CASE NO. 67

TRIAL OF JOHANNES OENNING AND EMIL NIX

BRITISH MILITARY COURT, BORKEN, GERMANY
21ST AND 22ND DECEMBER, 1945

A. OUTLINE OF THE PROCEEDINGS

Oenning, an ex-Hitler Youth of 15 years, and Nix, an ex-policeman, were accused of having committed a war crime in that they " at Velen, Germany, on the night of 25/26 March, 1945, in violation of the laws and usages of war, were concerned in the killing " of a named Royal Air Force Officer, a prisoner of war. Both pleaded not guilty.

It was alleged that Nix told Oenning and a military policeman to take the prisoner away and to do what they liked with him. The latter was then shot, and if Oenning was not proved to have fired the fatal shot he was a party to the crime and present at its commission, and did fire a shot. The body was then secretly buried, Oenning digging the grave.

Nix was found not guilty. Oenning was found guilty and sentenced to eight years' of imprisonment, after his Counsel had pleaded, in mitigation, that the youth had grown up under Nazi régime and was a victim of its influence. These findings were confirmed by superior military authority.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE CHARGE

The Prosecutor made reference to the 1929 Geneva Prisoners of War Convention in support of his case. Defence Counsel quoted paragraph 108a of Chapter XIV (*The Laws and Usages of War on Land*) of the British *Manual of Military Law*, which reads as follows :—

> " 108a. Prisoners of war may be fired upon if they offer violence to their guard or to any of the captor's forces or officials, or if they attempt to give active assistance to their own forces, or if they attempt to escape ; but a previous summons to desist and to surrender should be given if possible."

The previous summons to desist, said Counsel was not obligatory. He claimed that there was evidence to show that the prisoner had in fact attempted to escape.

For the argument that it would be lawful under International Law to shoot a prisoner of war if the person shooting " did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape," attention is drawn to a quotation from the summing up of the Judge Advocate in the *Drierwalde Case*, in Volume I of this series, p. 86. In the notes to that Case (p. 87) it was said that it was accepted

State practice to regard it as lawful to shoot at escaping prisoners ; paragraph 108a is one example of this acceptance.(1)

2. EXTENT OF COMPLICITY IN WAR CRIMES

The Prosecution claimed that the accused Oenning was responsible as a principal for the crime of shooting a prisoner of war ; and that the accused Nix was responsible at the very least as an accessory both before and after the fact.

Defence Counsel argued that, before Nix could be convicted as an accessory before the fact, it must be proved either that he assisted in the commission of the crime or was near enough to the scene of the offence to assist if necessary ; or that there was a common intent between the accused and the third party to commit the offence ; or that Nix instigated the killing. In Archbold's *Criminal Law*, at p. 1441, an accessory after the fact was defined as one who " knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon," for instance by removing the evidence of guilt.

These arguments constitute further examples of the introduction of Municipal Law concepts into war crime proceedings, one process whereby the body of International Law is augmented. This common practice has received comment in the notes to the *Jaluit Atoll Case*, in Volume I of this series, pp. 79–80.(2) Other references to alleged varying degrees of complicity in war crimes are to be found in the same volume at pp. 90, 92, 103 and 114 and frequently in subsequent volumes. Again in the *Jaluit Atoll Case*, the Prosecution claimed that the custodian of prisoners of war who handed them over to the executioners, knowing that they were to be executed, was an accessory before the fact. The Prosecution's argument was that he aided and abetted in the commission of the offence. The custodian was sentenced to ten years' imprisonment.

(1) See also Volume VII, p. 61.

(2) And on p. 72 of the present volume.