CASE No. 11

Trial of Kriminalassistent KARL-HANS HERMANN KLINGE

EIDSIVATING LAGMANNSRETT AND SUPREME COURT OF NORWAY, 8TH DECEMBER, 1945, AND 27TH FEBRUARY, 1946

Torturing and Ill-treatment of Civilians as a War Crime. The Validity under Article 97 of the Norwegian Constitution of the Retroactive Application of the Provisional Decree of 4th May, 1945, on the Punishment of Foreign War Criminals.

A. OUTLINE OF THE PROCEEDINGS

1. THE HISTORY OF THE CASE

The case against Karl-Hans Hermann Klinge was in the first instance tried by the Eidsivating Lagmannsrett (one of the five Norwegian courts of appeal). On 15th October, 1945, Klinge was charged by the Director of Public Prosecutions with having committed war crimes which violated:

(i) Art. 228 of the Civil Criminal Code, with which should be read Art. 3 of the Provisional Decree of 4th May, 1945,[1] by having ill-treated at the end of February or the beginning of March, 1945, a named Norwegian citizen during interrogations at the Gestapo H.Q. in Oslo.

(ii) Art. 229 of the Civil Criminal Code, with which should be read Art. 232 thereof and the Provisional Decree of 4th May, 1945, by having ill-treated and tortured 17 Norwegian citizens whom he interrogated at the Gestapo H.Q. in Oslo during the period from November, 1944, to the end of April, 1945.

It was proved that the victim named in the first charge was forced to bend his knees for a very long time, was then beaten with a truncheon across his back and his seat, and was finally stripped and, with his hands and feet bound, was thrown into a bath filled with ice-cold water, where he was repeatedly ducked under. As a result of this ill-treatment he collapsed and died on the same day.

The evidence also showed that the 17 victims referred to in the second charge were tortured by being beaten with a special heavy truncheon, and being hit in the face, and were given cold baths. During the interrogation " Wadenklemmen " and handcuffs were used.

The Lagmannsrett was satisfied with the evidence as to the defendant's guilt, and, on the 8th December, 1945, sentenced Klinge to death for having committed crimes against Arts. 228 and 229 of the Civil Criminal Code, and Art. 3 (*a*), (*b*) and (*c*) and Art. 1 of the Provisional Decree of 4th May, 1945. The case then went on appeal to the Supreme Court of Norway.

[1] Regarding the Norwegian Law concerning trials of war criminals, *see* Annex I on pp. 81-92.

2. COMPOSITION OF THE SUPREME COURT

As the case against Karl-Hans Hermann Klinge was regarded as a leading case, all the 13 judges of the Supreme Court took part in the hearing, as laid down by Art. 2 of Law No. 2 of 25th June, 1926. The judges were : Skau, Holmboe, Bonnevie, Schjelderup, Larssen, Alten, Grette, Evensen, Stang, Fougner, Berger, Bahr and Berg.

The Public Prosecutor was Statsadvokat Harald Sund. Counsel for the Defence was Høyesterettsadvokat Adam Hjorth.

3. THE CASE FOR THE DEFENCE (1)

Counsel for the Defence argued that the Lagmannsrett had unjustly applied the Provisional Decree of 4th May, 1945 ; as the crimes for which the defendant had been convicted had been committed before the passing of that Decree, the punishment should have been restricted to the limits set by Arts. 228, 229 and 62 of the Civil Criminal Code. Norwegian law did not provide for a more severe punishment than those laid down in these provisions. The Provisional Decree of 4th May, 1945, which provided for severer penalties, could not be applied, as such a course would be at variance with Art. 97 of the Constitution, which stated that : " No law may be given retroactive effect." International law recognised the death sentence, but international law could not give authority for the application of a more severe degree of punishment without having first been formally incorporated into Norwegian national law. The defending counsel pointed out that it had been commonly accepted in Norwegian legal theory and legal practice that the veto imposed by Art. 97 was absolute as far as criminal law was concerned.

It could not be said that the situation had been confused, because the King and his Government in London had had every opportunity of keeping the criminal law legislation up to date ; Counsel here made reference to the Provisional Decree of 22nd January, 1942, which had amended Chapters 19, 21 and 22 of the Civil Criminal Code.

