CASE No. 2

THE DOSTLER CASE

TRIAL OF GENERAL ANTON DOSTLER, COMMANDER OF THE 75TH GERMAN ARMY CORPS

UNITED STATES MILITARY COMMISSION, ROME, 8TH-12TH OCTOBER, 1945

Legal Basis of the Jurisdiction of the Commission. Shooting of unarmed Prisoners of War. Hague Convention No. IV of 1907. *Scope of the Geneva Prisoners of War Convention of* 1929. *Plea of Superior Orders.*

Anton Dostler was accused of having ordered the shooting of fifteen American prisoners of war in violation of the Regulations attached to the Hague Convention Number IV of 1907, and of long-established laws and customs of war. A plea was made to the jurisdiction of the Commission by his Counsel, on the grounds, first, that the accused was entitled to the benefits of the Geneva Prisoners of War Convention of 1929 in the conduct of his trial, and, secondly, that the Commission had not been legally established. These arguments, and the plea of superior orders later put forward on Dostler's behalf, were rejected, and he was condemned to death.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Trial was conducted by a Military Commission appointed by command of General McNarney, consisting of the following: Major-General L. C. Jaynes (President), Brigadier-General T. K. Brown, Colonel H. Shaler, Colonel James Notestein, Colonel F. T. Hammond, Jr., Major F. W. Roche (Judge Advocate), 1st Lt. W. T. Andress (Assistant Judge Advocate), Colonel C. O. Wolfe (Defence Counsel), and Major C. K. Emery (Assistant Defence Counsel).

In the conduct of its proceedings, the Commission was ordered to follow the provisions of circular 114 of Headquarters, Mediterranean Theatre of Operations, 23rd September, 1945, entitled " Regulations for the Trial of War Crimes."(1)

2. THE CHARGE AND SPECIFICATION

Anton Dostler was charged with violations of the laws of war in that, as commander of the 75th German Army Corps, he, on or about 24th

(1) See Annex II, pp. 113 ff.

March, 1944, in the vicinity of La Spezia, Italy, ordered to be shot summarily a group of United States Army personnel consisting of two officers and 13 enlisted men, who had then recently been captured by forces under General Dostler, which order was carried into execution on or about 26th March, 1944, resulting in the death of the said 15 members of the United States Army.

3. THE PLEA TO THE JURISDICTION OF THE MILITARY COMMISSION

At the beginning of the trial the Defence presented a plea to the jurisdiction of the Military Commission to try the accused. Article 63 of the Prisoners of War Convention of 1929, it was stated, provided that a sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power. This provision was also set out in para. 136 of the American Basic Field Manual, *Rules of Land Warfare*. By virtue of the provisions of the Constitution of the United States, the Geneva Convention had become part of the United States Municipal Law(*), and Article 16 of the American Articles of War (an Act of Congress) provided that officers of the United States Army shall be triable only by General and Special Courts-Martial, and in no case shall an officer, when it can be avoided, be tried by officers inferior to him in rank.

From this the Defence argued that the proper tribunal to try the accused would have been a Court Martial. (Trial before Courts Martial affords to the accused a higher degree of safeguards than trial by a Military Commission.)

The Prosecution replied that the provisions of the Geneva Convention with regard to the trial of prisoners of war, which the Defence had put forward, pertained to offences committed by a prisoner of war in captivity, and did not pertain to offences committed against the Law of Nations prior to his becoming a prisoner of war. If the accused, being a prisoner of war, had struck a guard, Counsel for the Defence would be absolutely correct; the accused would have had to be tried by a Court Martial, for that would have been an offence against the American Articles of War, but in the present case he was being tried for an offence, not against the Articles of War, but against the Laws of War, for which a Military Commission might be, and had been for more than a hundred years, the proper method of trial. Counsel for the Prosecution quoted from Winthrop's *Military Law and Precedents*, p. 835, enumerating the classes of persons who in United States law might become subject to the jurisdiction of Military Commissions, and expressly naming individuals of the enemy's army who had been guilty of illegitimate warfare or other offences against the laws of war. The Prosecutor also referred to paragraph 346 (*c*) of the Basic Field Manual, *Rules of Land Warfare*, according to which, in the event of clearly established violation of the laws of war, the injured party may legally resort to the punishment of captured individual offenders. He further quoted from paragraph 7 of the same Manual which enumerates the three types of military tribunals exercising military jurisdiction, namely: (*a*) Courts

(*) Counsel could also have pointed out that Congressional Legislation had made the Convention part of United States Law.

