CASE NO. 22

THE ABBAYE ARDENNE CASE

TRIAL OF S.S. BRIGADEFÜHRER KURT MEYER

CANADIAN MILITARY COURT, AURICH, GERMANY
10TH–28TH DECEMBER, 1945

Incitement by Regimental Commander to his men to deny quarter to opposing troops. Extent of his responsibility for shooting of prisoners of war by men under his command.

Kurt Meyer was accused of having, as Commander of the 25th S.S. Panzer Grenadier Regiment of the 12th S.S. Panzer Division, incited and counselled his men to deny quarter to allied troops; ordered (or alternatively been responsible for) the shooting of prisoners of war at his headquarters; and been responsible for other such shootings both at his headquarters and during the fighting nearby. He pleaded not guilty. In connection with the last set of charges and with the alternative charge, the Prosecution referred to the presumptions contained in Regulations 10 (3), (4) and (5) of the War Crimes Regulations (Canada). The accused was found guilty of the incitement and counselling, and was held responsible for the shootings at his headquarters, though not guilty of ordering them, and was found not to be responsible for the shootings outside his headquarters. A charge contained in a second Charge Sheet was abandoned. The sentence of death passed against him was commuted by the Convening Authority to one of life imprisonment.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was convened by the General Officer Commanding the Canadian Occupation Force, 3rd Canadian Infantry Division, Major-General C. Vokes, C.B., C.B.E., D.S.O., pursuant to the War Crimes Regulations (Canada).

It consisted of Major-General H. W. Foster, C.B.E., D.S.O., G.O.C. 4 Cdn. Armd. Div., as President, and, as members, Brig. I. S. Johnston, D.S.O., E.D., T./G.O.C., 5 Cdn. Armd. Div.; Brig. H. A. Sparling, D.S.O., C.R.A., 3 Cdn. Inf. Div. C.A.O.F.; Brig. H. P. Bell-Irving, D.S.O., O.B.E.,

Comd. 10 Cdn. Inf. Bde., and Brig. J. A. Roberts, D.S.O., Comd. 8 Cdn. Inf. Bde. Lt.-Col. W. B. Bredin, D.J.A.G. 3 Increment " B " (C.A.O.F.), Canadian J.A.G. Overseas, was Judge Advocate. The Prosecutor was Lt.-Col. B. J. S. Macdonald, O.B.E., E.D., O.C. 1 Cdn. War Crimes Investigation Unit, and the Defending Officer was Lt.-Col. M. W. Andrew, D.S.O., O.C. The Perth Regt.

2. THE CHARGE

The Convening Officer directed that the accused be tried on two Charge Sheets. Pursuant to sub-section (1) of Section 4 of the War Crimes Regulations (Canada), Brigadier R. J. Orde, Judge Advocate-General, certified the case as approved for trial on the charges set out therein. At the conclusion of the trial on the first Charge Sheet, however, the approval of the Convening Officer was asked, and given, not to proceed with the second.

The accused pleaded not guilty to all the charges.

The following are the texts of the two Charge Sheets :

FIRST CHARGE SHEET

The Accused, BRIGADEFUHRER KURT MEYER, *an Officer in the former Waffen S.S., then a part of the Armed Forces of the German Reich, now in the charge of* 4 *Battalion, Royal Winnipeg Rifles, Canadian Army Occupation Force, Canadian Army Overseas, is Charged With :*

FIRST CHARGE COMMITTING A WAR CRIME

in that he

in the Kingdom of Belgium and Republic of France during the year 1943 and prior to the 7th day of June, 1944, when Commander of 25 S.S. Panzer Grenadier Regiment, in violation of the laws and usages of war, incited and counselled troops under his command deny quarter to Allied troops.

SECOND CHARGE : COMMITTING A WAR CRIME

in that he

in the Province of Normandy and Republic of France on or about the 7th day of June, 1944, as Commander of 25 S.S. Panzer Grenadier Regiment, was responsible for the killing of prisoners of war, in violation of the laws and usages of war, when troops under his command killed twenty-three Canadian prisoners of war at or near the Villages of BURON and AUTHIE.

THIRD CHARGE : COMMITTING A WAR CRIME

in that he

at his Headquarters at L'Ancienne Abbaye, Ardenne in the Province of Normandy and Republic of France on or about the 8th day of June, 1944, when Commander of 25 S.S. Panzer Grenadier Regiment, in violation of the laws and usages of war gave orders to troops under his command to kill seven Canadian prisoners of war, and as a result of such orders the said prisoners of war were thereupon shot and killed.

