LAW REPORTS OF TRIALS OF WAR CRIMINALS

Selected and prepared by the

UNITED NATIONS WAR CRIMES COMMISSION

English Edition

VOLUME I

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

1947

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FOREWORD

I have been asked to contribute a Foreword to the first volume of Law Reports on Trials of War Crimes which are being selected and prepared by the United Nations War Crimes Commission, of which I am Chairman. The Commission in producing and publishing these law reports is fulfilling the duty assigned to it. The Commission is primarily concerned with criminals who fall within the first category under the Moscow Declaration of October 30th, 1943. This category may generally be defined to be that embracing particular individuals who have committed offences against the laws of war and whose offences can be ascribed to a particular location. These are sometimes called " minor war criminals," but that is a misleading term because of the enormity and scope of the crimes committed, which really include all war crimes except those that were charged at the Nuremberg and Tokyo trials and are described as crimes which have no particular geographical location. The Declaration distinguished these two categories for the purpose of providing how they were to be punished. The latter, the " major war criminals," were to be punished by joint decision of the governments of the Allies and the joint decision has resulted in the Nuremberg trial and the Tokyo trial. The former category were dealt with in the Moscow Declaration by providing that Germans who took part in the various atrocities referred to were to be brought back to the scene of their crimes and tried on the spot by the peoples whom they have outraged. The Commission has not been concerned directly, though it has been concerned indirectly, in the crimes which were charged in the proceedings at Nuremberg and Tokyo, but it has had very close relations with the cases of what have been called the " minor criminals." The trials of that class of offenders constitute the subject of these reports.

In the present volume, which was sent to press before the judgment of the International Military Tribunal at Nuremberg was promulgated, there are reports of six cases tried by British Military Courts and three cases tried by United States Military Commissions. I shall not attempt to deal with the details of these cases, which included offences against prisoners of war, slaughter of mariners attempting to escape from a torpedoed ship, poison gas used on inmates of concentration camps, killing on a large scale by poison administered by medical personnel in a sanatorium, and similar crimes.

It will be observed that in all these cases prosecutions were brought and conducted by the military authorities. The courts were constituted from serving officers of the two armies respectively with the exception of two instances, the Peleus and the Almelo cases, where the military courts were mixed in their composition. In the Peleus case the tribunal included Greek as well as British officers, and in the Almelo case Dutch as well as British officers. Most of these cases are dealing with offences committed against members of the military forces of the respective nation. In later volumes it is hoped to include reports of the trials of Germans accused of crimes in concentration camps. It was not found possible for technical reasons to include in the present volume reports of French cases, but that defect will, it is hoped, be remedied in the following volumes.

It will be observed that in these reports there is a certain difficulty because the court does not deliver a reasoned judgment. In the American cases

apart from the interlocutory observations on the questions of evidence or procedure which arise from time to time in each case, and on which the court rules, there is no reasoned judgment, so that it is difficult in some cases to specify precisely the grounds on which the courts gave their decision. That difficulty is, however, to a large extent surmounted in the United States cases by examining carefully the indictment, the speeches of the counsel on both sides and the judgment. By analysing and comparing in that way it will generally be possible to explain what the case was about and what the decision was. The reports have been largely prepared on the basis of shorthand and other notes taken at the hearings which have been furnished to the Commission by the good offices of the Judge Advocate General in Britain or of the United States representative on the Commission. In the case of the British Courts the Judge Advocate, who sits to help the Tribunal on questions of law and who sums up, provides in his addresses an analysis of the facts and the law which goes to explain the judgment. That position is absent, however, in the case of the United States trials. In these the Judge Advocate takes no part in the advising of the court, and legal questions are examined and discussed between prosecuting counsel (a member of the Judge Advocate's staff) and defending counsel, and there is generally a member with legal qualifications on the bench.

The reports seek in the head-note to state exactly what the reporters understand are the legal points discussed and adjudicated upon. Volume I contains, in Annexes I and II, two short statements on the principles of law and practice administered in British and United States Tribunals respectively. Other similar statements in respect of the relevant French law and of other systems will be annexed to later volumes.

I cannot sufficiently emphasise what I regard as the great importance of these reports from the point of view of the future development of International Law as applied to war crimes. Several hundred cases of war crimes have already been tried in courts of the different members of the United Nations ; these reports will show, for the practitioner or the student, the particular problems which have arisen and how in practice they have been dealt with and also show to the historian of the laws of war the practice of courts in applying those laws to particular cases. These reports are of the highest value and will prevent what would otherwise happen, namely the want of a correct record of the most significant cases which have been tried. It is with a view to illustrating as far as possible important points of law and procedure that these volumes of these cases and those to be contained in the succeeding volumes have been selected and reported. It is by studying them that the precise record can be secured and an appreciation formed of the problems to be solved and the methods adopted in solving them.

These reports have been prepared by Mr. Egon Schwelb, Dr. jur. (Prague), LL.B. (London), Legal Officer of the Commission, with the collaboration of Mr. Jerzy Litawski, LL.M. and LL.D. (Cracow), Legal Officer, and Mr. George Brand, LL.B. (London), Assistant Legal Officer. They have been submitted to the members of Committee III (Legal Committee) of the Commission, who have discussed them on behalf of the Commission and have made valuable suggestions. The preliminary scheme and the general

lines to be followed in the publication were discussed at meetings attended not only by members of the Commission but by representatives of the United Kingdom Foreign Office, War Office, the Judge Advocate General and the Stationery Office. These meetings were very helpful. Valuable help in dealing with United States Law has been given by the Civil Affairs Division of the War Department, Washington D.C. The Commission has also to express its indebtedness to the British Judge Advocate General and the United States War Department for copies of the reports and accounts of trials, without which the volumes could not have been prepared.

WRIGHT,
Chairman,
United Nations War Crimes Commission.

London, *October*, 1946.

CASE No. 1

THE PELEUS TRIAL

TRIAL OF KAPITÄNLEUTNANT HEINZ ECK AND FOUR OTHERS FOR THE KILLING OF MEMBERS OF THE CREW OF THE GREEK STEAMSHIP PELEUS, SUNK ON THE HIGH SEAS

BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS HELD AT THE WAR CRIMES COURT, HAMBURG, 17TH-20TH OCTOBER 1945

Killing of survivors of a sunken ship. Absence of mens rea. The defence nulla poena sine lege. The pleas of operational necessity and superior orders. The legal relevance of the British Manual of Military Law. Persuasive authority of the case of the "Llandovery Castle" decided by the German Reichsgericht in 1921.

The Commander of a German submarine was charged with ordering the killing of survivors of a sunken allied merchant vessel. Four members of the crew were charged with having done the actual killing. The defence of absence of *mens rea* was unsuccessful. It was held that the maxim *nulla poena sine lege* did not apply. The plea of operational necessity and the plea of superior orders were invoked by the Commander and three of the members of the crew respectively, but were held not to free the accused from responsibility.

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 C. I. V. Jones, C.B.E., Commander 106 AA Bde., as President, and, as members, Brigadier R. M. Jerram, D.S.O., M.C., Commodore D. Young-Jamieson, Royal Navy, Captain Sir Roy Gill, K.B.E., Royal Naval Reserve, Lieutenant-Colonel H. E. Piper, Royal Artillery, Captain E. Matpheos, Royal Hellenic Navy, and Commander N. I. Sarris, Royal Hellenic Navy.

The Judge Advocate was Major A. Melford Stevenson, K.C., Deputy Judge Advocate Staff, Judge Advocate General's Office.

(1) *See* Annex I, pp. 105-10.

The Prosecutor was Colonel R. C. Halse, Military Department, Judge Advocate General's Office.

The Defending Officers were as follows :

For the Accused Kapitänleutnant Eck : Fregatten-Kapitän Meckel and Dr. Todsen.

For the Accused Leutnant zur See Hoffmann : Dr. Pabst and Dr. P. Wulf (as to character only).

For the Accused Marine Stabsarzt Weisspfennig : Dr. Pabst.

For the Accused Kapitänleutnant (Ing) Lenz : Major N. Lermon, Barrister-at-Law, HQ 8 Corps District.

For the Accused Gefreiter Schwender : Dr. Pabst.

For all the Accused : Professor A. Wegner.

2. THE CHARGE

The prisoners were :

Kapitänleutnant Heinz Eck,
Leutnant zur See August Hoffmann,
Marine Stabsarzt Walter Weisspfennig,
Kapitänleutnant (Ing) Hans Richard Lenz,
Gefreiter Schwender.

They were charged jointly with :

" Committing a war crime in that you in the Atlantic Ocean on the night of 13/14th March, 1944, when Captain and members of the crew of Unterseeboat 852 which had sunk the steamship " Peleus " in violation of the laws and usages of war were concerned in the killing of members of the crew of the said steamship, Allied nationals, by firing and throwing grenades at them."

It was submitted on behalf of the Defence that the charge may be read in two different ways, according to which the phrase " in violation of the laws and usages of war " could qualify *either* the word " sunk " *or* the word " concerned," and what followed it.(2).

It was made clear at the outset by the Prosecution that the phrase " in violation of the laws and usages of war " qualified the words that follow it, and not the words that precede it, or in other words, that the prisoners were *not* accused of having violated the laws and usages of war by *sinking* the merchantman, but only by *firing* and *throwing grenades* on the *survivors* of the sunken ship.

3. THE OPENING OF THE CASE BY THE PROSECUTOR

The " Peleus " was a Greek ship chartered by the British Ministry of War Transport. The crew consisted of a variety of nationalities ; on board there were 18 Greeks, 8 British seamen, one seaman from Aden, two Egyptians, three Chinese, a Russian, a Chilean and a Pole.

(2) The first interpretation would mean that the steamship " Peleus " was sunk in violation of the laws and usages of war. The second construction would mean that the killing of members of the crew was in violation of the laws and usages of war.

On the 13th March, 1944, the ship was sunk in the middle of the Atlantic Ocean by the German submarine No. 852, commanded by the first accused, Heinz Eck. Apparently the majority of the members of the crew of the " Peleus " got into the water and reached two rafts and wreckage that was floating about. The submarine surfaced, and called over one of the members of the crew who was interrogated as to the name of the ship, where she was bound and other information.

The submarine then proceeded to open fire with a machine-gun or machine-guns on the survivors in the water and on the rafts, and also threw hand grenades on the survivors, with the result that all of the crew in the water were killed or died of their wounds, except for three, namely the Greek first officer, a Greek seaman and a British seaman. These men remained in the water for over 25 days, and were then picked up by a Portuguese steamship and taken into port.

Later in the year, a U-boat was attacked from the air on the East Coast of Africa and was compelled to beach. Her log was found, and in it there was a note that on the 13th March, 1944, she had torpedoed a boat in the approximate position in which the S.S. " Peleus " was torpedoed. The U-boat was the U-boat No. 852 commanded by the accused Eck and among its crew were the other four accused, three of them being officers, including the medical officer, and one an N.C.O.

Five members of the crew of the U-boat made statements to the effect that they saw the four accused members of the crew firing the machine-gun and throwing grenades in the direction of the rafts which were floating about in the water.

4. EVIDENCE FOR THE PROSECUTION

The Prosecution put forward affidavits by the three survivors of the crew of the " Peleus," and called five members of the crew of the U-boat as witnesses.

On the application of the Prosecution, arrangements were made for the names of these German witnesses not to be published by the Press.

The facts as appearing on this evidence were that the accused captain of the U-boat, Eck, had ordered the shooting and the throwing of hand grenades at the rafts and the floating wreckage, and that the accused Lt. Hoffmann, Oberstabsarzt Weisspfennig and Gefreiter Schwender had done the actual shooting and throwing of grenades ordered by Eck. The fifth accused, Kapitän-Leutnant Engineer Lenz, appears to have behaved in the following way : (*a*) When he heard that the captain had decided to eliminate all traces of the sinking, he approached the captain and informed him that he was not in agreement with this order. Eck replied that he was nevertheless determined to eliminate all traces of the sinking. Lenz then went below to note the survivors' statements in writing and did not take part in the shooting and throwing of grenades. (*b*) Later on, Lenz went on the bridge and noticed the accused Schwender with a machine gun in his hand. He saw that Schwender was about to fire his machine gun at the target and thereupon he, Lenz, took the machine gun from Schwender's hand and fired it himself in the general direction of the target indicated. He did this because he considered that Schwender, long known to him as one of the most

unsatisfactory ratings in the boat, was unworthy to be entrusted with the execution of such an order.

5. OUTLINE OF THE DEFENCE

The defence of Heinz Eck was based on the submission that he, as the commander of the U-boat, did not act out of cruelty or revenge but that he decided to eliminate all traces of the sinking. The Defence claimed that the elimination of the traces of the " Peleus " was operationally necessary in order to save the U-boat.

The other accused relied mainly on the pleas of superior orders. In addition to Counsel for the individual accused, the German Professor of Criminal and International Law, Wegner, acted as Counsel for all the defendants.

In elaborating the defence of operational necessity, Professor Wegner pointed out that submarine commanders had long been in an unfortunate position. When the submarine was a comparatively new weapon, the Washington Convention wanted to treat the commanders of submarines in certain cases as pirates. This, however, was never ratified by the countries concerned.

With regard to the plea of superior orders, Professor Wegner said that he stuck " to the good old English principles " laid down by the " Caroline case," according to which, he submitted, it was a well-established rule of International Law that the individual forming part of a public force and acting under authority of his own Government is not to be held answerable as a private trespasser or malefactor, that what such an individual does is a public act, performed by such a person in His Majesty's service acting in obedience to superior orders, and that the responsibility, if any, rests with His Majesty's Government. Superior command, as excluding personal responsibility, had, Professor Wegner said, also been recognised in the treatment of prisoners of war in the Convention of 1929. He further invoked an alleged statement made by Mr. Justice Jackson.

Whatever may be the merits of the modern conception of war crimes, it must not be permitted to obscure old and sound principles of criminal law and procedure. Professor Wegner further referred to the important principle embodied in the Latin phrase, *nullum crimen sine lege, nulla poena sine lege.*

6. EVIDENCE BY THE ACCUSED HEINZ ECK, COMMANDER OF THE SUBMARINE

The accused, Heinz Eck, during examination and cross examination, did not plead that, when ordering the shooting at the rafts and the wreckage, he had acted on a superior order.

His orders were, he said, that when operating in the South Atlantic he was to be concealed as far as possible because great numbers of U-boats had been sunk in that particular region. He manœuvred the boat to the place of the sinking, and ordered small arms on deck to prevent danger to the boat arising out of the presence of survivors, as he had heard of cases where the loss of the U-boat had actually been caused by the presence of survivors. He decided to destroy all pieces of wreckage and rafts and gave the order to open fire on the floating rafts. He thought that the rafts were a danger to

him, first because they would show aeroplanes the exact spot of the sinking, and secondly because rafts at that time of the war, as was well-known, could be provided with modern signalling communication. When he opened fire there were no human beings to be seen on the rafts. He also ordered the throwing of hand grenades after he had realised that mere machine gun fire would not sink the rafts. He thought that the survivors had jumped out of the rafts. He further admitted that the Leading Engineer, Lenz, objected to the order. Lenz had said that he did not agree with it, but he, Eck, had told him that, despite everything, he thought it right and proper to destroy all traces.

It was clear to him, he went on, that all possibility of saving the survivors' lives had gone. He could not take the survivors on board the U-boat because it was against his orders. He was under the impression that the mood on board was rather depressed. He himself was in the same mood ; consequently he said to the crew that with a heavy heart he had finally made the decision to destroy the remainder of the sunken ship.

Eck referred to an alleged incident involving the German ship " Hartenstein," of which he had been told by two officers. After this boat had saved the lives of many survivors, it was located by an aeroplane. The boat showed the Red Cross sign and one of the survivors, a flying officer, had, with a signal lamp, given some signals to the aeroplane not to attack the boat because of the survivors being on board, including women. The plane left, and after a time it returned and attacked the boat, which was forced to unload the survivors again, in order to dive, and it survived only after sustaining some damage. This case, about which he had been told before the beginning of his voyage, showed him that on the enemy side military reasons came before human reasons, that is to say before the saving of the lives of survivors. For that reason, he thought his measures justified.

The firing went on for about five hours.

In his address to the crew, he said : " If we are influenced by too much sympathy, we must also think of our wives and children who at home die also as victims of air attack."

To the Prosecutor's question : " Sympathy about the wreckage ? ", Eck said it was quite clear to him that the survivors would also die. Eck realised that they would die as a result of his shooting. He gave the order to shoot to Hoffmann, Weisspfennig and Schwender, but not to Lenz.

Eck's description of the " Hartenstein " incident was, in the main, confirmed by an English witness, a solicitor serving as a temporary civil servant at the Admiralty. He confirmed that, as a result of the incident, the German U-boat Command issued instructions as follows :—

" No attempt of any kind should be made at rescuing members of ships sunk, and this includes picking up persons in the water and putting them in lifeboats, righting capsized lifeboats and handing over food and water. Rescue runs counter to the rudimentary demands of warfare for the destruction of enemy ships and crews. Orders for bringing Captains and Chief Engineers still apply. Rescue the shipwrecked only if their statements will be of importance for your boat. Be harsh, having in mind that the enemy takes no regard of women and children in his bombing attacks of German cities."

7. EXAMINATION OF THE DEFENCE WITNESS, CAPTAIN SCHNEE

This officer, a member of the German U-boat command, who had sunk about 30 allied ships and received the Oak Leaf of the Iron Cross, described the instructions he had given to Eck before Eck left. He pointed out to him that the situation in this particular zone was very difficult for the Germans. In the months prior to the happening all boats of this type had been lost. The German U-boat command explained the destruction of these boats in that particular zone in two ways. First, this particular type of U-boat was the biggest of the German U-boat fleet and consequently the heaviest and slowest, and therefore the most vulnerable. Secondly, there was strong aircraft cover between the area of Freetown and Ascension. These air bases were in touch with aircraft carriers and so they were able to chase submarines until they could destroy them. Once the presence of the boat was detected in these waters, the aircraft defence could follow it up with all its power and destroy it. Traces of the sunken ship would be recognisable for the next few days and could be recognised by a plane. To the question whether it would not have been more advisable for Eck, instead of wasting time in destroying the wreckage, to take advantage of the night and to leave the place of the sinking, Schnee thought that in the best possible conditions the boat could only cover a distance of about 150 sea-miles during the night, a distance which was of no importance for air reconnaissance. During the course of the cross-examination of Schnee, the following exchanges took place between the Prosecuting Officer, the Judge Advocate and the witness :

Col. Halse (the Prosecuting Officer).—As an experienced U-boat commander what would you have done if you were in Eck's position on the night of the 13th March ?

A.—I do not know this case well enough to give an answer.

The Judge Advocate.—Come ; you can do a little better than that. You know the circumstances of this case, do you not ? You have been giving evidence about them ?

Q.—You have dealt in great detail with the propriety of leaving the site of the sinking, have you not ?

Q.—You were asked what would you have done if you had been the Commander of U-852 and had just sunk the " Peleus " ?

A.—It is very difficult for me to give an answer to that.

Q.—Would you try ?

A.—Now that the war is over I cannot possibly put myself in such a difficult position as Captain Eck was at that time.

Q.—The fact that the war is over has not deprived you of your imagination, has it ? Just answer yes or no.

A.—No.

Q.—What would you have done if you had been in Eck's position ?

A.—I would under all circumstances have tried my best to save lives, as that is a measure which was taken by all U-boat commanders ; but when I hear of this case, then I can only explain it as this, that Captain Eck, through the terrific experience he had been through, lost his nerve.

Q.—Does that mean that you would not have done what Captain Eck did if you had kept your nerve ?

A.—I would not have done it.

Q.—Did B.D.U. (the German U-boat command) approve of the killing of survivors ?

A.—No, it did not approve, not at the time when I was a member of the staff of B.D.U.

Q.—You were on the staff of B.D.U. in March 1944 ?

A.—Yes.

Q.—Were orders issued that survivors were not to be killed ?

A.—It was not necessary because this order had already been issued at the outbreak of war.

8. EXAMINATION OF THE FOUR OTHER ACCUSED

The accused Hoffmann, during his examination, relied for defence mainly on the order given by the Commandant.

The accused Weisspfennig also referred to the order but admitted that in the German navy there were regulations about the conduct of medical officers which forbade them to use weapons for offensive purposes. Weisspfennig disregarded this regulation because he had received an order from the Commandant. He did not know whether his regulations provided that he could refuse to obey an order which was against the Geneva Convention. He knew what the Geneva Convention was and realised that one of the reasons why he was given protection as a doctor was because he was a non-combatant. He realised that there were survivors. He did not regard the use of the machine gun in this particular case as an offensive action.

The accused Lenz, during his examination, repeated his explanation that he took over the firing from Schwender because he did not want a human being to be hit by bullets fired by a soldier whom he considered bad.

The accused Schwender said that, under orders, he fired at the wreckage, but not at human beings.

9. CLOSING ADDRESS BY PROFESSOR WEGNER

Professor Wegner recalled the decision of the German Supreme Court in the case of the " Llandovery Castle " (3) and submitted that the principle on which the German Supreme Court had acted in that case could not be followed today. Too much had happened since then ; the psychology of a whole nation, not to say of the world, had changed meanwhile. The legal difference between the situation of the Leipzig trials after the last war and the present situation was that now the accused were not before a German court and the defence did not know exactly what laws were going to be applied to their acts.

Counsel quoted Renault who, in an essay published in 1915, emphasised that one had to distinguish between a man being politically responsible and a criminal being guilty of a crime. If one confused criminal and political responsibility one became oneself guilty of a very dangerous confusion and injustice. One could not call any man a war criminal without his doing

(3) *Annual Digest of Public International Law Cases*, 1923-1924, Case No. 235 ; British Command Paper (1921) Cmd.1422, p. 45 ; Schwarzenberger, *International Law and Totalitarian Lawlessness*, p. 128.

wrong and being guilty according to a law enacted before his deed. And as to the wrong, one had to consider that in war acts which otherwise would be crimes are, in most cases, justified by International Law. Many rules of International Law were rather vague and uncertain. Could one decide to find an individual guilty of having violated a rule of International Law if the States themselves had always quarrelled about that rule, its meaning and bearing, if they had never really approached recognising it in common practice and hardly knew anything precise concerning it? If the States did not know, how could the individual know?

Professor Wegner further referred to statements made by the American Professor, Charles G. Fenwick, who, when dealing with the charges against the German army for devastation in 1917, resulting from the partial retreat of the German troops, had said: "Owing, however, to the conditional character of the prohibitions of the law, it is difficult in these cases as in others to determine whether the act of destruction was in violation of technical law, even in cases where it appeared to the sufferers to be wholly arbitrary and malicious."

The Professor went on to say that the decision of the German Supreme Court in the case of the "Llandovery Castle" was regarded in Germany as treason, and people having taken part in it, or having defended it, were treated as traitors. He alleged that a similar tendency against which he had always fought in his books and essays was always very strong in some quarters of English and American jurisprudence and especially in that part of it which was represented by Austin and his school. Most modern writers of that school of thought openly taught, in Professor Wegner's view, outspoken National jurisprudence, discarding Divine as well as Public International Law. It is by such tendencies that, since the second half of the last century, the way had been paved for the National Socialist contention that there existed no universal truth and law, but that, instead, the will and command of the nation had the supreme, absolute and totalitarian value, claiming an individual's whole and undivided loyalty. If a heresy like this prevailed among so many famous lawyers of almost every country, the individual must be excused to some extent for a confusion in his conception as to right and wrong.

Professor Wegner stated that Gardner's contention that English law did not admit a plea of superior command had been refuted by many writers. He quoted the pre-1944 text of the British Manual of Military Law and also referred to the "Caroline" case and stated that ever since this "case" it had been a well-established rule in International Law that the individual forming part of a public force and acting under the authority of his Government is not to be held responsible as a private trespasser or malefactor. Superior command, as excluding personal responsibility, had, according to Professor Wegner, also been recognised in the treatment of prisoners of war.

Referring to American papers published during the second world war suggesting that there was a most important difference between the Imperial German Government of 1914-1918 and the National Socialist rulers of 1939, the Professor pointed out that the average German people were to a very large extent to be excused for their unfortunate mistaking of revolutionary

violence and political ruse and swindle for something like national leadership. The National Socialist administration had been recognised by foreign Powers. The fear emanating from the Hitler government was almost irresistible and dominated Germany absolutely. The foreign Powers, including Great Britain and the U.S.A., had no such excuse for recognising the Hitler administration.

War criminals could only be convicted of such crimes as were crimes according to the penal code of their country, in the present case the German Criminal Code of 1871, and only such punishment might be inflicted as was provided by that law.

10. THE CLOSING ADDRESSES OF THE OTHER DEFENDING COUNSEL

The advocates defending the accused Hoffmann, Weisspfennig and Schwender distinguished the crime of Schwender from that of the others because Schwender had neither purposely nor carelessly nor by chance killed anybody. If Schwender were to be punished, thousands of soldiers would have to be punished, who, on orders, have shot at non-living targets.

As to Hoffmann and Weisspfennig, Counsel pleaded superior orders and further that the offences had not been proved. It was for the court to decide whether there had been *dolus directus* or *dolus eventualis* or a careless offence. He pointed out that in case they were found guilty it must be decided whether they were to be punished for murder, for manslaughter or for involuntary killing. They were not guilty, as a superior order lifted the criminal responsibility from them. Paragraph 47 of the *Militärstrafgesetzbuch*, to which the accused were subject at the time of the act and which applied to them then, and as long as they were prisoners of war, said: "If a penal law is violated by the execution of an order in the course of duty, the commanding superior is alone responsible for it. The obeying subordinate meets punishment for participating, however, if it was known to him that the order referred to an action which involved a criminal purpose."

Regarding the culpability of a soldier, one had to distinguish between the cases in which the subordinate knew the illegality of the order and those in which he did not know it. Only in the former case could one speak of the responsibility of an obeying subordinate; but also in such case the British Military Law would not hold the imprisoned enemy responsible, as was shown in para. 443 of Chapter XIV of the British *Manual of Military Law* (pre-1944 text) (4). The advocate referred to the decision of the German Reichsgericht in the case of the "Dover Castle," which was distinguishable from the case of the "Llandovery Castle." In the "Dover Castle" case, the Reichsgericht acted on the principle that the commanding superior alone was responsible and that the subordinate can only be punished if he was aware of the illegality of the order. Counsel submitted that the British Government had acquiesced in this decision and thus not objected to the principle. In the "Llandovery Castle" case, the Reichsgericht established the fact that the accused knew that the execution of the order was criminal.

(4) Amendment No. 12 to the *Manual of Military Law* 1929, Chapter XIV, notified in Army Orders for January, 1936.

In the " Dover Castle " case ([5]) the accused were not aware of that and were therefore acquitted.

Another Defending Officer referred also to the United States *Rules of Land Warfare*, 1914, according to which, he submitted, obedience to superior orders was a good defence.

The amendment of paragraph 443 of the British *Manual*([6]) (Amendment No. 34, notified in Army Orders for April, 1944), was, in Counsel's view, not valid for several reasons. He referred to the " Zamora " case([7]) where it was stated that the prize court administers International Law and not Municipal Law and although it may be bound by the Acts of the Imperial legislature, it is not bound by Executive Orders of the King in Council. If that is so, then *a fortiori* the present court was not bound by an amendment published by the War Office, and further this amendment was merely a statement of one writer on the subject of International Law. Counsel referred to Wheaton, 1944 Edition, where it is stated on page 586 : " Common sense indicates that it must be very difficult for officers or men to know when they are committing war crimes and that in any case they act under immediate dread of punishment if they decline to obey orders, so that justice, on the whole, tends to the view that war crimes must not be charged on individuals."

With regard to the 1944 amendment of the British *Manual*, Counsel was asked by the Judge Advocate whether he challenged the accuracy of the following : " The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot, therefore, escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity." Counsel stated that he was not prepared to challenge that.

11. THE CLOSING ADDRESS BY THE PROSECUTOR

The Prosecutor based his case on the decision of the German Supreme Court in the case of the " Llandovery Castle," where it had been said : " The firing on boats was an offence against the law of nations. In war on land the killing of unarmed enemies is not allowed. Compare the Regulations as to war on land, paragraph 23. Similarly in war at sea the killing of ship-wrecked persons who have taken refuge in lifeboats is forbidden."

As to the maxim of *nullum crimen sine lege, nulla poena sine lege*, the Prosecutor submitted that it is only applicable to municipal and state law, and could never be applicable to International Law.

The plea of superior orders in any case, on the facts, did not apply to Eck and Lenz, but neither could Hoffmann, Weisspfennig and Schwender rely on the defence of superior orders, because the order which was given by Eck was an illegal order. The German Supreme Court had decided in the case of the " Llandovery Castle " that the two members of the crew of the U-boat who were acting under the orders of their commander committed a war crime

([5]) *Annual Digest*, 1923-1924, Case No. 231 ; (1921) Cmd. 1422, p. 42.
([6]) See later, p. 18.
([7]) [1916] 2. A.C.77.

in firing at the boat, because they were doing something which was illegal, and that court decided that if an order is given which is, in itself, illegal, there can be no defence of superior orders.

With regard to Eck, the Prosecutor stated that in his submission, he must be guilty of the charges preferred. Eck admitted in evidence that he knew there must be survivors on the rafts. The Prosecutor suggested that that was cold-blooded murder.

Hoffmann admitted that he threw hand grenades. It was established by one of the affidavits that one of the persons who died on board the rafts was hit by a hand grenade. Subject to the Court's decision on the question of superior orders, the Prosecutor submitted that the case against Hoffmann was fully proved.

In the case of Weisspfennig, the Prosecutor pointed out that his case was made the worse by reason of the fact that he was of the medical profession and had no right to bear arms at all, except against savages and persons who were not in the same position as white men who fought in the war.

With regard to Lenz, the Prosecutor said that he was a man who first objected to the order and then deliberately fired in the direction of a human form which was stated to have been on some wreckage. How he could plead that he acted under superior orders was beyond the Prosecutor's comprehension.

As to Schwender, the only rating involved, there was no doubt that he did fire in the direction of the wreckage and that he must have known that they were firing on human targets.

No legal ruling was required in this case as to whether the offence was murder or manslaughter. The accused were charged with killing of survivors of the ship in violation of the laws and usages of war, as accepted by decent nations all over the world.

12. SUMMING UP BY THE JUDGE ADVOCATE

The Judge Advocate stated at the very outset that the court should be in no way embarrassed by the alleged complications of International Law which, it had been suggested, surrounded such a case as this. It was a fundamental usage of war that the killing of unarmed enemies was forbidden as a result of the experience of civilised nations through many centuries. To fire so as to kill helpless survivors of a torpedoed ship was a grave breach of the law of nations. The right to punish persons who broke such rules of war had clearly been recognised for many many years. Whatever might be said by those who were interested for or against the so-called Leipzig Trials, no one as far as the Judge Advocate knew had ever challenged the accuracy of the principle which was expressed in the judgment of the Supreme Court of Germany in the " Llandovery Castle " case. The Judge Advocate's advice to the Court was that it was entitled to take the statement of principle contained in the Leipzig judgment as the starting point of its investigation of this case.