Martial, (*b*) Military Commissions, and (*c*) Provost Courts, and provides that, in practice, offenders who are not subject to the Articles of War, but who by the Law of War are subject to trial by military tribunals, are tried by Military Commissions or Provost Courts.

The Defence said in reply that Winthrop had stated the law valid at the time when his book was written, and that this law had been amended when the United States ratified the Geneva Convention of 1929 and its provisions became part of the law of the land.

Two further arguments were then put forward by the Defence. The first was to the effect that the Commission had been set up by order of an American General, whereas the forces operating in that theatre were Allied forces of several different nationalities under a British Commanding General, Field Marshal Alexander. Counsel claimed that the accused was " entitled to be tried at least by a Court or a Commission appointed by the Commanding General of the theatre of operations in which the offence allegedly was committed," since he was " charged with being a war criminal rather than committing an offence against or which is peculiar only to the forces of the United States."

Secondly, the Defence argued that, should the foregoing argument be regarded as unsound, the appointment of the Commission was in any case invalid since, as far as the accused knew, no order had been given by the President of the United States appointing, or authorising the appointment of, the Commission, whereas its appointment required to be carried out either by the President or by some person legally authorised in the matter. Counsel quoted Article 38 of the Articles of War, to the effect that the President " may by regulations . . . prescribe the procedure . . . in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals . . ." He admitted that this provision concerned rules of procedure and evidence, but claimed that the implication was that the President was also the authority who should establish the procedure whereby Military Commissions were to be appointed.

The Prosecution claimed in reply that by long-standing practice, custom and even laws of war the Supreme Commander in the field had the authority to appoint a Military Commission. The belligerent injured by the offence was the United States, and the Supreme Commander for all American Forces in that theatre was General McNarney, who had appointed the Commission and had referred the case to it.

Under the provisions of *Rules of Land Warfare*, it was the injured belligerent who could bring the captured before a Military Commission, and Counsel therefore doubted whether Field Marshal Alexander would have had authority to appoint the Commission and refer the case to it.

Finally, Article 38 was purely permissive in character, not mandatory, and there was nothing in the Articles of War which took from General McNarney the power to appoint the Commission and to make rules for its procedure.

The Commission overruled the pleas of the Defence.

4. THE CASE FOR THE PROSECUTION

The Prosecution claimed, by virtue of the witnesses and evidence produced, to be able to establish the following facts :—

On the night of 22nd March, 1944, two officers and 13 men of a special reconnaissance battalion disembarked from some United States Navy boats and landed on the Italian coast about 100 kilometres north of La Spezia. The front at the time was at Cassino with a further front at the Anzio beach head. The place of disembarkation was therefore 250 miles behind the then established front. The 15 members of the United States Army were on a *bona fide* military mission, which was to demolish the railroad tunnel on the mainline between La Spezia and Genoa. On the morning of 24th March, 1944, the entire group was captured by a party consisting of Italian Fascist soldiers and a group of members of the German army. They were brought to La Spezia where they were confined near the headquarters of the 135th Fortress Brigade. The 135th Fortress Brigade was, at that time, commanded by a German Colonel, Almers (who was not before the Military Commission). His next higher headquarters was that of the 75th German Army Corps then commanded by the accused, Anton Dostler. The next higher headquarters was that of the Army Group von Zangen, commanded by the General of the Infantry von Zangen, who was called as a witness in the case. The next higher command was that of the Heeresgruppe C or Heeresgruppe South West, which was at that time under Field Marshal Kesselring.

The captured American soldiers were interrogated in La Spezia by two German Naval Intelligence Officers. In the course of the investigation one of the officers of the American party revealed the story of the mission. On 24th March a report was made by the 135th Fortress Brigade to the 75th Army Corps about the capture. On the next morning (25th March, 1944) a telegram was received at the headquarters of the 135th Fortress Brigade signed by the accused Dostler, saying in substance " the captured Americans will be shot immediately."

On receiving this cable, the commanding officer of the 135th Fortress Brigade and the Naval Officers interrogating the prisoners got into touch with the 75th Army Corps headquarters in order to bring about a stay of the execution. Late on the afternoon of the 25th March, Colonel Almers (then commanding the brigade) received another telegram from 75th Army Corps which said in substance that by 7.0 o'clock the next morning (26th March) he would have reported compliance with the order of execution.