FOURTH CHARGE : COMMITTING A WAR CRIME
(Alternative to Third Charge)

in that he

in the Province of Normandy and Republic of France on or about the 8th day of June, 1944, as Commander of 25 S.S. Panzer Grenadier Regiment, was responsible for the killing of prisoners of war in violation of the laws and usages of war, when troops under his command shot and killed seven Canadian prisoners of war at his Headquarters at L'Ancienne Abbaye Ardenne.

FIFTH CHARGE : COMMITTING A WAR CRIME

in that he

in the Province of Normandy and Republic of France on or about the 7th day of June, 1944, as Commander of 25 S.S. Panzer Grenadier Regiment, was responsible for the killing of prisoners of war in violation of the laws and usages of war, when troops under his command killed eleven Canadian prisoners of war (other than those referred to in the Third and Fourth Charges) at his Headquarters at L'Ancienne Abbaye Ardenne.

SECOND CHARGE SHEET

The Accused, BRIGADEFUHRER KURT MEYER, *an Officer in the former Waffen S.S., then a part of the Armed Forces of the German Reich, now in the charge of 4 Battalion, Royal Winnipeg Rifles, Canadian Army Occupation Force, Canadian Army Overseas, is Charged With :*

CHARGE: COMMITTING A WAR CRIME

in that he

in the Province of Normandy and Republic of France on or about the 17th day of June, 1944, as Commander of 12 S.S. Panzer Division (Hitler-Jugend), was responsible for the killing of prisoners of war in violation of the laws and usages of war, when troops under his command killed seven Canadian prisoners of war at or near the Village of MOUEN.

3. THE OPENING OF THE CASE FOR THE PROSECUTION

The Prosecutor rested his case upon Articles 23 (*c*) and (*d*) of the Hague Convention of 1907 concerning the Laws and Customs of War on Land, Articles 2 and 5 of the Geneva Convention of 1929 relative to the Treatment of Prisoners of War, and Articles 1 and 2 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. He referred also to Amendment No. 12 (1929) of the *Manual of Military Law*. The last, he said, contained a number of relevant provisions, many of which were simply restatements of the Hague and Geneva Conventions; Paragraph 51, however, in dealing with the prohibition of the killing or wounding of an enemy who has laid down his arms and has no longer means of defence, stated that, "This prohibition is clear and distinct; there is no question of the moment up to which acts of violence may be continued without disentitling the enemy to be ultimately admitted to the benefit of quarter. War is for the purpose of overcoming armed resistance and no vengeance can be taken because an individual has done his duty to the last but escaped injury."

The Prosecution contended that Meyer was responsible, either directly or due to "wilful or criminal negligence and failure of the accused to perform his duties as commander of the troops concerned," for the offences alleged in the first Charge Sheet.

Dealing with the first charge, the Prosecutor stated his opinion that there was sufficient evidence to show that Meyer had ordered his troops to deny quarter, but, he observed, "We have, however, to avoid any argument on that point, confined our charge to one simply of inciting and counselling, which of course, in any event, is a war crime."

Turning to the second charge, he pointed out that it was believed that at least one officer had participated in the mass shootings alleged to have taken place at Buron and Authie, and stated: "Apart from regulation (4), which makes this participation *prima facie* evidence of Meyer's responsibility,[1] he himself has admitted that he took an active part in leading this battle, and was well forward, as was his usual practice, in an effort to 'draw on' his young troops in this, their first engagement. It will be

[1] By "regulation (4)," Counsel intended to signify number 10 (4) of the War Crimes Regulations (Canada). Regarding this provision, see pp. 110-12 and 128.

submitted that because of this the court can reasonably infer that the accused must share directly in the responsibility for what occurred. . . . The ferocity of this treatment of prisoners, its widespread character, and the large number of separate crimes, conveys a definite impression that there must have been preliminary incitement and approval given, or orders issued, and is therefore of assistance to the court in determining the responsibility of the accused on this particular charge."

The Prosecutor indicated that whether the Court accepted the third or the fourth charge, which were alternatives, might turn in part on the weight which they placed on the evidence of a Polish youth named Jesionek. On these, and on the fifth charge, he summarised the evidence which he proposed to call.

