

Trial of ALBERT BURY and WILHELM HAFNER

UNITED STATES MILITARY COMMISSION, FREISING, GERMANY, 15TH JULY, 1945

A. OUTLINE OF THE PROCEEDINGS

Bury, ex-police chief of Langenselbod, Kreis Hanau, Germany, and Hafner, ex-policeman in the same place, were accused of unlawfully killing a United States prisoner of war. It was alleged that the former accused delivered the prisoner to the latter, with instructions to kill him, and that Hafner carried out these orders. The airman was taken to a secluded spot and shot. Bury stated that he had orders that "terror flyers" were no longer to be granted the protection of prisoners of war and were to be killed by lynching or beating and that the police were not to protect "terror flyers" if the populace lynched them. Both accused were sentenced to death by hanging and the sentences were confirmed.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSION

The proceedings again were based upon a delegation by the Commanding General, 12th Army Group, of the power to hold war crime trials, delegated to him by the Commanding General, European Theatre of Operations.

2. RULES OF PROCEDURE

The trial was held before the promulgation of the European directive,⁽¹⁾ but basic provisions regarding procedure similar to those set out therein were made for these proceedings. In the Special Order appointing the Commission, power was granted to it to make such rules for the conduct of the proceedings, consistent with the powers of a Military Commission, as were deemed necessary for a full and fair trial. The Order further provided that the Commission was not bound by the rules of procedure and evidence prescribed for General Courts Martial, but such evidence was to be admitted as had probative value to a reasonable man. In paragraphs 2 and 3 of the European directive it was subsequently provided:

"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 herein set forth, 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. . . . Such evidence shall be admitted before a military commission as, in the opinion of the President of the commission, has probative value to a reasonable man."

⁽¹⁾ See p. 56.

In the present trial, the Commission announced at the outset that its proceedings were to "be governed generally by the rules of procedure and evidence as laid down in the Manual for Courts Martial with the following changes. Statements made by the accused in the course of investigations which appear to be regularly and properly authenticated will be admitted in evidence, subject to such attack as the accused may desire to make. The statements made by the accused that are admitted in evidence will be received generally against all of the accused subject to such rebuttal as the accused or any of them may elect to make. The accused will be accorded the same privileges with regard to testifying as are accorded accused persons in trials before American Courts Martial, but if the accused or any of them elect to take the stand as an unsworn witness, he will be subject to cross-examination. If the accused elects to remain silent, the fact may be the subject of all reasonable inferences and comments."

It will be noted that the rule giving effect to the extra-judicial statements of one accused against another was different from that prevailing in Courts Martial. In paragraph 76, the *Manual for Courts Martial, U.S. Army*, provides: "The accused, whether he has testified or not, may make an unsworn statement to the court in denial, explanation, or extenuation of the offences charged, but this right does not permit the filing of the accused's own affidavit. This statement is not evidence, and the accused cannot be cross-examined upon it, but the prosecution may rebut statements of fact therein by evidence. Such consideration will be given the statement as the court deems warranted. The statement may be oral or in writing, or both. . . . If the statement made by an accused himself includes admissions or confessions, they may be considered as evidence in the case, but in a joint trial the statement by one accused is not evidence against his co-accused. . . ." Paragraph 114 (c) states: ". . . The fact that a confession or admission of one conspirator is inadmissible against the others does not prevent the use of such confession or admission against the one who made it, but any such confession or admission cannot be considered as evidence against the others. The effect of an unsworn statement made by one of several joint offenders at the trial is likewise to be confined to the one who made it. . . ." (1)

The remaining provisions of the *Manual* which were rendered inapplicable to the present proceedings are those contained in paragraphs 77 and 121 (b). Paragraph 77, *inter alia*, states: "The failure of an accused to take the stand must not be commented upon; . . ." In so far as an accused became liable to cross-examination *even if unsworn*, a departure was made also from paragraph 121 (b), which provides that: ". . . An accused person taking the stand *as a witness* becomes subject to cross-examination like any other witness. . . ." (2)

3. THE NATURE OF THE OFFENCE

The offence was said to be a breach of the Hague Convention No. IV, Arts. 4 and 23, and of the Geneva Prisoners of War Convention, Arts. 2 and 3.

(1) Regarding the question of the admissibility of evidence by one accused against another in the Belsen trial, held by a British Military Court, see Volume II, pp. 134-5.

(2) Italics inserted. In British war crime trials, by contrast, where an accused chooses not to appear as a witness on oath, he may make an unsworn statement, on which he is not subject to cross-examination. (Rules of Procedure 40 and 41.)

Art. 4 of the Hague Convention provides :

“ Art. 4. 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. . . .”

Art. 3 of the Geneva Convention states :

“ Art. 3. Prisoners of war are entitled to respect for their persons and honour. . . .” (1)

4. THE DEFENCE OF SUPERIOR ORDERS

The plea of superior orders was raised on behalf of both accused, but the Commission rejected it.

It is worthy of note that his own testimony showed that Bury had some latitude in determining whether or not any specific flyer should be killed. He received no explicit order with respect to the victim, and there was nothing to show that the haste and callousness with which the American flyer was dispatched was made necessary by the circumstances. Hafner is not recorded as having made any protest against the order. When he reported to Bury that the job was done, Bury replied, “ It is right so.”

It is not proposed to examine at length the law relating to superior orders in war crimes cases.(2) It would be permissible, however, to relate to the facts of the case the opinion of an authority on International Law not so far quoted on the present topic in these Volumes.

Glück, seeking to reconcile the dilemma in which a subordinate is placed by an order manifestly unlawful, compliance with which may later subject him to trial for a war crime, and refusal to comply with which may immediately subject him to disciplinary action, perhaps death, suggests that the following rule be applied : “ An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he actually knew, or, considering the circumstances, he had reasonable grounds for knowing that the act ordered is unlawful under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the law of his own country. In applying this rule, whenever the three legal systems clash, the last shall be subordinate.” (3) It is clear that the conduct of the accused in the present case was unlawful under the laws and customs of warfare and equally so under principles of criminal law prevailing in civilized nations, and it seems that Glück's test was satisfied, involving as it does the objective factor of reasonableness “ considering the circumstances.”

(1) For Article 2 of the 1929 Convention and Article 23 (c) of the 1907 Convention, see pp. 57-8.

(2) See the references set out on p. 58.

(3) Glück, *War Criminals, Their Prosecution and Punishment*, pp. 155-156.