CASE NO. 42

TRIAL OF HEINRICH GERIKE AND SEVEN OTHERS

(THE VELPKE CHILDREN'S HOME CASE)
BRITISH MILITARY COURT, BRUNSWICK
20TH MARCH–3RD APRIL, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused, Heinrich Gerike, Georg Hessling, Werner Noth, Hermann Muller, Gustav Claus, Doctor Richard Demmerich, Fritz Flint and Frau Valentina Bilien, were charged with committing a war crime " in that they at Velpke, Germany, between the months of May and December, 1944, in violation of the laws and usages of war, were concerned in the killing by wilful neglect of a number of children, Polish Nationals."

It was established that a home for infant children of Polish female workers was established in Velpke in about May, 1944, that the children were to be compulsorily separated from their parents, and that the purpose of the separation was to advance the work on the nearby farms in order to maintain the supply of food in the year 1944. In view of the protests to the effect that the tending of their babies by Polish women was hindering the production of food on the farms where they worked, the accused Gerike, then Kreisleiter of Helmstedt, was ordered by his Gauleiter to erect a home where the children could be kept after being taken away from their mothers. Gerike chose, though according to his account only as a temporary expedient, a corrugated iron hut, without running water, light, telephone or facilities for dealing with sickness. As a matron for the home, the Labour Officer sent, against her will, the accused Valentina Bilien, who stated in Court that she had been married to a Russian, but that her father was German and that she came to Germany in February, 1944. She had formerly been a school teacher in Russia and had had no previous experience of running a clinic for infant children. She was at first provided with no staff, no medical equipment and no records except for a register of incoming children. Gerike ordered her not to return the children to their mothers and not to send any to hospital. She was instructed to " call in a doctor if necessary. " She later had the assistance of four helpers, Polish and Russian girls, but conditions were largely the same when, six months later, possession of the premises was required by the Volkswagen makers.

Gerike, though he knew of the death-rate, never visited the home or interviewed Frau Bilien after the initial selection of the barracks. Nor did he engage the services of a trained nurse who lived in the village of Velpke.

Frau Bilien claimed that she was ordered by the Labour Office, and then by Gerike, to take over her post at the home. The evidence showed that the premises were infested with flies and the sick children were not adequately separated from the rest. The infants' clothing was not kept clean, and there were no scales for weighing them. The matron went away for her meals and to do shopping, and was never in the home at night, though the helpers stayed there. During six months, more than 80 Polish infants died. The

evidence of the village registrar showed that the three most frequent causes of death as certified by the doctors were general weakness, dysentery, and what they called catarrh of the intestines.

As administrator of the home, Gerike appointed the accused Hessling, who was also without previous experience of operating a children's clinic. Hessling called at the home at least once a month, and knew of the death-rate. Frau Bilien testified that she made many complaints to him, but that nothing was achieved except the raising of the entry age for children, which was previously eight to ten days after confinement, to four to six weeks thereafter. Hessling claimed that his only duty was to arrange the finances, but Gerike denied this. One witness testified that Frau Bilien, on finding that some of the children were dying because they needed mothers' milk, sent some back to their mothers, but that Hessling, on discovering her action, forbade such a course.

Two doctors paid rare visits to the home before September, 1944, when the accused Dr. Demmerick, though without official instructions, started to visit the home and to tend sick infants. Later in the period from September to December, 1944, however, Demmerick, falling in with the matron's suggestion, only tended such of the children as Frau Bilien brought to him, and only visited the home to sign death certificates. Demmerick claimed that, due to his large practice, he could find no time to write any letters of protest to persons in authority, or, in the later period, to visit the babies.

The accused Muller was an Ortsgruppenleiter, the leading Nazi in the village. He had seen the home and disapproved of it, but Gerike had told him that it was not his responsibility. Nevertheless, he once telephoned Gerike, told him of the frequent deaths and received an assurance that something would be done to improve matters. After that he appears not to have pursued the matter any further.

The accused Noth was Burgomeister in the village, and held no official position in the Nazi party, though he was a member thereof. He knew of the state of affairs at the home, advised against its establishment and wanted to see it removed.

The accused Claus, a farmer of Velpke, was found not guilty immediately after giving his evidence. He admitted that he sent at least two children to the home against the parents' will, but it was not proved that he knew of the neglect shown in the institution. The accused Flint died during the course of the trial.

Gerike, Hessling, Demmerick and Frau Bilien were found guilty. Muller and Noth were found not guilty.

Subject to confirmation by superior military authority, Valentina Bilien was sentenced to fifteen years' imprisonment, Dr. Richard Demmerick to ten years' imprisonment, and Georg Hessling and Heinrich Gerike to death by hanging. The findings and sentences were confirmed.

B. NOTES ON THE NATURE OF THE OFFENCE

The war crime of which the accused were found guilty was of a very unusual type and would repay a little examination. In the absence of a Judge Advocate's summing up, the arguments of Counsel can most profitably be examined in making an attempt to throw light on the legal nature of the offence.