Another point raised by the defending counsel was that the same Provisional Decree of 1942 did not introduce the death sentence for crimes against Arts. 228 and 229, and that it was only the Provisional Decree of 4th May, 1945, that made possible the infliction of a death sentence for crimes against the above-mentioned paragraphs. Thus the defendant's crimes had been judged more severely than would have been the case if the Provisional Decree of 1942 had been applied.

A subsidiary appeal was lodged against the extent of punishment ; according to the defending counsel, the sentence was too severe even if the Provisional Decree of 4th May, 1945, could be applied.

4. THE JUDGMENT OF THE COURT

The decision of the Lagmannsrett was upheld by nine of the judges of the High Court, with four judges dissenting. The judgments are summarised below.

(1) As no records are kept of the proceedings of such trials as the present, this statement of the case for the defence has been made up of passages from the judgments delivered.

(i) *Judge Skau*

Judge Skau was the first judge to give reasons in favour of upholding the sentence passed by the Lagmannsrett. He said that the crucial question for the court to decide was whether the provisions of Art. 97 of the Constitution had to be regarded as precluding the retroactive application of the Provisional Decree of 4th May, 1945. It appeared from the Decree itself and its explanatory memorandum that it was intended that the former be given retroactive effect.

Judge Skau fully realised the force of the argument of defence counsel in favour of keeping to a strict interpretation of Art. 97, and he agreed that an extraordinary situation did not in itself justify or authorise any modification of that provision ; on the contrary, it was in extraordinary situations that the provision had its most important purpose to fulfill. In his opinion, nevertheless, there was no question of a conflict with Art. 97 in the case in hand, which must be regarded as lying outside the intended scope of Art. 97. Before setting forth his reasons, however, Judge Skau made some preliminary observations.

The defendant had been convicted for a series of grave acts of torture. Torture, said Judge Skau, was not only criminal according to Norwegian law ; it was also a violation of the laws and customs of war. According to the same laws and customs of war, war crimes could be punished by the most severe penalties, including the death sentence. In other words the criminal character of the acts dealt with in the case in hand as well as the degree of punishment were already laid down in these provisions of international law relating to the laws and customs of war. Those provisions were valid for Norway as a belligerent country.

Judge Skau did not consider it necessary to deal with the question whether Norwegian courts were precluded by Art. 96 of the Constitution (" No one may be convicted except according to law. . . .") from trying war criminals in accordance, directly and solely, with the above-mentioned provisions of international law. It had to be regarded as conclusive that such a legal bar had been removed by the passing of the Provisional Decree of 4th May, 1945. That Decree had incorporated the provisions of international law regarding war crimes into Norwegian law as an integral part of the national legislation as far as it was considered necessary by the Norwegian legislature.

Even if it were granted that Norwegian courts could not have inflicted a more severe punishment than was provided for by Norwegian law had the Provisional Degree of 1945 not been passed, foreign war criminals tried in Norway would not have been sentenced for acts which were not criminal at the time when they were committed, nor would they have been given a more severe sentence than was provided for by international law in force at the time. It was beyond doubt that the acts in question were not only crimes according to Norwegian law but also war crimes, crimes against the " laws of humanity " and the " laws and customs of war." He particularly wanted to stress the international character of the trial and punishment of war criminals as distinct from the trial of the quislings of the various nations.

The late President Roosevelt and Mr. Churchill had declared, on 25th October, 1941, that the disposal of war criminals was one of the main

war aims of the Allies. A solemn statement on the punishment of war criminals had been made on 31st January, 1942, in the St. James's Declaration by the governments of those Allied countries whose territories had been occupied by the Axis Powers, and the Moscow Declaration of 1st November, 1943, voiced the same views. Judge Skau then recalled the preparatory work carried out by the United Nations War Crimes Commission for the trial of war criminals, and the conventions which had been adopted by the Allied nations setting out how the various nations should take part in the prosecution of war criminals.

In view of all these declarations, he agreed with the ruling of the Lagmannsrett that in the present case there could be no question of an unconstitutional retroactive application of the Provisional Decree of 4th May, 1945. The passing of that Decree was a link in or a result of Norway's adherence to the agreements between the Allied nations mentioned earlier. The claim of the Allied belligerent nations, including Norway, to exercise the right to punish war criminals became effective the moment their crimes were committed, this right being based on and circumscribed by the provisions of international law regarding the laws and customs of war.