Regarding the defence of operational necessity, the Judge Advocate stated : " The question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life has been the subject of

much discussion. It may be that circumstances can arise—it is not necessary to imagine them—in which such a killing might be justified. But the court had to consider this case on the facts which had emerged from the evidence of Eck. He cruised about the site of this sinking for five hours, he refrained from using his speed to get away as quickly as he could, he preferred to go round shooting, as he says, at wreckage by means of machine guns." The Judge Advocate asked the court whether it thought or did not think that the shooting of a machine gun on substantial pieces of wreckage and rafts would be an effective way of destroying every trace of the sinking. He asked whether it was not clearly obvious that in any event, a patch of oil would have been left which would have been an indication to any aircraft that a ship had recently been sunk. He went on to say : " Do you or do you not think that a submarine commander who was really and primarily concerned with saving his crew and his boat would have done as Captain Schnee, who was called for the defence, said he would have done, namely have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance ? "

Eck did not reply on the defence of superior orders. He stood before the court taking upon himself the sole responsibility of the command which he issued.

With regard to the defence of superior orders, the Judge Advocate said : " The duty to obey is limited to the observance of orders which are lawful. There can be no duty to obey that which is not a lawful order. The fact that a rule of warfare has been violated in pursuance of an order of a 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 confer upon the perpetrator immunity from punishment by the injured belligerent."

The Judge Advocate added : " It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject who can tell him whether or not a particular command is a lawful one. If this were a case which involved the careful consideration of questions of international law as to whether or not the command to fire at helpless survivors struggling in the water was lawful, you might well think it would not be fair to hold any of the subordinate accused in this case responsible for what they are alleged to have done ; but is it not fairly obvious to you that if in fact the carrying out of Eck's command involved the killing of these helpless survivors, it was not a lawful command, and that it must have been obvious to the most rudimentary intelligence that it was not a lawful command, and that those who did that shooting are not to be excused for doing it upon the ground of superior orders ? "

The maxim *nulla poena sine lege* and the principle that is expressed therein had nothing whatever to do with this case. It referred only to the municipal or domestic law of a particular State and the court should not be embarrassed by it in its considerations.

13. THE VERDICT

The five accused were found guilty of the charge.

14. THE SENTENCE

After Counsel for the Defence had pleaded in mitigation on behalf of the accused and some of them had also called witnesses, the following findings and sentences of the court were pronounced on 20th October, 1945, subject to confirmation :

Eck, Hoffmann, Weisspfennig were sentenced to suffer death by shooting. Lenz was sentenced to imprisonment for life, Schwender was sentenced to suffer imprisonment for 15 years.

The sentences were confirmed by the Commander-in-Chief, British Army of the Rhine, on 12th November, 1945, and the sentences of death imposed on Kapitänleutnant Heinz Eck, Marine Oberstabsarzt Walter Weisspfennig, and Leutnant zur See August Hoffmann, were put into execution at Hamburg on 30th November, 1945.

B. NOTES ON THE CASE

1. QUESTIONS OF JURISDICTION AND PROCEDURE

As far as British municipal law goes the jurisdiction of the Court was based on the Royal Warrant dated 14th June, 1945, A.O. 81/1945, as amended([8]). As far as the basis of the jurisdiction in International Law is concerned, it may be pointed out that the crew of the " Peleus," i.e. the victims of the crime, consisted of 18 Greeks, 8 British seamen, 1 seaman from Aden, 2 Egyptians, 3 Chinese, a Russian, a Chilean and a Pole. There were, therefore, 9 British subjects among the victims (8 British seamen and one seaman from Aden), and in order to establish British jurisdiction in this case it is, therefore, not necessary to have recourse to the fact that nationals of other Allied states (Greece, China, the Soviet Union and Poland) were among the victims, and to the still more general question of the universality of jurisdiction over war crimes.

The crime had been committed on the high seas, and this circumstance could be considered an additional ground for the jurisdiction of the court.

Finally, 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([9]), the four Allied Powers occupying Germany have assumed supreme authority with respect to Germany, including all the powers possessed by the German government and any state, municipal or local government, or authority. The jurisdiction of the British court, sitting in the British Zone, could, therefore, also be based on the fact that after the *debellatio* of Germany, the Allied Powers have been the local sovereigns in Germany.

The fact that a Greek ship and 18 Greek nationals were involved as the victims of the crime was obviously the reason why the Convening Officer appointed, as members of the Court, two officers of the Royal Hellenic Navy.

The trial was conducted under the rules of procedure as specified in the

([8]) See Annex I, p. 105.
([9]) (1945) Cmd. 6648.

Royal Warrant which contains a number of alterations of the general rules of procedure applicable to trials by Field General Courts Martial.

Applying the provision of the Royal Warrant, according to which 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 be of assistance in proving or disproving the charge, the Court admitted *inter alia* evidence consisting of affidavits made by the three survivors of the crew of the " Peleus." The affidavit of one of the survivors, a British seaman, contained a paragraph stating what the third officer, who later died, had told the deponent during the time he nursed him. One of the Defending Officers objected by saying that while the Regulations did permit affidavits which would not be admissible under the normal rules of evidence, there was nothing in the Regulations which says that an affidavit which also includes a statement from a third party may be introduced.

The Judge Advocate, in summing-up the discussion on this point, said that it was quite clear that in a Court which was bound by the ordinary English law this evidence could not be admitted ; but for convenience, and in view of the practical difficulties of obtaining evidence in cases such as this, the Court was granted a discretion to accept statements of this kind if it was so disposed. The only question was whether in the exercise of its discretion the Court thought it right to receive this statement.

The Court decided to admit the statement.

2. QUESTIONS OF SUBSTANTIVE LAW

The legal points raised by the Defence may be summarised under the following headings :—

(i) The absence of *mens rea* of the accused.
(ii) The maxim *nulla poena sine lege.*
(iii) The defence of operational necessity.
(iv) The defence of superior orders.

They will be dealt with in the following pages in this order and notes on the following questions involved in the trial will be added :—

(v) The problem of classification of War Crimes.
(vi) The awarding of punishment.

(i) *The absence of mens rea*

The Defence submitted that many rules of International Law are rather vague and uncertain and that an individual could not be found guilty of having violated a rule of International Law if the States themselves had always quarrelled about that rule, its meaning and bearing and if they had never really recognised it in anything that might be called a " common practice."

One of the defending Counsel alleged that tendencies, according to him very strong even among some English and American writers, had paved the way for the National Socialist contention that there existed no universal truth and law but that instead of it the will and command of the nation had the supreme and absolute and totalitarian value, and claimed an individual's whole and undivided loyalty. The National Socialist administration had been recognised by foreign Powers, and the fear emanating from the Hitler

régime was almost irresistible and dominated Germany absolutely. The foreign Powers, including Great Britain and the United States of America, had no such excuses for recognising the Hitler administration.

The Judge Advocate ruled on this plea that if this were a case which involved the careful consideration of the question whether or not the command to fire at helpless survivors struggling in the water was lawful in International Law, the Court might well think it would not be fair to hold any of the subordinates accused in this case responsible for what they were alleged to have done. In the present case, however, it must have been obvious to the most rudimentary intelligence that it was not a lawful command.

(ii) *The Defence of Nulla Poena Sine Lege*

The Defence submitted, though perhaps not in so many words, that the acts committed by the defendants were not crimes according to the law to which the accused were subject at the time when the crime was committed. The Prosecutor replied that the maxim *nullum crimen sine lege, nulla poena sine lege* was only applicable to municipal and State law and could never be applicable to International Law.

The Judge Advocate, in summing up, also ruled that the maxim *nulla poena sine lege* and the principle that it expressed had nothing whatever to do with this case. It referred only to municipal or domestic law of a particular State and the Court should not be embarrassed by it in its considerations([10]).

(iii) *The Defence of Operational Necessity*

The Commander of the U-boat did not plead that he had acted on superior orders. His defence was that he thought that the floating rafts were a danger to him, first because they would show an aeroplane the exact spot of the sinking, and secondly because rafts at that time of the war could be provided with modern signalling communications. The position of U-boats was very precarious, particularly in that part of the Atlantic where the incident occurred. Eck therefore thought his measure justified. It was clear to him that as a result of his shooting at the rafts, the survivors would die.

The Judge Advocate ruled that the question whether or not any belligerent is entitled to kill an unarmed person for the purpose of saving his own life did not arise in the present case. It may be, he said, that circumstances could arise in which such a killing might be justified. On the facts which had emerged in the present case, however, the Judge Advocate asked the Court whether or not it thought that the shooting with a machine gun at substantial pieces of wreckage and rafts would be an effective way of destroying every trace of the sinking. A submarine commander who was really and primarily concerned with saving his crew and his boat would have removed himself and his boat at the highest possible speed at the earliest possible moment for the greatest possible distance.

([10]) As will be shown, when the defences of operational necessity and superior orders are examined, the acts committed by the accused were punishable at the time they were committed both in International Law and in German municipal law, as laid down by the German Supreme Court in the case of the "Llandovery Castle." It was, therefore, not necessary for the decision to discard the maxim altogether from the province of International Law.

The case contains, therefore, no decision on the question whether or to what extent operational necessity legalises acts of cruelty such as shooting at helpless survivors of a sunken ship because on the facts of the case this behaviour was not operationally necessary, i.e. the operational aim, the saving of ship and crew, could have been achieved more effectively without such acts of cruelty.

(iv) *The Plea of Superior Orders*

(1) *The reference to the " Caroline " case*

The defence relied on what they called the " Caroline " case, alleging that ever since this " case " it had been a well-established rule of International Law that the individual forming part of a public force and acting under the authority of his Government is not to be held responsible as a private trespasser or malefactor. No pronouncement on this particular alleged authority was made by the Judge Advocate in his summing up. Nevertheless it may be useful to examine the proposition submitted by the Defence in more detail.

(*a*) At the outset it should be pointed out that the " Caroline " case is no " case " in the meaning of a decision of a court, at all, but a mere diplomatic incident. In so far as court proceedings were involved in the " Caroline " incident, they would rather establish a principle contrary to that claimed by the defence, as will be shown below.

(*b*) In 1837, during the Canadian Rebellion, several hundreds of insurgents seized Navy Island on the Canadian side of the river Niagara and chartered a vessel, the " Caroline," to carry supplies from the American side of the river to Navy Island and from there to the insurgents on the mainland of Canada. The Canadian Government, informed of the impending danger, sent across the Niagara a British force which obtained possession of the " Caroline," seized her arms, set her on fire and then sent her adrift down the falls of Niagara. During the attack on the " Caroline," two Americans were killed and several others were wounded. The United States complained of this British violation of her territorial supremacy, but Great Britain asserted that her act was necessary in self-preservation since there was not sufficient time to prevent the impending invasion of her territory through application to the United States Government. The latter admitted that the act of Great Britain would have been justified if there had really been a necessity for self-defence, but denied that, in fact, such necessity existed at the time. Nevertheless, since Great Britain had apologised for the violation of American territorial supremacy, the United States Government did not insist upon further reparation.

From this it follows that this " Caroline " incident has nothing to do with the individual responsibility of members of armed forces for war crimes, but is an illustration of the doctrine of self-preservation in International Law.

(*c*) The " Caroline " incident had a sequel known as the " Case of McLeod " which occurred in 1840. McLeod was a member of the British force sent by the Canadian Government in 1837 into the territory of the United States for the purpose of capturing the " Caroline." In 1840 he went on business to the State of New York and was there arrested and

indicted for the killing of an American citizen on the occasion of the capture of the " Caroline." At his arrest the British Minister at Washington demanded his release, claiming that the destruction of the " Caroline " was a public act done by persons in Her Majesty's Service, acting in obedience to superior orders and that the responsibility, if any, rested with Her Majesty's Government and could not, according to the usage of nations, be made a ground of legal proceedings against the individuals concerned, who were bound to obey the authorities appointed by their own Government. The United States Secretary of State replied that as the matter had passed into the hands of the Courts it was out of the United States Government's power to release McLeod summarily. A writ of Habeas Corpus was applied for on McLeod's behalf, but the courts of the State of New York refused to release him. McLeod had to stand his trial, but he was acquitted on proof of an alibi.

In a note from the American Secretary of State, however, occurs the following passage : " The Government of the United States entertains no doubt that after the avowal as a public transaction authorised and undertaken by the British authorities, individuals concerned in it ought not . . . to be holden personally responsible in the ordinary tribunals for their participation in it."

(*d*) In so far as there were actual decisions and proceedings of Courts in the Caroline-McLeod incidents, these decisions of the New York Courts upheld the personal responsibility of McLeod and he was acquitted on the merits of the case, not for reasons of immunity from American jurisdiction, or for taking part in an act of State, or for obeying superior orders.

(*e*) The diplomatic correspondence in the matter does not concern war crimes. The incidents occurred in the relations between two States that were and remained at all material times at peace, one of them (Great Britain) claiming to have exercised the legally recognised right of self-preservation and the other, the United States, acquiescing in it.

(*f*) The incident is, if anything, an illustration of the problem of the jurisdictional immunity of armed forces on *friendly* foreign territory, a problem which has played an important part in the legal development during the second World War.(11)

Nothing can be deduced from the " Caroline-McLeod " incident on the relationship between belligerents, particularly between a belligerent who is in occupation of enemy territory and the captured armed forces of the conquered belligerent. There does not exist any recognised doctrine in International Law under which the immunities of members of the forces of one belligerent from the jurisdiction of the other could be claimed.

(*g*) The members of the force that destroyed the " Caroline " were engaged in an enterprise claimed to be legitimate in International Law. The shooting of survivors of a sunken ship, on the other hand, is, as has been established in the " Llandovery Castle " case, obviously illegal.

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(11) *cf.* The Allied Forces Act, 1940, the United States of America (Visiting Forces) Act, 1942, and similar enactments and agreements of the United States, the Soviet Union and British Dominions and Dependencies.

(2) *The British Manual of Military Law and the plea of superior orders*

Until April, 1944, Chapter XIV of the British *Manual of Military Law* contained the much discussed statement (para. 443) that " members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to other means of obtaining redress . . . "

This statement was based on the 5th edition of Oppenheim's *International Law*, Volume II, page 454. Considerable doubts were cast on the correctness of this statement by most writers upon the subject and it was replaced in the 6th edition of Oppenheim by its learned editor, Professor Lauterpacht, by a statement to the effect that the fact that a rule of warfare has been violated in pursuance of an order of a belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime.

The fallacy of the opinion expressed in the pre-1944 text (para. 443 of Chapter XIV) of the British *Manual* and the corresponding rule of the United States *Rules of Land Warfare* (para. 347 of the 1940 text), was demonstrated in an article by Professor Alexander N. Sack in the *Law Quarterly Review* (Vol. 60, January, 1944, p. 63). The relevance of the plea of superior orders became also the subject of research and critical examination by official and semi-official international bodies which dealt with problems of war crimes during the second world war (United Nations War Crimes Commission ; London International Assembly, etc.).

In April, 1944, the British *Manual* was altered, the sentences just quoted being replaced by the following statement of the law :

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

A similar though not identical alteration of the American Field Manual has been brought about by " Change No. 1 to the *Rules of Land Warfare* " dated 15th November, 1944.

In the course of the trial, an objection was raised to the application of the law as stated in the amendment to the British *Manual of Military Law* and the decision of the British Privy Council in the Zamora case was invoked

where it had been stated that a British Prize Court administers International Law and not Municipal Law and although it may be bound by acts of the legislature, it is not bound by executive orders of the King in Council. If that be so, then, it was said, *a fortiori*, the Court is not bound by an amendment published by the War Office.

This objection was not referred to by the Judge Advocate in his summing up, but it was implied in his direction to the Court that this plea was not well founded.

The British *Manual of Military Law* is not a legislative instrument ; it is not a source of law like a statutory or prerogative order or a decision of a court, but is only a publication setting out the law. It has, therefore, itself no formal binding power, but has to be either accepted or rejected on its merits, i.e. according to whether or not in the opinion of the Court it states the law correctly. A problem similar to that which arose in the Zamora case, namely whether a Prerogative Order in Council is binding upon a British Court administering International Law, did not, therefore, arise.

If a statement contained in the *Manual* was, as is stated in the footnote to the British Amendment No. 34, " inconsistent with the view of most writers upon the subject and also with the decision of the German Supreme Court in the case of the Llandovery Castle," there was no obstacle, constitutional, legal or otherwise, to correcting the mistake in the statement of law on the one hand, and to proceeding on the basis of the law, as it had thus been elucidated, on the other.

The Judge Advocate accepted the law as stated in the 1944 amendment to the British *Manual* and advised the Court accordingly.

Counsel for the Defence, asked by the Judge Advocate whether he challenged the accuracy of the statement that the question was governed by the major principle that members of armed forces are bound to obey lawful orders only, stated that he was not prepared to challenge that.

(3) *The case of the " Llandovery Castle "*

Much reliance was placed in the " Peleus " case, both by the Prosecutor and by the Judge Advocate, on the decision of the German Supreme Court in the case of the hospital ship " Llandovery Castle," delivered in 1921. The case of the " Llandovery Castle " was treated not only as an authority for the rejection of the plea of superior order in the case of an order manifestly illegal, but it was treated as an authority also, as it were, on a special rule applicable to the particular facts of the case, namely on the question whether or not firing on lifeboats is an offence against the Law of Nations.

The facts in both cases were indeed very similar. The commander of the U-boat was not on trial before the German Reichsgericht ; the trial was conducted only against two officers of the crew, whereas the " Peleus " trial was against both the commander and the guilty members of the crew. The motive for the illegal command given by the U-boat commander was slightly different in the case of the " Llandovery Castle," where a hospital ship had been sunk and the U-boat commander, Patzig, attempted to eliminate all traces of the sinking in order to conceal his criminal act altogether, while the commander of the U-boat in the " Peleus " case claimed to have ordered the firing on the rafts out of operational necessity.

The Prosecutor in the " Peleus " trial quoted the German decision in the " Llandovery Castle " case *in extenso* and the Judge Advocate reminded the Court that it was entitled to take the statement of principle of International Law which was made in the case of the " Llandovery Castle " as the starting point of its investigation of the " Peleus " case.

The Defence attempted to distinguish the " Peleus " case from the " Llandovery Castle " case from two different angles.

On the one hand, it was submitted that during and since the last war there had been a practice on both sides that in certain conditions it might be permissible to attack lifeboats and survivors in case of emergency. By this alleged practice, the usage of war, according to which lifeboats should not be attacked under any conditions, had been changed. The Defence announced that they would call evidence in order to prove this change of the usages of war and a discussion took place whether evidence about this alleged practice should be admitted. The Judge Advocate advised the Court to allow such evidence as part of the defence, but the plea was not eventually substantiated in the course of the trial and the statement of the alleged change of the usages of war was not borne out by the evidence.

The other attempt to distinguish the " Llandovery Castle " case was made by arguing that the " Llandovery Castle " case had been decided by a municipal court applying German Municipal Law, whereas the " Peleus " case was being decided under International Law. This plea was unsuccessful.

(v) *The Problem of Classification of War Crimes*

One of the defending Counsel submitted that it is necessary to examine whether the accused were to be punished for murder, for manslaughter or for involuntary killing.

The Prosecutor replied that there was no legal ruling required in this case as to whether the offence was murder or manslaughter. The accused were charged with, " being concerned in the killing of survivors of the ship in violation of the laws and usages of war."

The Judge Advocate did not expressly deal with this point, but he stressed the fact that the Court was concerned here to decide whether or not there had been a violation of the laws and usages of war. The acts committed by the accused were therefore considered to be crimes, namely war crimes, irrespective of whether in municipal jurisprudence they should correctly be classified either as murder or as manslaughter or as any other offence against life and limb.

(vi) *The awarding of Punishment*

The Royal Warrant provides in Regulation 9 that a person found guilty by a Military Court of a war crime may be sentenced to any one or more of the following punishments, namely : (1) death (either by hanging or by shooting), (2) imprisonment for life or for any less term, (3) confiscation, (4) a fine.

In the " Peleus " case three of the accused, namely, the commander of the U-boat, one of the officers and the medical officer, were sentenced to death by shooting, the two latter in spite of their plea of superior orders. The ship's engineer was sentenced to imprisonment for life. In his case the

Court probably took into consideration, on the one hand, that he did, to a certain extent, oppose the order given by the commander to the other accused (not to him), and that, on the other hand, he had, without being personally ordered, eventually taken part in the shooting. The fifth accused, the only rating in the dock, was sentenced to 15 years' imprisonment, the Court probably considering the superior order given to him as an extenuating circumstance.

CASE No. 2

THE DOSTLER CASE

TRIAL OF GENERAL ANTON DOSTLER, COMMANDER OF THE 75TH GERMAN ARMY CORPS

UNITED STATES MILITARY COMMISSION, ROME, 8TH-12TH OCTOBER, 1945

Legal Basis of the Jurisdiction of the Commission. Shooting of unarmed Prisoners of War. Hague Convention No. IV of 1907. *Scope of the Geneva Prisoners of War Convention of* 1929. *Plea of Superior Orders.*

Anton Dostler was accused of having ordered the shooting of fifteen American prisoners of war in violation of the Regulations attached to the Hague Convention Number IV of 1907, and of long-established laws and customs of war. A plea was made to the jurisdiction of the Commission by his Counsel, on the grounds, first, that the accused was entitled to the benefits of the Geneva Prisoners of War Convention of 1929 in the conduct of his trial, and, secondly, that the Commission had not been legally established. These arguments, and the plea of superior orders later put forward on Dostler's behalf, were rejected, and he was condemned to death.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Trial was conducted by a Military Commission appointed by command of General McNarney, consisting of the following: Major-General L. C. Jaynes (President), Brigadier-General T. K. Brown, Colonel H. Shaler, Colonel James Notestein, Colonel F. T. Hammond, Jr., Major F. W. Roche (Judge Advocate), 1st Lt. W. T. Andress (Assistant Judge Advocate), Colonel C. O. Wolfe (Defence Counsel), and Major C. K. Emery (Assistant Defence Counsel).

In the conduct of its proceedings, the Commission was ordered to follow the provisions of circular 114 of Headquarters, Mediterranean Theatre of Operations, 23rd September, 1945, entitled " Regulations for the Trial of War Crimes."(1)

2. THE CHARGE AND SPECIFICATION

Anton Dostler was charged with violations of the laws of war in that, as commander of the 75th German Army Corps, he, on or about 24th

(1) See Annex II, pp. 113 ff.

March, 1944, in the vicinity of La Spezia, Italy, ordered to be shot summarily a group of United States Army personnel consisting of two officers and 13 enlisted men, who had then recently been captured by forces under General Dostler, which order was carried into execution on or about 26th March, 1944, resulting in the death of the said 15 members of the United States Army.

3. THE PLEA TO THE JURISDICTION OF THE MILITARY COMMISSION

At the beginning of the trial the Defence presented a plea to the jurisdiction of the Military Commission to try the accused. Article 63 of the Prisoners of War Convention of 1929, it was stated, provided that a sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power. This provision was also set out in para. 136 of the American Basic Field Manual, *Rules of Land Warfare*. By virtue of the provisions of the Constitution of the United States, the Geneva Convention had become part of the United States Municipal Law(2), and Article 16 of the American Articles of War (an Act of Congress) provided that officers of the United States Army shall be triable only by General and Special Courts-Martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

From this the Defence argued that the proper tribunal to try the accused would have been a Court Martial. (Trial before Courts Martial affords to the accused a higher degree of safeguards than trial by a Military Commission.)

The Prosecution replied that the provisions of the Geneva Convention with regard to the trial of prisoners of war, which the Defence had put forward, pertained to offences committed by a prisoner of war in captivity, and did not pertain to offences committed against the Law of Nations prior to his becoming a prisoner of war. If the accused, being a prisoner of war, had struck a guard, Counsel for the Defence would be absolutely correct ; the accused would have had to be tried by a Court Martial, for that would have been an offence against the American Articles of War, but in the present case he was being tried for an offence, not against the Articles of War, but against the Laws of War, for which a Military Commission might be, and had been for more than a hundred years, the proper method of trial. Counsel for the Prosecution quoted from Winthrop's *Military Law and Precedents*, p. 835, enumerating the classes of persons who in United States law might become subject to the jurisdiction of Military Commissions, and expressly naming individuals of the enemy's army who had been guilty of illegitimate warfare or other offences against the laws of war. The Prosecutor also referred to paragraph 346 (*c*) of the Basic Field Manual, *Rules of Land Warfare*, according to which, in the event of clearly established violation of the laws of war, the injured party may legally resort to the punishment of captured individual offenders. He further quoted from paragraph 7 of the same Manual which enumerates the three types of military tribunals exercising military jurisdiction, namely : (*a*) Courts

(2) Counsel could also have pointed out that Congressional Legislation had made the Convention part of United States Law.

Martial, (*b*) Military Commissions, and (*c*) Provost Courts, and provides that, in practice, offenders who are not subject to the Articles of War, but who by the Law of War are subject to trial by military tribunals, are tried by Military Commissions or Provost Courts.

The Defence said in reply that Winthrop had stated the law valid at the time when his book was written, and that this law had been amended when the United States ratified the Geneva Convention of 1929 and its provisions became part of the law of the land.

Two further arguments were then put forward by the Defence. The first was to the effect that the Commission had been set up by order of an American General, whereas the forces operating in that theatre were Allied forces of several different nationalities under a British Commanding General, Field Marshal Alexander. Counsel claimed that the accused was " entitled to be tried at least by a Court or a Commission appointed by the Commanding General of the theatre of operations in which the offence allegedly was committed," since he was " charged with being a war criminal rather than committing an offence against or which is peculiar only to the forces of the United States."

Secondly, the Defence argued that, should the foregoing argument be regarded as unsound, the appointment of the Commission was in any case invalid since, as far as the accused knew, no order had been given by the President of the United States appointing, or authorising the appointment of, the Commission, whereas its appointment required to be carried out either by the President or by some person legally authorised in the matter. Counsel quoted Article 38 of the Articles of War, to the effect that the President " may by regulations . . . prescribe the procedure . . . in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals . . ." He admitted that this provision concerned rules of procedure and evidence, but claimed that the implication was that the President was also the authority who should establish the procedure whereby Military Commissions were to be appointed.

The Prosecution claimed in reply that by long-standing practice, custom and even laws of war the Supreme Commander in the field had the authority to appoint a Military Commission. The belligerent injured by the offence was the United States, and the Supreme Commander for all American Forces in that theatre was General McNarney, who had appointed the Commission and had referred the case to it.

Under the provisions of *Rules of Land Warfare*, it was the injured belligerent who could bring the captured before a Military Commission, and Counsel therefore doubted whether Field Marshal Alexander would have had authority to appoint the Commission and refer the case to it.

Finally, Article 38 was purely permissive in character, not mandatory, and there was nothing in the Articles of War which took from General McNarney the power to appoint the Commission and to make rules for its procedure.

The Commission overruled the pleas of the Defence.

4. THE CASE FOR THE PROSECUTION

The Prosecution claimed, by virtue of the witnesses and evidence produced, to be able to establish the following facts :—

On the night of 22nd March, 1944, two officers and 13 men of a special reconnaissance battalion disembarked from some United States Navy boats and landed on the Italian coast about 100 kilometres north of La Spezia. The front at the time was at Cassino with a further front at the Anzio beach head. The place of disembarkation was therefore 250 miles behind the then established front. The 15 members of the United States Army were on a *bona fide* military mission, which was to demolish the railroad tunnel on the mainline between La Spezia and Genoa. On the morning of 24th March, 1944, the entire group was captured by a party consisting of Italian Fascist soldiers and a group of members of the German army. They were brought to La Spezia where they were confined near the headquarters of the 135th Fortress Brigade. The 135th Fortress Brigade was, at that time, commanded by a German Colonel, Almers (who was not before the Military Commission). His next higher headquarters was that of the 75th German Army Corps then commanded by the accused, Anton Dostler. The next higher headquarters was that of the Army Group von Zangen, commanded by the General of the Infantry von Zangen, who was called as a witness in the case. The next higher command was that of the Heeresgruppe C or Heeresgruppe South West, which was at that time under Field Marshal Kesselring.

The captured American soldiers were interrogated in La Spezia by two German Naval Intelligence Officers. In the course of the investigation one of the officers of the American party revealed the story of the mission. On 24th March a report was made by the 135th Fortress Brigade to the 75th Army Corps about the capture. On the next morning (25th March, 1944) a telegram was received at the headquarters of the 135th Fortress Brigade signed by the accused Dostler, saying in substance " the captured Americans will be shot immediately."

On receiving this cable, the commanding officer of the 135th Fortress Brigade and the Naval Officers interrogating the prisoners got into touch with the 75th Army Corps headquarters in order to bring about a stay of the execution. Late on the afternoon of the 25th March, Colonel Almers (then commanding the brigade) received another telegram from 75th Army Corps which said in substance that by 7.0 o'clock the next morning (26th March) he would have reported compliance with the order of execution.

Colonel Almers then gave orders for the conduct of the execution, for the digging of a grave, etc. During the night from Saturday 25th to Sunday, 26th March, two attempts were made by officers of the 135th Fortress Brigade and by the Naval Officers to bring about a change in the decision by telephoning to the accused Dostler. All these attempts having been unsuccessful, the 15 Americans were executed on the 26th March, early in the morning.

They were neither tried, nor given any hearing.

The argument of the Prosecution was that since the deceased had been soldiers of the United States Army, dressed as such and engaged on a genuine military mission, they were entitled to be treated as prisoners of war. Their execution without trial, therefore, was contrary to the Hague Convention

of 1907 and to a rule of customary International Law at least 500 or 600 years old.

5. THE EVIDENCE

Witnesses for the Prosecution included a Captain in the United States Army who had directed the operation against the tunnel. He stated that the fifteen soldiers had been *bona fide* members of the United States Forces ; he also bore witness as to the nature of the mission on which they were sent, and as to the clothing and equipment which they wore. Witnesses for the Prosecution included also an Italian employee of the Todt Organisation and two German Naval Intelligence Officers who gave further evidence regarding the deceased's clothing. One of the last two identified a document before the Commission as representing in substance the Führerbefehl to which reference was made by the Defence.([a]) Three ex-members of the Wehrmacht gave evidence of attempts made to induce Dostler to change the order regarding the execution, and on the circumstances of the execution. General Zangen appeared in the witness box and denied having ordered the execution of the prisoners.

Two depositions and the notes of a preliminary interrogation of General Dostler were also allowed as evidence. The first deposition was made by a German lieutenant in hospital, who bore witness to the contents of the telegram containing Dostler's orders regarding the immediate execution of the prisoners and to the efforts which were made to avert the latter. The second deposition was made by a Captain in the United States Army who had been present at the exhumation of the bodies of the soldiers.

The Defence recalled General Zangen, who bore witness to the accused's merits as a soldier, and called a second Wehrmacht General, von Saenger, who described the oath which officers of the German Army had had to take on the accession of Hitler to power. As will be seen, General Dostler himself also appeared as a witness under oath.

Although it was not possible to produce the witnesses primarily needed by the Defence (one of them, the commander of the Brigade, had escaped from captivity and had not been recaptured, while the others could not be traced in the American and British zones), the decisive facts were not controversial, namely that the victims had been members of the American Forces, carrying out a military mission, that the accused had ordered their shooting without trial and that they had been so shot.