Colonel Almers then gave orders for the conduct of the execution, for the digging of a grave, etc. During the night from Saturday 25th to Sunday, 26th March, two attempts were made by officers of the 135th Fortress Brigade and by the Naval Officers to bring about a change in the decision by telephoning to the accused Dostler. All these attempts having been unsuccessful, the 15 Americans were executed on the 26th March, early in the morning.

They were neither tried, nor given any hearing.

The argument of the Prosecution was that since the deceased had been soldiers of the United States Army, dressed as such and engaged on a genuine military mission, they were entitled to be treated as prisoners of war. Their execution without trial, therefore, was contrary to the Hague Convention

of 1907 and to a rule of customary International Law at least 500 or 600 years old.

5. THE EVIDENCE

Witnesses for the Prosecution included a Captain in the United States Army who had directed the operation against the tunnel. He stated that the fifteen soldiers had been *bona fide* members of the United States Forces ; he also bore witness as to the nature of the mission on which they were sent, and as to the clothing and equipment which they wore. Witnesses for the Prosecution included also an Italian employee of the Todt Organisation and two German Naval Intelligence Officers who gave further evidence regarding the deceased's clothing. One of the last two identified a document before the Commission as representing in substance the Führerbefehl to which reference was made by the Defence.(*) Three ex-members of the Wehrmacht gave evidence of attempts made to induce Dostler to change the order regarding the execution, and on the circumstances of the execution. General Zangen appeared in the witness box and denied having ordered the execution of the prisoners.

Two depositions and the notes of a preliminary interrogation of General Dostler were also allowed as evidence. The first deposition was made by a German lieutenant in hospital, who bore witness to the contents of the telegram containing Dostler's orders regarding the immediate execution of the prisoners and to the efforts which were made to avert the latter. The second deposition was made by a Captain in the United States Army who had been present at the exhumation of the bodies of the soldiers.

The Defence recalled General Zangen, who bore witness to the accused's merits as a soldier, and called a second Wehrmacht General, von Saenger, who described the oath which officers of the German Army had had to take on the accession of Hitler to power. As will be seen, General Dostler himself also appeared as a witness under oath.

Although it was not possible to produce the witnesses primarily needed by the Defence (one of them, the commander of the Brigade, had escaped from captivity and had not been recaptured, while the others could not be traced in the American and British zones), the decisive facts were not controversial, namely that the victims had been members of the American Forces, carrying out a military mission, that the accused had ordered their shooting without trial and that they had been so shot.

6. THE ARGUMENTS OF THE DEFENCE AND REPLIES MADE BY THE PROSECUTION

(i) *That the Deceased were not entitled to the Benefits of the Geneva Convention*

The Defence claimed that for any person to be accorded the rights of a prisoner of war under the Geneva Convention, it was necessary, under Article 1 thereof, for that person, *inter alia*, " to have a fixed distinctive emblem recognisable at a distance." The submission of the Defence was that the American soldiers had worn no such distinctive emblem, and that their mission had been undertaken for the purpose of sabotage, to be accomplished by stealth and without engaging the enemy. They were not therefore

(*) See the Appendix, p. 33.

entitled to the privileges of lawful belligerents, though it was admitted that they were entitled to a lawful trial even if they were treated as spies.(4)

(ii) *The Plea of Superior Orders*

The accused relied on the defence of superior orders which was based on two alleged facts :—

(*a*) The Führerbefehl of 18th October, 1942, the text of which is provided in the Appendix. The Führerbefehl laid down that if members of Allied commando units were encountered by German troops they were to be exterminated either in combat or in pursuit. If they should fall into the hands of the Wehrmacht through different channels they were to be handed over to the Sicherheitsdienst without delay.

The Defence Counsel submitted that pursuit could go on for weeks, and that it was not ordered that the allied troops should necessarily be killed on the spot.

In answer to the argument of the Prosecution that Dostler had exceeded the terms of the Führerbefehl (see later), the Defence pointed out that Dostler had received no punishment for his action, whereas para. 6 of the order stated that all leaders and officers who failed to carry out its instructions would be summoned before the tribunal of war.

(*b*) Alleged orders received from the Commander of the Army Group, General von Zangen, and from the Commander of the Heeresgruppe South West, Field Marshal Kesselring.