4. THE EVIDENCE FOR THE PROSECUTION

Twenty-nine witnesses were called by the Prosecution. Further evidence included various pre-trial statements and affidavits and a considerable number of extracts from the proceedings of a SHAEF Court of Enquiry which had made a preliminary investigation of the case.

The evidence against the accused may be divided into four parts, comprising respectively that intended to prove, first the inciting and counselling alleged in the first Charge, secondly the shooting of prisoners of war by troops under his command in or near Buron and Authie alleged in Charge 2 and a connection between Meyer and these offences sufficient to make him responsible for them, thirdly the shootings at the headquarters alleged in Charges 3–5, and fourthly the giving of the orders by the accused alleged in third Charge.

In connection with the first charge, evidence was provided by four ex-members of the 25th S.S. Panzer Grenadier Regiment which had been under Meyer's command.(1)

The first, in a statement made previously before the SHAEF Court of Enquiry, which was read to the court, said that in April 1944, a Company Sergeant Major had read to him and the rest of the H.Q. Company, while on parade, certain secret orders, which the Company had had to sign, to signify that they understood them, and which included instructions that if prisoners were taken they were to be shot after interrogation.

The second witness acknowledged a pre-trial statement made to a war crimes investigation unit, in which he said that he had heard Meyer utter words to the effect that his regiment took no prisoners. On being questioned by the President of the Court, the witness said that in February or March 1944, orders that no prisoners should be taken had been read to his company by the same Company Sergeant Major as has previously been mentioned.

(1) Acting under No. 10 (8) of the War Crimes Regulations (Canada), the President of the Court ruled that the names of the German witnesses should not be released to the press, in order to protect them against possible retaliation. In deference to this decision, the names of German witnesses are not given in these pages..

The third witness said that on 6th June, 1944, his platoon had heard a speech from a Company Commander to the effect that no prisoners should be taken and that he had been present when Meyer in a speech made late in 1943, at Beverloo, had said, " my regiment takes no prisoners." On being asked by defending counsel, however, whether Meyer had not actually said " I do not want any of my troops to be made prisoners," the witness replied that he was no longer able to give an answer to that question. He could not remember ever being told by any officer or N.C.O. to shoot prisoners. He remembered an order offering leave to soldiers who did take prisoners, and he thought that no punishment was meted out to those who took them. The speech at Beverloo was forgotten by himself and his comrades when they went into action.

The fourth of the witnesses referred to, Jan Jesionek, a Polish youth who had been conscripted into the 12th S.S. Panzer Division, told how the accused had made a speech at Le Sap, in which he had said that the German soldiers should take reprisals on prisoners of war. (Under cross-examination, however, the witness confessed that the accused used the word " Englishman " not " prisoners," but he claimed that the speech was so worded that it was understood that no prisoners were to be taken, but should be shot.) The witness said that von Buettner, the accused's Adjutant, whom the accused had described as his best officer, had at about Whitsun, 1944, issued a company instruction in which he said, " our company takes no prisoners."

Much of the evidence for the Prosecution fell within the second category and was intended to show that the shooting of prisoners of war alleged in Charge 2 had taken place, and in circumstances which would make Meyer legally responsible for these offences. For the most part, testimony was given by members and ex-members of the Canadian Army, who had themselves been taken prisoners during the action around Authie and the Abbaye Ardenne in the first days of the Allied invasion ; but corroborating evidence was provided by French civilians.

An extract from the evidence given at the SHAEF Court of Enquiry by Major Learmont, whose company had been in the vanguard of the fighting, indicated that he and a group of other prisoners had been lined against a wall at Buron, and covered by machine guns. It seemed clear that they were to be shot. A German soldier, whom the Major took to be an N.C.O., appeared and from his actions seemed to prevent the shootings from taking place. Similar stories of such interventions by individual Germans were told by two other witnesses. Major Learmont, however, also saw a fellow prisoner shot because he had been wounded and could not march. The witness was able to state that the particular group of prisoners of which he formed a part were, from the time of their arrival at the Abbaye Ardenne, escorted by Feldgendarmerie of the 12th S.S. Division.

The evidence which Lt.-Col. Petch, who had commanded the North Nova Scotia Highlanders in the fighting, had given the SHAEF Court of Enquiry, in which he described the military situation around Authie on 7th June, included a statement that the enemy personnel in the area had included elements of two infantry regiments belonging to the static defences

of the area. Furthermore, a prisoner of the 21st S.S. Panzer Division had been captured near Buron on that day.

