAW

(i) *The Problem of Collective Responsibility*

Regulation 8(ii) of the Royal Warrant of 14th June, 1945, as amended by Royal Warrant of 4th August, 1945, Army Order 127/1945, provides that :

"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."

This provision was invoked by the Prosecuting Officer who went on to compare the case with that of a crime committed by a gang, every member of the gang being equally responsible with the man who fired the actual shot. The Judge Advocate ruled that there was no dispute that all three (Sandrock, Schweinberger and Hegemann in the case of Pilot Officer Hood, and Sandrock, Schweinberger and Wiegner in the case of van der Wal) knew what they were doing and that they had gone to the wood for the very purpose of having the victims killed. If people were all present together at the same time, taking part in a common enterprise which was unlawful, each one in their own way assisting the common purpose of all, they were all equally guilty in law.

Sandrock commanded the two parties, Schweinberger did the actual shooting and Hegemann in the first case, Wiegner in the second, assisted by staying at the car and preventing strangers from disturbing the other two while they were engaged in the crime.

The finding is therefore in accordance with the established rules of criminal law of civilized countries, according to which not only the immediate perpetrators but also aiders and abettors, accessories, etc. are criminally liable.

(ii) *Espionage and War Treason*

Pilot Officer Hood had been captured in civilian clothes hiding in the house of a Dutch civilian, together with a Dutch civilian who was hiding from the German authorities because he wanted to avoid being sent to compulsory labour in Germany.

The Defence therefore submitted that the accused could reasonably believe that Hood was a spy and that Bote van de Wal had committed war treason, and that both were liable to be shot.

As far as the shooting of Pilot Officer Hood was concerned, the Defence referred to Art. 29 of the Hague Regulations which states, in defining a spy, that a person can only be considered a spy when, *acting clandestinely* or on false pretences, he obtains or endeavours to obtain information in the zone of operation of a belligerent with the intention of communicating it to the hostile party. Accordingly soldiers not wearing a disguise who have penetrated into the zone of operations of a hostile army for the purpose of obtaining information are not considered spies. The defence was obviously

based on the consideration that Hood had "acted clandestinely" and that he was "wearing a disguise." The Defence in this connection invoked para. 164 of Chapter XIV of the British *Manual of Military Law*, which provides that an officer or soldier who is discovered in the enemy's line dressed as a civilian or wearing an enemy uniform, may be presumed to be a spy, unless he is able to show that he had no intention of obtaining military information.

As far as the killing of van der Wal was concerned, para. 172 of Chapter XIV of the British *Manual* was invoked, according to which assisting or favouring espionage or treason or knowingly concealing a spy may be made the subject of charges. According to para. 445 of the British *Manual*, many acts which may be attempted or accomplished in occupied territory by private individuals or by soldiers in disguise are classed as war treason, among them, aiding enemy prisoners of war to escape.

This was of no avail because the Judge Advocate ruled that it was decisive whether the accused honestly believed that Hood and van der Wal had been tried according to law and that they further believed that in shooting them they were carrying out a lawful execution.

It was not relevant whether or not the circumstances under which Pilot Officer Hood had been apprehended gave rise to the suspicion that he was engaged in espionage against Germany, or whether the fact that Bote van der Wal had been captured while hiding together with Hood made him suspect of having committed war treason against Germany, either by assisting Hood as a spy, or by assisting Hood as a prisoner of war who was trying to escape. The only relevant question was whether Hood and van der Wal had been given a regular trial.

The verdict of the Military Court shows that the Court found as a fact that the accused had reason to believe neither that the victims had been legally tried and sentenced nor that the accused were carrying out a legitimate sentence.

It may be added that Art. 30 of the Hague Regulations expressly provides that even a spy taken in the act shall not be punished without previous trial.

The rule of law on which the decision of the Military Court is based is, therefore, the rule that it is a war crime to kill a captured member of the opposing armed forces or a civilian inhabitant of occupied territory, suspect of espionage or war treason, unless their guilt has been established by a court of law.

(iii) *The Plea of Superior Orders*

As far as the defence of superior orders is concerned, the Court proceeded on the law as stated in the 1944 Amendment of para. 443 of Chapter XIV of the British *Manual of Military Law*.⁽¹⁾

(iv) *"Superior Force"*

The Defence relied on the fact that the accused had acted under what they called "superior force," fearing the consequences for the accused

⁽¹⁾ For details of the development of the law regarding this plea, see the notes on Cases Nos. 1 and 2 of this series, pp. 18-20 and 31-33.

themselves and their families in case of disobedience to illegal orders. By convicting the accused, the Court rejected this defence.

(v) *The Absence of Mens Rea*

The Defence submitted that the accused were absolutely lacking in the intention to commit a crime and that their judgment as to what was lawful and what was not lawful had been conditioned by the order they received, and probably also by the behaviour of Hardegen, their commanding officer, and by the whole atmosphere in which they were living.

The Prosecuting Officer replied that there was no soldier in any army who had not heard of a firing party and who had not some general idea of the formalities proper and necessary for the carrying out of a lawful death sentence.

The Judge Advocate pointed out that the relevant consideration was whether the accused had reason to believe that they were carrying out a lawful sentence.