Dostler also claimed that he had revoked his first order to shoot the men and that he had eventually re-issued it on higher order.

The Defence tried to establish the fact that in 1933 all officers of the German Army had had to take a special oath of obedience to the Führer Adolf Hitler.(5) This fact was confirmed both by General von Zangen and Dostler himself in the witness box. The Prosecution put a question to General von Saenger whether he could cite to the Commission, any single case of a general officer in the German Army who was executed for disobedience to an order. Von Saenger replied that he had heard of two cases, one of which he knew ; the second was only a rumour. The witness did not know a case in the German Army in which a general officer was executed for disobedience to the Führerbefehl of 18th October, 1942.

General von Saenger admitted that the Führer gave out orders which in their way interfered with International Law. The officers at the front who had to execute these orders were convinced, however, that in those cases Hitler would make a statement or by some other means inform the enemy governments of his decisions, so that the officers were not responsible for

(4) While the Defence made no use of the facts in argument, the United States Captain who directed the operation bore witness that all of the soldiers were possessed of an Italian background, and that most of them could speak some Italian. He stated that the mission had had sabotage as its aim and that the whole company from which the men were drawn had been recruited in the United States with a view to work behind the enemy's lines. As it might be necessary to live off the land, a knowledge of the language of the country in which they were expected to operate was deemed very helpful.

(5) Actually this happened in 1934, when Hitler " succeeded " Hindenburg as " head of the State."

crimes committed while carrying out his orders. He also said that during the war officers could not resign from the German Army.

Dostler himself said that under the oath to Hitler he understood that it was mandatory upon him to obey all orders received from the Führer or under his authority.

Defence Counsel quoted a statement from Oppenheim-Lauterpacht, *International Law*, 6th edition, volume 2, page 453, to the effect that an act otherwise amounting to a war crime might have been executed in obedience to orders conceived as a measure of reprisals, and that a Court was bound to take into consideration such a circumstance.

The Defence invoked the text of the Führerbefehl which in its first sentence itself refers to the Geneva Convention and represents itself as a reprisal order made in view of the alleged illegal methods of warfare employed by the Allies. Counsel claimed that retaliation was recognised by the Geneva Convention as lawful, that the Führerbefehl stated the basis on which it rested and that the accused therefore had a perfect right to believe that the order, as a reprisal order, was legitimate.

The Defence quoted also paragraph 347 of the United States Basic Field Manual F.M.27-10 (*Rules of Land Warfare*), which says that individuals of the armed forces will not be punished for war crimes if they are committed under the orders or sanction of their government or commanders.

In so far as the defence was based on the Führerbefehl, the Prosecution submitted that, apart from an illegal order being no defence, the shooting of the prisoners in the present case had not even been covered by the terms of the Führerbefehl, because the latter ordered that Commandos should be annihilated in combat or in pursuit, but that if they came into the hands of the Wehrmacht, through other channels, they should be handed over without delay to the Sicherheitsdienst. The prosecuting Counsel pointed out that the deceased had not been killed in combat or in pursuit, and had been executed instead of being given up to the Sicherheitsdienst.

As far as the Defence relied on orders received from Army Group headquarters, and headquarters of the Heeresgruppe South West, this defence had not been substantiated. As far as the Army Group command was concerned, it had not been confirmed by the witness, General von Zangen, and as far as a command of the Heeresgruppe South West was in question, it was even rebutted by the statement of a witness that some hours after the execution a cable had been received from the headquarters of Heeresgruppe South West to the effect that the execution of the 15 Americans should not take place.

With regard to the text of the Führerbefehl of 18th October, 1942, which was used in evidence, the Defence Counsel said : " It is a matter of common knowledge that this Führerbefehl was kept extremely secret. As a matter of fact practically no originals of it have ever been found. This does not purport to be an original we have ; it is a copy on which the signature of whoever signed it is illegible. I understand it was secured from the French intelligence and they passed it on, and that one copy is the only one they have been able to find."