As part of the evidence of the shootings at Meyer's headquarters, alleged in Charges 3–5, the testimony of a French national named M. Vico, of various members of Canadian and British Concentration Units and of a Canadian Army Pathologist showed that eighteen bodies of Canadian soldiers had been disinterred from concealed graves in the garden of the Abbaye and had been identified by the discs which they wore. All bore fatal head wounds ; eight had evidently been shot while the others appeared to have been killed with a blunt instrument.

Evidence was brought to show that these prisoners were missing from their unit on 7th June, and that several of them had been interrogated at the Abbaye headquarters on that day. It was shown that at the relevant times, the accused had been at the Abbaye, and that it had been his Regimental Headquarters.

Cpl. Macleod of the Canadian Army (along with three other witnesses) stated that, when the pay books which had been taken away from certain of the prisoners at the Abbaye were later returned, they were not all distributed, because some of the prisoners were no longer present to claim them.

The evidence falling within the fourth category was given by Jan Jesionek, who said that, at the Abbaye on 8th June, 1944, he had seen a guard announce to the accused that seven Canadian prisoners had been taken. Whereupon Meyer had said, " what should we do with these prisoners ; they only eat our rations." (The witness later confessed under cross-examination that he could not remember the accused's exact words, but their meaning was, " what can we do with these men ; their only purpose is to eat our rations.") The accused had then said, for all those present to hear, " In future no more prisoners are to be taken." After that the prisoners had been conducted into a park attached to the Abbaye and as each one went into the park the witness heard a shot. He could only assume that Meyer had given orders that they should be shot. Jesionek had then entered the park and had seen seven Canadian dead bodies. He and several other German soldiers had stood in a big semi-circle around the bodies, because the spot where the bodies lay was full of blood.

5. THE EVIDENCE FOR THE DEFENCE

The accused, giving evidence on oath, denied ever saying that his unit took or would take no prisoners, and emphasised that during the entire Normandy Campaign he gave no orders to shoot prisoners. Describing the speech which he had delivered to the 15th Company at Le Sap, he said that Jesionek's statement that he had instructed the soldiers to take reprisals against prisoners of war was untrue. He also denied knowing, on 7th June, that any Canadian prisoners were shot at the Abbaye, and claimed that on the morning of the 10th June, two officers had reported that a number of dead Canadians had been found lying in a garden inside the headquarters. They had the impression that the Canadians had been shot. He went to the garden and when he found that their report was true he had been incensed.

He gave instructions to his Adjutant to find out who had done the deed, and ordered that the Canadians should be buried.

In surveying the operations of 7th June, he mentioned that, in a village near the Abbaye Ardenne called Cussy, he had found the Commander of the Grenadier Regiment of the 21st Panzer Division, who had his headquarters there. The accused also stated that there had been Feldgendarmerie at his headquarters at the Abbaye Ardenne.

The second witness for the Defence, an officer of the 12th S.S. Panzer Division, said that during training and during the first days of the invasion an instruction had been circulated that all prisoners should be sent " back to Division " as quickly as possible, except those taken by Reconnaissance missions, who had permission to question them. He had heard no reports that the accused had said that his unit took no prisoners. The witness stated that during July 1944, the accused had ordered that 150 prisoners should be sheltered in the buildings of his own headquarters because of the bad weather. He had never heard of prisoners being shot at the Abbaye at any time.

When asked whether there were other troops north-west of Caen on the 7th of June, besides the 12th Panzer Division, he replied that Caen itself was in the billeting area of the 21st Panzer Division, that a battle group of the latter Division had been put into action north-west of Caen on the 6th, and that other units in the area had comprised Coastal Defence personnel, Air Force Units and a heavy anti-tank battalion.

In connection with the disposition of troops in the Caen area, the third witness for the Defence, the Regimental Commander of the 21st S.S. Panzer Regiment, said that the headquarters of that Division and of the 716th Coastal Division were situated in a quarry north-west of Caen on the 8th June. In the same area on the same day he could remember parts of the 202 Anti-tank Battalion of the 21st Panzer Division and some Air Force personnel.

A further Defence witness, an Adjutant of the 12th S.S. Panzer Division, said that he had received orders three or four days after the beginning of the invasion that prisoners of war should be evacuated " back to Division " as soon as possible.