The real effect of the Decree was merely to authorise the Norwegian courts to make effective the already existing demand for punishment in conformity with the conventions concluded.

Art. 97 of the Constitution was one of the means of safeguarding citizens against an unjustified infringement by the state of their constitutional rights. Judge Skau agreed with the defending counsel that these protective provisions had been made not only in the interest of the individual citizen but also and primarily in the interest of the community. The arbitrariness and uncertainty which would be caused by an unlimited right to give new laws a retroactive effect would prejudice the most vital interests of the community.

It seemed unreasonable, however, to maintain that provisions made for the protection of the community could be pleaded by foreign intruders, citizens of a state which had attacked that same community in order to subdue it, who had used the most reckless and brutal means to achieve this end. Such a situation could not possibly have been foreseen by those who drafted the Constitution. To allow such a plea by foreign war criminals would be a violation of the high principles which were the foundation of Art. 97 and the claim for justice which it supported.

Judge Skau dismissed as irrelevant the argument that, since the King and his Government in London had had every opportunity of keeping the criminal law legislation up to date, it could not be claimed that the situation had been confused.

Turning to the point raised by the defending counsel, that the Provisional Decree of 1942 did not introduce the death sentence for crimes against Arts. 228 and 229, Judge Skau said that no explanation had been submitted as to why the provisions laid down by the Provisional Decree of 1945 had not been passed into law at an earlier date. He drew the court's attention, however, to the fact that the Provisional Decree of 1945, besides introducing more severe degrees of punishment than that of 1942, had set out the very

characteristics of crimes of the kind dealt with in the case in hand, defining them as war crimes and as crimes which were punishable according to Norwegian laws if they were provided against by Norwegian penal clauses. In Judge Skau's opinion it would have been formally more correct to charge and sentence the defendant for crimes against the Provisional Decree of 1945, reference also being made to Arts. 228 and 229 of the Civil Criminal Code, instead of for crimes against Arts. 228 and 229, reference also being made to the Provisional Decree of 1945. As he had pointed out earlier, the Provisional Decree of 1945 had incorporated into Norwegian national law the provisions on war crimes and their punishment laid down by international law. It was to be assumed that the date of the passing of the Decree had depended on the negotiations which had taken place between the Allied nations regarding the disposal of war criminals. It was not merely an expression of an altered and more severe attitude towards the war crimes dealt with.

Further, he wanted to point out that most probably very few outside the circle of victims who had been directly exposed to the atrocities had a complete idea or knowledge of the character and extent of the Gestapo's criminal methods before these were finally revealed. He was sure that if the Norwegian people could have foreseen at the beginning of the war that the Gestapo would act as they had done, the general and unanimous sense of justice would already then have demanded the same severe judgment of those war crimes as did the Provisional Decree of 1945. He did not agree with what had been said in the explanatory notes to the Traitors' Decree, referred to by the defending counsel, to the effect that in the circumstances prevailing during the war, the country being occupied, and the King and his Government abroad, and the Storting and the Supreme Court out of function, " it has not been possible to keep the national criminal legislation in step with the demands of justice developed in the nation in the war years." It was wrong in his opinion to interpret the quotation as meaning that the Norwegian people's sense of justice had changed during the years of war. It would be more correct to say that the people's sense of justice had not been given an opportunity to express itself before the atrocious character of those crimes was revealed.

In his opinion there was no contradiction between the conclusion which he had reached in the present case and the rulings given by the Supreme Court in cases against traitors when the question of the retroactivity of the various Provisional Decrees had been discussed and decided upon. In this connection he drew the court's attention to the interpretation, given in a recent case against a traitor, by the first judge, who had said: " In my opinion Art. 97 of the Constitution vetos a new law introducing punishment for acts which before its promulgation were regarded as lawful. In principle it also vetos the introduction of more severe punishment for such acts." In making the reservation constituted by the expression " in principle," the judge had apparently not wanted to commit himself as to the question whether an increase in punishment introduced by a new Decree would, in all instances, be at variance with Art. 97 of the Constitution. And when it had been stressed in theory that Art. 97 had imposed an absolute veto as regards criminal law, it was, no doubt, because circumstances like those with which they were being faced could not have been foreseen.

