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 again " (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.