As witnesses for the character of the accused, the Defence produced his wife, his Senior Commanding General, an ex-officer of Meyer's battalion and a Canadian Captain who had gained a favourable impression of Meyer when a prisoner in his hands.

6. THE EVIDENCE FOR THE REBUTTAL

The Prosecution called several witnesses for the rebuttal. One of these, a youth named Daniel Lachevre, said that in the evening of the 8th June, 1944, he had gone into the garden of the Abbaye with about four friends in order to play games. While he was there he noticed that the Germans had built a shelter, the position of which he indicated. He returned on the 9th and 10th in the evening and apart from the shelter he saw nothing unusual; in particular, he saw no dead bodies. Under cross-examination the witness said that he was very familiar with the garden and that he would have noticed if anyone had been digging there.

7. THE CASE FOR THE DEFENCE

Counsel for the Defence chose not to make any opening address before calling witnesses, but delivered a closing address.

He began by asking the Court to place little weight on the evidence of the first Prosecution witness, who had not been present for cross-examination by the Defence and questioning by the Court. He submitted that the witness's story, according to which an N.C.O. had read secret orders in the street of a town, no doubt with civilians present, in the absence of any officer on parade, was contrary to common sense and from a military point of view ridiculous. He also doubted whether a witness could possibly have memorised accurately a document which he had once heard read.

Counsel pointed out that Jesionek had said that it had only been understood from Meyer's speech (the exact words of which he could not remember) that reference was actually being made to prisoners. Meyer on the other hand, while his account of his speech was the same as that of Jesionek in so far as it had stressed the need for self-reliance, denied that retaliation against prisoners had been intended. Three Prosecution witnesses, as well as Meyer, had said that there were standing orders that prisoners should be taken ; and exercises on the interrogation of such prisoners had been mentioned.

Counsel's submission was that Meyer never gave any order that prisoners should not be taken and that if any such statement had been made no weight was placed on it by the men in his command. The first charge therefore remained unproved.

Regarding the second charge, Counsel made three submissions for the consideration of the Court. The first was that there were not only 25th Panzer Regiment troops around Buron and Authie on 7th June, 1944, but troops of the 21st Panzer Division, too. Secondly, the Defence claimed that if Canadian prisoners were killed in the area of Authie and Buron on 7th June, 1944, there was no evidence as to the formation to which those responsible belonged. To rebut the presumption that there was a general plan, sponsored by Meyer, to shoot prisoners was the evidence of Major Learment and Sgt. Dudka, who both told of an N.C.O. or officer who had stopped any intended shooting by the guards of Canadians. Other witnesses had described how they had been accorded the normal treatment of prisoners of war. In the third place, there was evidence that Meyer had given shelter of 150 prisoners in his own headquarters. Furthermore, 200 Canadians had been captured on 7th June, 1944. They had survived, although they could not all be needed for interrogation. There could therefore be no general plan for shooting prisoners.

Counsel concluded his treatment of the second charge by submitting that once a Brigade Commander had sent his men to the attack he had no control over their individual actions.

Turning to the third and fourth charges, Counsel spent some time in attempting to discredit Jesionek's evidence by contrasting his statements in court on a number of details not connected or only indirectly connected with the alleged offences with his words spoken during his interrogations

by a war crimes investigating team, and with the evidence of other witnesses on the same subjects. With more particular reference to the alleged shootings, Counsel claimed that Jesionek's story conflicted with the evidence of Lachevre. Counsel asked how the garden at the Abbaye could be completely undisturbed and unmarked if graves had recently been dug and if there had been a large pool of blood where the bodies had been ? Finally, as there was no evidence as to who shot the seven Canadians, even as to their regiment, Counsel submitted that the Court could not rightly find anyone guilty of the act.

With regard to the fifth charge, Counsel pointed out that there was considerable evidence that the German military police had had charge of the prisoners in question, and submitted that any suspicion should be directed in their direction. He expressed the opinion that, had any person in authority ordered the shootings, it was unlikely in the first place that the pay books of the victims would have been openly produced later, instead of being destroyed, and in the second place that marks of identification would have been left on the bodies.