During his examination, the accused, on being handed a copy of the text of the Führerbefehl of October, 1942, said that a document which he had

received in 1944 through Army Group channels contained substantially everything that was in the 1942 text, but with certain additions. He stated further that " this copy is not the complete Führerbefehl as it was valid in March, 1944. In the order that laid on my desk in March, 1944, it was much more in detail . . . the Führerbefehl which was laying in front of me listed the various categories of operations which may come under the Führerbefehl. In addition there was something said in that Führerbefehl about the interrogation of men belonging to sabotage troops and the shooting of these men after their interrogation. . . . I am not quite clear about the point, whether a new Führerbefehl covering the whole matter came out or whether only a supplement came out and the former Führerbefehl was still in existence. . . . The Führerbefehl has as its subject commando operations and there was a list of what is to be construed as commando operations. I know exactly that a mission to explode something, to blow up something, came under the concept of commando troops."

With regard to the mission of the 15 American soldiers he claimed that, after making consultations with staff officers, " as it appeared without doubt that the operation came under the Führerbefehl an order was given by me and sent out that the men were to be shot."

General von Saenger said that in the Autumn of 1943 he had been acquainted with a Führerbefehl on the same subject which was different in contents from that before the Commission. On the other hand, three witnesses, namely, one of the German Naval Intelligence Officers, an ex-Wehrmacht Adjutant and General von Zangen, could remember no amendments to the Führerbefehl of October, 1942.

7. THE VERDICT

The Commission found General Dostler guilty.

8. THE SENTENCE

General Dostler was sentenced to be shot to death by musketry. The sentence was approved and confirmed, and was carried into execution.

B. NOTES ON THE CASE

1. REGARDING THE PLEA TO THE JURISDICTION

If the argument of the Defence regarding the interpretation of the Geneva Convention were correct, it would have far-reaching consequences with regard to the trial of such war criminals as had been members of the armed forces of the enemy and had therefore, on being captured, acquired the status of prisoners of war. War criminals would not only be protected by Art. 63 of the Geneva Convention, which would guarantee them, within the United States jurisdiction, the statutory safeguards of the Articles of War and the protection of the " due process of law " clause of the Fifth Amendment, and in other jurisdictions all the procedural rights granted by the law of the capturing State to its own soldiers, but would also make the provisions of Arts. 60-66 of the Geneva Convention applicable. It would, therefore, be necessary for the authorities instituting the proceedings to notify the representative of the protecting Power (Art. 60), the representative

of the protecting Power would have the right to attend the hearing of the case (Art. 62, para. 3), the alleged war criminal would have the right of appeal against any sentence against him in the same manner as persons belonging to the armed forces of the detaining Power (Art. 64), sentences pronounced against prisoners of war would have to be communicated immediately to the protecting Power (Art. 65) and, if sentence of death were passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence would have to be addressed to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served (Art. 66, para.1) ; and it would, finally, be forbidden to carry out the sentence before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power (Art. 66, para. 2).

The Military Commission in the Dostler trial decided that the provisions of Art. 63 of the Geneva Convention were not applicable to the case. As is customary, the reasons of the Military Commission were not given.

The decision of the Military Commission on this point is in accordance with the decision of the majority of the Supreme Court of the United States in the case of the Japanese General Yamashita (delivered on 4th February, 1946). The Supreme Court, *per* Stone, C. J., held that Art. 63 (and Art. 60) of the Geneva Convention have reference only to offences committed by a prisoner of war while a prisoner of war and not to violations of the law of war committed while a combatant. This conclusion of the majority of the Supreme Court is based upon the setting in which these articles are placed in the Geneva Convention. Art. 63 of the Convention appears in Part 3 (" Judicial Suits ") of Chapter 3, entitled " Penalties applicable to Prisoners of War." This forms part of Section V, " Prisoners' Relations with the Authorities," one of the sections of title III, " Captivity." All taken together relate only to the conduct and control of prisoners of war while in captivity ; Chapter 3 is a comprehensive description of the substantive offences which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offences, and of the procedure by which guilt may be adjudged and sentence pronounced. The majority of the Supreme Court therefore thought it clear that Part 3, and Art. 63 which it includes, apply only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war.

Mr. Justice Rutledge, in his minority opinion, in which Mr. Justice Murphy joined, held that the context in which Arts. 60 and 63 are placed did not give any support to the argument of the majority of the Court. Neither Art. 60 nor Art. 63 contained, in the opinion of the minority, such a restriction of meaning as the majority read into them. In the absence of any such limitation, it would seem that they were intended to cover all judicial proceedings, whether instituted for crimes allegedly committed before the capture or later. In Mr. Justice Rutledge's opinion, policy supported this view. For such a construction was required for the security of United States soldiers, taken prisoner, as much as for that of prisoners taken by the United States. And the opposite view would leave prisoners of war open to any form of trial and punishment, for offences against the law of war, which their captors might wish to use, while safeguarding them, to the extent of the treaty limitations, in cases of disciplinary offences. This,

in many instances, the minority contended, would be to make the treaty strain at a gnat and swallow a camel.

