

CASE NO. 24

TRIAL OF KURT STUDENT

BRITISH MILITARY COURT, LUNEBURG, GERMANY,
6TH-10TH MAY, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused was faced with eight charges alleging war crimes committed by him in the kingdom of Greece (according to the last three charges, on the Island of Crete itself) as Commander-in-Chief of the German forces in Crete, at various times during May and June 1941. The charges alleged respectively that he was "responsible for," first, the use on or about 22nd May of British prisoners of war as a screen for the advance of German troops, when, near Maleme on the Island of Crete, troops under his command drove a party of British prisoners of war before them, resulting in at least six of these British prisoners of war being killed by the fire of other British troops; secondly, the employment in May of British prisoners of war on prohibited work, when, at Maleme aerodrome on the Island of Crete, troops under his command compelled British prisoners of war to unload arms, ammunition and warlike stores from German aircraft; thirdly, the killing on or about 23rd May of British prisoners of war, when, at Maleme aerodrome on the Island of Crete, troops under his command shot and killed several British prisoners of war for refusing to do prohibited work; fourthly, the bombing on or about 24th May of No. 7 General Hospital when, near Galatos on the Island of Crete, aircraft under his command bombed a hospital which was marked with a Red Cross; fifthly, the use on or about 24th May of British prisoners of war as a screen for the advance of German troops, when, near Galatos on the Island of Crete, troops under his command drove a party of British prisoners of war before them (these British prisoners of war being the staff and patients of No. 7 General Hospital), resulting in a named Staff Sergeant of the Royal Army Medical Corps and other British prisoners of war being killed by the fire of British troops; sixthly, the killing on or about 27th May of British prisoners of war, when, near Galatos, troops under his command killed three soldiers of the Welch Regiment who had surrendered to them; seventhly, the killing on or about 27th May of a British prisoner of war, when, near Galatos, troops under his command wilfully exposed British prisoners of war to the fire of British troops, resulting in the death of a named Private of the Welch Regiment; and finally, the killing in June of British prisoners of war, when, at a prison camp near Maleme, troops under his command shot and killed several British prisoners of war. He pleaded not guilty to all the charges.

The offences alleged all took place in connection with an attack by German parachutists on the Island of Crete under the direction of the accused. The latter, then General Student, was shown to have been at his base in Greece until the morning of 25th May, 1941, and to have been in Crete from that time until the end of June 1941. Air support was in the control of General von Richthoven, Commander of the 8th Air Corps, though a certain degree of co-operation between the two generals was shown to have existed.

The evidence on the first charge was that of an R.A.F. Sergeant who testified that, on 20th May, 1941, he was among a number of British personnel who were captured by German parachutists in Crete and forced to advance up a hill towards lines held by New Zealand troops ; when the latter shot at the prisoners, the Germans following behind returned fire. The witness was certain that at least two prisoners were killed and thirteen others fell to the ground.

The same witness also gave evidence relevant to the second and third charges. He described how he and other prisoners were forced, on the 21st May, to repair shell damage on Maleme aerodrome, which was captured by the Germans and under continuous fire. They were shot at if they tried to stop work ; though no one was killed or wounded, he was beaten when, due to a wound, he did not work fast enough. When ordered to unload guns, shells, cases and stores from landed aircraft, the prisoners refused to do so. Whereupon the officer in charge marched three aside and had them shot in the sight of the others. A second R.A.F. Sergeant also told how, on 22nd May, he and others were forced at the point of a gun to repair the Maleme aerodrome and to unload food and arms from German aircraft under fire from British artillery and subject to bombing. Both witnesses added that the prisoners were not allowed to take cover.

A former Sergeant in the R.A.M.C. provided evidence relative to the fourth and fifth charges. He described a bombing on 18th May, and a bombing and machine-gunning on 20th May, of the hospital, which occupied a promontory on the coast and was clearly marked with a Red Cross. After the capture on the same day of the hospital, the staff and the wounded were marched towards their own lines in the Galatos area. The witness concluded that they were intended as a shield for the German troops. A Staff Sergeant and some others were killed by fire from the New Zealanders.

Three affidavits were put in in which members of the Imperial forces who had since returned to Canada and New Zealand, stated that the date on which the hospital was bombed was 25th May.

Evidence relating to the sixth and seventh charges were given by two former members of the Welch Regiment. They described how on 27th May, 1941, three men of their section were shot by the Germans after capture and the Private named in the seventh charge was made to stand on the skyline so that he was killed by fire from his own lines.