Having come to the conclusion that the application of the Provisional Decree of 1945 was not, in the present case, at variance with the Constitution, he then proceeded to consider the appeal as far as the degree of punishment was concerned.

Judge Skau agreed with the Lagmannsrett that the death sentence was the only possible punishment in the case in hand. There was no justification for a mitigation of punishment even if Art. 5 of the Provisional Decree of 1945 (regarding superior orders) were pleaded, as the Lagmannsrett had been satisfied that the defendant had acted on his own accord though with the connivance of his superiors. The defending counsel had stressed the exhorbitant pressure exercised by the Nazi system on the German people and the fact that subordinates were intentionally misled as to the lawfulness of the Nazi methods. In that connection Judge Skau pointed out that the acts of ill-treatment of which the defendant had been found guilty were such severe violations of the " laws of humanity " that he, the defendant, regardless of all German propaganda, could not have been in doubt that his acts, irrespective of their purpose, not only were to be condemned morally but were also unlawful.

(ii) *Judge Holmboe*

Judge Holmboe was the first judge to give his reasons for dissenting. He said that in his opinion there was no justification for the application of the more severe punishment introduced by Art. 3, para. 2, of the Provisional Decree of 1945, as all the crimes proved against Klinge had been committed before the promulgation of that Decree. He agreed with Judge Skau that the Decree had been intended to have retroactive effect, though the intention had not been expressly laid down in the Decree itself. The explanation for that omission could most probably be found in the following quotation from its explanatory notes :

> " International law asserts that violations of the laws and customs of war are crimes and are punishable as such. In other words, the authority to prosecute has been sanctioned by international law and comes into effect as soon as a state of war exists. As a result there is no question of retroactivity in this respect, even though the regulations of the national penal code applicable to war crimes may have been promulgated after the crime was committed."

Judge Holmboe said that he could not accept that argument, which had also been put forward by the Lagmannsrett and given further consideration by Judge Skau. In his opinion, Art. 96 of the Constitution vetoed any trial except according to Norwegian law, i.e., according to formal laws or regulations passed by the legislature. It made no difference if there existed corresponding provisions sanctioned by international law which could be applied by international bodies or, as mentioned in the explanatory notes, by the national courts of those countries whose laws admitted the infliction of punishment without special reference to law. The Judge referred to the following passage in the explanatory notes :

> " Such an interpretation is alien to the Norwegian conception of law. Norwegian courts can only inflict punishment according to provisions of Norwegian civil or military law. The principle laid down in Art. 96 of the Constitution must be interpreted in this connection so as to make

an arbitrary application of an undefined provision of international law inadmissible. In Norway, international law is not incorporated into national law as an integral part, as is the case in various foreign legal systems. Before a rule of substantial character of international law can be applied by Norwegian courts, it must be incorporated into Norwegian national law by a special act."

Judge Holmboe fully agreed with that point of view and only wanted to add that the laws regarding criminal procedure in cases of crimes against the civil criminal code, as well as for crimes against the military criminal code, expressly laid down that the indictment, in describing the criminal acts alleged, should emphasise the characteristics contained in the relevant provisions and make reference to the paragraphs applicable to the case. The only exception was made in charges dealt with by courts-martial, but it appeared from Art. 6 and Art. 1 of the law of procedure regarding crimes against the military criminal code that, even in courts-martial, punishment could not be inflicted except according to Norwegian law. In his opinion those provisions alone constituted a sufficient objection to arriving at a conviction on the basis only of the international law applicable to the crimes in question at the time of their perpetration.

If that was the case it would follow that Norwegian national law, when incorporating the provisions laid down by international law, would be given retroactive effect if applied to acts committed before its promulgation.