8. THE PROSECUTOR'S CLOSING ADDRESS

Dealing in the course of his closing remarks with the first charge, Counsel for the Prosecution asked whether it was likely that a Company Sergeant Major would have undertaken to read orders of the kind alleged, unless he had a superior order to do so. He maintained further that this officer had adopted the only possible means of conveying secret orders to his troops, when he gathered them together in tight formation and conveyed to them orally the contents of the written instructions which he held in his hand. Counsel pointed out the wealth of evidence which must be weighed against the word of the accused that he had given no orders that prisoners were to be shot. As proof of the accuracy of Jesionek's words, Counsel asked the Court to compare the bulk of his account of Meyer's speech at Le Sap with that of the accused himself.

If the Court still had any doubt as to the first charge, Counsel asked them to consider the evidence as to the actual shootings and to ask themselves whether these could have happened without incitement or counsel. Furthermore, there was practically no evidence that they had resulted in the punishment of the offenders.

Whether the accused were found guilty on either the third or the fourth charge would depend almost exclusively on the weight placed by the Court on his evidence and on that of Jesionek. The latter was a Pole who had deserted from the German Army ; his father had been imprisoned by the S.S. for a period. Nevertheless, there was no reason why he should act out of spite against Meyer personally. His evidence had not been shaken in any material respect by cross-examination. Taking it as firmly established that the shooting did occur, the only explanation would be that someone at the headquarters, with Meyer's knowledge or approval, carried it out, within a hundred metres of his command post, in broad daylight, and at a time when he could have been and probably was there. This presupposed either that the persons committing the deed felt secure in the

knowledge that the Regimental Commander had ordered the shooting or had approved it, or that the perpetrators had no fear of disciplinary consequences if they should be found out. The Court had heard of the accused's reputation as a strict disciplinarian.

By contrast with Jesionek's account, which he characterised as honest and convincing, Counsel drew attention to the fact that Meyer, in previous examinations, had denied all knowledge of the shootings, even after being informed of the evidence obtained from Jesionek. On being told that he was to be tried he had subsequently made a statement, which Counsel regarded as untrue, admitting that he knew of the shooting of eighteen prisoners, and saying that it was reported to him on 10th or 11th June. Despite the recent nature of the shootings, he had told the Court that he had not been able to find the perpetrators. Was it probable, asked Counsel, that the bodies were left for several days with civilians in the vicinity? Would they have been buried in five separate graves had they all been shot at the same time? Furthermore, Mm. Vico and Lachevre had shown that no bodies were there on the evenings of the 8th, 9th, or 10th June, or on the 11th. Again, the shelter which had been constructed by the Germans was in such a position as to make it improbable that the accused had entered the garden by the way he had described, or seen the bodies from the position which he had indicated while in the witness box.

While he would not claim that there definitely were no other troops in the neighbourhood, Counsel maintained that there was no positive evidence that the prisoners were killed by troops other than the Meyer's Regiment. Though most of the troops involved in the killings were wearing camouflage uniform, he claimed that they were all under Meyer's command. He pointed out that the offer of leave to soldiers who took prisoners only came later, when the flow of prisoners had diminished.

Even if the shootings alleged in the fifth charge were committed by the Military Police serving at Meyer's headquarters, the former, were clearly under the latter's disciplinary control.

Regarding the question of the handing back of the prisoners' pay books, Counsel for the Prosecution thought that the Defence was expecting a little too much efficiency in suggesting that any person in authority would have destroyed those of the shot prisoners.

9. SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate pointed out that the killing of prisoners was a war crime, not only under international custom and usage, but also under the Hague Convention No. IV of 1907 and the Geneva Prisoners of War Convention of 1929.

If an officer, though not a participant inor present at the commission of a war crime incited, counselled, instigated or procured the commission of a war crime, and *a fortiori,* if he ordered its commission, he might be punished as a war criminal. The first and third charges fell within this category of offences. In the second, fourth and fifth charges, however, Meyer was alleged to have been " responsible for " the crimes set out therein. In this connection,

the Judge Advocate pointed out that Regulations 10 (3) (4) and (5) of the War Crimes Regulations (Canada) stated that when certain evidence was adduced, that evidence might be received by the Court as *prima facie* evidence of responsibility. By virtue of these Regulations, it was unnecessary, as far as the second, fourth and fifth charges were concerned, for the Prosecution to establish by evidence that the accused ordered the commission of a war crime, or verbally or tacitly acquiesced in its commission, or knowingly failed to prevent its commission. The facts proved by the Prosecution must, however, be such as to establish the responsibility of the accused for the crime in question or to justify the Court in inferring such responsibility. The secondary onus, the burden of adducing evidence to show that he was not in fact responsible for any particular war crime then shifted to the accused. All the facts and circumstances must then be considered to determine whether the accused was in fact responsible for the killing of prisoners referred to in the various charges. The rank of the accused, the duties and responsibilities of the accused by virtue of the command he held, the training of the men under his command, their age and experience, anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavour to prevent, the killing of prisoners, were matters affecting the question of the accused's responsibility.