The only direct evidence on the eighth charge was that of the first-mentioned witness, but it was not clear whether the alleged shootings took place before 30th June, 1941, when the accused gave up his command in Crete.

The accused claimed that he knew nothing of the bombing of the hospital and that if any atrocities occurred in the field they were without his consent or knowledge and against his wishes. In a pre-trial statement he expressed the opinion that : " The question of temporarily detaining prisoners to work in the fighting zone must in my opinion be judged separately. It can never be avoided in airborne operations, as Arnhem has shown." When he went into the witness box he distinguished between unloading medical

supplies and food and unloading arms and ammunition, and said that he thought it perfectly possible that prisoners did unload one plane as it came in containing medical supplies and were then withdrawn when another came in with arms and ammunition.

A former Major attached to the accused's Staff said that the reconnaissance photograph of the area of the hospital showed a tented camp but no Red Cross markings. Two other German officers stated that no one in the accused's headquarters realised that the camp was a hospital. One of these two witnesses, the accused's former Chief of Staff, said that Student's superior, General Lohr, had ordered the accused to allow General Ringl, the commander in the western part of the Island (which included Maleme), a free hand, and that Lohr had also said that requests for targets to be bombed should be made directly by General Ringl to General von Richt-hoven. Orders had gone out, added the witness, that as many prisoners as possible should be taken and sent back for interrogation.

A Brigadier in the New Zealand Expeditionary Force, who had been very near the hospital at the time of its bombing, came forward to give evidence for the Defence. He stated that on the 18th or 19th May, 1941, one bomb fell inside the hospital area, but that it seemed clear that the attack was intended for a large crowd of troops who were bathing in the sea. The witness stated that the invasion of Crete began on 20th May, and pointed out that after 10 a.m. on that date the tented area ceased to be a hospital, the staff and patients having been driven out by the Germans themselves. He did not think that these prisoners had been used as a screen, because no attack was actually launched behind them. The position was very fluid at the time, men of his own brigade were hunting parachutists and there were many isolated battles in progress. The prisoners taken from the hospital were later retaken by the Imperial troops, but were not put back there because the whole area of the hospital had become a battleground. The witness observed that the red cross must have been visible on any reasonable photograph taken of the hospital from the air. His general opinion, however, was that the German troops had maintained good conduct, and that the red cross had subsequently been respected.

The accused was found not guilty of the first, fourth, fifth, seventh and eighth charges but guilty of the second, third and sixth.

Subject to confirmation by superior military authority, he was sentenced to imprisonment for five years. The finding and sentence were not, however, confirmed.

B. NOTES ON THE CASE

1. THE NATURE OF THE OFFENCES ALLEGED

All of the acts alleged by the eight charges to have taken place were clear breaches of International Law. Even though the precise provisions violated were never specifically quoted, it is not without interest to set out some relevant Articles of the Geneva Prisoners of War Convention of 1929 and Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.

The former Convention provides :

" Article 2. Prisoners of war are in the power of the hostile government, but not of the individuals 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.

" Article 7. As soon as possible after their capture, prisoners of war shall be evacuated to depôts sufficiently removed from the fighting zone for them to be out of danger.

Only prisoners who, by reason of their wounds or maladies, would run greater risks by being evacuated than by remaining may be kept temporarily in a dangerous zone.

Prisoners shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone. . . .

" Article 27. Belligerents may employ as workmen prisoners of war who are physically fit, other than officers and persons of equivalent status according to their rank and their ability. . . .

Non-commissioned officers who are prisoners of war may be compelled to undertake only supervisory work, unless they expressly request remunerative occupation. . . .

" Article 31. Work done by prisoners of war shall have no direct connexion with the operations of the war. In particular, it is forbidden to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units. . . .

" Article 32. It is forbidden to employ prisoners of war on unhealthy or dangerous work. . . ."

The Convention on the sick and wounded provides :

" Article 6. Mobile medical formations, that is to say, those which are intended to accompany armies in the field, and the fixed establishments of the medical service shall be respected and protected by the belligerents.

" Article 9. The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, and chaplains attached to armies, shall be respected and protected under all circumstances. . . .

" Article 19. As a compliment to Switzerland, the heraldic emblem of the red cross on a white ground, formed by reversing the Federal colours, is retained as the emblem and distinctive sign of the medical service of armed forces. . . .