2. REGARDING THE PLEA OF SUPERIOR ORDERS

(i) *The "Dover Castle" Case*

The Defence claimed that reprisal was recognised by the Geneva Convention as lawful and that, since the Führerbefehl stated the basis on which it rested, the accused had a right to believe that the order, as a reprisal order, was legitimate.

This was a line of thought on which the decision of the German Supreme Court in the case of the "Dover Castle" was based.(*) The German Supreme Court acquitted in 1921 the accused who pleaded guilty to torpedoing a British hospital ship, because in the Court's view the accused were entitled to hold, on the information supplied to them by their superiors, that the sinking of an enemy hospital ship was a legitimate reprisal against the abuse of hospital ships by the enemy in violation of Hague Convention No. X. Professor Lauterpacht, in the *British Yearbook of International Law*, 1944, page 76, says that "no person can be allowed to plead that he was unaware of the prohibition of killing prisoners of war who have surrendered at discretion. No person can be permitted to assert that, while persuaded of the utter illegality of killing prisoners of war, he had no option but to obey an order." "But the situation is," according to Lauterpacht "more complicated when the accused pleads not only an order, but the fact that the order was represented as a reprisal for the killing by the adversary of prisoners of his own State."

This plea was, though not in so many words, made by Dostler's Defence and overruled by the Commission.

The Commission's decision on this point is in accordance, *inter alia*, with Art. 2, para. 3, of the Prisoners of War Convention of 1929, according to which measures of reprisal against prisoners of war are forbidden. From this it follows that under the law as codified by the 1929 Convention there can be no legitimate reprisals against prisoners of war. No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal.

Through the express provision of Art. 2, paragraph 3 of the Geneva Convention, the decision of the German Reichsgericht in the "Dover Castle" case has lost even such little persuasive authority as it may have had at the time it was rendered.

(ii) *The United States Basic Field Manual and the Plea of Superior Orders*

The Defence relied also on paragraph 347 of the United States Basic Field Manual FM.27-10 (*Rules of Land Warfare*) which says that individuals of the Armed Forces will not be punished for war crimes if they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall. It will be appreciated that this provision of

(*) *Annual Digest of Public International Law Cases*, 1932-1924, Case No. 231; British Command Paper (1921) 1422, p. 42.

paragraph 347 of the American *Rules of Land Warfare* corresponds exactly to the original text of paragraph 443 of Chapter XIV of the British *Manual of Military Law*.(7)

Paragraph 443 of the British Manual was amended in April, 1944, (by Amendment No. 34) to the effect that " the fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of any individual belligerent commander does not deprive the act in question of its character of a war crime ; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent."

A similar alteration of the American Field Manual has been brought about by Change No. 1 to the *Rules of Land Warfare*, dated 15th November, 1944. By this amendment, the sentences quoted above from paragraph 347 of the *Rules of Land Warfare* have been omitted and the following provisions have been added to paragraph 345 :—

> " Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."

It will be seen that the statement of the law contained in the new text of the American Basic Field Manual differs somewhat from the 1944 text of the British *Manual*, though both abandon the sweeping statements contained in the former text regarding the plea of superior orders. The new British text appears to exclude an unlawful order as a defence, thus being in line with the law as it was eventually laid down in Article 8 of the Charter of the International Military Tribunal of 8th August, 1945, under which superior orders are not to free a defendant from responsibility, but may be considered in mitigation of punishment.

The statement contained in the new text of paragraph 345 of the American Basic Field Manual makes it possible to consider superior orders or Government sanction in determining culpability, either by way of defence or in mitigation of punishment.

Neither the British *Manual of Military Law* nor the United States Basic Field Manual are legislative instruments ; both were published only for informative purposes, and if a certain statement, contained in both, was, as is stated in the footnote to the British Amendment No. 34, " inconsistent with the view of most writers upon the subject and also with the decision of the German Supreme Court in the case of the 'Llandovery Castle,' " there was no obstacle, constitutional, legal, or otherwise, in the way of correcting the mistake in the statement of law on the one hand, and proceeding on the basis of the law as it thus had been elucidated on the other.