Dealing with the third charge, the Judge Advocate said: " There is no evidence that anyone heard any particular words uttered by the accused which would constitute an order, but it is not essential that such evidence be adduced. The giving of the order may be proved circumstantially; that is to say, you may consider the facts you find to be proved bearing upon the question whether the alleged order was given, and if you find that the only reasonable inference is that an order that the prisoners be killed was given by the accused at the time and place alleged, and that the prisoners were killed as a result of that order, you may properly find the accused guilty of the third charge." He drew attention, however, to paragraph 42 of Chapter VI of the *Manual of Military Law* regarding circumstantial evidence, which states: ". . . before the Court finds an accused person guilty on circumstantial evidence, it must be satisfied not only that the circumstances are consistent with the accused having committed the act" (that is, said the Judge Advocate, that he gave the order) " but that they are inconsistent with any other rational conclusion than that the accused was the guilty person."

In connection with the fourth charge, he pointed out that Regulation 10 (5) provided that if the accused or an officer or N.C.O. of his regiment was present when members of his regiment shot the seven prisoners then the Court might accept that fact as *prima facie* evidence of the accused's responsibility for that crime.

10. THE VERDICT

Meyer was found guilty of the first, fourth and fifth charges, and not guilty of the second and third.

11. THE SENTENCE

Meyer was sentenced to death by shooting.

The Convening Authority, however, commuted the death sentence to one of life imprisonment, on the grounds that Meyer's degree of responsibility did not warrant the extreme penalty.

B. NOTES ON THE CASE

1. THE JURISDICTION OF THE COURT

The jurisdiction of the Court was based on the War Crimes Regulations (Canada), P.C. 5831.[1]

2. QUESTIONS OF SUBSTANTIVE LAW

(i) *The Offence Alleged*

It is a well-established rule of customary International Law that unarmed prisoners of war are not to be shot or deliberately harmed, and this provision has received recognition in various international conventions, which were referred to by the Prosecutor in his opening address. It may be useful to examine the provisions which he mentioned.

Articles 23 (*c*) and (*d*) of the Hague Convention of 1907 concerning the Laws and Customs of War on Land run as follows :

> " Article 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 ;
>
> (*d*) To declare that no quarter will be given."

Article 2 of the Geneva Prisoners of War Convention of 1929 provides that :

> " 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."

Article 5 forbids the ill-treatment of prisoners of war who refuse to give information regarding the situation of their armed forces or their country.

Articles 1 and 2 of the Geneva Convention of 1929 for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field lay down that :

> " Article 1. Officers and soldiers and other persons officially attached to the armed forces who are wounded or sick shall be respected and protected in all circumstances ; they shall be treated with humanity and cared for medically without distinction of nationality, by the belligerent in whose power they may be."

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[1] See p. 125.

Nevertheless, the belligerent who is compelled to abandon wounded or sick to the enemy, shall, as far as military exigencies permit, leave with them a portion of his medical personnel and material to help with their treatment.

Article 2. Except as regards the treatment to be provided for them in virtue of the preceding article, the wounded and sick of an army who fall into the hands of the enemy shall be prisoners of war, and the general provisions of International Law concerning prisoners of war shall be applicable to them.

Belligerents shall, however, be free to prescribe, for the benefit of wounded or sick prisoners, such arrangements as they may think fit beyond the limits of the existing obligations."

Amendment No. 12 (1929) to the *Manual of Military Law*, to which the Prosecution referred, is a re-drafting of Chapter XIV (The Laws and Usages of War on Land) of the *Manual*, made in the light, *inter alia*, of the Geneva Conventions of 1929. It is intended as a guide for the use of the military forces. It has not therefore the authority as a statement of International Law which attaches to an international treaty.

Such publications, prepared for the benefit of the armed forces of various nations, are frequently used in argument in the same way as other interpretations of International Law, and, *in so far as their provisions are acted upon*, they mould state practice, which is itself a source of International Law.