" Article 20. The emblem shall figure on the flags, armlets, and on all material belonging to the medical service, with the permission of the competent military authority.

"Article 22. The distinctive flag of the Convention shall be hoisted only over such medical formations and establishments as are entitled to be respected under the Convention, and with the consent of the military authorities: . . .

Belligerents shall take the necessary steps, so far as military exigencies permit, to make clearly visible to the enemy forces, whether land, air, or sea, the distinctive emblems indicating medical formations and establishments, in order to avoid the possibility of any offensive action."

The accused claimed that the temporary detailing of prisoners to work in the fighting zone was unavoidable in airborne operations. In his summing up, the Judge Advocate made an interesting observation on the question whether parachute troops should occupy the same position as others in relation to the provisions of the International Conventions on the Conduct of Warfare. "Parachutists," he said to the Court, "are not like ordinary soldiers. They have difficult situations to deal with and they often have to work in small numbers. They have to work on their own initiative and it is for you, as soldiers, to say whether the same standard must be adopted by a parachutist when he is dropped in hostile country in small numbers as with the ordinary soldier in the ordinary infantry attack and it is for you to decide whether on this expedition those paratroops would not be told that they would have to be ruthless, that they would have to fight hard and they would have difficult circumstances to get over but their paramount object must be to carry out the plan. Now, gentlemen, I invite you later on to consider how parachutists are trained and how they must be trained for their difficult duties. I am bound to say here that the Defence are saying in the case of this particular formation trained by Student that it was trained most humanely, that they would be clear as to what to do and that they would behave strictly in accordance with the laws and usages of war. I will say no more on that point but it is one, no doubt, which will occur to you and you will have to consider the conduct of the parachute troops in the positions in which they were brought. I think you will take the view that the Defence feels that the Hague Convention and International Agreements are out of date in that they act rather harshly on the parachutist, and they would make them read no doubt so that the parachutist would not come under this International Law which is intended to make fighting less severe for non-combatants and combatants alike." This question had not, however, received any treatment by Counsel.

2. THE PERSONAL RESPONSIBILITY OF THE ACCUSED FOR OFFENCES COMMITTED BY HIS TROOPS

The eight charges brought against the accused alleged not offences committed by him, but offences for which he was responsible. The Prosecutor pointed out in his closing address: "This case falls really into two parts and there are two separate matters which it will be your duty to decide. First whether these events which you have heard sworn to in the witness box or any of them in fact took place and if you decide that they

did take place the second point will arise as to whether this man was responsible for them." Student was not shown to have ordered any of the offences alleged.

The Prosecutor claimed that : " General Student was very keen on the capture of Crete. He had pitted his opinion against the opinion of Hitler and it was up to him to get Crete at all costs and in my submission all these things were done by subordinates with the full knowledge that they would have been supported by their Commander-in-Chief." Defence Counsel, on the other hand, pointed out that : " When a General decides to make a big scale operation on a corps basis he makes his appreciation of the situation and his staff work out the orders regarding details. Any general policy is obviously that General's responsibility but I maintain that the details are not. The orders which have been worked out by his staff are passed on to all commanders at all levels until the small details are arrived at. It is the small tasks such as the attack on a given hill which are planned and carried out by the junior commanders and their troops. Therefore surely is it not the junior commanders who are responsible for any small and isolated incidents happening within their platoons or sections and are not the senior commanders responsible for what happens throughout their command as a whole." The basic principles relating to the extent of the responsibility of a commander for offences committed by his troops, however, were not fully examined in the present case.

Certain facts may nevertheless be set out which were considered of some importance in the case, and which may have been taken into account by the Court and by the Confirming Authority in making their respective decisions.

In the first place, it was recognised as more probable that repeated or widespread offences were performed under the General's orders than isolated offences. Counsel for the Defence observed that all the charges related to acts done in the Maleme/Canea area, whereas actually troops were dropped at four main points, Maleme, Canea, Rhethymnon and Herakleon. In other words, he claimed, only about half of the troops concerned in the invasion were in the Maleme/Canea area. It could not, therefore, be said that it was the general policy of the parachute troops to commit atrocities and to capture Crete at any price. Why, he asked, if the shooting of prisoners of war was General Student's general policy, did not incidents occur at the prison camps at Canea and Skenis similar to those alleged to have happened at the camp near Maleme ?