6. THE ARGUMENTS OF THE DEFENCE AND REPLIES MADE BY THE PROSECUTION

(i) *That the Deceased were not entitled to the Benefits of the Geneva Convention*

The Defence claimed that for any person to be accorded the rights of a prisoner of war under the Geneva Convention, it was necessary, under Article 1 thereof, for that person, *inter alia*, " to have a fixed distinctive emblem recognisable at a distance." The submission of the Defence was that the American soldiers had worn no such distinctive emblem, and that their mission had been undertaken for the purpose of sabotage, to be accomplished by stealth and without engaging the enemy. They were not therefore

([a]) See the Appendix, p. 33.

entitled to the privileges of lawful belligerents, though it was admitted that they were entitled to a lawful trial even if they were treated as spies.(4)

(ii) *The Plea of Superior Orders*

The accused relied on the defence of superior orders which was based on two alleged facts :—

(*a*) The Führerbefehl of 18th October, 1942, the text of which is provided in the Appendix. The Führerbefehl laid down that if members of Allied commando units were encountered by German troops they were to be exterminated either in combat or in pursuit. If they should fall into the hands of the Wehrmacht through different channels they were to be handed over to the Sicherheitsdienst without delay.

The Defence Counsel submitted that pursuit could go on for weeks, and that it was not ordered that the allied troops should necessarily be killed on the spot.

In answer to the argument of the Prosecution that Dostler had exceeded the terms of the Führerbefehl (see later), the Defence pointed out that Dostler had received no punishment for his action, whereas para. 6 of the order stated that all leaders and officers who failed to carry out its instructions would be summoned before the tribunal of war.

(*b*) Alleged orders received from the Commander of the Army Group, General von Zangen, and from the Commander of the Heeresgruppe South West, Field Marshal Kesselring.

Dostler also claimed that he had revoked his first order to shoot the men and that he had eventually re-issued it on higher order.

The Defence tried to establish the fact that in 1933 all officers of the German Army had had to take a special oath of obedience to the Führer Adolf Hitler.(5) This fact was confirmed both by General von Zangen and Dostler himself in the witness box. The Prosecution put a question to General von Saenger whether he could cite to the Commission any single case of a general officer in the German Army who was executed for disobedience to an order. Von Saenger replied that he had heard of two cases, one of which he knew ; the second was only a rumour. The witness did not know a case in the German Army in which a general officer was executed for disobedience to the Führerbefehl of 18th October, 1942.

General von Saenger admitted that the Führer gave out orders which in their way interfered with International Law. The officers at the front who had to execute these orders were convinced, however, that in those cases Hitler would make a statement or by some other means inform the enemy governments of his decisions, so that the officers were not responsible for

(4) While the Defence made no use of the facts in argument, the United States Captain who directed the operation bore witness that all of the soldiers were possessed of an Italian background, and that most of them could speak some Italian. He stated that the mission had had sabotage as its aim and that the whole company from which the men were drawn had been recruited in the United States with a view to work behind the enemy's lines. As it might be necessary to live off the land, a knowledge of the language of the country in which they were expected to operate was deemed very helpful.

(5) Actually this happened in 1934, when Hitler " succeeded " Hindenburg as " head of the State."

crimes committed while carrying out his orders. He also said that during the war officers could not resign from the German Army.

Dostler himself said that under the oath to Hitler he understood that it was mandatory upon him to obey all orders received from the Führer or under his authority.

Defence Counsel quoted a statement from Oppenheim-Lauterpacht, *International Law*, 6th edition, volume 2, page 453, to the effect that an act otherwise amounting to a war crime might have been executed in obedience to orders conceived as a measure of reprisals, and that a Court was bound to take into consideration such a circumstance.

The Defence invoked the text of the Führerbefehl which in its first sentence itself refers to the Geneva Convention and represents itself as a reprisal order made in view of the alleged illegal methods of warfare employed by the Allies. Counsel claimed that retaliation was recognised by the Geneva Convention as lawful, that the Führerbefehl stated the basis on which it rested and that the accused therefore had a perfect right to believe that the order, as a reprisal order, was legitimate.

The Defence quoted also paragraph 347 of the United States Basic Field Manual F.M.27-10 (*Rules of Land Warfare*), which says that individuals of the armed forces will not be punished for war crimes if they are committed under the orders or sanction of their government or commanders.

In so far as the defence was based on the Führerbefehl, the Prosecution submitted that, apart from an illegal order being no defence, the shooting of the prisoners in the present case had not even been covered by the terms of the Führerbefehl, because the latter ordered that Commandos should be annihilated in combat or in pursuit, but that if they came into the hands of the Wehrmacht, through other channels, they should be handed over without delay to the Sicherheitsdienst. The prosecuting Counsel pointed out that the deceased had not been killed in combat or in pursuit, and had been executed instead of being given up to the Sicherheitsdienst.

As far as the Defence relied on orders received from Army Group headquarters, and headquarters of the Heeresgruppe South West, this defence had not been substantiated. As far as the Army Group command was concerned, it had not been confirmed by the witness, General von Zangen, and as far as a command of the Heeresgruppe South West was in question, it was even rebutted by the statement of a witness that some hours after the execution a cable had been received from the headquarters of Heeresgruppe South West to the effect that the execution of the 15 Americans should not take place.

With regard to the text of the Führerbefehl of 18th October, 1942, which was used in evidence, the Defence Counsel said : " It is a matter of common knowledge that this Führerbefehl was kept extremely secret. As a matter of fact practically no originals of it have ever been found. This does not purport to be an original we have ; it is a copy on which the signature of whoever signed it is illegible. I understand it was secured from the French intelligence and they passed it on, and that one copy is the only one they have been able to find."

During his examination, the accused, on being handed a copy of the text of the Führerbefehl of October, 1942, said that a document which he had

received in 1944 through Army Group channels contained substantially everything that was in the 1942 text, but with certain additions. He stated further that " this copy is not the complete Führerbefehl as it was valid in March, 1944. In the order that laid on my desk in March, 1944, it was much more in detail . . . the Führerbefehl which was laying in front of me listed the various categories of operations which may come under the Führerbefehl. In addition there was something said in that Führerbefehl about the interrogation of men belonging to sabotage troops and the shooting of these men after their interrogation. . . . I am not quite clear about the point, whether a new Führerbefehl covering the whole matter came out or whether only a supplement came out and the former Führerbefehl was still in existence. . . . The Führerbefehl has as its subject commando operations and there was a list of what is to be construed as commando operations. I know exactly that a mission to explode something, to blow up something, came under the concept of commando troops."

With regard to the mission of the 15 American soldiers he claimed that, after making consultations with staff officers, " as it appeared without doubt that the operation came under the Führerbefehl an order was given by me and sent out that the men were to be shot."

General von Saenger said that in the Autumn of 1943 he had been acquainted with a Führerbefehl on the same subject which was different in contents from that before the Commission. On the other hand, three witnesses, namely, one of the German Naval Intelligence Officers, an ex-Wehrmacht Adjutant and General von Zangen, could remember no amendments to the Führerbefehl of October, 1942.

7. THE VERDICT

The Commission found General Dostler guilty.

8. THE SENTENCE

General Dostler was sentenced to be shot to death by musketry. The sentence was approved and confirmed, and was carried into execution.

B. NOTES ON THE CASE

1. REGARDING THE PLEA TO THE JURISDICTION

If the argument of the Defence regarding the interpretation of the Geneva Convention were correct, it would have far-reaching consequences with regard to the trial of such war criminals as had been members of the armed forces of the enemy and had therefore, on being captured, acquired the status of prisoners of war. War criminals would not only be protected by Art. 63 of the Geneva Convention, which would guarantee them, within the United States jurisdiction, the statutory safeguards of the Articles of War and the protection of the " due process of law " clause of the Fifth Amendment, and in other jurisdictions all the procedural rights granted by the law of the capturing State to its own soldiers, but would also make the provisions of Arts. 60-66 of the Geneva Convention applicable. It would, therefore, be necessary for the authorities instituting the proceedings to notify the representative of the protecting Power (Art. 60), the representative

of the protecting Power would have the right to attend the hearing of the case (Art. 62, para. 3), the alleged war criminal would have the right of appeal against any sentence against him in the same manner as persons belonging to the armed forces of the detaining Power (Art. 64), sentences pronounced against prisoners of war would have to be communicated immediately to the protecting Power (Art. 65) and, if sentence of death were passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence would have to be addressed to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served (Art. 66, para.1) ; and it would, finally, be forbidden to carry out the sentence before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power (Art. 66, para. 2).

The Military Commission in the Dostler trial decided that the provisions of Art. 63 of the Geneva Convention were not applicable to the case. As is customary, the reasons of the Military Commission were not given.

The decision of the Military Commission on this point is in accordance with the decision of the majority of the Supreme Court of the United States in the case of the Japanese General Yamashita (delivered on 4th February, 1946). The Supreme Court, *per* Stone, C. J., held that Art. 63 (and Art. 60) of the Geneva Convention have reference only to offences committed by a prisoner of war while a prisoner of war and not to violations of the law of war committed while a combatant. This conclusion of the majority of the Supreme Court is based upon the setting in which these articles are placed in the Geneva Convention. Art. 63 of the Convention appears in Part 3 (" Judicial Suits ") of Chapter 3, entitled " Penalties applicable to Prisoners of War." This forms part of Section V, " Prisoners' Relations with the Authorities," one of the sections of title III, " Captivity." All taken together relate only to the conduct and control of prisoners of war while in captivity ; Chapter 3 is a comprehensive description of the substantive offences which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offences, and of the procedure by which guilt may be adjudged and sentence pronounced. The majority of the Supreme Court therefore thought it clear that Part 3, and Art. 63 which it includes, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war.

Mr. Justice Rutledge, in his minority opinion, in which Mr. Justice Murphy joined, held that the context in which Arts. 60 and 63 are placed did not give any support to the argument of the majority of the Court. Neither Art. 60 nor Art. 63 contained, in the opinion of the minority, such a restriction of meaning as the majority read into them. In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before the capture or later. In Mr. Justice Rutledge's opinion, policy supported this view. For such a construction was required for the security of United States soldiers, taken prisoner, as much as for that of prisoners taken by the United States. And the opposite view would leave prisoners of war open to any form of trial and punishment, for offences against the law of war, which their captors might wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offences. This,

in many instances, the minority contended, would be to make the treaty strain at a gnat and swallow a camel.

2. REGARDING THE PLEA OF SUPERIOR ORDERS

(i) *The "Dover Castle" Case*

The Defence claimed that reprisal was recognised by the Geneva Convention as lawful and that, since the Führerbefehl stated the basis on which it rested, the accused had a right to believe that the order, as a reprisal order, was legitimate.

This was a line of thought on which the decision of the German Supreme Court in the case of the "Dover Castle" was based.(6) The German Supreme Court acquitted in 1921 the accused who pleaded guilty to torpedoing a British hospital ship, because in the Court's view the accused were entitled to hold, on the information supplied to them by their superiors, that the sinking of an enemy hospital ship was a legitimate reprisal against the abuse of hospital ships by the enemy in violation of Hague Convention No. X. Professor Lauterpacht, in the *British Yearbook of International Law*, 1944, page 76, says that "no person can be allowed to plead that he was unaware of the prohibition of killing prisoners of war who have surrendered at discretion. No person can be permitted to assert that, while persuaded of the utter illegality of killing prisoners of war, he had no option but to obey an order." "But the situation is," according to Lauterpacht "more complicated when the accused pleads not only an order, but the fact that the order was represented as a reprisal for the killing by the adversary of prisoners of his own State."

This plea was, though not in so many words, made by Dostler's Defence and overruled by the Commission.

The Commission's decision on this point is in accordance, *inter alia*, with Art. 2, para. 3, of the Prisoners of War Convention of 1929, according to which measures of reprisal against prisoners of war are forbidden. From this it follows that under the law as codified by the 1929 Convention there can be no legitimate reprisals against prisoners of war. No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal.

Through the express provision of Art. 2, paragraph 3 of the Geneva Convention, the decision of the German Reichsgericht in the "Dover Castle" case has lost even such little persuasive authority as it may have had at the time it was rendered.

(ii) *The United States Basic Field Manual and the Plea of Superior Orders*

The Defence relied also on paragraph 347 of the United States Basic Field Manual FM.27-10 (*Rules of Land Warfare*) which says that individuals of the Armed Forces will not be punished for war crimes if they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall. It will be appreciated that this provision of

(6) *Annual Digest of Public International Law Cases*, 1932-1924, Case No. 231; British Command Paper (1921) 1422, p. 42.

paragraph 347 of the American *Rules of Land Warfare* corresponds exactly to the original text of paragraph 443 of Chapter XIV of the British *Manual of Military Law*.(7)

Paragraph 443 of the British Manual was amended in April, 1944, (by Amendment No. 34) to the effect that " the fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of any individual belligerent commander does not deprive the act in question of its character of a war crime ; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent."

A similar alteration of the American Field Manual has been brought about by Change No. 1 to the *Rules of Land Warfare*, dated 15th November, 1944. By this amendment, the sentences quoted above from paragraph 347 of the *Rules of Land Warfare* have been omitted and the following provisions have been added to paragraph 345 :—

> " Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."

It will be seen that the statement of the law contained in the new text of the American Basic Field Manual differs somewhat from the 1944 text of the British *Manual*, though both abandon the sweeping statements contained in the former text regarding the plea of superior orders. The new British text appears to exclude an unlawful order as a defence, thus being in line with the law as it was eventually laid down in Article 8 of the Charter of the International Military Tribunal of 8th August, 1945, under which superior orders are not to free a defendant from responsibility, but may be considered in mitigation of punishment.

The statement contained in the new text of paragraph 345 of the American Basic Field Manual makes it possible to consider superior orders or Government sanction in determining culpability, either by way of defence or in mitigation of punishment.

Neither the British *Manual of Military Law* nor the United States Basic Field Manual are legislative instruments ; both were published only for informative purposes, and if a certain statement, contained in both, was, as is stated in the footnote to the British Amendment No. 34, " inconsistent with the view of most writers upon the subject and also with the decision of the German Supreme Court in the case of the 'Llandovery Castle,' " there was no obstacle, constitutional, legal, or otherwise, in the way of correcting the mistake in the statement of law on the one hand, and proceeding on the basis of the law as it thus had been elucidated on the other.

It may be added that the Regulations for the Trial of War Crimes issued for the Mediterranean Theatre of Operations on 23rd September, 1945, under which the trial was conducted, contain the provision (Regulation 9)(8) that " the fact that an accused acted pursuant to order of his Government

(7) See Note on the " Peleus " case, No. 1 of this series, *supra*, p. 18 of this volume.

(8) See Annex II, page 120.

or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the commission determines that justice so requires." This provision was, however, not referred to during the trial.

(iii) *The application of the Führerbefehl to the facts of the Dostler Case*

It was submitted by the Prosecution that—apart from the general reason that an illegal order is no excuse—Dostler could not rely on the defence of superior order because his act was not covered even by the Führerbefehl.

Paragraph 3 of the Führerbefehl is to the effect that all enemy troops encountered by German troops during so-called commando operations were to be exterminated to the last man, either in combat or in pursuit. If such men appeared to be about to surrender, no quarter should be given on general principle.

As the Prosecution pointed out, the 15 American service men had not been killed either in combat or in pursuit ; they had been shot at least 45 hours after capture.

This was contrary even to the Führerbefehl, which provides in paragraph 4 that if members of such commando units were to fall into the hands of the Wehrmacht through different channels (for example, through the police in occupied territories), they were to be handed over to the Sicherheitsdienst without delay. It was formally forbidden to keep them, even temporarily, under military supervision.

From this it follows that even if the Führerbefehl had been binding upon Dostler, he ought to have acted according to paragraph 4 and handed over the prisoners to the Sicherheitsdienst, and that he was not even under the terms of the Führerbefehl entitled to have them shot. It was asserted by one of the witnesses that, on the day of the execution, an S.S. officer and an S.S. truck came down from Genoa to La Spezia to take the 15 Americans over ; but the Lieutenant in charge of the execution squad did not hand them over and told them that he had received a written order from General Dostler that the 15 Americans should be shot immediately.

It may be added that Dostler would have committed a war crime even if he had acted according to paragraph 4 of the Führerbefehl and had handed over the prisoners of war to the S.D.

APPENDIX

THE TEXT OF THE FÜHRERBEFEHL AS PRODUCED IN THE TRIAL(*)

The Führerbefehl of 18th October, 1942

1. Recently our adversaries have employed methods of warfare contrary to the provisions of the Geneva Convention. The attitude of the so-called commandos, who are recruited in part among common criminals released from prison, is particularly brutal and underhanded. From captured documents it has been learned that they have orders not only to bind prisoners but to kill them without hesitation should they become an encumbrance or

(*) See *supra* p. 26. The text of another order by Hitler relating to the treatment of captured saboteurs was produced in evidence at subsequent war crime trials, and will be dealt with in a later volume of this series of Law Reports.

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. Ebeltje 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(2). 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

(2) 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.(3)

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

(3) 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,(4) 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.(5)

2. RULES OF PROCEDURE AND RULES OF EVIDENCE(6)

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.

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(4) (1945) Cmd. 6648 ; see also notes on Case No. 1 of this series, *supra*, p. 13.

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

(6) 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 abetters, 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*.(7)

(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

(7) 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.

CASE No. 4

THE HADAMAR TRIAL

TRIAL OF ALFONS KLEIN AND SIX OTHERS

UNITED STATES MILITARY COMMISSION APPOINTED BY THE COMMANDING GENERAL WESTERN MILITARY DISTRICT, U.S.F.E.T., WIESBADEN, GERMANY, 8TH-15TH OCTOBER, 1945.

Liability of civilians for killing allied nationals by means of injections. Pleas of Superior Orders, alleged Legality under German Law, Coercion and Necessity.

The accused were members of the staff of a small sanatorium in the town of Hadamar, Germany, and took part in the deliberate killing of, among others, over 400 Polish and Soviet nationals by injections of poisonous drugs. The pleas of superior orders, of alleged legality under German Law, and of coercion and necessity were held not to free the accused from responsibility.

A. OUTLINE OF THE PROCEEDINGS(1)

1. THE COURT

The Court was a Military Commission appointed by the Commanding General of the 7th United States Army, Western Military District.(2)

The Commission consisted of Colonel Edward R. Roberts, F.A., H.Q. 7th Army, Colonel Lonnie O. Field, F.A., HQ. 7th Army, Colonel John L. Dicks, Q.M.C., HQ. 7th Army, Colonel Trevor W. Swett, G.S.C., HQ. 7th Army, Colonel David Wagstaff, Jr., Cav., 15th Cav. Group, Colonel Daniel S. Stevenson, V.C., HQ. 7th Army, Colonel Leon Jaworski, J.A.G.D., HQ. U.S.F.E.T. (Trial Judge Advocate), Capt. Wm. R. Vance, J.A.G.D., HQ. U.S.F.E.T. (Asst. Trial Judge Advocate), Lt. Col. Juan A. A. Sedillo, J.A.G.D., HQ. XXI Corps (Defence Counsel), Capt. Melvin R. Wintman, Inf., HQ. 7th Army (Asst. Defence Counsel).

The detail for the Commission provided : " The Commission shall have power, as required, to make such rules for the conduct of its proceedings, consistent with the powers of such commission, as deemed necessary for a full and fair trial of the accused. The Commission shall have regard for, but shall not be bound by, rules of procedure and evidence prescribed for general courts-martial. Such evidence shall be admitted as has, in the opinion of the President of the Commission, probative value to a reasonable man. Peremptory challenges shall not be allowed. The concurrence of at least two-thirds of the members present at the time of voting shall be necessary for a conviction or sentence."

(1) The full transcript of this trial is not available to the Secretariat of the United Nations War Crimes Commission. This report is based on a War Crime Trial Report received from the United States Authorities.

(2) See Annex II, p. 113.

2. THE CHARGE

The indictment was worded as follows :

" Charge : Violation of International Law.

" Specification : In that Alfons Klein, Adolf Wahlmann, Heinrich Ruoff, Karl Willig, Adolf Merkle, Irmgard Huber and Philipp Blum, acting jointly and in pursuance of a common intent and acting for and on behalf of the then German Reich, did, from on or about 1 July, 1944, to on or about 1 April, 1945, at Hadamar, Germany, wilfully, deliberately and wrongfully, aid, abet, and participate in the killing of human beings of Polish and Russian nationality, their exact names and number being unknown but aggregating in excess of 400, and who were then and there confined by the then German Reich as an exercise of belligerent control."

3. DIGEST OF THE EVIDENCE

(i) *The General Facts*

The evidence showed that for many years before 1944 (the accused were charged with crimes committed from on or about 1st July, 1944, to on or about 1st April, 1945) there had been operating in the town of Hadamar, Germany, a small sanatorium for the care of the mentally ill. It was a State institution and, during the relevant time, it was under the jurisdiction of the provincial administration located in Wiesbaden. It was subordinate to this provincial administration in that all policies were decided by, and all important orders came from, Landesrat (more probably Landrat) Fritz Bernotat at Wiesbaden, who was in turn subordinate to Gauleiter Jakob Springer. (Neither Bernotat nor Springer was in the dock in the present trial.) It is also shown by the evidence that between January, 1941, and some time in the middle of 1944, as many as 10,000 Germans, alleged to be mentally ill, were admitted to Hadamar and there put to death. At first the bodies of these were cremated. Later they were killed by means of " medications and injections," and, apparently, buried in the institution cemetery. The record of the trial contains considerable testimony in which it is attempted to show that there existed a German law or decree authorizing and directing such disposition of the insane. Inasmuch, however, as the accused were not tried for the deaths of these people and since most if not all of such deaths took place prior to the time of the acts for which all the accused were tried (the killing of persons of Polish and Soviet nationality), it was not deemed necessary to do more than state the above facts as a prelude to the relevant elements of the case.

It was clearly established that between 5th or 6th June, 1944, and 13th March, 1945, there took place numerous shipments of Polish and Russian men, women and children to Hadamar from various other institutions and camps in Germany or German-occupied territory. Their number totalled 476 and all were killed within one or two days after their arrival at the institution, either by hypodermic injections of morphine or scopolamine, or derivatives thereof, or by doses of veronal or chloral. It was repeatedly testified that all were killed and that there was no evidence that any who arrived avoided death, except for one woman who escaped from the institution.

The reason given by the officials and employees at Hadamar who directed

and actually gave the fatal injections was that all of the victims were incurably ill from tuberculosis. There is also some evidence that they had been told and believed that the Poles and Russians came under the provisions of the German law or decree which required such disposition of German insane. One witness testified that they had not been so instructed.

The Defence was unable to prove the existence of any such decree, much less its real or purported application to the non-German victims. The ex-chief prosecutor of Wiesbaden testified that some 4 or 5 years ago he reported to his superior his suspicions that German insane patients were being put to death in insane asylums. Following this report, he was visited by the Chief Prosecutor from Frankfurt and was told that all prosecutors and court presidents had been invited to a conference in Berlin where after viewing some pictures of insane persons, they were shown a photostat copy of an order from Hitler authorising the killing of insane persons by physicians in the institutions under certain undefined conditions. This subject was classified as " Secret State Affair," and following its dissemination any charges or complaints based on the death of insane persons were forwarded by the receiving prosecutors direct, without action, to the Ministry of Justice. It was emphasised by the Prosecution that the alleged order applied only to insane German patients.

The exhumation and autopsy by a qualified American pathologist of the bodies of six of the Poles and Russians showed that at least one of the victims had not suffered from tuberculosis and that in none of them was the disease in such an advanced state that death therefrom was reasonably to be expected within a short period of time. There was uncontroverted evidence that incoming Poles and Russians were neither examined nor treated for tuberculosis by the one doctor on the institution's staff, who was actually an alienist or psychiatrist and not a pathologist.

There were at Hadamar none of the customary facilities for treatment of tuberculosis. The cause of death was the injection of excessive doses of narcotic drugs which are not specifics for treatment of respiratory diseases. The victims were induced to receive the injections and take the drugs by assurances that they were being treated for the disease from which they allegedly suffered or that they were being inoculated against communicable diseases. Perfunctory examinations were made by hospital personnel to determine whether the victims were in fact dead, after which they were hurriedly buried in mass graves in a portion of the institution's cemetery.

Upon their arrival at the institution, records were properly made out of their names, sex, nationality and other data. The records of their deaths, however, were always falsified as to dates and causes of death, so that neither the fact that they died as a result of overdoses of narcotics nor the fact that death always occurred within an exceedingly short period of time after arrival, was shown.

(ii) *The accused Alfons Klein*

The accused Alfons Klein was the chief administrative officer of the institution in charge of records, food, housing and reports, and he knew of the deaths of the Poles and Russians, and in fact received the original orders from Bernotat and Springer requiring them to be received and to be put to death, and transmitted such orders to other institution personnel. One

accused stated that the accused Klein " gave all the orders." Klein attended a conference with Bernotat and Springer (in July or August, 1944) in which he was informed that a number of incurable tubercular labourers would arrive at Hadamar. At a later conference he was instructed that these workers were to be killed under the same law and in the same way as the German insane persons had been killed. He alleged that he had protested both against the fact that they were being sent to Hadamar and the fact that they were to be killed, but to no avail. He said he had no authority over their admission or disposition. He feared that if he disobeyed these orders he would have been sent to a concentration camp. At one point in his testimony, Klein denied that he himself ever ordered an injection to be given or that he ever gave one. He was often present, however, when they were given. Upon cross-examination he admitted that he had given orders for injections, but maintained that he " merely transmitted (to the personnel) the order which Bernotat gave me through the Gauleiter." Other orders given by him for the reception of Russians and Poles and their subsequent burial were " purely administrative." The accused never saw the law or decree which was purported to have ordered the deaths, but he did not then doubt its existence. The personnel at Hadamar had been required to take an oath not to reveal anything that happened there. Several former employees who had told of what went on were arrested by the Gestapo and taken to concentration camps and one died there. The accused, however, never threatened personnel in any way.

In his pre-trial statement, Klein had said that personnel were entirely free to leave Hadamar at any time. In his testimony he qualified this by testifying that he had said so because he was told before he made the pre-trial statement that the personnel had made statements that he, Klein, had always given orders to them to have the Russians and Poles killed and that he had threatened them several times with concentration camp if the work was not done. He added that as an " official " rather than an " employee," he himself could not leave. Later on even employees could not leave, because of shortage of personnel. He knew that what was being done at Hadamar was " wrong." In a closing statement to the Military Commission, Klein said that he examined the medical papers of all the imported labourers " specifically " ; that they showed the Poles and Russians to have been treated for various periods of time at other hospitals for tuberculosis without effect ; that upon personal examination he found that more than half of these persons had tuberculosis ; and that because of the sufferings they were undergoing and the danger of their infecting other people, killings could not be considered as violations of international law, because it was " cruel . . . if you would let them live longer."

(iii) *The accused Dr. Adolf Wahlmann*

The accused, Adolf Wahlmann, was the institution's doctor. He was primarily an alienist and a psychiatrist. He became chief physician and the only doctor at the institution in August 1942. He was present at a conference at the hospital with Bernotat and Klein before any of the Russians and Poles arrived, in which conference it was determined that these " patients " were to be killed by the same method as the German patients. He determined the nature and the amount of the drug to be given to each prospective

victim, although there was also some testimony that he left this task to his chief nurses. The pharmacy from which drugs were obtained was in his office. He requisitioned the drugs which were used in the killings, entered the alleged cause of death on the patient's hospital card and signed the death certificate.

(iv) *The accused Ruoff and Willig*

The accused Heinrich Ruoff began working as chief male nurse at the asylum in 1936, about two months after the programme of extermination began. He took an active part in administering the fatal injections. He estimated that Willig and he " gave injections to two or three hundred Poles and Russians, but it could have been four or five hundred too."

The accused Karl Willig was a male nurse at Hadamar. He had been so employed since 1941. He participated equally with Ruoff in the killings by means of administering hypodermic injections of the narcotics and also by orally given doses of veronal and chloral. He later helped in the burial of some of the dead. He attended the daily morning conferences with Dr. Wahlmann and Huber when Ruoff did not ; in these meetings plans were made for further disposal of inmates.

Ruoff and Willig were told by Klein and Bernotat that Polish and Russian patients were to be treated as German insane persons—which meant that they were to be killed. They were told that if they complained about their tasks they would " end up in concentration camps." They obtained drugs from Dr. Wahlmann and in obedience to the orders from Klein and Bernotat administered injections which resulted in the deaths of the Polish and Russian victims. The accused Ruoff was unable to estimate how many he had put to death except in his pre-trial statement which was quoted above. He " presumed " that all the Russians and Poles were ill because of their appearances and also because he " saw many diagnoses of the doctors." Upon Klein's instructions, Ruoff gave Merkle some names of Poles and Russians " every now and then to be reported to the statistical office." He made several efforts to leave Hadamar, but his requests were always refused.

In his statement prior to trial, however, Ruoff made no mention of efforts to leave.

Willig admitted assisting Ruoff to kill Poles and Russians, and he testified that together with Ruoff and Blum he was told by Klein that they were to receive incurably tubercular Russians and Poles who were " to be killed like the . . . German mentally diseased."

After Blum had left Hadamar, Willig also took over the burial supervision. He too believed that all the Russians and Poles were incurably tubercular, had been told that there was a law which provided for their deaths and had attempted unsuccessfully to leave Hadamar.

Orders to kill the victims came from Klein. In his statement prior to trial, Willig had said that nobody had ever threatened him with the concentration camp if he left his job at Hadamar. He had no other employment anywhere, and he never tried to be dismissed. Once he asked to be transferred into a different institution, but this was refused. He could not ask to be dismissed

because he would have lost his pension and would probably have been imprisoned.

(v) *The accused Irmgard Huber*

Irmgard Huber was the chief female nurse at the institution, carrying out the orders of Dr. Wahlmann and overseeing the duties of the seven other female nurses. She knew beforehand of the arrival of the first transport and made preparations for housing the victims. There was some evidence that the female nurses actually gave injections. It was at least well established that the accused Huber took part in daily morning conferences at which Wahlmann signed death certificates. She obtained narcotics from the pharmacy in Dr. Wahlmann's office for Ruoff and Willig and she was actually present on at least one occasion when fatal injections or dosages were given to patients, and when false death certificates were made out.

(vi) *The accused Adolf Merkle*

The accused Adolf Merkle began working at Hadamar in 1943. He was primari'y the institution's bookkeeper, both for the registering of incoming patients and for purposes of recording dates and causes of death. He knowingly made false entries as to the dates and causes of death of all the victims. Merkle was said by Ruoff to have been thoroughly familiar with what went on at the institution. On the witness stand, he steadfastly denied that he knew the true state of affairs, or that he gave injections or saw any dead bodies. He believed that the persons died of tuberculosis or pneumonia.

(vii) *The accused Philipp Blum*

The accused Philipp Blum had been a doorman and telephone switchboard operator at the hospital since before 1940, had served for a short period of time in the Luftwaffe, and had returned to Hadamar in 1941. After January 1943 he became the chief caretaker of the cemetery until he was again called up in August 1944. Probably only the first batch of Poles and Russians arrived during his presence at Hadamar. Some bodies he buried without the approval of Dr. Wahlmann on his own belief that they were dead. He supervised the burial in mass graves of 100 bodies, " more or less," of Russians and Poles. He knew beforehand that the batch was to arrive and what was going to be done. He was in the ward in which the victims were put to bed, received injections, and died, and he waited for them to die knowing that he would then be required to bury them. There is also in the record one statement by Ruoff that Blum helped to administer the poisons which brought about the deaths. His own pre-trial statement indicates full knowledge on his part of what was intended and what actually did take place.