The Prosecutor referred to Article 46 of the Regulations annexed to the Hague Convention No. IV of 1907, which forms part of Section III (*Military Authority over the Territory of the Hostile State*) and which provides that :

> " *Art.* 46. Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected. Private property may not be confiscated."

Counsel pointed out that under international law it was forbidden in time of war to kill the innocent and defenceless population of any country overrun, " either in their own country or in the country of the occupying power ". He added that it was unlawful for an occupying power to deport slave labour from the occupied country to its own territory, in the first place.

Elaborating his legal argument further, the Prosecutor quoted a number of passages from Archbold's *Pleading, Evidence and Practice in Criminal Cases* which expounded certain aspects of the English law of murder and criminal negligence. These were as follows :

> " If a man, however, does any other act, of which the probable consequence may be and eventually is death, such killing may be murder, although no stroke were struck by himself ; as was the case of the gaoler, who causes the death of a prisoner by imprisoning him in unwholesome air ; of the unnatural son, who exposed his sick father to the air against his will, by reason whereof he died ; of the harlot, who laid her child in an orchard, where a kite struck it and killed it ; of the mother, who hid her child in a pig-sty, where it was devoured ; and of the parish officers, who moved a child from parish to parish till it died from want of care and sustenance."(1)

> " Neglect of the helpless : Premeditated neglect or ill-treatment by persons having custody, charge, or control of helpless persons, whether children, imbeciles, or lunatics, or sick or aged, by deliberate omission to supply them with necessary food, etc., if attended with fatal results, may be murder ; and if the same result flows from gross neglect in such a case, the offender is guilty of manslaughter."(2)

> " If a grown-up person chooses to undertake the charge of a human creature helpless either from infancy, simplicity, lunacy, or other infirmity, he is bound to execute that charge without wicked negligence ; and if a person who has chosen to take charge of a helpless creature lets it die by gross negligence, that person is guilty of manslaughter. Mere negligence will not do ; there must be negligence so great as to satisfy a jury that the prisoner was reckless and careless whether the creature died or not. ' Reckless ' is a more accurate epithet to be applied

(1) Archbold, *Pleading Evidence and Practice in Criminal Cases*, 31st Edition, p. 861.
(2) *Ibid*, p. 887.

to the negligence required than ' wicked '. If a person has the custody of another who is helpless, and leaves that other with insufficient food or medical attendance, and so causes his death, he is criminally responsible."(1)

" Where death results in consequence of a negligent act, it would seem that to create criminal responsibility the degree of negligence must be so gross as to amount to recklessness. Mere inadvertence, while it might create civil liability, would not suffice to create criminal liability." The next paragraph reads: " In explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted or did not amount to a crime, Judges have used many epithets such as ' culpable ', ' criminal ', ' gross ', ' wicked ', ' clear ', ' complete '. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability, the facts must be such that, in the opinion of the jury, the negligence of the prisoner went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."(2)

In general it is recognized that the distinction made in English Law between murder and manslaughter is not relevant in trials of war criminals,(3) and the Prosecutor did not in fact indicate on which of the above statements he chose to place most reliance in the present case.

The Prosecutor placed particular stress on the claim that once the child came from the farm where the female Polish worker had it and passed into the home, then all the obligations of motherhood, and the tests laid down by those passages, became applicable to Gerike, Hessling and Bilien. From the moment Gerike established the home for infant children of female Polish workers, whose children were to be taken away from their parents if necessary by force, " the Home became a Party affair, an NSDAP institution, entrusted by the Gauleiter to the control, administration and responsibility of the Kreisleitung of Helmstedt. . . . As long as the children of these workers remained in the custody of their mothers, albeit they were working on the farms, then if harm or hap should come to those children, then it may well have been the fault of the Polish mother, but once you have removed those children by force and against the will of the mother into that Home which is run by the Party from Kreis downwards, then and there the Party at the Kreisleitung takes over the parental responsibility of those infant children, and with that responsibility they take over naturally a whole burden of complicated duties relating to every branch of ordinary child welfare ". Counsel claimed that the case of infant children had from time immemorial been " the act and attribute of a civilized community ". In dealing with Frau Bilien he pointed out that: " Although she has said that what she did she did under order, she seems to have had very little idea of service and devotion and sacrifice to duty. If you undertake a task of skill then in law you are called upon to show the skill of the task that you have undertaken."

(1) *Ibid*, p. 863.
(2) *Ibid*, p. 882.
(3) See for instance Vol. I, pp. 91-92, and p. 81 of the present Volume.