(ii) *The Application of Paragraphs* (3), (4) *and* (5) *of No.* 10 *of the War Crimes Regulations (Canada)*[1]

The view of the Judge Advocate in the case on these provisions have already been recorded. It would not be out of place, however, to set out the remarks of Counsel on these interesting paragraphs. In his opening address, Prosecuting Counsel said that the vicarious responsibility of a high-ranking officer for atrocities committed by troops under his command, in the absence of a direct order was based, " firstly, on a known course of conduct and expressed attitude of mind on the part of the accused ; secondly, upon his failure to exercise that measure of disciplinary control over his officers and men which it is the duty of officers commanding troops to exercise ; and, thirdly, on a rule of evidence applicable in these cases, which in effect says that, upon proof of certain facts, the accused may be convicted, if he does not offer an explanation to the court sufficient to raise in their minds a reasonable doubt of his guilt."

Paragraphs (4) and (5) were important to the present case because evidence would be submitted to show that the accused was *prima facie* guilty for war crimes under both provisions, quite apart from positive evidence of guilt. The Prosecution would produce evidence to show, in Charges 1, 3 and 4, that an officer or N.C.O. or both were present at the time when these offences were committed, and that this was probably also the case with respect to Charges 2 and 5. Furthermore, the offences proved would be such as to constitute " more than one war crime " within the meaning of

(1) See pp. 128-9.

paragraph (4). Discussing further the presumptions laid down in paragraphs (3), (4) and (5), Counsel expressed the opinion that: " Technically it could be said that an Army Commander might be held responsible for the unlawful acts of a private soldier hundreds of miles away, simply because an N.C.O. happens to be present at the time the offence was committed. . . . It is only pedantic nonsense to suggest that any such meaning is intended. A reasonable line must be drawn in each case, depending on its circumstances. The effect of the provision is simply, that upon proof of the facts there set out, the burden shifts to the accused to make an explanation or answer, and the court may convict but is not obliged to do so, in the absence of such explanation or answer. The section does not say that the court must receive such evidence as *prima facie* evidence of responsibility, but merely that it may."

Counsel for the Defence did not touch upon the provisions in question.

During the trial proceedings, a discussion arose as to the extent to which evidence not directly connected with the offences alleged on the Charge Sheet could be rendered admissible by Regulation 10 (4). The Prosecution proposed to produce evidence of an atrocity committed at the Regimental Headquarters at Abbaye Ardenne on or about the 17th June, 1944. The Defence objected that the charges contained in the first Charge Sheet made no mention of events alleged to have been committed at such a date. The Prosecution replied that this piece of evidence was made admissible by Regulation 10 (4), since it constituted evidence which " could be adduced before the Court to show that his formation, while under his command, committed a series of offences in order to establish a *prima facie* case of his responsibility for the offences with which he is charged." There was no question of the accused being specifically charged with the commission of the offence referred to.

The decision of the Court was that, provided the Prosecution could establish the fact that the accused was the responsible commander at the time when this incident was alleged to have occurred, it was prepared to listen to this evidence.

The question then arose as to whether the accused had not been promoted to Divisional Commander at the time of the alleged offence and whether the evidence was not therefore rendered inadmissible. The opinion of the Defence was that if Meyer was in command of the division at the time when the offence occurred, the matter fell right outside the first Charge Sheet, wherein he was accused of crimes committed as commander of the 25th Panzer Grenadier Regiment. The second Charge Sheet had been kept separate from the first by reason of that fact. The Prosecution replied that, if the Court considered that the accused was not Regimental Commander at the time, then the Prosecution would submit that the evidence was nevertheless admissible. A witness was then produced who stated that Meyer was promoted to Commander of the 12th S.S. Panzer Division at about noon on 17th June. A second witness could only state that the promotion took place about ten days after the beginning of the invasion (which, according to the examining Counsel, could mean either 16th or 17th June). The Prosecution then stated that the evidence which they wished to produce related in fact to two incidents, one in the early morning of the

17th and the other on the late afternoon thereof. Whereupon the President of the Court ruled that the evidence was admissible.

From the fact that Meyer was found guilty on the fourth and fifth charges but not on the third, it seems clear that the Court made an express application of the presumptions contained in Regulation 10, and considered that it was justifiable thereupon to pass the death sentence on the accused. The Convening Authority, however, was of the opinion that " Meyer's degree of responsibility was not such as to warrant the extreme penalty."