4. FINDINGS AND SENTENCES

All the accused were found guilty. Klein, Ruoff and Willig were sentenced to be hanged ; Wahlmann was sentenced to life imprisonment ; and Merkle, Blum and Huber were sentenced to imprisonment for 35 years, 30 years and 25 years respectively.

The sentences were confirmed by the Commanding General, HQ. 7th

Army, Western Military District, and the death sentences also by the Commanding General, U.S. Forces, European Theatre, and were put into execution.

B. NOTES ON THE CASE

1. QUESTIONS OF JURISDICTION

(i) *Jurisdiction of the Military Commission in United States Municipal Law*

The Military Commission was appointed by a special order of the Commanding General, Western Military District, to whom authority had been delegated by the Commanding General, United States Forces European Theatre, who in turn derived his powers from a delegation by the President of the United States.

The traditional jurisdiction of American Military Commissions to try offenders or offences against the law of war has been recognised by statutes enacted by the Congress of the United States, particularly by the Statute known as the " Articles of War." (Section 1, ch. II Act of 4th June, 1920 (41 Stat 787), as amended), as has been decided by the Supreme Court of the United States in recent decisions.([a])

The Supreme Court of the United States held that the United States Congress had recognised Military Commissions and preserved their traditional jurisdiction over enemy combatants. In the present case, the accused were not combatants but enemy civilians. Under the common law of war, the jurisdiction of American Military Commissions comprises also jurisdiction over civilians.

(ii) *Jurisdiction of the Military Commission in International Law*

The accused were only charged with the killing of human beings of Polish and Russian nationality. This is important for two reasons ;—

(1) Crimes committed against Germans and other Axis nationals were outside the scope of the trial, the Military Commission thus not being vested with or assuming jurisdiction over what in the Charter of the International Military Tribunal are called " crimes against humanity " as far as they are not simultaneously violations of the laws and usages of war ; and

(2) Among the victims of the accused, there were no persons of United States nationality nor had the crimes been committed on United States territory or by United States nationals.

In view of (2), the Commission had to decide the question whether it could assume jurisdiction despite the fact that the crime, committed by foreigners outside United States territory, had not affected United States nationals.

The Commission decided the question in the affirmative.

Provided that the acts, with which the prisoners were charged and of which they eventually were found guilty, were violations of the laws of war,

([a]) For details of the United States Law governing Military Commissions trying war crimes, see Annex II, pp. 111-22.

the following reasons sustaining the Commission's jurisdiction can be adduced :—

(*a*) the general doctrine recently expounded and called " universality of jurisdiction over war crimes," which has the support of the United Nations War Crimes Commission and according to which every independent State has, under International Law, jurisdiction to punish not only pirates but also war criminals in its custody, regardless of the nationality of the victim or of the place where the offence was committed, particularly where, for some reason, the criminal would otherwise go unpunished.

(*b*) the narrower theory that the United States did have a direct interest in punishing the perpetrators of the offence inasmuch as the victims were nationals of allies engaged in a common struggle against a common enemy ;

(*c*) the assumption of supreme authority in Germany by the four great Powers through the Declaration of Berlin, dated 5th June, 1945, the United States being the local sovereign in the United States zone of occupation and deriving jurisdiction both from the principle of territoriality and from the principle of personality, the accused being German nationals.

2. QUESTIONS OF SUBSTANTIVE LAW

(i) " *Violation of International Law* "

The accused were charged with " Violation of International Law." It may be assumed that the offences alleged and eventually proved were held to be violations of that part or branch of International Law which is called the " Law of War," or to be, in the parlance of Article 6 (*b*) of the Charter of the International Military Tribunal, a violation of the laws and customs of war.

In view of the restriction of the trial to crimes against allied nationals, it was certainly unnecessary to decide whether, in addition to the violation of the laws and customs of war, provisions of any other branch of International Law had been infringed, for instance, those provisions of International Law which now have been laid down under the heading " crimes against humanity."

(ii) *The Status of the Victims*

It was established in the proceedings that the victims were Polish and Soviet nationals, but nothing was said as to whether they had been inhabitants of German-occupied Soviet and Polish territory, deported for labour into Germany. The Military Commission was, of course, in a position to take judicial notice of the fact that hundreds of thousands of Soviet and Polish citizens from occupied territory had been compulsorily deported to Germany for work. This being so, it was obvious that this was a war measure and the murdering of these deported allied nationals a war crime.

(iii) *The Status of the Accused*

The accused were not members of the German armed forces, but personnel of a civilian institution. The decision of the Military Commission is, there-

fore, an application of the rule that the provisions of the laws and customs of war are addressed not only to combatants but also to civilians, and that civilians, by committing illegal acts against nationals of the opponent, may become guilty of war crimes.

(iv) *Alleged Legality under German Law*

The accused invoked in their defence the alleged fact that a German law or decree enacted under the Hitler régime required that incurable persons should be put to death.

As a matter of fact the existence of this alleged German law or decree was not established by the Defence. At the most it was proved, through the testimony of a former Chief Prosecutor of Wiesbaden, that there was an "administrative order" from Hitler's office which permitted it. There was the additional consideration that even if such a decree existed and if it made the killing of incurable persons legal, such provisions could not legalise the killing of other than German nationals, because under general rules of interpretation a rule of this kind would have to be interpreted strictly.

Moreover, the accused could not prove that their victims had actually been incurable persons.

The present case is, therefore, not an express application of the principle that in the case of crimes like these it is irrelevant whether or not they were perpetrated in violation of the domestic law of the country where perpetrated. (Art. 6 (*c*) of the Charter of the International Military Tribunal.)

(v) *The Plea of Superior Orders*(4)

The accused also pleaded that they had acted under orders received from higher administrative quarters. They were not successful in this plea. The Military Commission applied to the relationship of civilian employees to their superiors the now well-established doctrine that individuals who violate the laws and customs of war are criminally liable in spite of their acting under a superior order, if the order was illegal.

(vi) *Coercion and Necessity*

The accused also pleaded coercion or necessity but the Military Commission considered this defence to be established neither in fact nor in law.

(4) Regarding the development of the law concerning this plea, see the notes on pages 18-20 and 31-33.

CASE No. 5

THE SCUTTLED U-BOATS CASE

TRIAL OF OBERLEUTNANT GERHARD GRUMPELT

BRITISH MILITARY COURT HELD AT HAMBURG, GERMANY, ON 12TH AND 13TH FEBRUARY, 1946

Scuttling of U-boats in violation of the Instrument of Surrender of 4th May, 1945. Plea of Absence of Mens Rea, and of Superior Orders. The Language of the Court.

Grumpelt was accused of having scuttled two U-boats which had been surrendered by the German Command to the Allies. He claimed that he was not aware of the terms of the relevant Instrument of Surrender, since these had not been notified to him in any way, and further that he had received intimation that a general order for the scuttling of all U-boats should be put into effect, while at the same time not hearing of any countermanding of that order. He was nevertheless sentenced to imprisonment for seven years. His sentence was reduced to five years by higher military authority.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was a British Military Court for the Trial of War Criminals, 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 Lieut.-Col. Sir Geoffrey Palmer, Bart. (Coldstream Guards), as President, and Lieut.-Cdr. E. H. Cartwright (Royal Navy) and Lieut. I. S. B. Crosse (Royal Navy) as members, with C. L. Stirling, Esq., C.B.E., Barrister-at-Law, D.J.A.G., as Judge Advocate.

The Prosecutor was Colonel R. C. Halse, of the Office of the Judge Advocate General; the Defending Officer was Kapt. Lt. Ing. O. Daniel, of the German Navy.

2. THE CHARGE

The defendant was First Lieutenant (Engineer) Gerhard Grumpelt, an officer of the German Navy. Pursuant to Regulation 4 of the Regulations for the Trial of War Criminals he was charged with committing a war crime, in that he " at Cuxhaven, North-West Germany, on the night of 6-7th May, 1945, after the German Command had surrendered all Naval ships in that place, in violation of the laws and usages of war, scuttled U-boats 1406 and 1407."

The accused pleaded not guilty.

(1) See Annex I, p. 105.

3. THE OPENING OF THE CASE BY THE PROSECUTOR

The Prosecutor stated that, before the surrender of the German armed forces to the Allies, the accused was an instructor to U-boat officers. In May, 1945, he was at Cuxhaven. On the 3rd May, U-boats 1406 and 1407, which were of the very latest type of U-boat, arrived at Cuxhaven under the command of their respective captains. The war was then nearly at its end. On the next day, five German officers of the High Command visited Field Marshal Montgomery, commanding 21st Army Group, and at 1830 hours on that day they signed an instrument of surrender, whereby the German High Command agreed to surrender all German armed forces in Holland, in North West Germany, including the Frisian Islands, Heligoland and all other islands, in Schleswig-Holstein, and in Denmark, to the Commander-in-Chief of 21st Army Group. This surrender included within its scope all naval ships in those areas. Hostilities were to cease on land and sea, and in the air, at 0800 hours British Double Summer Time on Saturday, 5th May, 1945. At the material time, it was agreed by the German High Command that all German vessels would be handed over to the British Command and that fighting would cease at 0800 hours on the next day.

At 0400 hours on the 5th May, continued the Prosecutor, four hours at the most before the firing was to cease as a result of the terms imposed by Field Marshal Montgomery, an order was issued by the German Naval Command giving the code word " Regenbogen "—" Rainbow "—which meant that all U-boats were to be scuttled. That was some short time after the German High Command had signed the terms of surrender. Later that morning someone came to the conclusion that that was not quite right and that order was cancelled. However, Grumpelt must have disagreed, because he made arrangements, at about 11 o'clock in the morning, that he and the captains of the U-boats 1406 and 1407 would proceed to sea and scuttle these ships.

That arrangement came to the knowledge of a higher German officer, and he gave orders that they were not to go to sea. Grumpelt got to hear of this, changed his plan, and made an arrangement by which they would go to sea at 2200 hours on the night of May 6th. That plan was defeated by the German commander of the " Helgoland," who called a conference of U-boat commanders at 2000 hours on the 5th May, at which the agreement was reached that the latter would not scuttle the ships under their command.

Despite this, after a day of discussion as to whether the U-boats were to be scuttled on the next night, Grumpelt went aboard these two U-boats with a rating, and scuttled them. He did it, according to his statement, of his own volition, quite openly and in a sane mind, because he wished to deprive the Allies of the use of those two submarines, which were of the very latest type and capable of giving a great deal of information to the Allies.

The submission of the Prosecution to the Court was that it was a war crime for a member of the armed forces, or any member of the vanquished nation, or in fact of the victorious nation, to break the terms of a surrender or armistice, especially in the existing circumstances, when a country which was victorious against one country was still at war with another, an ally of the second.

Acting in accordance with Regulation 8 (1) of the Royal Warrant, the

Prosecutor put forward a photostatic copy of the terms of surrender signed on 4th May, 1945, the relevant paragraphs of which read as follows :

" Instrument of Surrender of all German armed forces in Holland, in North West Germany, including all islands, and in Denmark.

" 1. The German Command agrees to the surrender of all German armed forces in Holland, in North West Germany including the Frisian Islands and Heligoland and all other islands, in Schleswig-Holstein, and in Denmark, to the C.-in-C. 21 Army Group. This to include all naval ships in these areas. These forces to lay down their arms and to surrender unconditionally.

" 2. All hostilities on land, on sea, or in the air by German forces in the above areas to cease at 0800 hrs. British Double Summer Time on Saturday, 5th May, 1945.

" 3. The German Command to carry out at once, and without argument or comment, all further orders that will be issued by the Allied Powers on any subject.

" 4. Disobedience of orders, or failure to comply with them, will be regarded as a breach of these surrender terms and will be dealt with by the Allied Powers in accordance with the accepted laws and usages of war."

4. EVIDENCE FOR THE PROSECUTION

The facts as appearing in the evidence for the Prosecution were provided by four witnesses, officers and other members of the German Navy as follows :

(i) *Werner Klug, Oberleutnant zur See, commanding U-boat* 1406

Klug stated that his ship, which was of the latest type, received on the 5th May, 1945, in a message, the code word " Rainbow," which meant " scuttle." The order came between 0300 and 0500 hours, and as a result, he went immediately to No. 5 Security Division for the purpose of scuttling the ship. There an order countermanding the first was given, at about 5 o'clock in the morning, almost immediately after the original order had been received. Shortly after that, on the same morning, he met the accused Grumpelt and both of them made up their minds to scuttle the U-boats, as they considered the countermanding of the order of No. 5 Security Division not binding on them, because they were not under the orders of that Division. The meeting for the purpose of scuttling the ships was fixed for the afternoon on the same day.

After that arrangement had been made, Klug received further orders from the Chief of No. 5 Security Division, Captain Thoma, who forbade him and the other commanders to scuttle their ships, and threatened that they would be shot in the event of disobedience.

The witness was unable to state whether he told the accused of the order of Captain Thoma when he saw him again later, or whether Grumpelt knew about this order. They both made a new arrangement for 2200 hours to scuttle the ships nevertheless, because they still considered the order of No. 5 Security Division as not binding on them.

The latter arrangement was again postponed, because at 2000 hours all the U-boats commanders were ordered to attend a conference with Admiral Klaikampf on the " Helgoland," where they had to give their word of honour not to scuttle their ships. Grumpelt had not attended the conference, but as a result thereof the meeting between him and Klug at 2200 hours did not materialise and they never saw or talked to one another after the conference.

Towards the end of 5th May, the witness's ship ceased to be on active duty, and the crew was paid off, and on the next day the U-boat was towed to a new position into a corner of the port where all the U-boats were left in the custody of a guard ship No..1267.

Cross-examined by the Defence, the witness stated that there was no superior officer at Cuxhaven whose orders were binding upon him, and that for operational duties he could not accept orders from the higher officers in charge of Cuxhaven. The No. 5 Security Division was an authority of the minesweeping department and Admiral Klaikampf was the Commander of the Coastal Defence. For operational duties and orders all U-boats Commanders were in touch with higher Commanders of the operational department only by wireless and on a different wave-length from that used for surface craft. His own listening-in device was not in a state of service at the material time.

The exact contents of the capitulation order or the so-called armistice order, or the wording of it, were not notified to the U-boats commanders.

Neither the Prosecution nor the Defence wished to call the commanding officer of U-boat 1407 because his evidence, it was thought, would be practically the same.

(ii) *Wilhelm Mohr, Obersteuermann, officer commanding VP1267 at Cuxhaven*

This witness said that, on the night of the 6/7th May, 1945, he was still commanding the ship VP 1267, and that at about 2330 hours, the sentry reported that one of the two U-boats which his ship was guarding was in the process of being sunk and that men were going on to the other U-boat. He did not know their numbers then, but found later on that they were the 1406 and the 1407. He then went on to the boat which was sinking last and there found O/Lt. Grumpelt and O/Machinist Lorenz. The witness told the accused to get off the U-boat at once, whereupon all three left the boat and went on to the witness's boat, VP 1267, where the latter told the accused that his, the witness's boat and another boat, No. 1225, commanded by Schroeder, had been detailed as guard ships and that the next morning he was going to report on the incident.

At the time, the witness thought he was going to get into trouble because Grumpelt had sunk the U-boats which he, the witness, was guarding. He even told the accused that he expected to have trouble because of this, to which the accused replied that he would hold himself responsible.

(iii) *Wilhelm Lorenz, Obermaschinist, subordinate to O/Lt. Grumpelt*

The witness said that he was living and messing with the accused on board the ship VP 1267, commanded by Mohr, when on the night of 6/7th May he was ordered by the accused to go with him on one of the U-boats. There he was told to search the boat for food-stuffs and after a while to take a piece

of lard on to his own ship. When he rejoined Grumpelt, he found that the U-boat was already sinking, from which he assumed that Grumpelt scuttled it. Both of them left the craft, and went to the other U-boat. Grumpelt went alone to the front and aft of the boat and the witness had the impression that valves were being opened. By that time a sentry was firing in the direction of the boat and after a while they were joined by Mohr. Water was already flowing through and the boat started sinking.

The witness did not know when the armistice was signed, but there was talk generally that the armistice had been signed, and they knew that military operations ended on the 5th May. They did not go on duty that day as it was obvious there was no further need to train U-boat crews.

(iv) *Edgar Pabst, Oberstaabsrichter at the 5th Security Division at Cuxhaven*

Pabst said that, in view of the information received from Captain Thoma on the 7th May, he saw the accused and asked him whether it was true that he had scuttled the U-boats. Grumpelt replied : " I have scuttled the boats, I take all responsibility and I had orders to do so. ' Rainbow ' was the code word."

The witness himself knew that the armistice with 21 Army Group was effective as from some time before the 6th May, as it was generally known that a " cease fire " had been ordered. He believed it was made known over the wireless, but was not sure. He could not say whether at that time he had had any knowledge of any terms of surrender between the armed forces.

(v) *Affidavit of Lt. Hunter*

At the end of the case for the Prosecution, the latter handed in to the Court under Regulation 8 (i) an affidavit containing a statement made by an officer attached to the staff of the British Naval Commander in Chief, Germany, who interrogated the accused several times, together with two exhibits referred to in that statement. One of these exhibits, a statement made by the accused before Lt. Hunter, a translation of which was read to the Court, runs as follows :—

> " Cuxhaven. 29.5.1945. Statement by Engineer Lt. Gerhard Grumpelt. (Technical U-boat Training Group.) During the nights of 5th, 6th, or 7th May, 1945, I went of my own volition on board the boats U 1406 and U 1407 in order to sink them. The fore and after air vents were opened. The Kingston valve was opened from the sea and the filter of the mud trap removed. Besides this, the air vent of the midship main ballast tank was opened in to the boat. I was hindered in my task by the guard firing. Nevertheless both boats were sunk. I gave Chief E. R. A. Wilhelm Lorenz the order to accompany me on these boats. The sinking of the two boats was carried out by me personally. Chief E. R. A. Lorenz switched off the current. We then went on board patrol vessel (K.f.K.) 1267. I confirm the correctness of this statement. (Signed) Gerhard Grumpelt, Oberleutnant (Ing)."

5. THE CASE FOR THE DEFENCE

The Defending Counsel admitted that the accused had sunk the two U-boats during the night of 6/7th May, 1945, and thus contravened the special

capitulation orders as laid down on the 4th May, but based his defence on the submission that the accused was not aware of the terms laid down in the Instrument of Surrender, because these were not notified to him in any way. Counsel pointed out that the accused had never heard about the countermanding of the order which the code word " Rainbow " implied, and could therefore not be found guilty.

6. THE EVIDENCE OF THE DEFENCE WITNESSES

(i) *The accused Gerhard Grumpelt*

The accused said that he knew of the preparations for the " Rainbow " order before the capitulation and also what should be done when that order was given. His whole education in the German Navy taught him that no ship should fall into the hands of the enemy but should be scuttled. Therefore, when on the morning of the 5th May he heard the word " Rainbow " it was at once quite clear to him that he had to obey the order implied in that code word. He had taken counsel with the other commandants of the U-boats, and they came to the conclusion that they should obey the order.

Up to the moment when he obeyed the order and committed the act which the code word " Rainbow " implied, he never heard anything about a countermanding of that order, although he was available at all times on board the Boat 1267 for any orders to reach him. He did not know there was a meeting on the " Helgoland " with all U-boat commanders, and had never seen the two commanders of U-boats 1406 and 1407 after the conference at which they had given their word of honour. In any case Admiral Klaikampf was not entitled to give operational orders to U-boats, and what he did at the conference was in fact, not the issuing of an order ; he merely received a pledge of honour from U-boats commanders not to scuttle their boats. Only on the 7th May did he hear that an armistice had been concluded and before the scuttling was effected he never heard anything about the conditions implied in the terms of the armistice.

The commander of the 5th Security Division could not have given him any orders in connection with U-boat warfare which would have been binding on him. The only higher authority which could have been entitled to give him such orders at the time was Admiral Friedeburg, who was the highest of the commandants of the U-boats.

In answer to Dr. Pabst's question whether he had scuttled the two submarines, he had said : " Yes, I scuttled two U-boats, I did it alone and I received the order to scuttle by the code word ' Rainbow.' I take full responsibility for my actions." He said that, because he had been told on the morning of the 7th by Captain Thoma that the code word " Rainbow " did not exist any more.

The order " Rainbow " made him responsible for seeing to the scuttling of all the U-boats in his area. In the first instance, he said, " the U-boat commanders were responsible for it, but if they did not obey the orders the second roster came, and I as training officer belonged to this part of the officers who then had to step into the breach. . . This order came through the wireless and if the commanders did not obey and execute this order the next step was that we, the training officers, had to do the job." It was a

general order in the German Wehrmacht that if one leader did not do his duty then the next one stepped into the breach and did it for him. That had nothing to do with the " Rainbow " order ; " it was a very high order, the so-called Führer order, concerning doing duty if the senior officer does not do so."

He did not hear the order on the radio himself. A U-boat commander, whose name he could not remember, told him that the order was to the effect that U-boats should obey the order " Rainbow " within a specified area. On the morning of the 5th May, on the " Helgoland," the former said, according to the accused, " Grumpelt, the time has come ; we must scuttle the U-boats ; the code word ' Rainbow ' has arrived." He had also received the news from Klug, who had said to him : " Grumpelt, it is a necessary and it is quite a natural course for us to take, to scuttle the ships of the newest and latest type, and it is our duty to do so."

(ii) *Karl Schimpf, U-boat commander*

Schimpf said that, before and after the " cease fire," he was stationed in Wesermunde, which was in the same naval district as Cuxhaven, and that the orders for Wesermünde were the same as those for Cuxhaven. At the time of the " cease fire," a code word " Rainbow " was made known. It was binding and necessitated the immediate sinking of the U-boats. No further explanatory orders were necessary. The order was carried out in the district of Wesermunde and all the U-boats were scuttled during the " cease fire," but before the armistice. He did not remember the exact date because he did not execute the order himself, as he had already left the boat at that time.

He was aware of a so-called " Führer " or " Leader " order, which signified that if a leader failed in the execution of his duty, the next in line was responsible for carrying it out, and it was even possible that a training officer belonging to a U-boat unit in the area governed by the district command could carry out an order of that sort. Such an order was supposed to go down even to a seaman as it spoke only about higher authority without defining the exact grade of the rank.

(iii) *Fritz Schroeder, officer commanding boat No.* 1225

The witness stated that he received an order from the 5th Security Division to make his ship fast alongside U-boats 1406 and 1407 as a security boat in order that no unauthorized personnel should go on to those craft, as they had been left by their crews. He ordered the sentry to fire on the accused Grumpelt and his Chief Maschinist Lorenz because he was not aware or not sure that it was they who were there. If he had known for certain that it was Grumpelt and Lorenz he would not have given an order to fire, as he would have considered them as authorized personnel. It would not have been his duty to try and stop officers known to him in the process of scuttling the boats as his orders did not include ensuring that the boats were not damaged.

Examined by the Judge Advocate, Schroeder nevertheless admitted that he told the accused after the scuttling occurred that the accused was " putting him and his crew on the spot for negligence," and that he would report the matter to Captain Thoma.

(iv) *E. Bleihauer*

The witness claimed that he had been in charge of the U-boat flotilla at Wilhelmshaven which belonged to the same district as Cuxhaven. At the time he supervised all signals in the flotilla. He was on duty on the morning of 5th May when the code word " Rainbow " was sent out directly to all U-boats west of a certain area. It came from the commandant of the U-boat flotilla in Kiel, Admiral Friedeburg.

7. THE CLOSING ADDRESS OF THE DEFENDING COUNSEL

The defending Counsel admitted that the scuttling of the two U-boats was without doubt a violation of the laws and usages of war, but stated that this clear fact was not quite sufficient to make the accused guilty, because it had not been proved that the terms of surrender were known to the accused. In fact, at the time when the scuttling took place the accused did not know those stipulations and could not have known them. Counsel pointed out the fact that it was forbidden to the whole of the German people and, therefore, to the German Wehrmacht, to listen in to Allied or neutral radio stations. To these stations belonged also those German stations which fell into the hands of the enemy, for instance Hamburg, which was conquered during the war. That order, was, of course, obeyed, and it was not until after the general surrender and capitulation on the 8th May, 1945, that the order was cancelled.

Counsel also submitted that in all German official documents and communications of that period only the word or idea of " cease fire " was used and mentioned. As to this, Counsel said that only on the 7th May, 1945, after the scuttling, did the accused hear anything about the so-called " cease fire," and that the conditions relating to the German units stationed in North West Germany, in Holland and in Denmark between the 5th and 8th May, 1945, were always called by the German authorities " cease fire " and not " armistice," " surrender " or " capitulation." Only after the 8th May, 1945, the day when the whole German Wehrmacht capitulated, was the word " armistice " mentioned. As distinct from the expression " armistice," the words " cease fire," in the Counsel's submission, meant only that all acts of war with the enemy were interrupted temporarily, and that after " cease fire " these hostilities might be continued or on the other hand an armistice might be concluded.

The third point of the defending Counsel's submission was that apart from the above facts the accused had, by virtue of the receiving of the code word " Rainbow," a clear order and duty to scuttle the boats under all conditions. In all the German armed forces, he said, it had always been a holy tradition and duty never to allow any arms, not even in the worst circumstances or conditions, to fall into the hands of the enemy. This duty could only be cancelled through the conclusion of an armistice. During the whole duration of the war this spirit had been taught to all soldiers through their officers again and again and it had become part of their code of honour. Any soldiers who acted otherwise would have been condemned to death. In order to make sure that in extreme cases or conditions this was so understood an order, the code word " Rainbow," had been prepared. This code word dealt with scuttling and destruction of ships of war provided the

respective commandants found it necessary. In order to make absolutely sure that these orders should be carried out in time of crisis an order which was considered extremely important by the High Command, a so-called Leader order or Führer order, had been given at the beginning of 1945, saying that if a superior officer was not in a position to carry out an order the next senior in rank had to carry it out. The rank in this case did not matter and this duty was passed on from rank to rank until an officer was found who could carry out the order.

8. THE CLOSING ADDRESS BY THE PROSECUTOR

The Prosecutor based his case on the submission that though the order " Operation Rainbow " was issued, the accused was acting after this order had been cancelled, knowing well that it had been cancelled, and therefore he was not in fact acting under that order. He knew this quite well, because of various events which transpired, first that the two boats had been moved from their original positions and were moored next to a couple of guard-ships, secondly that the captains did not agree to go at 1600 hours and again did not attend at 2200 hours, and thirdly, that those captains made no attempts to scuttle their ships. The accused acted, therefore, entirely of his own volition in order to deprive His Majesty of the use of two of the latest submarines.

The Prosecutor based his argument on the following statement of law contained in Oppenheim-Lauterpacht, *International Law*, 6th Edition, Volume II, pp. 432-3 : " That capitulations must be scrupulously adhered to is an old customary rule, since enacted by Article 35 of the Hague Regulations. Any act contrary to a capitulation would constitute an international delinquency if ordered by a belligerent Government, and a war crime if committed without such order. Such violation may be met by reprisals or punishment of the offenders as war criminals." He submitted that, in view of the fact that on the 4th May the German High Command surrendered the German armed forces in North West Germany, any act done to any part of the German forces after that time was an act of violation of the laws and usages of war. Therefore, it was a war crime for Grumpelt to scuttle the two U-boats and he actually did it knowing that it was a war crime.

Assuming for a moment that the accused did not know that the order " Rainbow " had been cancelled, the Prosecution's submission was that even then it was no defence to the charge that Grumpelt committed an act in violation of the laws and usages of war as he could not plead as a defence that he acted under an order which was obviously an illegal order. That order was illegal, as the German High Command had no power to order the U-boat commanders to sink vessels which no longer belonged to the German High Command but had been handed over to the British authorities under the terms of the surrender.

9. SUMMING UP BY THE JUDGE ADVOCATE

The summing up by the Judge Advocate was to a large extent confined to the facts of the case, and centred predominantly around the all-important question of the *mens rea* of the accused, upon which the accused's case entirely depended.

" The interesting part," he said, " of this little congregation of German craft on that night was . . . that the crews of those U-boats had left them, that they had been moved specially to this place in the port and that they were under the guard of VP.1225 . . . and that any ordinary sensible person must have appreciated that the position then was that the VP was in that position to prevent those two U-boats being damaged or scuttled, and that was because the German High Command realised full well that if U-boats were scuttled after a certain period elapsed from the signing of these terms of the surrender on the 4th May it would involve a great deal of trouble for the Germans." This was because in view of the terms of the surrender signed on the 4th May, 1945 " the operative *de facto* German Command at that time were undertaking that at least by the morning of 5th May, 1945, the ownership, the property, in U-boats would pass to the Allies and that they would not treat them from that moment as their own and cause them to be scuttled or damaged in any way," and the Defence were agreed " that if after the signing of those terms of surrender a German officer with knowledge of those terms deliberately sabotaged a German U-boat which had become the property of the Allies that would be a breach of the laws and usages of war." It was a matter for the Court to decide " whether or not the scuttling of German U-boats on the late evening of the 6th May after these terms of surrender had been entered into was a war crime or not, done with the knowledge that these terms had been entered into." In the Judge Advocate's opinion there was ample evidence that the fact of scuttling U-boats in such circumstances could be a war crime.

On the defence of superior orders, the Judge Advocate said that the fact that the " Rainbow " order was sent out to U-boat commanders had to be accepted but he left it to the Court to decide " how far it was binding upon the accused, Grumpelt, whether it was binding upon him by reason of receiving an order from an unknown U-boat commander or from the U-boat commander Klug, or whether it devolved upon him in the way he suggested, arising out of what he calls a Führer order. And even although that might have been binding upon him on the 5th May, had not things happened to which any sensible man would have reacted by the night of the 6th May, that any reasonable person must have understood then that there was no possibility of scuttling those boats and then being able to say that it was done under a lawful command ? . . . Is it not reasonable to assume that Grumpelt knew perfectly well on the 6th May that those U-boats could not be scuttled, and further, that the command who had power to put them under guard had deliberately put them under guard so that they might not be scuttled ? "

The Judge Advocate thought that there was nothing in the relationship between Grumpelt and Schroeder to suggest that the accused was at that time setting up a defence that he was carrying out the lawful orders of his superiors. Another point in favour of the Prosecution was " the statement which the accused himself made. . . . It is typed in German and it is signed by the accused. . . . The translation with which we were supplied starts off quite categorically in this way : ' During the night of the 5th or 6th (or 6th to 7th) of May, 1945, on my own resolve, I boarded U-boats 1406 and 1407 in order to sink same.' The material German phrase appears to be ' eigner Entschlossenheit ' . . . It might be described as ' Of my own disposition '."

The Prosecution, stated the Judge Advocate, asked the Court to " say that on the evidence you should find as an irresistible inference that the accused on that night did not bother to make inquiries apparently of any superior officer and he had quite a time on the day in question to do so if he wanted to, and the only interpretation you can put upon that is that he was deliberately wishing to appear as a German patriot and sink these craft in circumstances in which he knew perfectly well he was not entitled to and knowing perfectly well he had no proper orders from a proper lawful superior authority to carry out."

10. THE VERDICT AND SENTENCE

The accused was found guilty of the charge.

