CASE No. 14

Trial of GUNTHER THIELE and GEORG STEINERT

UNITED STATES MILITARY COMMISSION, AUGSBERG, GERMANY, 13TH JUNE, 1945.(1)

A. OUTLINE OF THE PROCEEDINGS

The accused, a German army lieutenant and grenadier respectively, were charged with a violation of the Laws of War. The specification against Thiele alleged that he " did, at or near Billingsbach, Germany, on or about 17th April, 1945, wrongfully and unlawfully order that ....., an American prisoner of war, be killed, which order was then and there executed by a member of his command." It was alleged that Steinert " did, at or near Billingsbach, Germany, on or about 17th April, 1945, wrongfully and unlawfully kill " the same named prisoner of war. Both pleaded not guilty.

It was shown that a United States officer was wounded and taken prisoner by members of the command of Lieutenant Thiele. Captain Schwaben, the battalion commander and superior officer of Lieutenant Thiele, sent an order to Lieutenant Thiele to kill the prisoner. Lieutenant Thiele then ordered Grenadier Steinert to do the killing, and Grenadier Steinert carried out this order. The accused were, at the time of the offence, part of a German unit which was closely surrounded by United States troops, from whom the Germans were hiding.

The accused were sentenced to death by hanging. On the recommendation of his Staff Judge Advocate, however, the appointing authority commuted the sentences to terms of imprisonment for life.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSION

This trial, like the following two annotated in the present document, was held before the promulgation by order of General Eisenhower of the directive regarding Military Commissions in the European Theatre of Operations of 25th August, 1945.(2) In respect of the present trial, the authority to appoint the Military Commission was delegated by the Commanding General, European Theatre of Operations, to the Commanding General, 12th Army Group, by letter dated 19th November, 1944, with power of redelegation. This power was delegated by the Commanding General, 12th Army Group, to the Commanding General, Seventh United States Army, by letter dated 21st May, 1945. In the first letter authority was given to the Commanding Generals, Sixth and Twelfth Army Groups, to

(1) This report and the following three contained in this Volume are based not on complete transcripts of the trials, which were not available to the Secretariat of the United Nations War Crimes Commission, but on trial summaries furnished by the United States authorities.

(2) *See* Annex III, p. 105.

appoint Military Commission for the trial of persons subject to the jurisdiction of such commissions who were " charged with espionage or with such violation of the laws of war as threaten or impair the security of their forces, or the effectiveness and ability of such forces or members thereof." By a radio message from the Commanding General, Seventh Army, to the Commanding General, 12th Army Group, dated 4th June, 1945, the facts of this case were stated and the opinion was expressed that they came under the provisions set out above in that they were acts that threatened or impaired the security of United States forces, or the effectiveness and ability of those forces or members thereof. Advice was given in the same way of the intention to try this case and concurrence was requested to this and similar trials. Authority to hold the trial was then given.

2. CONFIRMATION OF SENTENCES

Paragraph 12 (Review) of the European directive of 25th August, 1945, provides that :

"(*a*) Every record of trial by military commission will be referred by the appointing authority to his staff judge advocate for review before he acts thereon.

"(*b*) Every record of trial in which a death sentence is adjudged, if such sentence is approved and not commuted by the appointing authority, will be forwarded to the Deputy Theatre Judge Advocate, War Crimes Branch, this headquarters, APO 757, for review by the Theatre Judge Advocate or his deputy and presentation with appropriate recommendations to the confirming authority for action."

The first three United States trials dealt with in the present volume[1] all took place before the promulgation of the directive of August 25th, 1945, but in each case a review of the proceedings was submitted to the appointing authority by his Staff Judge Advocate and before a death sentence was carried out a further review was prepared by the Deputy Theatre Judge Advocate for the Commanding General, European Theatre of Operations.

3. THE LEGAL NATURE OF THE OFFENCE

The acts of the accused were in violation of Art. 2 of the 1929 Geneva Prisoners of War Convention and of Art. 23 (*c*) of the Hague Convention No. IV of 1907. These run as follows :

" *Art.* 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."

" *Art.* 23. In addition to the prohibitions provided by special Conventions, it is particularly forbidden :

(*c*) To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion."

(1) *See* pp. 56-64.

4. THE DEFENCE OF SUPERIOR ORDERS

The Defence, in putting forward the plea of superior orders on behalf of both accused, quoted Section IV, paragraph 47, of the *Deutsches Militaerstrafgesetzbuch* (German Military Penal Code):

> " (1) If in the execution of an order relating to Service matters a penal law is violated, the commanding officer is solely responsible. Nevertheless, the subordinate obeying the order is subject to penalty as accomplice: 1. If he transgressed the order given, or 2, if he knew that the order of the commanding officer concerned an action the purpose of which was to commit a general or military crime or misdeameanour.
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> " (2) If the guilt of the subordinate is minor, his punishment may be suspended.'

The law relating to the plea of superior orders has already been discussed in Volumes I and II of this series.(1) It will suffice here to point out that the plea was rejected by the Commission, but that, on the recommendation of his Staff Judge Advocate, the Commanding General, 7th United States Army, commuted the sentences to imprisonment for life.

5. THE DEFENCE OF MILITARY NECESSITY

The accused raised the defence that their acts were legal because based on military necessity. The Court, however, rejected this plea.

On this point, Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), pages 183-4, states:

> " As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects. In accordance with the German proverb, *Kreigsraeson geht vor Kriegsmanier* (*necessity in war overrules the manner of warfare*), many German authors before the World War were already maintaining that the laws of war lose their binding force in case of extreme necessity. Such a case was said to arise when violation of the laws of war alone offers, either a means of escape from extreme danger, or the realization of the purpose of war—namely, the overpowering of the opponent. This alleged exception to the binding force of the law of war was, however, not at all generally accepted by German writers. . . The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war, i.e., generally binding customs and international treaties, but only by usages (*Manier*, i.e., *Brauch*). . . . In our days, however, warfare is no longer regulated by usages only, but to a greater extent by laws—firm rules recognized either by international treaties or by general custom. These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self preservation. . . Art. 22 of the Hague

(1) Volume I, pp. 16-20 and 31-33; and Volume II, p. 152.

Regulations stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity. What may be ignored in the case of military necessity are not the laws of war, but only the usages of war."

The accused in this case had violated the laws of war as expressed in solemn treaty obligations and, therefore, the doctrine of military necessity was no defence.