The Prosecutor claimed that three instances had been proved in which captured troops had been forced by German soldiers to advance ahead of them, either to act as a screen to the latter in their attack or to cause the Imperial troops to reveal their positions by firing on the prisoners in mistake for their enemies. The fact that no less than three instances of such behaviour had been proved gave rise to an inference, in the Prosecution's submission, that an instruction had been given that in certain circumstances such action was correct. He pointed out that General Student had said that he was responsible for the whole of the training of the parachute division.

In his summing up the Judge Advocate set out very clearly what had been the Prosecution's position in the case ; the Prosecution, he said, " are going to say that, when you look at this list of atrocities deposed to by the ordinary decent type of soldier or airman, you will have to draw the inference that it was calculated ; that it was part of the policy and that it would only arise in the well disciplined German forces if those troops and the officers knew that they had been either ordered to do it by their commander or, alternatively, that they had been led to believe that no.hing would have been heard about it and it would be condoned and appreciated."

A second important question in connection with the responsibility of the accused was that of his official relationship with General von Richthoven, Commander of the 8th Air Corps. Clearly if the latter was able to act entirely independently of Student, the accused could not be held responsible for the bombing of the aerodrome. Defence Counsel claimed that during a conference between the accused and General von Richthoven, only general outlines for air support were discussed. The Prosecutor, on the other hand, claimed that the hospital could not have been selected as a target without the knowledge of the accused and his staff. The Judge Advocates's opinion was that the Court would " be satisfied that, on any major operation on that island, there would be no bomb dropped without Student knowing why and ensuring that the parachute troops should not be bombed " ; he thought that the Court would accept " that there was, in this German expedition, the closest liaison between the staff of the air force and the staff on the ground." Nevertheless the accused was found not guilty of the fourth charge.

The physical presence of the accused in Crete at the time of the alleged offences, on the other hand, was not regarded by Counsel as important. The Prosecutor submitted that it was " quite immaterial " whether he was in Athens or in Crete " at the time " ; he was supreme commander during the whole operation. The Defence made no particular use of the fact that the accused did not arrive in Crete until 25th May, 1941. The Judge Advocate restricted himself to the observation that : " It is common ground that General Student was not in this area at all before the morning of the 25th May, and therefore anything that he may be responsible for up to that date would have been done from his base in Greece."

ANNEX

CANADIAN LAW CONCERNING TRIALS OF WAR CRIMINALS BY MILITARY COURTS

I. JURISDICTION OF CANADIAN MILITARY COURTS

The jurisdiction of the Canadian Military Courts for the trial of war criminals is based on the Act respecting War Crimes of 31st August, 1946 (10 George VI Chap. 73). This re-enacts the War Crimes Regulations (Canada) which were made by Order in Council on 30th August, 1945, and Section 2 of the Act states that: "This Act shall be deemed to have come into force on the thirtieth day of August, one thousand nine hundred and forty-five, and everything purporting to have been done heretofore pursuant to the said Regulations shall be deemed to have been done pursuant to the authority of this Act." The Act is to continue in force until a day fixed by proclamation of the Governor in Council. The actual Regulations are contained in a Schedule to the Act, and Regulation 3 lays down that: "The custody, trial and punishment of persons charged with or suspected of war crimes shall, on and after the date hereof, be governed by these Regulations."

The Regulations are similar in many respects to those attached to the British Royal Warrant of 14th June, 1945, Army Order 81/45,⁽¹⁾ but also include some features of their own. For instance no equivalents of Regulation 10 (4) and (5) (see pp. 128-9) are contained in the British enactment.

II. DEFINITION OF WAR CRIME IN THE REGULATIONS

Regulation 2 (f) provides that: "'War crime' means a violation of the laws or usages of war committed during any war in which Canada has been or may be engaged at any time after the ninth day of September, 1939."

It follows, therefore, that the jurisdiction of Canadian Military Courts for the trial of alleged war criminals, like that 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 CANADIAN MILITARY COURT

Regulation 4 (1) gives certain Canadian Senior Officers power to convene Military Courts for the trial of alleged war criminals, and to confirm the findings and sentences of such Courts, with the proviso that no military court shall be convened for the trial of any person for a war crime unless the case has been certified by the Judge Advocate General, or a representative of his appointed by him for that purpose, as approved for trial.

⁽¹⁾ See Volume I of this series, pp. 105-110.