After the Prosecutor had stated that he himself was satisfied that the accused had an entirely good character, the defending Counsel pleaded on his behalf in mitigation of punishment. To that end Counsel made a statement which included the following :

" The Prosecution tried to establish a case that the accused acted entirely on his own and out of his own decision. As I see it, the expression ' own decision ' has not been understood in the right way. The accused did not want you to infer that he scuttled the U-boats on his own because he sought fame or something similar. I want to point out the reason is, because of the absence of the U-boat commanders, Grumpelt thought that the above-mentioned Leader order came into effect."

On 13th February, 1945, subject to confirmation by higher authority, the Court sentenced the accused to be imprisoned for seven years. The findings and sentence were confirmed by the General Officer Commanding 8 Corps District on 8th March, 1946, with a remission of two years.

B. NOTES ON THE CASE

1. QUESTIONS OF JURISDICTION AND PROCEDURE

(i) *Composition and Jurisdiction of the Court*

As to these, see Annex I, pp. 105-6.

(ii) *The Language of the Court*

The trial was conducted under the rules of procedure specified in the Royal Warrant.

At the very outset, defending Counsel applied for the whole of the proceedings to be translated to the accused. Counsel stated that he would himself address the Court and speak during the whole trial in German.

The Judge Advocate thereupon explained the position as follows :

" The language of the Court is English, and it is quite unusual for the Court to be addressed in German. What we normally do is to translate all the evidence so that the accused understands it, but it is quite unusual to translate everything the defending Counsel says."

After ascertaining that Counsel had some knowledge of English, the Judge Advocate requested that Counsel should do his best to address the Court in

English, and so far as the evidence was concerned, that would be translated to the accused. The defending Counsel's reply was as follows :

" I must insist upon it that all the most important parts which will be decisive for the judges to judge Gerhard Grumpelt must be in the German language, and I must insist that the German language should be acknowledged here as having the same rights as the English language. I am quite satisfied that things which are not important need not be translated so that the proceedings should not be unduly interrupted, but my opening and closing speech, which are decisive, I shall give in German."

After the Court had conferred, the Judge Advocate provisionally ruled that all the evidence would be translated, but that the Prosecutor's opening address should not be translated in the ordinary way. Counsel stated that this was agreeable to him and added that he understood enough English to follow the Prosecutor, but not enough to deal with the witnesses when in the witness box or in his addresses to the Court. In fact, the defending Counsel's short opening address was made in German and translated at once, and the German text of his final address, written by himself, was attached to the proceedings.

The interests of the accused in this case were fully safeguarded by the fact that two, and later on, during the evidence for the defence, a further three, officers and soldiers were detailed to act as interpreters.

It is to be noted that the rules of procedure as specified in the Royal Warrant do not contain any express provision either as to the language of the Military Courts trying war crimes cases, or as to the rights of the accused and duties of the defending Counsel as to the language in which they should address the court.

The rules of procedure followed in war crimes trials by British Military Courts are with certain exceptions(2) those followed in English civil courts. It seems beyond doubt that an English Court would have a right to insist on *Counsel* addressing it in English. The English law on the rights of a non-English speaking *accused* is at present contained in an *obiter dictum* of Lord Reading, C.J., in *R.* v. *Lee Kun* (1916) 1 K.B. 337, to the following effect : When a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence, and is not defended by Counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by prisoner. If he is defended by Counsel, the evidence must be translated to him unless he or his Counsel express a wish to dispense with the translation and the judge thinks fit to permit the omission, but the judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him.

The action of the Court in the Grumpelt trial could in any case be fully explained by reference to two relevant provisions. Regulation 13 of the Royal Warrant states that " In any case not provided for in these Regulations such course will be adopted as appears best calculated to do justice." The same is provided by Rule 132 of the Rules of Procedure made under the authority of the Army Act.

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(2) See Annex I, pp. 107-8.

2. QUESTIONS OF SUBSTANTIVE LAW

(i) *The Criminality of Violating the Terms of Surrender*

(*a*) *Capitulation and Armistices in International Law.* Defending Counsel, endeavouring to establish the absence of *mens rea* in the accused, made a distinction as to the character of certain different legal conceptions, namely " cease fire," " armistice," " surrender " and " capitulation," and submitted that at the time when the scuttling took place the convention of 4th May, 1945, agreed upon between the two belligerent parties, was known to the German people and the accused as signifying " cease fire " and nothing else. Therefore, he contended, the accused's actions should be judged from the point of view of what the " cease fire " conception implied.

International Law recognises and distinguishes between capitulations and simple surrender on the one hand, and different kinds of armistice on the other.

As to the first category, capitulation or *stipulated* surrender in contradistinction to *simple* surrender is a convention between the armed forces of belligerents stipulating the terms of surrender of defended places, or of men-of-war, or of troops. With regard to the character and contents of capitulations, Oppenheim-Lauterpacht, *International Law*, Volume II, Sixth Edition (Revised), p. 431, contains the following passage : " Unless otherwise expressly provided, a capitulation is concluded under the obvious condition that the surrendering forces become prisoners of war, and that all war material and other public property in their possession, or within the surrendering place or ship, are surrendered in the condition in which they were at the time when the capitulation was signed. Nothing prevents forces fearing surrender from destroying their provisions, munitions, arms, and other instruments of war which, when falling into the hands of the enemy, would be useful to him. Again, nothing prevents a commander, even after negotiations regarding surrender have begun, from destroying such articles. But when once a capitulation has been signed, such destruction is no longer lawful and if carried out, constitutes perfidy, which may be punished by the other party as a war crime."([3])

As to the second category, armistices or truces are all agreements between belligerent forces for a temporary cessation of hostilities. Under this category come all kinds of cessation of hostilities, including suspensions of arms (referred to by the Defence as " cease fire "), general armistices, and partial armistices.([4]).

The common feature of all kinds of armistices is that hostilities between the belligerent parties must cease. The legal consequences of an armistice are in some respects the subject of much dispute in legal literature, as the

([3]) And see also the passage quoted by the Prosecutor, on p. 63. As an illustration of the State practice of the United States reference could be made to the following extract from *The Laws and Usages of War at Sea*, published by the Navy Department, on June 27th, 1900 ; " *After agreeing upon or signing* a capitulation, the capitulator must neither injure nor destroy the vessels, property, or stores in his possession that he is to deliver up, unless the right to do so is expressly reserved to him in the agreement of capitulation." (Italics not in the original.)

([4]) See p. 434 of the work already quoted in the text.

Hague Regulations do not mention the matter. This controversy has been summarised as follows :

" Everybody agrees that belligerents during an armistice may, *outside the line where the forces face each other*, do everything and anything they like regarding defence and preparation of offence ; for instance, they may manufacture and import munitions and guns, drill recruits, build fortresses, concentrate or withdraw troops. But no unanimity exists regarding such acts as must be left undone, or may be done, *within the very line where the belligerent forces face each other.*"(5)

It seems therefore that the legal issue is in doubt, but in any case it must be argued that the above-mentioned controversy and the differentiation put forward by the Defence Counsel, as well as the meaning which according to him should have been laid upon the " cease fire " conception, was not relevant to the case, because it must have been obvious to the accused, as it must have been to the most rudimentary intelligence, that the German Naval Authorities could not have issued a general order for scuttling all naval craft if only a simple " cease fire " was agreed upon temporarily, after which, as the Defence contended, hostilities might have been resumed.

(*b*) *Violation of the Terms of Surrender viewed as a War Crime.* That capitulations, surrender conventions and armistices must be scrupulously observed is an old customary rule strengthened by the provisions of Article 35 of the Hague Regulations which expressly provides that " capitulations agreed upon between the contracting parties must . . . be scrupulously observed by both parties."

It would therefore appear as beyond doubt that any violation of a capitulation or armistice is prohibited and if committed constitutes a violation of the customary and conventional rules of the laws and usages of war. There is no doubt that any act contrary to a capitulation and any violation of an armistice would also constitute a war crime if committed by individuals on their own account. This point of view finds confirmation, in addition to the above-mentioned provision, also in Article 41 of the Hague Regulations, which says that " a violation of the terms of the armistice by individuals acting on their own initiative . . . entitles the injured party to demand the punishment of the offenders . . ."

It is also to be recalled that the Royal Warrant of 14th June, 1945, by which Regulations for the trial of war criminals were issued, expressly provides that " ' War Crime ' means a violation of the laws and usages of war . . ."

The same definition has been provided by the Charter of the International Military Tribunal in Article 6 (*b*), which reads as follows : " The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility : *war crimes :* namely, *violation of the laws or customs of war.* Such violations shall include, *but not be limited to,* murder, illtreatment or deportation to slave labour, or for any other purpose, of civilian population of or in occupied territory, murder or illtreatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity."

(5) Ibid, p. 438.

From the latter part of this Article it follows that not only crimes of the " murder type " (atrocities) but also violations of any other laws or customs of war should be considered as war crimes, even though such violations might constitute purely technical offences only.

(*c*) *The Instrument and Terms of Surrender.* The charge against Grumpelt was based on the Instrument of Surrender signed on 4th May, 1945, which, in paragraph 1, provided that " the German Command agrees to the surrender of all German armed forces. . . . This to include all naval ships . . ."

This Instrument, however, did not provide any conditions with regard to scuttling or damaging the instruments of war, conditions which are usually embodied in the conventions between armed forces of belligerents stipulating terms of surrender. Such conditions were, for instance, provided in two further Conventions signed with the German Command after 4th May, 1945. Paragraph 2 of the Unconditional Surrender of the German Forces signed at Rheims on 8th May, 1945, contains the words : " No ship, vessel or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment." Paragraph 2 of the Unconditional Surrender of German Forces at Berlin on 9th May, 1945, contains the words " No ship, vessel or aircraft is to be scuttled, or any damage done to their hulls, machinery, or equipment, nor to machines of all kinds, armament, apparatus, and all the technical means of prosecution of war in general."(6)

Irrespective of whether the omission of such a specification in the Instrument of 4th May was accidental or not, the Court would seem to have acted on the assumption that this does not affect either the legal or the practical question of what is to be involved in the surrendering of enemy armed forces. Any surrender convention is concluded under the implied condition that all war material in the possession of the surrendering forces is surrendered in the condition in which it was at the time when the instrument was signed. Therefore, such an explanatory provision need not necessarily be embodied in the surrender agreement. It was also of no avail for the Defence to argue that at the material time the accused did not know the exact terms of the Instrument of Surrender, as the necessary conditions of any surrender must be obvious at least to any military person of the rank of officer.

(ii) *The Mens Rea of the Accused*

In spite of some legal points raised, or rather, touched upon, by the Defence, the case turned substantially on a question of fact and on what view the Court was to take of the question whether the accused at the material time knew of the surrendering of the German armed forces in the North West region of Germany.

With regard to this question, the Judge Advocate in concluding his summing-up advised the Court in the following way :

" Do you think it is at all reasonably possible that the accused had heard nothing at all which would put him upon his guard as regards the handing over of the submarines, remembering that he was with this security flotilla, and was in a naval port at a time when rumours were presumably going round

(6) For the full texts, see *American Journal of International Law*, Vol. 39, No. 3, July, 1945, pp. 169-71.

like wild fire? Are you satisfied that the man's state of mind at the time in question was this: "I honestly believed I had an order: I did not know anything about any surrender; it was not for me to inquire why the higher command should be scuttling submarines; I honestly conscientiously and genuinely believed I had been given a lawful command to scuttle these submarines and I have carried out that command and I cannot be held responsible"? Gentlemen, that is a matter for you to consider.

"The Defence suggests if you look at the evidence as a whole that that is a reasonable possibility. I am going to tell you that in my view, if the accused did not have any knowledge of these terms and that he did believe honestly that he had an order of this kind and that he carried it out, well, then, gentlemen, you will be entitled to acquit him."

CASE No. 6

THE JALUIT ATOLL CASE

TRIAL OF REAR-ADMIRAL NISUKE MASUDA AND FOUR OTHERS OF THE IMPERIAL JAPANESE NAVY

UNITED STATES MILITARY COMMISSION, UNITED STATES NAVAL AIR BASE, KWAJALEIN ISLAND, KWAJALEIN ATOLL, MARSHALL ISLANDS. 7TH-13TH DECEMBER, 1945

Jurisdiction of the Commission and the Rules of Procedure and Evidence followed therein. Shooting of unarmed prisoners of war. Liability of custodian who released them to be shot. Hague Convention No. IV of 1907. *Geneva Prisoners of War Convention of* 1929. *Plea of Superior Orders.*

Masuda, who committed suicide before the trial, had ordered three subordinates in the Imperial Japanese Navy to shoot to death three United States airmen, who had become unarmed prisoners of war, and a fourth, who had custody of the prisoners, to hand them to the three executioners. These four were brought to trial for the part which they had played in the killing of the airmen. A plea to the jurisdiction of the Commission was made without success by the Defence. The plea of superior orders was effective only in reducing the sentence of the custodian of the prisoners to ten years' imprisonment. The other three accused were sentenced to death.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

By a message of 8th October, 1945, the Commander of the Marshalls Gilberts Area requested of the Commander-in-Chief of the Pacific Fleet the authority to convene a Military Commission for the trial of persons accused of War Crimes committed in that area prior to its occupation by United States forces. This authority was duly granted, and, in pursuance thereof, the Commander of the Marshalls Gilberts Area, as Convening Authority, ordered the setting up of a Military Commission on board the United States Naval Air Base at Kwajalein Island " for the trial of such war crime cases as may properly be brought before it." The Military Commission so appointed consisted of the following members, any five of whom were empowered to act : Commodore B. H. Wyatt, U.S.N. (President), Captain C. C. Champion, Jr., U.S.N., Captain J. R. Weisser, U.S.N., Colonel Thomas F. Joyce, Inf., Commander William W. White, U.S.N., Lieutenant-Colonel Basil P. Cooper, F.A., and Lieutenant John A. Murphy,

U.S.N.R., and Lieutenant William P. Mahoney, U.S.N.R., as Judge Advocate,(1) either of whom was authorised to act as such.

At the request of the accused, and pursuant to verbal orders from the Convening Authority, Lt. F. J. Madrigan, U.S.N.R., and Lt.-Comdr. Kozo Hirata, I.J.N., acted as Counsel for the accused. Lt. E. F. Field, U.S.N.R., acted as assistant to the Defence Counsel.

A plea to the jurisdiction of the Commission made by the Defence at the outset of the trial was over-ruled by the former, after the Defence and the Prosecution had presented arguments concerning the point (see later).

2. THE CHARGE AND SPECIFICATION

The accused were Rear-Admiral Masuda, Lieutenant Yoshimura, Ensign Kawachi, Ensign Tasaki, and Warrant Officer Tanaka, all of the Imperial Japanese Navy.

The charge against the five accused, as approved by the Convening Authority, was one of murder. The specification stated that they " did, on or about 10th March, 1944, on the Island of Aineman, Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America and the Japanese Empire, wilfully, feloniously, with malice aforethought without justifiable cause, and without trial or other due process, assault and kill, by shooting and stabbing to death, three American fliers, then and there attached to the Armed forces of the United States of America, and then and there captured and unarmed prisoners of war in the custody of the said accused, all in violation of the dignity of the United States of America, the International rules of warfare and the moral standards of civilised society."

An objection made by the accused on the grounds that the inclusion in the charge of the words " moral standards of civilised society " was improper and non-legal was over-ruled by the Commission.

The charge as originally drafted contained the word " unlawfully " instead of " wilfully " ; the change was authorised by the Convening Authority on the request of the Commission.

Rear-Admiral Masuda did not appear at the trial, and, during its course and on the direction of the Convening Authority, a *nolle prosequi*(2) was entered by the Judge Advocate as to the charge and specification against him. He had committed suicide before the opening of the trial, and had before his death written a statement in which he confessed that he had ordered the execution of the airmen.

3. THE ARGUMENTS USED BY THE PROSECUTION IN SUPPORT OF THE CHARGE AND SPECIFICATION

The Prosecution brought forward a number of witnesses to show that the three American airmen on or about February, 1944, were forced to land

(1) It will be noted that the principal duty of the Judge Advocate in trials by United States Military Commissions is to prosecute. His function is thus widely different from that of the Judge Advocate in proceedings of British Military Courts, which is set out briefly in Annex I, pp. 106-7.

(2) The term *nolle prosequi* signifies the abatement of prosecution.

near Jaluit Atoll, Marshall Islands, and subsequently became unarmed prisoners of war on Emidj Island, on which was established the Japanese Naval Garrison Force Headquarters under the command of Rear-Admiral Masuda. Approximately one month later, on the orders of Masuda, and without having been tried, the airmen were taken to a cemetery on Aineman, an adjoining island, where they were secretly shot to death and then cremated. Yoshimura, Kawachi and Tanaka had admitted to having killed the prisoners by shooting ; one had also used a sword. Tasaki had admitted that, having been in charge of the prisoners, he had arranged their release to the executioners, knowing that they were to be killed. Signed statements to the above effect were produced before the court.

One of the two Judge Advocates, in his opening argument, stated that one of the basic principles which had actuated the development of the laws and customs of war was the principle of humanity which prohibited the employment of any such kind or degree of violence as was not necessary for the purposes of war. Among the many and numerous restrictions and limitations imposed by virtue of this principle was " the universally recognised and accepted rule " provided in Article 23 (*c*) of the 1907 Hague Convention which states : " It is particularly forbidden . . . to kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion." If this rule did not suffice, a variety of additional rules had been universally recognised and accepted, protecting prisoners of war from outrages, indignities and punishment.

His colleague relied instead on Article 2 of Part I of the Geneva Convention of 1929 relative to the Treatment of Prisoners of War which states that : " Prisoners of War are in the power of the hostile Government, but not of the individuals or formations which captured them. They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity. Measures of reprisals against them are forbidden."

4. THE CASE FOR THE DEFENCE

(i) *The Plea to the Jurisdiction*

The plea, made by the Defence to the jurisdiction of the Commission, was set out in four sections, and may be summarised as follows :

(*a*) The Congress of the United States had not delegated authority to Military Commissions, such as the present, to try enemy nationals for war crimes ;

(*b*) The Commission had no jurisdiction to try the defendants on charges or specifications founded on laws which were *ex post facto* in that they did not exist at the time of the commission of the acts for which the accused were charged ;

(*c*) The " SCAP " rules, issued by command of General MacArthur, by virtue of which the Commission was established and the trial held, violated established rules of United States law, both substantial and procedural. In particular, Section 16 thereof permitted the introduction of hearsay and secondary evidence ; and

(*d*) Even if the " SCAP " rules were applicable the venue([3]) of the trial was incorrectly laid. Under Section 5 (*b*) of the Rules, trials were to be held in Japan, with the exception that " persons whose offences have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of local jurisdiction." Accordingly the trial should have been held either in Japan or in Jaluit, the scene of the alleged crimes.([4])

The Defence finally claimed that the defendants had the power under Section 5 (*b*) to elect to be tried by civil tribunal, and stated that they did so elect.

(ii) *The Defence of Superior Orders*

The accused pleaded not guilty. They admitted their part in the execution of the American Prisoners of War, but claimed as a defence that, as military men of the Japanese Empire, they were acting under orders of a superior authority, which they were bound to obey.

One of the defending Counsel, himself a Lieutenant-Commander in the Imperial Japanese Navy, described the absolute discipline and obedience which was expected from the Japanese forces, and quoted an Imperial Rescript which included the words : " Subordinates should have the idea that the orders from their superiors are nothing but the orders personally from His Majesty the Emperor." The Japanese forces were exceptional among the world's armed forces in this respect and, therefore, he claimed, it was impossible to apply therein " the liberal and individualistic ideas which rule usual societies unmodified to this totalistic and absolutistic military society." The strategic situation was so critical in early 1944 that the characteristic referred to was displayed in the Jaluit unit to an exceptional degree. Furthermore the order was given direct by a Rear-Admiral to " mere Warrant Officers and Petty Officers." If they had refused to obey it, " everyone would have fallen upon them."

As the accused had no criminal intent, it was clear that they had committed no crime.

The other defending Counsel pointed out that the executioners each requested that they should not be assigned the task of carrying out the killing, but when emphatically ordered by Masuda, a man of strong character, they had obeyed, in accordance with their training. Their actions were not of their own volition ; they were the will of another.

Tasaki, the custodian of the prisoners of war, who arranged their handing over to the executioners, also merely acted in accordance with the orders of the Rear-Admiral. Certainly the latter had told him why he was to surrender the prisoners, but this fact in no way placed him in the position of a participant in the commission of a crime.

([3]) The word " venue " is a Common Law term for the local area for which the Court is commissioned and sits, and in which, as a rule, the offence was committed.

([4]) The term "SCAP rules," used here and on pp. 75 and 78, refers to the Regulations Governing the Trial of War Criminals in the Pacific Theatre, of September 24th, 1945. See Annex II, p. 113.

5. THE ARGUMENTS OF THE PROSECUTION USED IN COUNTERING THE PLEAS OF THE DEFENCE

(i) *Concerning the Jurisdiction of the Court*

The Judge Advocate, in countering the Defence's plea to the jurisdiction of the Commission, began by stating that this jurisdiction had already been upheld. Nevertheless he would reply briefly to the objections raised by the defence.

His arguments, which he arranged so as to meet those of the Defence point by point, were as follows :

(*a*) The power to conduct Military Commissions was part of the executive power of the President of the United States, and was delegated to subordinate commanders. The necessary formalities had in this case been fulfilled.

(*b*) " The statute laws are dated 1929. The laws of humanity also set forth in the specification have no dates, the laws are set back as far as civilisation."

(*c*) The " SCAP " rules had been approved by the Judge Advocate for the United States Navy, and their use was in accordance with the directions of the Commander of the Marshalls Gilberts Area. The Commission was not trying United States citizens but those of a foreign country.

(*d*) A similar objection to the venue of a trial had been over-ruled previously on the grounds that the trial was held as close to the scene of the alleged crime as was convenient. The same applied to the present case.

(ii) *Concerning the Defence of Superior Orders*

One of the two Judge Advocates quoted three authorities with the intention of securing the rejection by the Commission of the plea of superior orders. The Judge Advocate General, he said, had made reference, in Court Martial Orders 212-1919, to the following dictum in *U.S.* v. *Carr* (25 Fed. Cases 307) : " Soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime."

In another case, involving the killing of a Nicaraguan citizen by a member of the United States forces, the Judge Advocate stated : " An order illegal in itself and not justified by the rules and usages of war, or in its substance clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that it was illegal, will afford no protection for a homicide, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same crime in law " (CMO 4-1929).

In the opinion of the Judge Advocate, however, the statement of the law most clearly in point was contained in " the rules promulgated by the Supreme Command of the Allied Powers for use in war crime cases. This body of international law, briefly known as the SCAP rules and adopted

by the Commission at the direction of the Judge Advocate General of the Navy, has the following provision applicable to the defence raised by the accused, quoting sub-paragraph (*f*) of paragraph 16 :

'The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defence but may be considered in mitigation of punishment if the commission determines that justice so requires.' "

6. THE EVIDENCE

The evidence is not here set out at length, since, in the main, the facts were not disputed, and the case turned essentially on a question of law. The facts derived from an examination of the witnesses for the Prosecution are set out in brief under heading 3 (*supra*). These witnesses comprised a legal officer who had acted as war crimes and atrocities investigator for the Marshalls Gilberts Area, an islander who had witnessed the capturing of the prisoners, one of the captors, a Japanese Lieutenant who had interrogated them, an interpreter who was present during the interrogation, a Japanese truck-driver who had been ordered by Kawachi to take the airmen to the cemetery, the seaman who cremated their bodies, a Japanese Major who testified to the authenticity of Masuda's written statements on the killing of the prisoners, a United States soldier who translated from the Japanese various documents before the Court, and one of the two Judge Advocates in the trial, who testified that the statements by the four accused which were before the Commission had actually been signed by them.

The three accused of having been the actual executioners gave evidence on their own behalf. Tasaki's evidence was given only by way of a signed statement.

7. THE VERDICT

All four accused were found guilty.

8. THE SENTENCE

Yoshimura, Kawachi and Tanaka were sentenced to death by hanging.

Tasaki was sentenced to ten years' imprisonment. His punishment was lighter than that of the others because of the " brief, passive and mechanical participation of the accused."

The proceedings, findings and sentences were approved by the Commander of the Marshalls Gilberts Area, Rear-Admiral Harrill.

B. NOTES ON THE CASE

1. CONCERNING THE PLEA TO THE JURISDICTION OF THE COMMISSION

Comment upon the plea to the jurisdiction of the Commission made by the Defence may conveniently be arranged in the same manner as were the remarks of Counsel.

(i) *The Legal Basis of the Commission*

The Defence claimed that no legislative act had ever enabled the holding

by such Courts of trials of enemy nationals for war crimes. The contention of the Prosecution was that the authority to hold such trials derived from the executive power of the President.

The same question came before the Supreme Court of the United States in two cases, *Ex Parte Quirin*, 317 U.S.1, and *In the Matter of the Application of General Tomoyuki Yamashita*, No. 61 Miscellaneous and 672, October Term, 1945.

In these cases, the Supreme Court, *per* Mr. Chief Justice Stone, upheld the legality of trials by Military Commissions of enemy combatants for perpetrating war crimes. The Court pointed out that Congress, in the exercise of the power conferred on it by Article I, paragraph 8, cl. 10 of the Constitution to " define and punish Offences against the Law of Nations . . . ," of which the law of war was a part, had, by the statute entitled the Articles of War (1920, amended in 1937 and 1942), recognised the " Military Commission " appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the laws of war. Article 15 declared that " the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offences that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." Article 2 included among those persons subject to the Articles of War the personnel of the United States military forces. The Court pointed out, however, that this, as Article 12 indicated, did not exclude from the class of persons subject to trial by Military Commissions " any other person who by the law of war is subject to trial by military tribunals," and who under Article 12 may be tried by Court Martial, or under Article 15 by Military Commission.

Congress had not attempted to codify the laws of war, continued the Chief Justice, but had, by Article 15, incorporated within the pre-existing jurisdiction of Military Commissions created by the appropriate military command " all offences which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction."

The power to convene Commissions of the nature referred to continued after hostilities had ceased, and at least until peace had been " officially recognised by treaty or proclamation of the political branch of the Government."

The conclusion of the Court in the *Yamashita Case* was that the Joint Chiefs of Staff of the American Military Forces were acting legally when, by direction of the President, on September 12th, 1945, they instructed General MacArthur, Commander in Chief, United States Army Forces, Pacific, to proceed with the trial before appropriate military tribunals of such Japanese War Criminals " as have been or may be apprehended."

The opinion of the Supreme Court in *Ex Parte Quirin* was delivered on October 29th, 1942, while that in the *Yamashita Case* was delivered on February 4th, 1946.

The Judge-Advocate prosecuting in the Jaluit Atoll case, in his reply of December 7th, 1945, to the Defence's plea to the jurisdiction of the Commission, did not specify in what " previous case " that jurisdiction had been

upheld. The authorities cited above are, however, wholly in line with the decision of the Commission to reject the plea and with the statement of the Prosecution that " The jurisdiction of the military commission to try offences against the law of nations derives from the President of the United States, who, as Commander in Chief of the Armed Forces, exercises the power of military government over territories occupied by our country. His representative in the Pacific, the Commander in Chief of the Pacific Fleet, has, as the deputy military governor, conferred specific authority to convene this commission on the Commander Marshalls Gilberts Area."

It will be noted that the Judge Advocate did not state how far the power of the President in this matter was derived from the Constitution and how far from Congressional legislation. In *Ex Parte Quirin*, the Supreme Court pointed out that the Constitution of the United States conferred on the President the " executive power " (Article II, paragraph 1, cl. 1) and imposed on him the duty to " take care that the Laws be faithfully executed " (Article II, paragraph 3). It also made him the Commander in Chief of the Army and Navy (Article II, paragraph 2, cl. 1). The Court decided, however, that it was not necessary to determine to what extent the President as Commander in Chief had constitutional power to create Military Commissions without the support of Congressional legislation. Nor did the Court in the *Yamashita Case* need to investigate that problem.

(ii) *Ex post facto legislation*

The Judge Advocate's claim that the rules of International Law, with whose infringement the accused were charged, were binding on them at the time of the commission of the alleged war crimes gives rise to no comment. It will be noticed, however, that, for the purpose of refuting the arguments of the Defence on this point, the Judge Advocate made no reference to what may be called the municipal law ingredients included in the charge and specification. Further comment on this inclusion is made later, under heading 2, " Concerning the charge and specification."

(iii) *The legality of the rules applied in the trial*

The Commander of the Marshalls Gilberts Area directed the President of the Commission "to use SCAP Rules governing the trials of War Criminals as a guide, not only for the rules of evidence, but also as a guide for substantive law and procedure on all issues arising in the trial of war criminals." The Defence claimed that these rules violated " established substantive and procedural law known to American jurisprudence." The Judge Advocate, on the other hand, claimed that their use was legal, and secured the concurrence of the Commission on the point.

Here, again, the decision of the Supreme Court in the *Yamashita Case* is relevant. One of the grounds upon which the petitioner sought writs of habeas corpus and prohibition against the Military Commission which tried him was : " that the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 38th

Articles of War and the Geneva Convention, and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment."

Article 25 prohibits the reception in evidence by a Military Commission of depositions on behalf of the Prosecution in a capital case, while Article 38 empowers the President to prescribe by regulations the procedure for cases before Military Commissions and states that these regulations " shall, in so far as he shall deem practicable, apply the rules of evidence generally recognised in the trial of criminal cases in the district courts of the United States : *Provided.* That nothing contrary to or inconsistent with these Articles shall be so prescribed . . ."

In the opinion of the Supreme Court, however, neither Article was applicable to the trial of an enemy combatant by a Military Commission for violations of the laws of war. Chief Justice Stone, delivering the majority judgment, stated that Article 15 had been added in 1916 to the Articles in order to preserve intact the traditional jurisdiction of " the non-statutory military commission." The Article read : " The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offences that . . . by the law of war may be triable by such military commissions." Article 2 of the Articles of War enumerated " the persons . . . subject to these articles " and enemy combatants were not included among them. The Court concluded that the benefits of the Articles were not conferred upon such persons, and that the Articles left the control over the procedure in their trials where it had previously been, that is to say with the Military Command. The Commission's rulings on evidence and on the mode of conducting the proceedings were not subject to review by the civil courts but only by the reviewing military authorities. It was therefore unnecessary to consider what, in other situations, the Fifth Amendment might require.

It may be added here that the Supreme Court had already decided in *Ex Parte Quirin* that the Fifth and Sixth Amendments laying down the right to a trial by jury in a civil court for capital crimes did not extend to trials in military tribunals. Since, however, this decision is not relevant to the Masuda trial, it is not analysed in these notes. The *Yamashita Case* is relevant since it shows that a defendant in a trial before a Military Commission is not entitled to object if the rules of evidence applied therein are not those " generally recognised in the trial of criminal cases in the district courts of the United States."

(iv) *The venue of the trial*

The ruling tacitly approved by the Commission on the question of venue gives rise to no comment. No defendant could have reasonably been allowed to plead, for instance, that no liability rested on him had the island on which he had committed his crimes disappeared as the result of a volcanic upheaval.