Consequently the main question in the case was whether such retroactivity would be at variance with Art. 97 of the Constitution. As had already been mentioned by Judge Skau, it had always been maintained that in Norwegian legal theory it was beyond doubt that Art. 97 had to be regarded as an absolute veto on the retroactive application of criminal law to the detriment of a defendant. That meant that Art. 97 not only vetoed the introduction of retroactive punishment for acts which were not punishable by the laws in force at the time of their perpetration—a question of no interest in the case—but also the retroactive increase in the degree of punishment. That interpretation of Art. 97 had always formed the basis of Norwegian criminal law and that was without doubt the reason why the question had not been dealt with previously by the courts. The same interpretation had also formed the basis for the Provisional Decrees passed in London during the war. The Provisional Decree of 22nd January, 1942, concerning punishment for membership in the Quisling Party, had not been given retroactive effect. The same applied to the Provisional Decrees of 3rd December, 1942, and 22nd January, 1942, which, *inter alia*, introduced capital punishment for various crimes against the Civil Criminal Code.

In Judge Holmboe's opinion, in normal circumstances the retroactive application of a law introducing capital punishment for crimes which could only be punished by imprisonment at the time of their perpetration, as in the case in hand, would have been at variance with Art. 97 of the Constitution.

The question arose whether the extraordinary conditions which followed the war and the occupation justified a more elastic interpretation of Art. 97 or, as Judge Holboe preferred to put it, whether those extraordinary conditions could, fully or to some extent, justify the disregarding of that provision altogether. The explanatory notes to the Provisional Decree of 1945,

did not deal with that point, apparently considering that the question of retroactivity in the strict sense of the word did not arise as the provisions already existed in international law ; to that point of view Judge Holmboe strongly dissented.

Summing up the arguments set out above, Judge Holmboe pointed out that there had been no constitutional obstacles preventing the criminal legislation from being kept up to date during the occupation. The Cabinet in London had all the time taken it for granted that, as long as the Storting was out of function, the King could pass the necessary laws in the form of Provisional Decrees. The Supreme Court had adopted that point of view and had accordingly enforced all Provisional Decrees regarding criminal law. He particularly wanted to stress that the very same crimes which were dealt with in the Provisional Decree of 1945 regarding the punishment of foreign war criminals had also been dealt with by the Provisional Decree of 1942, which amended Chapters 19, 21 and 22 of the civil penal code. According to its explanatory notes, the Provisional Decree of 1942 expressly aimed at covering serious crimes, such as murder, torture and grave bodily injury, committed by " the Germans and their collaborators," and it laid down that the death sentence could be applied for crimes which, according to the provisions of the Civil Criminal Code in the chapters referred to, could be punished by a life sentence. Consequently there had seemed to be no need at that time to introduce the death sentence for other crimes mentioned in the same chapters of the criminal code, including crimes for which the defendant had been convicted. After three years, a few days before the capitulation, the authorities responsible for the legislation had decided that the Provisional Decree of 1942 did not suffice and that the application of the death sentence should be extended to cover less serious crimes like the ones dealt with in the present case.

Judge Holmboe said that he realised that there might have been various difficulties in keeping the legislation up to date, as for instance trying working conditions and insufficient contact with public opinion at home. The discussions between the Allies regarding the disposal of war criminals might also have been a reason for the delay in the passing of new Decrees, but surely those difficulties could not justify the retroactive application, contrary to the Constitution, of Provisional Decrees.

One predominant intention of Art. 97 was that the criminal should be aware beforehand of the punishment which his crime involves. That, though a very important point, was not the only decisive one. It was impossible to accept the argument that German war criminals could not, according to the provisions of international law only, expect any other punishment than a death sentence in the event of Germany's losing the war. Another not less important result of Art. 97 was that the state powers, be it the legislature, the administration or the judiciary, should not be given the opportunity of arbitrarily and retroactively introducing or increasing a punishment for an act already committed. In other words, Art. 97 had to be regarded as a complement to the fundamental principle expressed in Art. 96 : " No one may be convicted except according to law." He did not agree that the case in hand had to be regarded as lying outside the field which Art. 97 was intended to cover. The Constitution and its historical models came to life during a period of wars and revolutions, at a time when terror

was not unknown, though it must be admitted that those who drafted the Constitution could not possibly have foreseen such a form of warfare as that waged by Germany during the Second World War. Art. 97 had been intended not to cover certain specified situations but to be an expression of a principle of law which according to its authors should form the basis of the legislation of a free community. One had to be wary of limiting the scope of that provision to suit an extraordinary situation. In normal times that provision was of lesser importance, in any case as far as criminal law was concerned, as it voiced only a principle which would concur with the people's sense of justice. It was in turbulent times that the provision was significant. It could be maintained that the situation with which they were faced was exactly like the one which Art. 97 was intended to cover. The sense of justice which had matured in the Norwegian people during the occupation had grown under the influence of the terror and indignation caused by the atrocities committed as well as by anxiety and grief. He did not want to make any conjectures as to whether the demand for justice, as had been maintained by Judge Skau, would have been the same before the occupation. However strongly he felt that the crimes committed against the Norwegian people should be severely punished, experience had shown that an atmosphere born of cruelty and hatred was calculated to upset a carefully considered and fair judgment.