It may be added that the Regulations for the Trial of War Crimes issued for the Mediterranean Theatre of Operations on 23rd September, 1945, under which the trial was conducted, contain the provision (Regulation 9)(8) that " the fact that an accused acted pursuant to order of his Government

(7) See Note on the " Peleus " case, No. 1 of this series, *supra*, p. 18 of this volume.

(8) See Annex II, page 120.

or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the commission determines that justice so requires." This provision was, however, not referred to during the trial.

(iii) *The application of the Führerbefehl to the facts of the Dostler Case*

It was submitted by the Prosecution that—apart from the general reason that an illegal order is no excuse—Dostler could not rely on the defence of superior order because his act was not covered even by the Führerbefehl.

Paragraph 3 of the Führerbefehl is to the effect that all enemy troops encountered by German troops during so-called commando operations were to be exterminated to the last man, either in combat or in pursuit. If such men appeared to be about to surrender, no quarter should be given on general principle.

As the Prosecution pointed out, the 15 American service men had not been killed either in combat or in pursuit; they had been shot at least 45 hours after capture.

This was contrary even to the Führerbefehl, which provides in paragraph 4 that if members of such commando units were to fall into the hands of the Wehrmacht through different channels (for example, through the police in occupied territories), they were to be handed over to the Sicherheitsdienst without delay. It was formally forbidden to keep them, even temporarily, under military supervision.

From this it follows that even if the Führerbefehl had been binding upon Dostler, he ought to have acted according to paragraph 4 and handed over the prisoners to the Sicherheitsdienst, and that he was not even under the terms of the Führerbefehl entitled to have them shot. It was asserted by one of the witnesses that, on the day of the execution, an S.S. officer and an S.S. truck came down from Genoa to La Spezia to take the 15 Americans over; but the Lieutenant in charge of the execution squad did not hand them over and told them that he had received a written order from General Dostler that the 15 Americans should be shot immediately.

It may be added that Dostler would have committed a war crime even if he had acted according to paragraph 4 of the Führerbefehl and had handed over the prisoners of war to the S.D.

APPENDIX

THE TEXT OF THE FÜHRERBEFEHL AS PRODUCED IN THE TRIAL(*)

The Führerbefehl of 18th October, 1942

1. Recently our adversaries have employed methods of warfare contrary to the provisions of the Geneva Convention. The attitude of the so-called commandos, who are recruited in part among common criminals released from prison, is particularly brutal and underhanded. From captured documents it has been learned that they have orders not only to bind prisoners but to kill them without hesitation should they become an encumbrance or

(*) See *supra* p. 26. The text of another order by Hitler relating to the treatment of captured saboteurs was produced in evidence at subsequent war crime trials, and will be dealt with in a later volume of this series of Law Reports.

constitute an obstacle to the completion of their mission. Finally, we have captured orders which advocate putting prisoners to death as a matter of principle.

2. For this reason, an addition to the communiqué of the Wehrmacht of 7th October, 1942, is announced; that, in the future, Germany will resort to the same methods in regard to these groups of British saboteurs and their accomplices—that is to say that German troops will exterminate them without mercy wherever they find them.

3. Therefore, I command that: Henceforth all enemy troops encountered by German troops during so-called commando operations, in Europe or in Africa, though they appear to be soldiers in uniform or demolition groups, armed or unarmed, are to be exterminated to the last man, either in combat or in pursuit. It matters not in the least whether they have been landed by ships or planes or dropped by parachute. If such men appear to be about to surrender, no quarter should be given them on general principle. A detailed report on this point is to be addressed in each case to the OKW for inclusion in the Wehrmacht communiqué.

4. If members of such commando units, acting as agents, saboteurs, etc., fall into the hands of the Wehrmacht through different channels (for example, through the police in occupied territories), they are to be handed over to the Sicherheitsdienst without delay. It is formally forbidden to keep them, even temporarily, under military supervision (for example, in P/W camps, etc.).

5. These provisions do not apply to enemy soldiers who surrender or are captured in actual combat within the limits of normal combat activities (offensives, large-scale air or seaborne landings). Nor do they apply to enemy troops captured during naval engagements, nor to aviators who have baled out to save lives, during aerial combat.

6. I will summon before the tribunal of war all leaders and officers who fail to carry out these instructions—either by failure to inform their men or by their disobedience of this order in action.