2. CONCERNING THE CHARGE AND SPECIFICATION

It will have been noticed that the charge against the prisoners was one of murder and that the specification mentioned both a breach of " the Inter-

national rules of warfare " and wilful felonious killing " with malice aforethought without justifiable cause, and without trial or other due process." While one Judge Advocate quoted Article 23 (*c*) of the 1907 Hague Convention and made a general reference to related rules of customary International Law, he also recalled that the charge against the accused was one of murder and proceeded to analyse in detail the elements of a definition of murder as " the unlawful killing of a human being with malice aforethought."

His colleague pointed out that the specification had been " patterned carefully after the samples set forth in *Naval Courts and Boards*." He gave more attention than his colleague to the International Law governing the case, however, and expressed the opinion that the rules of Conventional Law which were the most relevant were the rules laid down in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, from which he quoted Article 2. It might be argued, he continued, that the Japanese Government was not a signatory to the Convention. Against this, however, he said : " Although Japan has not ratified or formally adhered to the Prisoners of War Convention, it has, through the Swiss Government, agreed to apply the provisions thereof to prisoners of war under its control, and also, so far as practicable, to interned civilians."

Even if Japan were not legally bound, the shooting of unarmed prisoners who are behaving in an orderly fashion is clearly a war crime under customary International Law.

At first sight it may appear that the introduction of the definition of murder, based on Anglo-Saxon rules of Municipal Law, was not strictly justifiable in a case where breaches of International Law on an island under Japanese mandate were alleged. The intention of the Prosecution, however, was not to charge the accused with breaches of United States law *as well as* of International Law. The use of the words in the specification, " all in violation of . . . the International rules of warfare," as applying to the charge of murder, clearly shows that the introduction of the terms used in United States law was intended merely to amplify and define the specification. In the present state of vagueness prevailing in many branches of the law of nations, even given the fact that there are no binding precedents in International Law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of International Law. This is so, even if it involves the use of tautology, inherent in some Common Law definitions, such as is exemplified in the phrase, " wilfully, feloniously, with malice aforethought without justifiable cause . . ." in the specification.

CASE No. 7

THE DREIERWALDE CASE

TRIAL OF KARL AMBERGER (FORMERLY OBERFELDWEBEL)

BRITISH MILITARY COURT, WUPPERTAL, 11TH-14TH MARCH, 1946

Shooting of unarmed prisoners of war. Plea that they were thought to be trying to escape. Hague Convention No. IV of 1907.

The accused was in charge of a party conducting five allied prisoners of war ostensibly to a Railway Station. On the way, the party, including the accused, began firing on them ; all were killed except one, who escaped though wounded. The case for the Prosecution was that since the prisoners of war had made no attempt to escape, the shooting was in violation of the laws and usages of war. The Defence claimed that Amberger had genuinely believed that the prisoners were trying to escape. The Commission found him guilty and sentenced him to death by hanging.

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, entitled " Regulations for the Trial of War Criminals," as amended by Army Orders 127/1945, 8/1946 and 24/1946.

It consisted of Lt.-Col. B. G. Melsom (East Lancashire Regiment) as President, and, as members, Major K. H. F. Baker (83rd Field Regiment, R.A.), Major S. L. Heale (South Wales Borderers), S/Ldr. J. H. G. Guest (Overseas H.Q., R.A.A.F.), and Captain B. Chichester (North Irish Horse). The Australian member was appointed in view of the fact that the case involved the shooting of two members of the Royal Australian Air Force as well as members of the Royal Air Force. C. L. Stirling, Esq., C.B.E., Deputy Judge Advocate General, acted as Judge Advocate in the trial. The Prosecutor was Major G. I. D. Draper (Irish Guards), and the Defending Officer was Lt. C. Ellison, K.O.S.B.

2. THE CHARGE

The accused, Karl Amberger (formerly Oberfeldwebel), a German National, was charged with " Committing a War Crime in that he at Dreierwalde Aerodrome on or about 22nd March, 1945, in violation of the laws and usages of War, was concerned in the killing of . . . (two members of the Royal Australian Air Force and two members of the Royal Air Force) . . ., allied Prisoners of War."

In his closing speech the Prosecutor stated that the legal basis of the charge lay in Article 23 (*c*) of the Hague Rules of 1907, which bound both the German and the British Governments. This laid down that " In addition to the prohibitions provided by special Conventions it is particularly forbidden : (*c*) to kill or wound any enemy who, having laid down his arms, no longer having means of defence, has surrendered at discretion."

3. THE CASE AND EVIDENCE FOR THE PROSECUTION

The Prosecutor opened his case by stating that Karl Amberger was acting on the relevant date in March, 1945, as senior instructing warrant officer at the Aerodrome between the villages of Hopsten and Dreierwalde. During a severe air raid made in the vicinity of the Aerodrome on the 21st March, 1945, the four deceased allied prisoners of war, together with Flight-Lieutenant Berick of the Royal Australian Air Force, were forced to bale out, and were on capture taken to the Aerodrome. Towards the evening of the 22nd March, a party, consisting of Amberger in charge, and two German N.C.O.s, set off ostensibly to conduct the five prisoners of war to a railway station for the purpose of taking them to a Prisoner of War Camp or Interrogation Centre. After going about a mile and a half the party turned on to a track leading into a wood. Here, despite the fact that the prisoners were proceeding with decorum, the three N.C.O.s, including Amberger, began firing on them. All were killed except Flight-Lieutenant Berick, who escaped, though wounded. The case for the Prosecution was that the prisoners made no attempt to escape, and that the shooting was cold and calculated murder.

It had proved impossible to bring F/Lt. Berick from Australia to attend the trial, but two sworn affidavits made by him were submitted.

In these, he stated, *inter alia*, that, as the prisoners were proceeding along the track in the wood five abreast, having been ordered to do so, they " heard a click " behind them ; F/Lt. Berick looked round and saw one of the guards cocking the action of his Schmeizer. All three had their weapons at the ready. The firing then began.

Authenticated photostatic reproductions of two photographs, which F/Lt. Berick maintained that he had subsequently taken at the scene of the shooting, were also submitted to the Court.

Werner Lauter (formerly Oberfeldwebel), a witness, stated that he was acting at the Aerodrome in March, 1945, as the Chief Clerk of the Kommandatur. He claimed that Amberger had volunteered to do the escort duty and had detailed the other N.C.O.s from his own unit. Lauter maintained that he had heard remarks made by the accused to this effect : " I shall finish off these Allied P.O.W.s, these Allied Airmen." The witness had therefore been so doubtful as to the fitness of Amberger for the task that he had communicated his doubts to the Adjutant. It had proved impossible, however, to find a substitute for Amberger.

An authenticated photostatic reproduction of an affidavit of Joachim Erdmann, clerk at the Aerodrome in March, 1945, was then submitted. Extensive efforts to find the witness had failed. His evidence was, *inter alia*, that, on 22nd March, 1945, on returning with a girl, Elfriede Nicklas, from a walk, he passed the five prisoners and certain German N.C.O.s, on a track

leading into some woods. After he and the girl had walked about 300 yards past the party, they heard firing from the direction in which it had gone.

Elfriede Nicklas, a German national, identified Amberger as being one of the guard party. She testified that the prisoners were quite disciplined as they passed, and claimed that Erdmann had said that N.C.O.s in the Aerodrome had been asked to volunteer to shoot the prisoners. After the shooting, Erdmann, she claimed, had told her that it was to have taken place at a spot further along the route, and not where it actually did happen.

As a result of F/Lt. Berick's complaint on finally returning to England, Major William Davidson, R.A.M.C., a pathologist, proceeded to Dreierwalde Cemetery, where he exhumed a grave and found four bodies which he identified as being those of the prisoners. All four had been shot through the head. His report was submitted to the Court.

4. THE CASE AND EVIDENCE FOR THE DEFENCE

The accused pleaded not guilty.

Giving evidence himself as a witness on oath, Amberger denied having volunteered for escort duty or having made remarks hostile to prisoners of war. He had himself decided that the party should proceed through the woods instead of by the road way, since thus there would be less danger of meeting civilians. Feeling among the civilians was high due to Allied air-raids. He maintained that the prisoners were certainly marching abreast immediately before the alleged attempt to escape, but that he had not ordered them to do so. Amberger claimed that he saw the prisoners talking to one another in a suspicious way, and taking their bearings from canal bridges and from the stars. He had therefore honestly believed that they were going to attempt to escape. In the failing light four of the prisoners had then tried to escape in various directions, while the fifth had attacked him.

There were no other witnesses for the defence.

The defending Counsel did not deny the shooting of the four airmen, but asked the Court to believe that " there was an attempt to escape, or what appeared to be an attempt to escape which, in the contention of the defence, means the same thing."

The defending Counsel, in his closing speech, attempted to reconcile F/Lt. Berick's statement that no attempt had been made to escape with Amberger's evidence to the contrary, by saying that the cocking of the action of a weapon by one guard was not unnatural given the fact that five prisoners had to be guarded in a lane in the growing dusk. Having previously suffered ill-treatment, Berick and the other prisoners probably regarded it as likely that they were to be shot, as others in their position had been, and began to run when it was not necessary for them to do so.

5. THE VERDICT

The accused was found guilty of the charge, subject to confirmation by the Superior Military Authority.

6. THE SENTENCE

Counsel for the Defence, pleading in mitigation on behalf of Amberger,

asked the Court to take into account the latter's previous record as a brave, responsible soldier. He may have considered that the airmen in his hands were responsible for the attack, which killed around 40 civilians and airmen on the airfield at Dreierwalde, and that he was justified in acting as judge over the acts of these men.

Nevertheless, the accused was sentenced to death by hanging. The sentence was confirmed and carried out on 15th May, 1946.

B. NOTES ON THE CASE

1. QUESTIONS OF PROCEDURE

(i) *Application, in accordance with Section* 128 *of the Army Act, of Rules of Evidence followed in British Civil Courts.*

Regulation 3 of the Royal Warrant lays down that, with certain exceptions, the provisions of the Army Act and of the Rules of Procedure made pursuant thereto so far as they relate to Field General Courts-Martial shall apply so far as applicable to Military Courts convened under the Royal Warrant in the same way as if the Military Courts were Field General Courts-Martial and the accused were persons subject to military law charged with having committed offences on active service.

Section 128 of the Army Act provides that the rules of evidence to be adopted in proceedings before Courts-Martial shall be the same as those which are followed in civil courts in England. Rule 73 (*c*) of the Rules of Procedure S.R. & O. 1926, No. 989, makes it clear that the term " civil court " in this connection refers to a court of ordinary criminal jurisdiction in England, including a court of summary jurisdiction.

One example of the application in the trial of rules of evidence used in British Civil Courts is provided by the use therein of circumstantial evidence. As the Judge Advocate pointed out, the case turned entirely on a question of fact : did the prisoners attempt to escape or not ? No issues of law were involved.

Circumstantial evidence was of the greatest importance in the trial, because neither F/Lt. Berick nor Erdmann, two of the main witnesses, was present for cross-examination, and also in view of the many points at which the evidence of witnesses was conflicting. Lauter, for instance, said that Amberger had expressed his intention to murder the prisoners and had volunteered to do escort duty ; Amberger denied both statements. F/Lt. Berick's evidence was that Amberger ordered the prisoners to march abreast before the shooting started, and that they had at all times kept good behaviour and had made no move to escape ; Amberger denied giving such an order and claimed that they were seen to be talking suspiciously to one another and to be taking their bearings, and that an attempt to escape had actually begun before firing took place.

The circumstantial evidence brought forward included the Pathologist's statement that all four prisoners had been shot through the head and that some of the bullets could not have entered the head while the deceased was in an erect position. The question arose, as a consequence, whether prisoners fleeing in different directions in the gathering dusk could all have been shot

in the same part of the anatomy, and how it was that some bullets entered the head of one of the deceased in the manner described.

(ii) *Exceptional Rules of Procedure permitted by the Royal Warrant*

One of the exceptions referred to in Regulation 3 of the Royal Warrant relates to the types of evidence which it is admissible to bring before a Military Court. Under Regulation 8 (i), " 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." Examples of such evidence which were admitted during the proceedings under review were the two affidavits signed by F/Lt. Berick, the authenticated photostatic copy of an affidavit by Joachim Erdmann, and the Pathologist's report. The defending Counsel and the Judge Advocate both commented on the fact that the leading witness for the Prosecution was not present to be cross-examined ; the latter pointed out that it was impossible for the court to judge his demeanour and his words, as they could Amberger's, and decide whether he was an honest and credible witness. Nevertheless, no-one questioned the legality of the procedure adopted.

Further examples of the more drastic rules of evidence permissible before a Military Court are found in the instances of " hearsay " evidence used during the trial. In English Civil Courts, subject to exceptions, a statement, whether oral or written, made by a person who is not called as a witness is not admissible to prove the truth of any matter contained in that statement (see Harris and Wilshere's *Criminal Law*, Seventeenth Edition, p. 482). Such evidence is rendered permissible by Regulation 8 (i) of the Royal Warrant provided it satisfies the conditions laid down therein.

A quotation from the final address of the defending Counsel is interesting in this connection : " I realise that under Royal Warrant it is possible and permissible to have hearsay evidence, but I only point out the danger of accepting it on its face value. You have had the advantage of hearing Elfriede Nicklas in the witness box, and her whole recollection of the episode was indeed hazy, and it may well be that even though she was telling the truth that Erdmann did in fact say ' We have been asked to volunteer to kill these men. I knew it was going to happen, ' that he may have been boasting. We do not know because we have not had him here to cross-examine him. He might have wanted to make some impression with the girl, to show how tough he was and that he was of the gangster type."

2. QUESTIONS OF SUBSTANTIVE LAW

(i) *Concerning the Choice of the Charge*

It has been seen that the charge against Amberger was brought under Article 23 (*c*) of the 1907 Hague Convention concerning the Laws and Customs of War on Land, which relates to enemies who have " surrendered at discretion." The question is not important whether this phrase, which was coined at a time when aerial warfare and the baling out of airmen were not known, covers the case of prisoners of war who have not become prisoners by " surrendering at discretion " but simply by descending from

the skies to territory held by the opposing belligerent. The conventional rule of International Law which protects prisoners of war, whether or not they have surrendered, is now contained in the International Convention relative to the treatment of Prisoners of War, signed at Geneva on 27th July, 1929, and Article 2 states that :

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

This provision develops the principle already contained in Art. 4 of the 1907 Hague Regulations respecting the laws and customs of war on land(1).

There is no doubt that the allied airmen, who did not surrender to the German armed forces, but were captured by German civilians, came under the protection of Art. 2 of the 1929 Convention. It is also safe to say that the killing of prisoners of war constituted a war crime under customary International Law even before the promulgation and ratification of the Conventions of 1907 and 1929.

(ii) *Concerning the Legality of the Shooting of Prisoners while Attempting to Escape*

The Judge Advocate in his summing up made the following statement : " Gentlemen, war is a cruel thing, and there are certain rules which apply to war. One is that it is the duty of an officer or a man if he is captured to try and escape. The corollary to that is that the Power which holds him is entitled to prevent him from escaping, and in doing so no great niceties are called for by the Power that has him in his control : by that I mean it is quite right, if it is reasonable in the circumstances, for a guard to open fire on an escaping prisoner, though he should pay great heed merely to wound him, but if he should be killed though that is very unfortunate it does not make a war crime. . . . If the accused, Karl Amberger, did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape then that would not be a breach of the rules and customs of war, and therefore you would not be able to say a war crime had been committed."

It follows from this statement that a person who came under the protection of the Hague and Geneva Conventions and the provisions of customary International Law protecting prisoners of war would subsequently lose that protection on the rise of any set of circumstances which caused his captors reasonably to believe that he was attempting to escape. It should be noted that these circumstances need not, apparently, arise due to the acts or omissions of the captive. While it is not enough for the captor to have a merely subjective fear that an attempt to escape is being made, on the other hand the events which give rise to the requisite reasonable apprehension could, on the face of the Judge Advocate's statement, be due to other agencies than the volition of the prisoner.

(1) Art. 4 of the Hague Regulations : " Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated. All their personal belongings, except arms, horses, and military papers, remain their property."

Chapter 3—" Penal Sanctions with regard to Prisoners of War "—of the 1929 Convention makes no mention of the shooting at, or killing of, prisoners attempting to escape.

Under Article 50, escaped prisoners who are recaptured before being able to rejoin their own armed forces or to leave the territory occupied by the armed forces which captured them shall be liable only to disciplinary punishment (*i.e.* they shall not be liable to judicial proceedings). Under Article 54, imprisonment is the most severe disciplinary punishment which may be inflicted on a prisoner of war. These provisions, however, leave open the question of the procedure which can legally be followed while the prisoner is still in flight.

There is surprisingly little authority on this point. The 6th (Revised) Edition of Volume II of Oppenheim-Lauterpacht's *International Law* contains the following passage : " The conviction became general that captivity should only be the means of preventing prisoners from returning to their corps and taking up arms agáin " (p. 293). An escaping prisoner, it could be argued, was already potentially in arms again, and this circumstance justified his being treated as already once again a member of the opposing forces. At all events, firing upon prisoners who reasonably appear to be attempting an escape seems to be accepted State practice.

(iii) *Concerning the Sentence*

Regulation 9 of the Royal Warrant provides that a person found guilty by a Military Court of a war crime may be sentenced to any one or more of the following punishments : (1) death (either by hanging or shooting), (2) imprisonment for life or for any less term, (3) confiscation, (4) a fine.

In his address in mitigation the defending Counsel urged that Amberger might pay for his crime with a term of imprisonment. As has been seen, the plea was unsuccessful.

CASE No. 8

THE ESSEN LYNCHING CASE

TRIAL OF ERICH HEYER AND SIX OTHERS

BRITISH MILITARY COURT FOR THE TRIAL OF WAR CRIMINALS, ESSEN, 18TH-19TH AND 21ST-22ND DECEMBER, 1945

Liability of civilians for the killing of unarmed prisoners of war. Liability of the military for incitement to kill prisoners of war, and for inactivity while under a duty to protect them. Collective responsibility.

Heyer, a Captain in the German Army, gave instructions that a party of three Allied prisoners of war were to be taken to a Luftwaffe unit for interrogation. He ordered the escort not to interfere if civilians should molest the prisoners, while also saying that they ought to be shot, or would be shot. A German private was charged with having refrained from interfering with a crowd which murdered the prisoners, although entrusted with their custody. The remaining accused were German civilians who were alleged to have committed the killing. Heyer and one civilian were sentenced to death. The private and two further civilians were sentenced to terms of imprisonment. The remaining two civilians were acquitted.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was convened under the Royal Warrant of June, 1945, and consisted of the following : President : Lieut.-Colonel B. G. Melsom, E. Lancs. ; Members : Wing-Commander J. G. C. Barnes, 8501 Air Disarmament Wing, RAF ; Major L. E. Dickson, MC, 1 Glasgow Highlanders ; Major C. Freeman, MC, 107 Medium Regt. RA. ; Legal Member : Captain C. W. E. Shelley, ERE List, Legal Staff, Headquarters British Army of the Rhine. The Prosecutor was Major W. St. J. C. Tayleur, RA, Legal Staff, HQ Lines of Communication. The Defending Officer was Major J. W. Stone, 49 Recce Regiment, in civilian life a solicitor.

2. THE CHARGE

The seven accused were jointly charged with committing a war crime in that they, at Essen-West on the 13th December, 1944, in violation of the laws and usages of war, were, with other persons, concerned in the killing of three unidentified British airmen, prisoners of war.

At the material time, one of the accused, Erich Heyer, had been a Captain

in the German army ; and the accused Peter Koenen had been a private in the German army.

The rest of the accused were German civilians, inhabitants of Essen.

3. THE CASE FOR THE PROSECUTION

The Prosecutor stated that the three captured British airmen had been handed by the German police into the custody of the military unit which was under the command of the accused Hauptmann Heyer. The three airmen were placed by Hauptmann Heyer under an escort consisting of an N.C.O., who was not before the Court, and the accused, Private Koenen.

The Prosecution alleged that Heyer had given to the escort instructions that they should take the prisoners to the nearest Luftwaffe unit for interrogation. It was submitted by the Prosecution that this order, though on the face of it correct, was given out to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. It was alleged that he had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners.

When the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge ; one of the airmen was killed by the fall ; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.

The allegation of the Prosecution was that there were three stages in the killing, starting with the incitement at the entrance to the barracks, continuing with the beating and finally the throwing over the parapet and shooting. The accused Heyer " lit the match." Each person who struck a blow was " putting flame to the fuel," which was the enraged population, and finally " the explosion " came on the bridge. It was, therefore, the submission of the Prosecution that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen, was guilty in that he was concerned in the killing. It was impossible to separate any one of these acts from another ; they all made up what is known as a lynching. From the moment they left those barracks, the men were doomed and the crowd knew they were doomed and every person in that crowd who struck a blow was both morally and criminally responsible for the deaths of the three men.

Hauptmann Heyer admittedly never struck any physical blow against the airmen at all. His part in this affair was an entirely verbal one ; in the submission of the Prosecution this was one of those cases of words that kill, and he was as responsible, if not more responsible, for the deaths of the three men as any one else concerned.

The Prosecutor expressly stated that he was not suggesting that the mere fact of passing on the secret order to the escort that they should not interfere to protect the prisoners against the crowd was sufficiently proximate to the killing, so that on that alone Heyer was concerned in the killing. The

Prosecutor advised the Court that, if it was not satisfied beyond reasonable doubt that he had incited the crowd to lynch these airmen, he was then entitled to acquittal, but if the Court was satisfied that he did in fact say these people were to be shot, and did in fact incite the crowd to kill the airmen, then, in the submission of the Prosecution, he was guilty.

The Prosecution referred to the rule of British law in which an instigator may be regarded as a principal. The same held good in this case if a man incited someone else to commit a crime and that crime was committed. Although the person who incited was not present when the crime was committed, he was triable and punishable as a principal and it made no difference in this respect whether the trial took place under British law or under the Regulations for the trial of war criminals.

Referring to the member of the escort, Private Koenen, the Prosecutor pointed out that his position was somewhat difficult because his military duty and his conscience must have conflicted. He was given an order not to interfere and he did not interfere. He stood by while these three airmen were murdered. Mere inaction on the part of a spectator is not in itself a crime. A man might stand by and see someone else drowning and let him go and do nothing. He has committed no crime. But in certain circumstances a person may be under a duty to do something. In the Prosecutor's submission this escort, as the representative of the Power which had taken the airmen prisoners, had the duty not only to prevent them from escaping but also of seeing that they were not molested. Therefore it was the duty of the escort, who was armed with a revolver, to protect the people in his custody. Koenen failed to do what his duty required him to do. In the Prosecutor's opinion, his guilt was, however, not as bad as the guilt of those who took an active part, but a person who was responsible for the safety of the prisoners and who deliberately stood by and merely held his rifle up to cover them while other people killed them, was " concerned in the killing."

4. THE EVIDENCE

The allegation of the Prosecution that Heyer had ordered the escort not to interfere in any way with the crowd if they should molest the prisoners was proved in evidence, and was also admitted by Heyer himself. It was confirmed by some German witnesses, though not admitted by Heyer, that he made remarks to the effect that the airmen ought to be shot or that they would be shot.

One of the accused, Boddenberg, expressly admitted having hit the airmen with his belt. The part played by each of the others was described by one or more German witnesses.

5. THE VERDICT

Hauptmann Heyer and Private Koenen were found guilty. Two of the accused civilians were acquitted. The other civilians were found guilty.

6. THE SENTENCES

The Court sentenced Heyer to death by hanging, and Koenen to imprisonment for five years.

The sentences on the three civilians who were found guilty were as follows :

Johann Braschoss was sentenced to death by hanging,
Karl Kaufer to imprisonment for life, and
Hugo Boddenberg to imprisonment for ten years.

The executions were carried out on March 8th, 1946.

B. NOTES ON THE CASE

There was no Judge Advocate appointed in this case and consequently no summing up in open Court. The considerations as to the facts and as to the law which guided the Court cannot, therefore, be quoted from the transcript in so many words. It is only possible to attempt by inference to derive them from the verdict and from the sentences imposed, having regard to arguments brought forward by Counsel.

As has already been said, the Court found Hauptmann Heyer guilty, from which it follows that the Court accepted the arguments as to the criminal liability of Heyer, set out above.

From the fact that the Court sentenced Peter Koenen to imprisonment for five years, it can be seen that it accepted the Prosecutor's proposition both as to Koenen's guilt and as to the extenuating circumstances which were pointed out in his favour by the Prosecutor himself.

It may be stated in this connection that the Defence did not plead superior orders, either with regard to Heyer or with regard to Koenen, as a circumstance excluding criminal responsibility in a case where the order was illegal.

Two of the accused civilians were acquitted, the Court considering the allegations preferred against them by the witnesses not beyond reasonable doubt.

The other civilians were found guilty because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot or given the blows which caused the death.

The Prosecutor pointed out that the charge alleged that the accused were concerned in the killing of the three British airmen. That was the wording of the charge, but, the Prosecutor added, for the purpose of this trial he would invite the Court to take the view that this was a charge of murder and of nothing other than murder. The allegation would be that all these seven Germans in the dock were guilty either as an accessory before the fact or as principals in the murder of the three British airmen.

This proposition was not accepted by the Court. The legal member pointed out that this was not a trial under English Law. Murder was the killing of a person under the King's peace. The charge here was not murder and if Counsel spoke of murder he was not using the word in the strict legal sense but in the popular sense. As long as everyone realised what was meant by the word " murder " for the purposes of this trial, the legal member

did not think there was any difficulty. As to using words like " accessory before the fact " and so on, which are applicable to English law and to felonies, the legal member again saw no objection to that, as long as all concerned knew exactly what they were talking about. They were using the words almost in inverted commas as analogies to English law.(1)

(1) It may be added that the mere passing of the order to the officer's subordinates to the effect that they should not protect the prisoners of war under their escort against mob violence, could even, standing alone, be considered a war crime, though not that war crime with which the accused in the present case were charged. The Prosecutor stated that the passing on of this order was not sufficiently proximate to the killing to say that on that alone Heyer could have been found guilty of having been concerned in the killing. But this behaviour of Heyer's can be considered a war crime under Art. 2, para. 2 of the Geneva Convention of 1929, which says that prisoners of war shall at all times be protected particularly against acts of violence, from insults and from public curiosity. Prisoners of War are, under Art. 3 of the Convention, entitled to respect for their persons and honour.

Heyer was actually found guilty of being concerned in the killing because of his positive utterances to this effect. The decision of the Military Court, in this case, could not, therefore, be considered a persuasive authority for the proposition that the passing of the secret order, standing by itself, does not constitute a war crime.

CASE No. 9

THE ZYKLON B CASE

TRIAL OF BRUNO TESCH AND TWO OTHERS

BRITISH MILITARY COURT, HAMBURG,
1ST–8TH MARCH, 1946

Complicity of German industrialists in the murder of interned allied civilians by means of poison gas.

Bruno Tesch was owner of a firm which arranged for the supply of poison gas intended for the extermination of vermin, and among the customers of the firm were the S.S. Karl Weinbacher was Tesch's Procurist or second-in-command. Joachim Drosihn was the firm's first gassing technician. These three were accused of having supplied poison gas used for killing allied nationals interned in concentration camps, knowing that it was so to be used. The Defence claimed that the accused did not know of the use to which the gas was to be put; for Drosihn it was also pleaded that the supply of gas was beyond his control. Tesch and Weinbacher were condemned to death. Drosihn was acquitted.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court consisted of Brigadier R. B. L. Persse, as President, and, as members, Lt. Col. Sir Geoffrey Palmer, Bart., Coldstream Gds., and Major S. M. Johnstone, Royal Tank Regt.

Capt. H. S. Marshall was Waiting Member.

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

Major G. I. D. Draper, Irish Guards, Judge Advocate General's Branch, HQ. B.A.O.R., was Prosecutor.

Three German Counsel appeared on behalf of the accused. Dr. O. Zippel, Dr. C. Stumme and Dr. A. Stegemann defended Tesch, Weinbacher and Drosihn respectively.

2. THE CHARGE

The accused, Bruno Tesch, Joachim Drosihn and Karl Weinbacher, were charged with a war crime in that they "at Hamburg, Germany, between 1st January, 1941, and 31st March, 1945, in violation of the laws and usages of war did supply poison gas used for the extermination of allied nationals interned in concentration camps well knowing that the said gas was to be so used." The accused pleaded not guilty.

3. THE CASE FOR THE PROSECUTION

The prosecuting Counsel, in his opening address, stated that Dr. Bruno Tesch was by 1942 the sole owner of a firm known as Tesch and Stabenow, whose activities were divided into three main categories. In the first place, it distributed certain types of gas and gassing equipment for disinfecting various public buildings, including Wehrmacht barracks and S.S. concentration camps. Secondly, it provided, where required, expert technicians to carry out these gassing operations. Lastly, Dr. Tesch and Dr. Drosihn, the firm's senior gassing technician, carried out instruction for the Wehrmacht and the S.S. in the use of the gas which the firm supplied. The predominant importance of these gassing operations in war-time lay in their value in the extermination of lice.

The chief gas involved was Zyklon B, a highly dangerous poison gas, 99 per cent. of which was prussic acid. The gas was manufactured by another firm. Tesch and Stabenow had the exclusive agency for the supply of the gas east of the River Elbe, but the Zyklon B itself went directly from the manufacturers to the customer.

The contention for the Prosecution was that from 1941 to 1945 Zyklon B was being supplied as a direct result of orders accepted by the accused's firm, Tesch and Stabenow. On that basis, the Zyklon B was going in vast quantities to the largest concentration camps in Germany east of the Elbe. In these same camps the S.S. Totenkopfverbände were, from 1942 to 1945, systematically exterminating human beings to an estimated total of six million, of whom four and a half million were exterminated by the use of Zyklon B in one camp alone, known as Auschwitz/Birkenau. In these concentration camps were a vast number of people from the occupied territories of Europe, including Czechs, Russians, Poles, French, Dutch and Belgians, and people from neutral countries and from the United States. The Prosecutor also claimed that over a period of time the three accused got to know of this wholesale extermination of human beings in the eastern concentration camps by the S.S. using Zyklon B gas, and that, having acquired this knowledge, they continued to arrange supplies of the gas to these customers in the S.S. in ever-increasing quantities, until in the early months of 1944 the consignment per month to Auschwitz concentration camp was nearly two tons.

The accused Weinbacher was a " Procurist " ; when Tesch was absent he was fully empowered and authorised to do all acts on behalf of his principal which his principal could have done. His position was of great importance, since his principal would travel on the business of the firm for as many as 200 days in the year.

The case for the Prosecution was that knowingly to supply a commodity to a branch of the State which was using that commodity for the mass extermination of Allied civilian nationals was a war crime, and that the people who did it were war criminals for putting the means to commit the crime into the hands of those who actually carried it out. The action of the accused was in violation of Article 46 of the Hague Regulations of 1907, to which the German government and Great Britain were both parties.

4. THE EVIDENCE FOR THE PROSECUTION

Emil Sehm, a former bookkeeper and accountant employed by Tesch and Stabenow, supplied information, regarding the legitimate business activities of the firm and the positions of the three accused therein, which substantially bore out the opening statements of the Prosecutor on these points. He went on to state that in the Autumn of 1942 he saw in the files of the firm's registry one of the reports, dictated by Tesch, which gave accounts of his business journeys. In this travel report, Tesch recorded an interview with leading members of the Wehrmacht, during which he was told that the burial, after shooting, of Jews in increasing numbers was proving more and more unhygienic, and that it was proposed to kill them with prussic acid. Dr. Tesch, when asked for his views, had proposed to use the same method, involving the release of prussic acid gas in an enclosed space, as was used in the extermination of vermin. He undertook to train the S.S. men in this new method of killing human beings.