A case which turned mainly if not entirely on allegations, not of acts, but of omissions necessarily raised difficult questions as to what standard of care each accused could reasonably have been expected to observe. The Prosecution claimed that the accused, each " according to his function ", had been guilty of such a gross and criminal disregard of their duties towards these defenceless Polish infants as to show a total disregard as to whether they lived or whether they died, and were therefore guilty under the charge. For various accused it was argued that they had done all that they could in the difficult position as regards accommodation, transport, suitable labour and medical services which resulted from the war. For Noth it was claimed that he had no power to alter a state of affairs which was actually under the control of the Nazi party.

The Court refused to support the allegation of the Prosecution in all cases. For instance, the Prosecution, while pointing out that Muller had, unlike Demmerick, Hessling and Gerike, never assumed the care of the children, submitted that Muller was neglectful in his functions as chief Nazi in the village, and that he thus " did contribute to the whole miserable affair and allowed it to go forward." Ortsgruppenleiter Muller was nevertheless acquitted. So also was the Burgomeister, Noth, who, according to the Prosecution's submission, turned a blind eye to the home, while he and the Ortsgruppenleiter together could have done much to relieve the conditions and death-rate therein. On the other hand, the Court inflicted a term of ten years' imprisonment on Dr. Demmerick, who had never received official instructions to tend the babies but who, according to the Prosecution, had by his acts " assumed the care of those children in place of their mothers ".

It is to be noted Article 46 of the Hague Convention No. IV of 1907, which was drafted at a time when deportations for forced labour on the scale carried out by Nazi Germany could not have been contemplated, strictly speaking applies only to the behaviour of the occupying Power *within occupied territory*. Nevertheless, it is clear that the general rule laid down therein must be followed also in respect of inhabitants of occupied territory who have been sent into the country of the occupant for forced labour, as had the mothers of the children who were sent to the Velpke home, and to children born to them while in captivity. It was pointed out by the Prosecutor that such deportation was itself contrary to international law, as was stated in Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition, on pp. 345–6, in the following passage :

> " . . . there is no right to deport inhabitants to the country of the occupant, for the purpose of compelling them to work there. When during the World War the Germans deported to Germany several thousands of Belgian and French men and women, and compelled them to work there, the whole civilized world stigmatized this cruel practice as an outrage."

It could have been argued by the Defence in the present case that the offence of deportation was committed by persons other than the accused ; nevertheless, it seems reasonable to assume that the inhabitants of an occupied territory keep their rights under international law when forced to leave their own country, even though this is not expressly provided in the Hague Convention. Indeed, the Tribunal which conducted the *Justice*

Trial stated clearly that the transfer of " Night and Fog " prisoners from occupied territories to Germany did not cleanse the " Night and Fog " Plan of its iniquity " or render it legal in any respect ".(1)

Similarly, the Judge Advocate acting in the Trial of Georg Tyrolt and others by a British Military Court, Helmstedt, 20th May–24th June, 1946, said of the victims of the offences charged in that case : " Quite obviously if it is wrong to show lack of respect to their family life and individual life in their own country, you cannot get out of that obligation simply by taking them to your country and then ill-treating them there."

The last-mentioned trial is indeed a useful parallel to the *Velpke Children's Home Case*. The charge against the accused was one of " Committing a War Crime in that they at Wolfsburg, and Ruehen, Germany, between the months of April, 1943, and April, 1945, in violation of the laws and usages of war, were concerned in killing by wilful neglect a number of children of Polish and Russian nationals." The general facts of the case were also very similar to those in the trial of Gerike and others and again concerned the operation of a children's home. In his closing address the Prosecutor quoted the first three passages from Archbold which are cited above(2) and added :

> " In a war crime we do not have to distinguish in charging a person between murder and manslaughter. To kill infant children who are admittedly helpless and in their care either by premeditated neglect or by wicked neglect is equally a war crime whether it be murder or manslaughter, but it is for you to decide in the case of each accused which degree is applicable to each accused."

The Judge Advocate referred to the Prosecutor's words as follows :

> " Again, I have no quarrel whatever with the authorities that Major Draper cited to you in support of his contention that these accused, if they did what is alleged against them, come within the doctrines of our English law regarding the standard of behaviour that must be expected of persons who undertake the care of young children. . . . I agree with those submissions in law that he has made to you, and my advice to you is that they are sound and that they should govern your decisions when you come to consider the verdict. Either of those standards would include the wording of the charge in this case, namely ' concerned in killing by wilful neglect ' and the final question of which of those two standards any one of those accused neglected to observe, if any of them did, can only affect, in my opinion, your sentence at a later stage and not your verdict."

Death sentences were passed on the accused Dr. Korbel, who had been responsible for the medical care and health of the children, and on Ella Schmidt, a nurse in whose charge they were placed. A sentence of five years' imprisonment was passed on Liesel Bacher, a nurse who also had charge of the infants for a period. Seven others accused were found not guilty. The findings and sentences were confirmed.

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(1) See p. 56 of Vol. VI of this series. Regarding deportation, see also p. 75, and pp. 53–61, of the present volume.
(2) See p. 78.