Sehm had written down a note of these facts and taken it away with him, but had burnt it the next day on the advice of an old friend, named Wilhelm Pook, to whom he had related what he had seen.

Dr. Marx, a German Barrister practising since 1934, who was called upon to define the status of a Procurist in German law, said :

> " The procurist had the right to act in the name and on behalf of the firm. He is a man who, out of all the others mentioned in the law who have also the right to act on behalf of the firm, has most of these rights. He has the right to act on behalf of the firm and to conclude any transactions or any sort of act on behalf of the firm, and to conclude any transactions or any sort of legal proceedings in which the firm might find itself involved. One can say that anybody who has any sort of transactions with a man who holds the ' Procura ' and who is called the Procurist is in exactly the same position as if he had had that transaction with the head of the firm."

Erna Biagini, a former stenographer of the firm, who was also in charge of the registry, claimed to have read, in " approximately 1942," a travel report of Dr. Tesch which stated that Zyklon B could be used for killing human beings as well as vermin.

Anna Uenzelmann, a former stenographer of the firm, said that in about June 1942 Tesch, after he had dictated a travel report on returning from Berlin, had told her that Zyklon B was being used for gassing human beings, and had appeared to be as terrified and shocked about the matter as she was.

Karl Ruehmling, who had been a bookkeeper and assistant gassing master with the firm, said that Zyklon B was sent by the concern to the concentration camps at Auschwitz, Sachsenhausen and Neuengamme, but Auschwitz was sent the largest consignments.

Alfred Zaun, who was in charge of the firm's bookkeeping, said that, in his opinion, Auschwitz of all the concentration camps had received the most Zyklon B during the war.

Wilhelm Bahr, an ex-medical orderly at Neuengamme, described a prussic acid course which he had attended in the S.S. Hospital at Oranienburg in

1942, and which Dr. Tesch had conducted. He said that he himself had gassed two hundred Russian prisoners of war in Neuengamme in 1942, using prussic acid gas, but that it was not Dr. Tesch who had taught him the procedure which he had applied.

Perry Broad, who had been a Rottenführer in the Kommandatur of the Auschwitz camp from June 1942 until early 1945, described how persons were gassed there with Zyklon B. The people being gassed, to his knowledge, at Auschwitz and Birkenau were German deportees, Jews from Belgium, Holland, France, North Italy, Czechoslovakia and Poland, and Gypsies.

Dr. Bendel, who had been a prisoner at Auschwitz and had acted as a doctor to the inmates, said that from February 1944 to January 1945 a million people had been killed there by Zyklon B.

The remaining Prosecution witnesses were a member of a British war crimes investigation team, who identified pre-trial statements made by the accused ; Wilhelm Pook and his wife ; and five more employees of Tesch and Stabenow. The evidence of Pook and his wife supported that of Sehm to a degree, though not in every detail, but the fact that they had discussed the events of 1942 between his and their giving evidence was recognised by the Judge Advocate to be " undoubtedly unfortunate."

The Prosecution, acting in accordance with Regulation 8(i) (*a*) of the Royal Warrant, submitted to the Court a sworn affidavit in which Dr. Diels, a former high-ranking German government official, stated that it was common knowledge in 1943 in Germany that gas was being used for killing people.

Among various other documents(1) Dr. Tesch's S.S. subscription card was produced before the Court ; the Defence pointed out, however, that this did not prove that Dr. Tesch had been an active member of the S.S.

5. THE OPENING STATEMENTS OF DEFENCE COUNSEL

(i) *Counsel for Tesch*

Before calling Tesch to the witness-box, his Counsel stated that he intended to prove to the court, first, that Tesch had no knowledge of the killing of human beings by means of Zyklon B ; secondly, that Zyklon B was delivered only for normal purposes of disinfection and for medical reasons ; thirdly, that parts of gas chambers were sold only for the purpose of exterminating vermin ; fourthly, that concentration camps got the gas only in amounts which were quite normal in relation to the number of inhabitants, and only for killing vermin ; and fifthly, that instruction courses were held only according to the relevant laws and regulations, and again only for the purpose of teaching the method of exterminating vermin.

(ii) *Counsel for Weinbacher*

Dr. Stumme, defending Weinbacher, said that by the evidence which he would call, he would try to prove that Weinbacher had no knowledge of any note or report by Dr. Tesch to the effect that human beings were being killed by poison gas, and that until the capitulation of Germany he never

(1) Of the various documents admitted as evidence in the trial (including five affidavits, and the pre-trial statements by all of the accused) the Secretariat of the United Nations War Crimes Commission has only been able to examine an extract from the affidavit of Dr. Diels.

had any reason to believe that Zyklon B was being used for any other purpose than the destruction of vermin.

(iii) *Counsel for Drosihn*

Counsel for Drosihn set out to prove, by the evidence which he called, first, that Dr. Drosihn had nothing to do with the business concerning the supply of gas ; secondly, that, being on journeys for considerable periods, he had only a very scanty knowledge of the activities of the business ; thirdly, that he heard about the gassing of human beings only after the capitulation of Germany ; and fourthly, that he never carried out instruction either in concentration camps or for S.S. personnel.

6. THE EVIDENCE FOR THE DEFENCE

(i) *Dr. Tesch*

All three accused gave evidence on oath. Dr. Tesch stated that he had heard nothing and had known nothing about human beings being killed in concentration camps with prussic acid. He denied ever having attended any conference, or having been approached by any official or military authority on the subject, or having written in any document that human beings should be killed by prussic acid. He specifically denied that he had made the remarks referred to by Anna Uenzelmann. He had never been to Auschwitz himself and had had no reason to believe that the camps were incorrectly run.

He did not think that deliveries to Auschwitz were very high because it was a large camp and, further, it " administered more camps in the General Government of Poland." He could not remember Dr. Drosihn ever having instructed S.S. men. Although the witness had paid subscriptions to both the S.S. and the Nazi Party, he had never been an active member of either. He thought that the passage in the travel report which Erna Biagini had read might have been a record of an answer put to him by a pupil.

Drosihn, stated Tesch, was a technical expert and was not concerned with the administration of the firm or the office. Weinbacher, however, had complete control when Tesch was away from the office.

(ii) *Karl Weinbacher*

This accused, giving evidence on oath, said that his work was, briefly, to look after the current business affairs in the absence of Dr. Tesch, seeing to the incoming and the outgoing mail, answering any queries, and confirming any orders received. He read some of Dr. Tesch's travel reports but not all, because there were too many ; in particular, he had not read any dealing with the possibility of destroying Jews with Zyklon B. Dr. Tesch had not mentioned any such possibility to him, nor had the witness heard during the war that Jews were being gassed. He had never been inside a concentration camp, nor had he received unfavourable reports during the war about such camps. He, too, stated that Drosihn had nothing to do with the business management. He could not agree that the S.S. would necessarily come to Dr. Tesch for advice on the extermination of human beings with Zyklon B, since, although Dr. Tesch was an expert on the use of the gas, there were plenty of books available on prussic acid.

(iii) *Dr. Drosihn*

Drosihn claimed that his part in the activities of the firm consisted in collaborating on scientific issues, being in charge of the gassing, for instance, of ships in Hamburg docks, and examining delousing chambers to see whether they were working correctly. He spent about 150 to 200 days a year in travelling on business. He had been to check the working of the delousing chambers in Sachsenhausen and Ravensbruck and had been to Neuengamme ; but had neither been to Auschwitz, nor given instructions to the S.S. in any place. He knew nothing of the size of consignments of gas to Auschwitz. Contrary to Tesch's evidence, the witness claimed to have reported to him once that he had seen happening in the camps things that were contrary to human dignity.

(iv) *The Remaining Defence Witnesses*

Nine other witnesses called by the Defence did not add very substantially to the evidence before the Court. The subjects covered by their remarks included the character of Dr. Tesch, and the extent of general knowledge in Germany concerning the killing of Jews. *Inter alia*, they were called to prove that Zyklon B was widely used for the legitimate purpose of killing vermin. These witnesses were two Medical Officers from Hamburg, a doctor and two chemists employed by the German Hygiene Institute, a retired professor of the same institute, the Manager of the Disinfection Institute of Hamburg, a stenotypist formally employed by Tesch and Stabenow, and Dr. Stumme, one of the Defence Counsel, who gave evidence regarding the German law regarding State secrets.

7. THE CLOSING ADDRESSES OF THE DEFENCE COUNSEL

(i) *Counsel for Tesch*

In his closing address, Dr. Zippel, dealing with the point of law involved, submitted that, since the charge was not one of destroying human life but only of supplying the means of doing so, such action would only be contrary to the laws and usages of war if the means supplied were necessarily intended to kill human beings. To supply a material which also had quite legitimate purposes was no war crime.(2)

Turning to the facts, Counsel claimed that while supplies of Zyklon B to the S.S. were large, it was the duty of the S.S. to see that the state of health in the eastern provinces was kept at a high level, and it was concerned not only with the Wehrmacht itself, but also with the state of health of those parts of the eastern provinces whose population was repatriated to Germany before the entry of Germany into war with Russia. Supplies were not too great to have been used wholly for legitimate purposes. Since 1944 the S.S. had had unlimited permission to use the gas for the destruction of vermin and the prevention of epidemics. He submitted that even in the concentration camps the gas was, at least at the beginning, used only for its legitimate purpose.

(2) The English translation of Dr. Zippel's speech subsequently contains the following passage : " I have two duties to perform. The first would be to try to prove that Tesch supplied this gas not knowing for what purposes it might be used. My second duty is that, even if he knew something about it, still the laws of this procedure would not suffice to find him guilty."

Counsel then questioned whether the Zyklon B used at Auschwitz for killing human beings had been supplied by Tesch and Stabenow. The fact that Auschwitz was situated in the district for which the firm were the agents could not be decisive, for other firms were able to supply that district, especially since during the war the boundaries of the districts were not so much respected as before. Further, the S.S. had been active all over the occupied territories during the war and had had various means of securing the gas. So many people were killed by gassing in Auschwitz that the S.S. must necessarily have used sources other than Tesch and Stabenow.

Counsel observed that the witnesses who were called to prove that Dr. Tesch knew about the unlawful use of his gas had given different versions as to how he must or should have known about such use. He proceeded also to throw doubts on the reliability of Sehm, for instance, in view of a statement of his, denied by many other witnesses, that the files of the firm in which he had found the travel report were kept under lock and key. Miss Biagini had denied that she saw anything in this report about a conference with the High Command of the Wehrmacht or any propositions made by Dr. Tesch to this authority. None of the typists who could have typed the travel report in question knew of it or of any rumour in the office regarding it. Under the existing war-time regulations of secrecy, it seemed impossible that a man as careful as Tesch should have dictated a report on an interview with the High Command on such a secret matter, placed the report where anyone in the office could read it, as was the case with all travel reports, and then discussed the facts with his employees. Dr. Tesch had been shown to be a fair and honest man, and his concentration on his work explained why he had not heard any rumour which may have circulated Germany concerning the gassing of human beings. Regarding the large supplies of gas to Auschwitz in particular, Counsel submitted that Dr. Tesch was too busy to be expected to know what individual customers bought, and in any case the supply of Zyklon was not as important to the firm as were its gassing activities. Furthermore, Dr. Tesch had regarded Auschwitz as a transit camp needing therefore unusually frequent delousing. Counsel concluded that Dr. Tesch knew nothing of the gassing of human beings either in Auschwitz or Neuengamme.

(ii) *Counsel for Weinbacher*

In his closing address, Dr. Stumme submitted that it had become clear during the trial that Weinbacher did not know that Zyklon B had been used for the killing of human beings. Not one of the witnesses could say really that Weinbacher had any knowledge of a travel report or any observation of Dr. Tesch that human beings had been killed by Zyklon B, or that Dr. Tesch had conversations with Weinbacher on such a subject. Nor had the trial shown that Weinbacher should have had reasonable suspicion, or grounds for suspicion, that Zyklon B had been used for the killing of human beings. Even if Dr. Tesch had written such a travel report as the one alleged, Weinbacher need not have read it, because he was a busy man, and witnesses had shown that many of the travel reports were filed and read by no one. Even Sehm claimed to have come across the particular report by accident, and Miss Biagini because she had to file it. He repeated Dr. Zippel's argument that Dr. Tesch would not write a State secret in a

document which all the staff could read. If Sehm had found any other document, it must have been purely by accident ; and no such accident had happened to Weinbacher. In connection with the large supplies of gas which were sent to Auschwitz, Counsel pointed out that Weinbacher had stated on oath that he had never had a summary of supplies to a single customer because this was left to the accountants. In any case, it had been shown that the quantity of Zyklon B needed for the killing of human beings was much smaller than that required for the killing of insects. The quantities of Zyklon B needed for killing half a million or even a million human beings stood in such small proportion to the quantities needed for the killing of insects that it would not have been noticed at all. Therefore, there had been no need for Weinbacher to have grown suspicious, since, claimed Counsel, he knew that Auschwitz was one of the biggest camps and a sort of transit camp. Counsel did not think, therefore, that it was correct to assume that the large quantity of Zyklon going to Auschwitz was any indication of the fact that human beings were being killed there. Supplies for Neuengamme were much lower than those for Auschwitz.

Dr. Stumme did not deal with the law involved, except for stating that Weinbacher, although a procurist, was still only an employee like Sehm and Miss Biagini, against whom no action was being taken, despite the knowledge which they were said to have had.

(iii) *Counsel for Drosihn*

Dr. Stegemann, in his closing address, confined his remarks to what concerned his client exclusively, while claiming the benefit of everything favourable to him which had already been said by the other Counsel. Every witness who was asked had said that the accused had had nothing whatever to do with the firm's business activities. He could not, therefore, for instance, have known of the size of the consignments to Auschwitz. His relatively small salary showed his subordinate position. He was a zoologist, and first technical gassing master to the firm, and spent more than half the year in travelling. When both Tesch and Weinbacher were away, Mr. Zaun had had the power of attorney, not Drosihn.

Both Dr. Tesch and Dr. Drosihn had said that the latter had never instructed S.S. men in the use of Zyklon B, and not even Sehm claimed that he knew anything about the alleged travel report. Drosihn had been away from the office for irregular periods, and was in no position to read Dr. Tesch's travel reports, which were in any case of no interest to him. Counsel denied that there had been general knowledge in Germany before the end of of the war about the gassing of Jews ; his client could not therefore have acquired such knowledge from rumours.

8. THE PROSECUTOR'S CLOSING ADDRESS

In his closing address, the prosecuting Counsel said that the possibility that some firm other than Tesch and Stabenow could have supplied Zyklon B to Auschwitz could be ruled out, as the latter had the monopoly in that area. The essential question was whether the accused knew of the purpose to which their gas was being put. Counsel admitted that the S.S. were under no restrictions as to the use they made of the gas, and that the direct knowledge which was available to Tesch as to that use was of the scantiest,

due to the fear and secrecy in which the S.S. worked. He relied for his case on the evidence of Sehm, Miss Biagini and Miss Uenzelmann.

Counsel said that it was unbelievable that Dr. Tesch did not know that anything wrong went on in the concentration camps. Dr. Drosihn had said without hesitation that he saw things there which were not worthy of human dignity, and that he had said so to Tesch. It was also unbelievable that Dr. Tesch had no knowledge of the amounts of gas being supplied to the S.S. and to Auschwitz in particular, by a firm which was wholly his property. In 1942 and 1943 Auschwitz had been the firm's second largest customer. Dr. Tesch had no reason to believe that Auschwitz was a transit camp, and moreover he was too efficient a man to be duped by the S.S. Counsel completed his case against Tesch by casting doubt on his veracity by showing how contradictions existed between his statements and those of other witnesses on certain details unrelated to the main issue.

Dealing very shortly with Weinbacher's position, Counsel contended that all that Tesch knew must, from the nature of the inner organisation of the business, have also been known by Weinbacher. For 200 days in the year he was in sole control of the firm, with access to all the books, able to read the travel reports, indeed compelled to read the travel reports if he was to carry on the business properly during the periods when his principal was away.

Prosecuting Counsel claimed that Drosihn must to some extent have shared the confidence of Tesch and Weinbacher, even although his activities were confined to the technical side of the firm as opposed to the sales and bookkeeping side.

He concluded that, by supplying gas, knowing that it was to be used for murder, the three accused had made themselves accessories before the fact to that murder.

9. THE SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate, in summing up the evidence before the Court, pointed out that the latter must be sure of three facts, first, that Allied nationals had been gassed by means of Zyklon B ; secondly, that this gas had been supplied by Tesch and Stabenow ; and thirdly, that the accused knew that the gas was to be used for the purpose of killing human beings. On points of law he did not think that the Court needed any direction.

After summarising the evidence of the Prosecution witnesses, the Judge Advocate said : " To my mind, although it is entirely a question for you, the real strength of the Prosecution in this case rests rather upon the general proposition that, when you realise what kind of a man Dr. Tesch was, it inevitably follows that he must have known every little thing about his business. The Prosecution ask you to say that the accused and his second-in-command Weinbacher, both competent business men, were sensitive about admitting that they knew at the relevant time of the size of the deliveries of poison gas to Auschwitz. The Prosecution then ask : " Why is it that these competent business men are so sensitive about these particular deliveries ? Is it because they themselves knew that such large deliveries could not possibly be going there for the purpose of delousing clothing or for the purpose of disinfecting buildings ? "

In Weinbacher's case, there was no direct evidence, either by way of conversation or of anything that he had written among the documents of the firm produced during the trial, which formed any kind of evidence specifically imputing knowledge to Weinbacher as to how Zyklon B was being used at Auschwitz. " But the Prosecution," said the Judge Advocate, " ask you to say that, in his case as in Tesch's case, the real strength of their case is not the individual direct evidence, but the general atmosphere and conditions of the firm itself." The Judge Advocate asked the Court whether or not it was probable that Weinbacher would constantly watch the figures relating to a less profitable activity of the firm, particularly since he received a commission on profits as well as his salary.

The Judge Advocate emphasised Drosihn's subordinate position in the firm, and asked whether there was any evidence that he was in a position either to influence the transfer of gas to Auschwitz or to prevent it. If he were not in such a position, no knowledge of the use to which the gas was being put could make him guilty.

10. THE VERDICT

Tesch and Weinbacher were found guilty.
Drosihn was acquitted.

11. THE SENTENCE

Counsel for Tesch, pleading in mitigation of sentence, said that if Tesch did know the use to which the gas was being put, and had consented to it, this happened only under enormous pressure from the S.S. Furthermore, had Tesch not co-operated, the S.S. would certainly have achieved their aims by other means. Tesch was merely an accessory before the fact, and even so, an unimportant one.

Counsel for Weinbacher pleaded that the Court should consider the latter's wife and three children ; that he as a business employee might have thought that the ultimate use of the gas was Tesch's responsibility ; and that if he had refused to supply Zyklon B the S.S. would immediately have handed him over to the Gestapo.

Nevertheless, subject to confirmation, the two were sentenced to death by hanging.

The sentences were confirmed and carried into effect.

B. NOTES ON THE CASE

1. A QUESTION OF JURISDICTION : THE NATIONALITY OF THE VICTIMS

The Prosecutor specified a number of Allied countries from which, he claimed, many of the persons gassed had originated. Wilhelm Bahr told how he himself had gassed two hundred Russians. Perry Broad mentioned Jews from Belgium, Holland, France, Czechoslovakia and Poland, among those gassed at Auschwitz. The Judge Advocate, in his summing up, stated that " among those unfortunate creatures undoubtedly there were many Allied nationals."

It was not alleged that British citizens were among the victims.

The British claim to jurisdiction over the case could be based primarily on the fact 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 therein. They have, therefore, become the local sovereigns in Germany. There is vested, then, in the United Kingdom authorities, administering the British Zone of Germany, the right to try German nationals for crimes of any kind wherever committed. The claim to jurisdiction is the stronger if, as in the present case, the criminal activities of the accused have been committed in the British Zone of Germany, by German residents of this Zone, although, of course, the crimes to which the accused were alleged to be accessories had their effect outside Germany, in Auschwitz, Poland.

British jurisdiction could further be based on either

(*a*) the general doctrine called Universality of Jurisdiction over War Crimes, under which 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 ; or

(*b*) the doctrine 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.

2. QUESTIONS OF SUBSTANTIVE LAW

(i) *The Crime Alleged*

Article 46 of the Hague Convention of 1907, concerning the Laws and Customs of War on Land, on which the case for the Prosecution was based, provides that " Family honour and rights, individual life and private property, as well as religious convictions and worship must be respected." This Article falls under the section heading, *Military Authority over the Territory of the Hostile State*, and was intended to refer to acts committed by the occupying authorities in occupied territory. In the trial of Tesch, the acts to which the accused were allegedly accessories before the fact were committed mainly at Auschwitz, in occupied Poland.

(ii) *Civilians as war criminals*

The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation.

The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal.

ANNEX I

BRITISH LAW CONCERNING TRIALS OF WAR CRIMINALS BY MILITARY COURTS

I. JURISDICTION OF THE BRITISH MILITARY COURTS

The jurisdiction of the British Military Courts for the trial of war criminals is based on the Royal Warrant dated 14th June, 1945, Army Order 81/45, with amendments. The Royal Warrant states that His Majesty " deems it expedient to make provision for the trial and punishment of violations of the laws and usages of war " committed during any war " in which he has been or may be engaged at any time after the 2nd September, 1939." It is His Majesty's " will and pleasure " that " the custody, trial and punishment of persons charged with such violation of the laws and usages of war shall be governed by the Regulations attached to the Warrant."

The Royal Warrant is based on the Royal Prerogative, which, in English law, is " nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown " (Dicey's definition).

The constitutionality and legality of the Royal Warrant and of its individual provisions have so far not been challenged in any British Superior Court as have its American counterparts, the orders of the American executive authorities appointing Military Commissions for the trial of war criminals under the law of the United States. The latter have been reviewed by the Supreme Court of the United States in the so-called Saboteur Case, *ex parte Quirin and others* (1942) and in the cases *in re Yamashita* (1946) and *in re Homma* (1946).

Provisions similar to those contained in the Royal Warrant have in the Commonwealth of Australia been made by an Act of Parliament (War Crimes Act, 1945, No. 48/1945), and in the Dominion of Canada by an Order in Council, made under the authority of the War Measures Act of Canada, and entitled *The War Crimes Regulations (Canada)* (P.C. 5831 of 30th August, 1945; Vol. III, No. 10, Canadian War Orders and Regulations).

II. DEFINITION OF " WAR CRIME " IN THE ROYAL WARRANT

Regulation 1 of the Royal Warrant provides that " war crime " means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939. The jurisdiction of the British Military Courts is, as far as the scope of the crimes subject to their jurisdiction is concerned, narrower than the jurisdiction of, e.g., the International Military Tribunal established by the Four-Power Agreement of 8th August, 1945, which, according to Article 6 of its Charter, has jurisdiction not only over violations of the laws and customs of war (Art. 6 (*b*)) but also over what the Charter calls " crimes against peace " and " crimes against humanity " (Art. 6 (*a*) and (*c*)).

III. CONVENING OF A MILITARY COURT

Regulation 2 of the Royal Warrant gives to certain Senior Officers power

to convene Military Courts for the trial of persons charged with having committed war crimes. The accused is not entitled to object to the President or any member of the Court or the Judge Advocate, or to offer any special plea to the jurisdiction of the Court. (Regulation 6.)

IV. COMPOSITION OF THE MILITARY COURT

Regulation 5 (1) of the Royal Warrant provides that a Military Court shall consist of not fewer than two officers in addition to the President. If the accused is an officer of an enemy or ex-enemy Power, the Convening Officer should, so far as practicable, appoint or detail as many officers as possible of equal or superior relative rank to the accused. He is, however, under no obligation so to do. If the accused belongs to the naval or air force of an enemy or ex-enemy Power, the Convening Officer should appoint or detail if available at least one naval officer or one air force officer as a member of the Court, as the case may be.

It was under this last provision that naval officers were appointed to sit on the bench, *inter alia*, in the *Peleus* and the *Scuttled U-boats* cases (Nos. 1 and 5 of this Volume).

V. MIXED INTER-ALLIED MILITARY COURTS

Under Regulation 5, paragraph 3, the Convening Officer may, in a case where he considers it desirable so to do, appoint as a member of the Court, but not as President, one or more officers of an Allied Force serving under his command or placed at his disposal for the purpose, provided that the number of such officers so appointed shall not comprise more than half the members of the Court, excluding the President. It is left to the discretion of the Convening Officer to appoint or not to appoint Allied officers as members of the Court.

In law, a mixed Court constituted under Regulation 5, paragraph 3 of the Royal Warrant remains, of course, a British municipal court.

In the *Peleus* case (No. 1 of this Volume) and in the *Almelo* case (No. 3), Greek and Dutch officers respectively were appointed to serve on the Military Court ; in the first case because a Greek ship and 18 Greek nationals were involved as the victims of the crime ; in the second case because the crime had been committed on Dutch territory and one of the victims was a Netherlands national. In other cases, where the number of Allied nations involved was obviously too large, as, e.g., in the concentration camp cases, no Allied officers were appointed. In many cases, national observers from all nations interested were invited to attend. That the appointment of Allied members of the Military Courts is not compulsory is strikingly demonstrated by the trial by a British Military Court at Singapore of W/O Tomono Shimio of the Japanese Army. In that case the accused was charged, found guilty and sentenced to death by hanging, by a Court consisting of British officers only, for having unlawfully killed *American* prisoners of war at Saigon, *French* Indo-China. The locus delicti commissi was French territory, the victims were United States nationals.

VI. THE JUDGE ADVOCATE

A Judge Advocate may be deputed to assist a British Military Court by

the Judge Advocate General of the Forces or in default of such deputation may be appointed by the officer convening the Court. The duties of the Judge Advocate, according to Rule 103 of the Rules of Procedure, an Order in Council (S.R. & O. 989/1926 as amended) promulgated under the authority of Section 70 of the Army Act, consist mainly in advising the Court on matters of substantive and procedural law. He must also, unless both he and the Court think it unnecessary, sum up the evidence before the Court deliberates on its findings. Paragraph (*h*) of Rule 103 lays down that, " In fulfilling his duties the Judge Advocate will be careful to maintain an entirely impartial position." The Judge Advocate has no voting powers. The members of the Court are judges of law and fact, and consequently the Judge Advocate's advice need not be accepted by them.

If no Judge Advocate is appointed the Convening Officer must appoint at least one officer having legal qualifications as President or as member of the Court, unless in his opinion no such officer is necessary (Rule of Procedure 103 and Regulation 5, paragraph 2, of the Army Order 81 of 1945, as amended). Since the Legal Member, unlike the Judge Advocate, is a member of the Court, he has the right to vote.

VII. RULES OF PROCEDURE AND RULES OF EVIDENCE

The 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. & O. 989/1926).

According to Section 128 of the Army Act, the rules of evidence of a British Court Martial, and under the Royal Warrant also of Military Courts, are the rules applicable in English Civil Courts. By " Civil Courts" is meant Courts of ordinary criminal jurisdiction in England, including Courts of summary jurisdiction (Rule 73 of the Rules of Procedure, 1926).

The rules of evidence referred to include for instance the maxim that the accused is innocent until he is proved guilty. In the *Dreierwalde* case (No. 7 of this volume) for example this principle was underlined and elaborated by the Counsel for the Defence, in his final address, thus : " . . . it is for the Prosecution to establish beyond reasonable doubt that which is alleged in the charge before you ; it is not for the accused to clear himself. On the other hand, it is not for the Prosecution to establish that they have proved their case beyond all sort of doubt, they need only establish it beyond that sort of doubt which would be left in the mind of an ordinary reasonable man." The Judge Advocate in his summing up said to the Court, " It is for you to decide whether the prosecution have made out their case . . . if you have a reasonable doubt as to what happened on that pathway ; that you think the evidence is consistent possibly with a murdering or possibly consistent with a shooting after a genuine attempt to escape you must acquit the accused."

The rules of Civil Courts in England and, under the provisions quoted above, also of British Military Courts, differ in certain respects from the

rules of procedure under which Courts of continental countries exercise jurisdiction. One of the main differences is that in English Courts the accused is allowed, if he so chooses, to give evidence on his own behalf as a witness under oath. The *Dreierwalde* trial again provides an example. There, the Judge Advocate told Amberger that, should he decide to give evidence on oath, he would be sworn and would no doubt be questioned to find whether his words were true. Should he decide not to do so, it would be permissible instead for him simply to make a statement, and in such a case his words could not be questioned as to their truth. In either event, his Counsel would be able to address the Court and call any witnesses, but, the Judge Advocate pointed out, if Amberger decided to take the latter course, so that his story could not be tested by questioning, it would not carry the same weight as would the former. The accused decided to give evidence on oath. Both the defending Counsel and the Judge Advocate subsequently pointed out to the Court that the evidence on oath which he gave must be treated in the same way as that of any of the other witnesses.

There are, of course, also differences in the way in which witnesses are examined, on the one hand, in the law of most Continental countries, where it is the President of the Court who primarily directs the examination, and, on the other hand, in English law, where it is mainly the responsibility of Counsel for the Prosecution and for the Defence to examine the witnesses " in chief," to cross-examine and to re-examine them.

VIII. SPECIAL RULES OF EVIDENCE APPLICABLE IN MILITARY COURTS ONLY

In the interest of the reliability of the fact-finding of the Court, English procedure, very like most continental codes of procedure, excludes certain types of evidence, e.g., written statements in circumstances where the person can be examined *viva voce*.

In view of the special character of the war crimes trials and the many technical difficulties involved, the Royal Warrant, by Regulation 8, has introduced a certain relaxation of the rules of evidence otherwise applied in English Courts.

Under Regulation 8 (i) a Military 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 in evidence in proceedings before a Field General Court Martial. It is under this provision that Military Courts are entitled to admit, e.g., affidavits or statutory declarations, i.e., written statements made under oath, which otherwise would not be received as evidence in an English Court.

Regulation 8 enumerates as examples certain types of documents which may be received as evidence.

IX. PROCEDURE REGARDING CRIMES COMMITTED BY UNITS OR GROUPS OF MEN

Regulation 8 (ii) of the Royal Warrant, as amended, provides :—

" 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."

X. REPRESENTATION BY COUNSEL

Regulation 7 of the Royal Warrant provides that Counsel may appear on behalf of the Prosecutor and accused in like manner as if the Military Court were a General Court Martial. The appropriate provisions of the Rules of Procedure, 1926, apply accordingly.

Rule 88 provides that Counsel shall be allowed to appear on behalf of the Prosecutor and accused at General and District Courts-Martial :

(1) when held in the United Kingdom ; and

(2) when held elsewhere than in the United Kingdom, if the Army Council or the Convening Officer declares that it is expedient to allow the appearance of Counsel.

The Rules of Procedure, 1926, provide that English and Northern Irish barristers-at-law and Solicitors, Scottish Advocates or Law Agents, and the corresponding members of the legal profession in other British territories, are qualified to appear before a Court Martial.

Regulation 7 also provides that, in addition to these persons qualified in British law, any person qualified to appear before the Courts of the country of the accused, and any person approved by the Convening Officer of the Court, shall be deemed to be properly qualified as Counsel for the Defence.

In practice accused persons tried as war criminals are defended either by advocates of their own nationality or by British serving officers appointed by the Convening Officer, who may or may not be lawyers.

XI. PUNISHMENT OF WAR CRIMES

The punishment of a war crime consists in any one or more of the following :—

(1) Death (either by hanging or shooting).

(2) Imprisonment for life or for any less term.

(3) Confiscation.

(4) A fine.

The Court may also order the restitution of money or property taken or destroyed by the accused. (Regulation 9.)

XII. APPEAL AND CONFIRMATION

No right of appeal in the ordinary sense of that word exists against the decision of a Military Court. The accused may, however, within 48 hours give notice of his intention to submit a petition to the Confirming Officer against the finding or the sentence or both. The petition must be submitted within 14 days. If it is against the finding it shall be referred by the Confirming Officer to the Judge Advocate General or to his deputy. The finding

and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or the Rules of Procedure or any defect or objection, technical or other. An exception exists only in the case where it appears that a substantial miscarriage of justice has actually occurred.

No action has yet been taken before British civil courts similar to that taken in the United States in the *Quirin*, *Yamashita* and *Homma* cases, where the proceedings of United States Military Commissions were made the subject of judicial review (see para. I *supra* and Annex II, pp. 111, 112-13 and 121).

XIII. THE AUTHORITY OF DECISIONS OF MILITARY COURTS

The Military Courts are not superior courts and their decisions are therefore not endowed with that special binding authority which Anglo-American law attaches to judicial decisions as precedents. Their relevance for the development of International Law may rather be compared with the relevance of judicial decisions in countries whose legal systems are not based on the Anglo-American doctrine of the binding character of precedents. Although the findings and sentences of British Military Courts trying war criminals do not lay down rules of law in an authoritative way, they are declaratory of the state of the law and illustrative of actual State practice.

ANNEX II

UNITED STATES LAW AND PRACTICE CONCERNING TRIALS OF WAR CRIMINALS BY MILITARY COMMISSIONS AND MILITARY GOVERNMENT COURTS

I. THE DIFFERENT TYPES OF UNITED STATES MILITARY AND MILITARY GOVERNMENT TRIBUNALS

In United States Law there are three types of Military Tribunals, namely (*a*) Courts Martial, General, Special and Summary, (*b*) Military Commissions, and (*c*) Provost Courts. In addition to these Tribunals, based on internal United States law, both Common Law and Statutory Law, there exist, in territory occupied by United States Forces, (*d*) Military Government Courts. This Annex, which deals with the trial of war criminals by United States Courts, is not concerned with the type of Military Tribunals mentioned under (*a*) (Courts Martial). Although United States Law (Art. 12 of the Articles of War) provides that General Courts Martial " shall have power to try any person subject to Military Law . . . and any other person who by the law of war is subject to trial by military tribunals " and although under this article the United States can at any time elect to try war criminals before General Courts Martial, this has, in practice, not been done.

Provost Courts (*supra* (*c*)) are Tribunals of a summary nature. As there have not been trials of war criminals before United States Provost Courts, this type can also remain outside the scope of this introduction, which will therefore be restricted to Military Commissions (Part I) and Military Government Courts (Part II).

PART I : UNITED STATES MILITARY COMMISSIONS

II. THE BASIC PROVISIONS

The United States Military Commissions are an old institution which existed prior to the Constitution of the United States of America. They have been described as the American Common Law War Courts.

They were not created by statute, but recognised by statute law. In very recent decisions (the so-called Saboteur case *ex parte Richard Quirin* (1942), *in re Yamashita* (1946) and *in re Homma* (1946)) the Supreme Court of the United States had occasion to consider at length the sources and nature of the authority to create Military Commissions. The Supreme Court stated that Congress and the President, like the courts, possess no power not derived from the Constitution of the United States. But one of the objects of the Constitution, as declared by its preamble, is to " provide for the common defence." As a means to that end the Constitution gives to Congress the power to " provide for the common Defence," " To raise and support Armies," " To provide and maintain a Navy," and " To make Rules for the Government and Regulations of the land and naval Forces." Congress is

given authority " to declare War . . . and make Rules concerning Captures on Land and Water," and " To define and punish Piracies and Felonies committed on the high seas and Offences against the Law of Nations." In the exercise of the power conferred upon it by the constitution to " define and punish . . . offences against the Law of Nations," of which the law of war is a part, the United States Congress has by a statute, the Articles of War, recognised the " Military Commission " appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the law of war. The Supreme Court pointed out that Congress by sanctioning the trial by Military Commission of enemy combatants for violations of the law of war had not attempted to codify the law of war or to mark its precise boundaries. Instead it had incorporated, by reference, as within the pre-existing jurisdiction of Military Commissions created by appropriate military command, all offences which are defined as such by the law of war, and which may constitutionally be included within the jurisdiction.

The Constitution confers on the President the " executive Power " and imposes upon him the duty to " take care that the Laws be faithfully executed." It makes him the Commander in Chief of the Army and Navy. The Constitution thus invests the President as Commander in Chief with the power to wage war and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations including those which pertain to the conduct of war.

The President of the United States, as the Commander in Chief of the Armed Forces, and the Commanders in the Field have the power to appoint Military Commissions and to prescribe the rules and regulations under which they have to operate.

It should be added that Military Commissions may be appointed not only by the President or any Field Commander but also by any Commander competent to appoint a General Court Martial. The Commander in the Field has this right because of his general power as a Military Commander.

III. REGULATIONS FOR THE TRIAL OF WAR CRIMINALS BY MILITARY COMMISSIONS

The British Royal Warrant of 14th June 1945 (see Annex I of this Volume) has made regulations for the trial of war criminals for all British Military Courts in all theatres of operations and in all territories under the jurisdiction of the United Kingdom Government and armed forces.

The United States authorities, on the other hand, have made different provisions for different territories. The President, as President and Commander in Chief of the Army and Navy, by Order of July 2nd, 1942 (7 Federal Register 5103), appointed a Military Commission and directed it to try Richard Quirin and seven other German saboteurs for offences against the law of war and the Articles of War and prescribed regulations for the procedure on the trial and for review of the record of the trial and of any judgment or sentence of the Commission. At the same time, by Proclamation (7 Federal Register 5101), the President declared that " all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation,

and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defences, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the laws of war, shall be subject to the law of war and to the jurisdiction of military tribunals." The Supreme Court of the United States in its decision *ex parte Richard Quirin*, 317 U.S. 1 (1942), sustained the validity of this procedure against various contentions based upon the Constitution of the United States.

Similarly, by command of General McNarney, Regulations for the Trial of War Crimes for the Mediterranean theatre of operations were made on the 23rd September 1945 by circular No. 114 ; these Regulations (in the following pages called the Mediterranean Regulations), formed the basis of the proceedings against General Dostler (see Case 2 of this Volume).

By command of General Eisenhower, a directive regarding Military Commissions in the European theatre of operations was made by an Order of 25th August 1945 (to be called the European directive hereafter). These rules applied, e.g., to the *Hadamar* trial (Case No. 4 of this Volume).

On 26th June 1946, a directive was issued by Headquarters, United States Forces, European Theatre, which contained certain new provisions as to the trial of persons accused of being participants in mass atrocities when the principal participants in such atrocities had already been convicted. Reference will be made to these provisions below in paragraph IX.

For the United States Armed Forces, Pacific, Regulations governing the trial of war criminals were made by General MacArthur on 24th September 1945. These regulations of 24th September 1945 formed the basis of the trial, *inter alia*, of the Japanese General *Yamashita* and of the *Jaluit Atoll Case*, No. 6 of this Volume. These regulations were superseded almost immediately after the Yamashita trial by the "Regulations Governing the Trials of Accused War Criminals" of 5th December 1945, generally called "SCAP Regulations" or "SCAP Rules." Whenever, in this Annex, "SCAP" Rules are quoted, the reference is to the Regulations made on 5th December 1945. The earlier Regulations of 24th September 1945, which sometimes, in the parlance of the officers of the courts, were also cited as "SCAP" Rules, will, to distinguish them from the Document dated 5th December 1945, here be called the "Pacific September Regulations."

Another set of Regulations similar to the Pacific September Regulations were issued for the China Theatre on 21st January, 1946, and are referred to hereafter as the China Regulations.

IV. THE DEFINITION OF WAR CRIME IN THE REGULATIONS FOR THE TRIAL OF WAR CRIMINALS IN THE DIFFERENT UNITED STATES THEATRES OF OPERATIONS

The definition of "war crime" and consequently the scope of the offences falling under the jurisdiction of Military Commissions is different according to the different Regulations and Directives dealt with in the preceding paragraph of this Annex.

The narrowest jurisdiction is that vested in the Military Commissions appointed in the Mediterranean Theatre of Operations. In the Mediterranean Regulations (Regulation 1) the expression "war crime" means a violation of the laws or customs of war.

Under the European Directive (paragraph 1*a*), Military Commissions are appointed for the trial of persons who are charged with violations of the laws or customs of war, of the law of nations or of the laws of occupied territory, or any part thereof. The European Directive adds therefore to the jurisdiction of Military Commissions violations of the law of nations other than the laws or customs of war, and violations of the local law of the occupied territory. In Regulation 5 of the Pacific September Regulations the offences falling under the jurisdiction of the Military Commissions are described as follows :

" murder, torture or ill-treatment of prisoners of war or persons on the seas ; killing or ill-treatment of hostages ; murder, torture or ill-treatment, or deportation to slave labour or for any other illegal purpose, of civilians of, or in, occupied territory ; plunder of public or private property ; wanton destruction of cities, towns or villages ; devastation, destruction or damage of public or private property not justified by military necessity ; planning, preparation, initiation or waging of a war of aggression, or an invasion or war in violation of international law, treaties, agreements or assurances ; murder, extermination, enslavement, deportation or other inhumane acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or in connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated ; and all other offences against the laws or customs of war ; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy."

The SCAP Regulations of 5th December 1945, which have superseded the Regulations of 24th September 1945, define the offences to be tried by the Military Commissions in the following words (Regulation 2(*b*)) :

"(1) Military commissions established hereunder shall have jurisdiction over all offences including, not limited to, the following :

" (*a*) The planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

" (*b*) Violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory ; murder or ill-treatment of prisoners of war or internees or persons on the seas or elsewhere ; improper treatment of hostages ; plunder of public or private property ; wanton destruction of cities, towns or villages ; or devastation not justified by military necessity.

" (*c*) Murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population before or during the war, or persecutions on political, racial or religious grounds in execution of, or in connection with, any crime defined

herein, whether or not in violation of the domestic laws of the country where perpetrated.

"(2) The offence need not have been committed after a particular date to render the responsible party or parties subject to arrest, but in general should have been committed since or in the period immediately preceding the Mukden incident of September 18th 1931."

In the China Regulations the jurisdiction of the Commission is circumscribed as follows : " The military commissions established hereunder shall have jurisdiction over the following offences : Violations of the laws or customs of war, including but not limited to murder, torture, or ill-treatment of prisoners of war or persons on the seas ; killing or ill-treatment of hostages, murder, torture or ill-treatment, or deportation to slave labour or for any other illegal purposes, of civilians of, or in, occupied territory ; plunder of public or private property ; wanton destruction of cities, towns or villages ; devastation, destruction or damage of public or private property not justified by military necessity ; murder, extermination, enslavement, deportation or other inhuman acts committed against any civilian population, or persecution on political, racial, national or religious grounds, in execution of or connection with any offence within the jurisdiction of the commission, whether or not in violation of the domestic law of the country where perpetrated ; and all other offences against the laws or customs of war ; participation in a common plan or conspiracy to accomplish any of the foregoing. Leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy."

In describing the offences subject to trial by Military Tribunals, the Regulations used in the Pacific theatre and in China reflect the influence of the Four Power Agreement of 8th August 1945, and particularly of Article 6 of the Charter of the International Military Tribunal annexed to it. Under the Charter the International Military Tribunal has jurisdiction over :

(*a*) Crimes against peace,

(*b*) War crimes, namely, violation of the laws or customs of war, and

(*c*) Crimes against humanity.

Military Commissions operating under the SCAP Regulations have jurisdiction over all offences, including, but not limited to, the three types of offences enumerated. It is also expressly stated there that the offences need not have been committed after a particular date, but in general should have been committed since or in the period immediately preceding the Mukden incident of 18th September 1931.

V. COMPOSITION OF MILITARY COMMISSIONS

Under all the Regulations mentioned Military Commissions must be composed of not fewer than three members. In the European and Mediterranean Theatres of Operations the members must be officers of the United States Army. (Para. 1(*c*) of the European Directive and Regulation 3 of the Mediterranean Regulations.)

Under Regulation 8 of the China Regulations, a Commission may consist

of Army and other service personnel or of both service personnel and civilians. The Pacific September Regulations, on the other hand, provide also for " international military commissions consisting of representatives of several nations or of each nation concerned, appointed to try cases involving offences against two or more nations or any other offences ; and commissions consisting of members of any one branch or of several branches of the army services of one or more nations." (Regulation 2.) The SCAP Regulations contain similar provisions (Regulation 1(*b*)) with the difference that an International Commission may also try cases involving offences against one nation only.

The most outstanding instance of an American Military Tribunal consisting of representatives of several nations is the International Military Tribunal for the Far East which was established by Special Proclamation of General Douglas MacArthur of 19th January 1946 (as amended by a subsequent Order of 26th April 1946) " for the just and prompt trial and punishment of major war criminals in the Far East." The Pacific September Regulations (No. 5(*b*)) also provide that persons whose offences have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of local jurisdiction, which is an application of the Moscow Declaration of 30th October 1943 to the Pacific theatre of war.

The provision relating to the return of Japanese war criminals to the scene of their crimes is omitted in the SCAP Regulations. It is, however, retained in the China Regulations (Regulation 5(*b*) concerning persons whose offences have a geographical location outside the China Theatre of Operations).

VI. THE JUDGE ADVOCATE

In American law the function of the Judge Advocate is entirely different from that of the Judge Advocate in British Military Tribunals. Whereas the British Judge Advocate is an impartial adviser to the Tribunal (see Annex I of this Volume, paragraph VI) Article 17 of the American Articles of War provides that the trial judge advocate of a general or special Court Martial shall prosecute in the name of the United States, and shall, under the direction of the Court, prepare the record of its proceedings. The Mediterranean Regulations (No. 3) provide that for each Military Commission there shall be appointed a judge advocate and a defence Counsel with such assistants as may be required, whose duties shall be similar to those of like officers before General Courts Martial. Similar provisions apply to the European Theatre (paragraph 1(*c*) of the Directive), and under the Pacific September Regulations (Regulation 11), the SCAP Rules (Regulation 4(*a*)) and the China Regulations (Regulation 11). In the two Regulations relating to the Pacific, it is also provided that in prosecutions for offences involving more than one nation, each nation concerned may be represented among the prosecutors. In the SCAP Regulations, this is expressly left to the discretion of the convening authority.

VII. RULES OF PROCEDURE

The Mediterranean Regulations (No. 8) provide that Military Commissions shall conduct their proceedings as may be deemed necessary for full and fair

trial, having regard for, but not being bound by, the rules of procedure prescribed for General Courts Martial. In the European directive it is stated (by paragraph 2) that Military Commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such Commissions, and with the rules of procedure set forth in the directive, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for General Courts Martial.

In the Regulations applied in the Pacific Theatre it is provided, *inter alia*, that the Commission shall confine each trial strictly to a fair, expeditious hearing of the issues raised by the charges, exclude irrelevant issues or evidence and prevent any unnecessary delay or interference. (Regulation 13(*a*) of the September Regulations and Regulation 5(*a*) (1) of the SCAP Rules. In substance the same is provided in Regulation 13(*a*) of the China Regulations.) The Sessions of the Commission shall be public except when otherwise directed by the Commission. (Regulation 13(*c*) of the September Regulations ; Regulation (5*a*) (3) of the SCAP Rules.) The accused shall be entitled, *inter alia*, to be represented prior to, and during, trial by Counsel appointed by the convening authority or Counsel of his own choice, or to conduct his own defence. (Regulation 5(*b*) (2) of the SCAP Rules ; provisions substantially to the same effect are contained in Regulation 14(*b*) of the September Regulations and Regulation 14(*b*) of the China Regulations.) The accused shall be entitled to testify on his own behalf and have his Counsel present relevant evidence at the trial in support of his defence, and cross-examine each adverse witness who personally appears before the Commission; and to have the substance of the charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them. (Regulation 5(*b*) (3) and (4) of the SCAP Rules ; similarly : Regulation 14(*c*) and 14(*d*) of the September Regulations and Regulations 14(*c*) and 14(*d*) of the China Regulations.)

VIII. RULES OF EVIDENCE

The President's order of 2nd July 1942, mentioned in paragraph III of this Annex, appointing a Military Commission for the trial of the alleged saboteurs, included the provision that " Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man." The provisions laid down in overseas theatres were clearly influenced by this drafting.

The Mediterranean Regulations (Regulation 10) provide expressly that the technical rules of evidence shall not be applied but any evidence shall be admitted which, in the opinion of the president of the Commission, has any probative value to a reasonable man. Similar provisions are contained in paragraph 3 of the European Directive, in Regulation 16 of the Pacific September Regulations, in Regulation 5(*d*) of the SCAP Rules and in Regulation 16 of the China Regulations.

In the Mediterranean Regulations it is added that without limiting the scope of this rule the following in particular will apply :

" (*a*) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the president of the commission, unable to attend

without undue delay, the commission may receive secondary evidence of statements made by or attributed to such witness.

"(*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.

"(*c*) Any report by any person when it appears to the president of the commission that the person in making the report was acting within the scope of his duty may be admitted in evidence.

"(*d*) Any deposition or record of any military tribunal may be admitted in evidence.

"(*e*) Any diary, letter or other document may be received in evidence as to the facts therein stated.

"(*f*) If any original document cannot be produced, or, in the opinion of the president of the commission, cannot be produced without undue delay, a copy or translated copy of such document or other secondary evidence of its contents may be received in evidence. A translation of any document will be presumed to be a correct translation until the contrary is shown.

"(*g*) Photographs, printed and mimeographed matter, and true copies of papers are admissible without proof.

"(*h*) Confessions are admissible without proof of circumstances or that they were voluntarily made. The circumstances surrounding the taking of a confession may be shown by the accused and such showing may be considered in respect of the weight to be accorded it, but not in respect of its admissibility."

Similar but not identical provisions are contained in the other instruments. In the SCAP Rules, for instance, it is also provided (Regulation 5(*d*) (2)) that the Commission shall take judicial notice of facts of common knowledge, official government documents of any nation and the proceedings, records and findings of Military or other Agencies of any of the United Nations, a provision which corresponds to Art. 21 of the Charter of the International Military Tribunal, annexed to the Four-Power Agreement of 8th August 1945.

Regulation 7 of the SCAP Rules states that all purported confessions or statements of the accused shall be admissible without prior proof that they were voluntarily given, it being for the Commission to determine only the truth or falsity of such confessions or statements.

IX. CRIMES COMMITTED BY UNITS OR GROUPS

The SCAP Rules contain, in Regulation 5(*d*) (4), also the following provisions, the substance of which was also contained in the September Regulations :

" If the accused is charged with an offence involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial resulting in the conviction of any other member of that unit, group or organization,

relative to that concerted offence, may be received as *prima-facie* evidence that the accused likewise is guilty of that offence."

This provision is similar to that of Regulation 8(ii) of the British Royal Warrant (see Annex I of this Volume, paragraph IX).

The SCAP Rules, in Regulation 5(*d*) (5), further provide that :

" The findings and judgement of a commission in any trial of a unit, group, or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial, by that or any other commission, of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in that unit, group or organization convicted by a commission, the burden shall be on the accused to establish by proof any mitigating circumstances relating to his membership or participation therein."

Substantially the same provision was contained in the September Regulations, which also provided, in Regulation 4(*b*), that :

" Any military or naval unit or any official or unofficial group or organization, whether or not still in existence, may be charged with criminal acts or complicity therein and tried by a military commission."

The China Regulations have similar provisions in Regulations 16(*d*) and (*e*).

It will be seen that these provisions are based on a principle similar to that expressed in Articles 9 and 10 of the Charter of the (European) International Military Tribunal.

The Directive of 26th June 1946, applicable primarily to Military Government Courts in the European Theatre of Operations, contains in its paragraph 11 detailed provisions under the heading " Mass Atrocities, Subsequent Proceedings." It is recalled there that certain mass atrocity cases have heretofore been tried, i.e. the Hadamar (see Case 4 of this Volume), Dachau and Mauthausen cases, " wherein the principal participants of the respective mass atrocities were charged with violating the laws and usages of war, under particulars alleging that they acted in pursuance of common design to subject persons to killings, beatings, torture, starvation, abuses or indignities, or particulars substantially to the same effect. The courts pronounced sentences in those cases involving imprisonment and death and of necessity, in view of the issues involved therein, found that the mass atrocity operation involved in each was criminal in nature and that those involved in the mass atrocities acting in pursuance of a common design did subject persons to killings, beatings, tortures, etc." The Directive now provides, with regard to subsequent proceedings against accused other than those involved in initial or " parent " mass atrocity cases, *inter alia*, that : " In such trial of additional participants in the mass atrocity, the prosecuting officer will furnish the court certified copies of the charge and particulars, the findings and the sentence pronounced in the parent case." Thereupon the court " will take judicial notice of the decision rendered in the parent case, including the finding of the court (in the parent case) that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, did subject persons to killings, beating, tortures, etc., and no examination of the record in such parent case need be made for this purpose.

In such trials of additional participants in the mass atrocity, the court will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof."

X. THE DEFENCE OF SUPERIOR ORDERS

The Mediterranean Regulations provide in Regulation 9 :

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

The corresponding provisions of Regulation 16(*f*) of the Pacific Regulations of September 1945, of Regulation 5(*d*)(6) of the SCAP Rules and of Regulation 16(*f*) of the China Regulations provide as follows :

" The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defence, but may be considered in mitigation of punishment if the commission determines that justice so requires."

As to the development of the law regarding this plea see the notes on the *Peleus* and *Dostler* cases, *supra*, pages 18-20 and 31-33.

The Supreme Court of the United States decided in the *Yamashita* case that under the Laws of War a commanding officer may be charged with a violation of those laws solely because of his failure to control his troops.

XI. PUNISHMENT OF WAR CRIMES

For the Commissions operating in the European theatre it is provided that they may be guided by, but are not limited to, the penalties authorised by the Manual for Courts Martial, and by the laws of the United States, and of the territory in which the offence was committed or the trial is held. The Manual for Courts Martial and the Articles of War prohibit cruel and unusual punishments of every kind and otherwise provide for different crimes different punishments, from fines and imprisonment to the death sentence. The Mediterranean Regulations (No. 13) state that appropriate sentences imposed by a Military Commission are (*a*) Death (by hanging or shooting), (*b*) Confinement for life or a lesser term, (*c*) Fine.

In Regulation 20 of the Pacific Regulations of September 1945, in Regulation 5(*b*) of the SCAP Rules and in Regulation 20 of the China Theatre it is added that the Commission may also impose such other punishment as it shall determine to be proper. The Commission may also order confiscation of any property of the convicted accused, deprive the accused of any stolen property, or order its delivery to the Commander-in-Chief for disposition as he shall find to be proper, or may order restitution with appropriate penalty in cases of default. In all Regulations it is provided that concurrence of at least two-thirds of the members of the Commission present at the time of voting shall be necessary for the conviction and for the sentence.

XII. APPEAL AND CONFIRMATION

The sentence of a Military Commission must not be carried into execution until it has been approved by the appointing authority. Death sentences must, in addition, be also confirmed by the Theatre Commander. The approving and confirming authorities have before them, in acting, a review and recommendation by the Staff Judge Advocate. Thus, while there is no " appeal " as that term is used in judicial proceedings, every record of trial is scrutinised as to the facts and points of law, and the Commanding General has trained legal advice as to what, in right and justice, should be done.

XIII. THE UNITED STATES COURTS OF LAW IN RELATION TO MILITARY COMMISSIONS

Notwithstanding the absence of a right of appeal Military Commissions are in United States law, to a certain extent, subject to control and supervision by the American courts. A Military Commission is not, any more than a Court Martial, a " Court " whose rules and judgments are subject to review by the judicial courts. The judicial courts will, however, in a proper case enquire whether the Military Tribunal has jurisdiction of the person and of the offence, and whether the sentence imposed was within the power of the Tribunal. But if the Military Tribunal had lawful authority to hear, decide and condemn, its action is not subject to judicial review merely because it is contended that it made a wrong decision on disputed facts. Correction of errors of decision belongs to the superior military authorities on their review of the case, not to the judicial courts. The most usual way for testing the validity of trials and sentences by a Military Commission is by writ of *Habeas Corpus*. The purpose of the writ of *Habeas Corpus* is to bring the person seeking the benefit of it before the court or judge to determine whether or not he is legally restrained of his liberty. It is a summary remedy for unlawful restraint of liberty. Where it is decided that the restraint is unlawful the court orders the release of the applicant, but if the restraint is lawful the writ is dismissed. The Supreme Court of the United States has emphasised in *ex parte Quirin* and *in re Yamashita* that on application for *Habeas Corpus* the court is not concerned with the guilt or innocence of the petitioners. The court considers only the lawful power of the Commission to try the petitioner for the offence charged.

In determining this question, the court will consider the following points :

(*a*) Was the Commission created by lawful military command ?

(*b*) Is the defendant charged with a violation of the Laws of War ?

(*c*) Is any provision of the Constitution or United States statutes or any treaty or lawful military command violated by the trial ?

A broad review necessarily results from the determination of these three questions.

The Supreme Court of the United States examined the judgments of the Military Commissions in the cases *ex parte Quirin*, *in re Yamashita* and *in re Homma* and sustained the jurisdiction of the Military Commission, in the Quirin case unanimously, in the two other cases by majority judgments.

XIV. THE AUTHORITY OF DECISIONS OF MILITARY COMMISSIONS

Like the British Military Courts, the United States Military Commissions

are not superior courts and what has been said on the authority of British Military Courts in Annex I of this Volume applies *mutatis mutandis* to decisions of United States Military Commissions.

The decisions of the Supreme Court of the United States in the three cases mentioned and the decisions of the other courts which have been or may be seised of cases of war criminals, in connection with a writ of Habeas Corpus or other similar remedies, have, of course, that binding authority which attaches to their decisions under the general law of the United States.

PART II : MILITARY GOVERNMENT COURTS

XV. THE ESTABLISHMENT OF MILITARY GOVERNMENT COURTS

It has been stated in the first part of this Annex that the United States Forces, European Theatre, have used two separate sets of Tribunals for the trial of war criminals, namely, Military Commissions, which have been dealt with in Part I of this Annex, and Military Government Courts. These Tribunals are distinct and have a different historical origin. The origin and jurisdiction of Military Commissions have been treated in the first part of this paper. Military Government Courts are generally based upon the occupant's customary and conventional duty to govern occupied territory and to maintain law and order.

Military Government Courts were established for the occupied parts of Germany by Ordinance No. 2 made by General Eisenhower, as Supreme Commander of the Allied Expeditionary Force. The Supreme Commander also issued the *Rules of Military Government Courts.*

When, after the Berlin Declaration of 5th June 1945, General Eisenhower, in his capacity of Commander-in-Chief of the American Forces in Europe, took over the administration of the American occupation zone, he made a Proclamation stating that, *inter alia*, all orders by the Military Government, including proclamations, laws, regulations and notices given by the Supreme Commander or on his instructions, remain in force in the American occupation zone unless repealed or altered by the Commander-in-Chief himself. The Military Government Ordinance No. 2 and the Rules of Procedure in Military Government Courts are, therefore, the basis of Military Government Courts established in the American zone of occupation.

Additional provisions regulating the trial of war crimes and related cases by United States Military Government Courts were made by a directive of General Eisenhower on 16th July 1945.

XVI. JURISDICTION OF MILITARY GOVERNMENT COURTS

Under Ordinance No. 2 there are three kinds of Military Government Courts : General Military Courts, Intermediate Military Courts and Summary Military Courts (Article I of Ordinance No. 2). The jurisdiction of these Courts is as follows :

Ratione personae : These Courts have jurisdiction over all persons in the occupied territory except allied military personnel.

Ratione materiae : The Military Government Courts shall, under Article II (2), have jurisdiction over :

(i) all offences against the laws and usages of war ;

(ii) all offences under any proclamation, law, ordinance, notice or order issued by or under the authority of the Military Government or of the Allied Forces ;

(iii) all offences under the laws of the occupied territory or of any part thereof.

The directives of 16th July 1945 and of 26th June 1946 provide that as a matter of policy cases involving offences against laws and usages of war, or laws of the occupied territory, or any part thereof, commonly known as war crimes, together with such other related cases, within the jurisdiction of Military Government Courts, as may from time to time be determined by the Theatre Judge Advocate, committed prior to 9th May 1945, shall be tried before the specially appointed courts provided for in this directive.

XVII. THE COMPOSITION OF MILITARY GOVERNMENT COURTS

General Military Government Courts and Intermediate Military Government Courts consist of not fewer than five members and not fewer than three members respectively. Military Government Courts are appointed by Army/Military District Commanders ; the Orders appointing the Courts designate one or more Prosecutors or Defence Counsel. At least one officer with legal training is detailed as a member of such Courts.

XVIII. RULES OF PROCEDURE AND EVIDENCE

A Military Government Court shall in general admit oral, written or physical evidence having bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof.

Every accused before a Military Government Court shall be entitled, *inter alia*, to be present at his trial, to give evidence and to examine or cross-examine any witness ; but the Court may proceed in the absence of the accused if the accused has applied for and been granted permission to be absent or if the accused is believed to be a fugitive from justice.

The Directive of 26th June 1946 (in para. 5(*c*)) deals with " United Nations Observers." At the time of referring charges for trial " the Deputy Theatre Judge Advocate for War Crimes will determine those United Nations, if any, which in his judgement should be invited to send observers to the trial and will extend such invitations on behalf of the Theatre Commander."

As to the provisions of the Directive regarding " Mass Atrocity : Subsequent Proceedings," see *supra*, para. IX at pages 119-20.

XIX. POWERS OF SENTENCE

General Military Government Courts may impose any lawful sentence, including death.

XX. REVIEW OF SENTENCES

A person convicted by a Military Government Court has the right to petition for review of the finding or sentence. The petition must be filed with the Court within 10 days of conviction.

No sentence of a Military Government Court shall be carried into execution until the case record shall have been examined by an Army/Military District Judge Advocate and the sentence approved by the officer appointing the Court or by the Officer Commanding for the time being. No sentence of death shall be carried into execution until confirmed by higher authority.

The Reviewing authority may, upon review, *inter alia :*

confirm or set aside any finding,

substitute the finding of guilty by an amended charge,

confirm, suspend, reduce, commute or modify any sentence or order, or

increase any sentence, where a petition for review which is considered frivolous has been filed and the evidence in the case warrants such increase.

The reviewing authority may at any time remit or suspend any sentence or part thereof.

The proceedings shall not be invalidated nor any findings or sentences disapproved for any error or omission, technical or otherwise, occurring at any such proceedings, unless in the opinion of the reviewing authority it shall appear that the error or omission has resulted in injustice to the accused.

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