It could be argued that the fact that international law had sanctioned the application of the death sentence for crimes of the kind dealt with in this case justified the view that the Provisional Decree of 1945 was not in itself unfair. That argument, however, could not justify its retroactive and unconstitutional application. Neither did he agree with the view put forward by Judge Skau that it would be unreasonable to accept a war criminal's plea which was based on the Norwegian Constitution. It was of decisive importance that the provision in Art. 97 contained a veto which was addressed in the first place to the legislature but at the same time also to the judges. It was a binding provision as to the way in which the administration of justice should be carried out in Norway. In effect, it constituted, of course, a safeguard for the criminal as well, regardless of the character and seriousness of the crime. The crimes they were dealing with in the case in hand were very serious indeed, but that should not prevent the defendant from being tried according to Norwegian law as laid down by the Constitution.

Judge Holmboe had consequently come to the conclusion that the application of Art. 3 of the Provisional Decree of 1945 to the present case would be at variance with the Constitution. As a result, the punishment should not have exceeded a maximum of 13 years and six months of imprisonment. He admitted that the result was not satisfactory. If it had been possible according to his conception of the law to propose a more severe form of punishment, he would have done so. He was not blind to the fact that it would hurt the people's sense of justice that foreign war criminals were to be punished by a restricted term of imprisonment only, whereas Norwegian torturers could be given death sentences. In that connection, however, it had to be remembered that the traitors were sentenced not only for torture but for treason as well. Taking the long view, however, it was no disaster if a criminal or a group of criminals were sentenced to a

more lenient punishment than the judge himself would wish to apply. On the other hand, it was of the greatest importance that the courts, when trying war criminals, should without reservation stick to the unshakeable safeguard against despotism as far as criminal law was concerned, namely the provision contained in the Constitution against the retroactivity of a new law, which represented a principle which had prevailed for generations.

He contended that the crimes should be brought directly within the Civil Criminal Code which, according to Arts. 228, 229, 232 and 62 thereof, was applicable to the case.

(iii) *Judge Bonnevie*

Judge Bonnevie also argued that the application of the Provisional Decree of 4th May, 1945, was at variance with Arts. 96 and 97 of the Constitution. In his opinion the sentence of the Lagmannsrett should consequently be annulled and the case retried by the Lagmannsrett, particularly as other provisions of the Civil Criminal Code might be considered applicable. According to those provisions, in conjunction with the Provisional Decree of 3rd October, 1941, the death sentence could in his opinion, be applied without violating Arts. 96 and 97 of the Constitution. He recalled, however, that the Director of Public Prosecutions had maintained that the crimes dealt with in the case could not be brought under the above-mentioned provisions, which was apparently the reason why the Lagmannsrett had not considered the question whether those provisions could be applied.

(iv) *Judge Schjelderup*

Judge Schjelderup agreed with Judge Skau but added that in his opinion it was sufficient and decisive that the crimes for which the defendant had been sentenced were not only a violation of Norwegian criminal law in the narrower sense but a violation of the generally accepted provisions of the laws and customs of war. Those provisions came into force as between Norway and Germany on 9th April, 1940, on the outbreak of the hostilities, and would remain in force until the final peace treaties were signed. The Provisional Decree of 1945, and particularly the already existing criminal provisions referred to in Art. 1 thereof, must not, according to his opinion, be regarded as anything but an interpretation of law already in force at the time of the promulgation of the Decree. According to the generally accepted laws and customs of war, which in his opinion were directly binding on the defendant, his acts were, at the time of their committing, crimes which could be punished by the death sentence. There was no question of applying a more severe punishment than could be inflicted at the time of the perpetration of the crimes. The laws of war with their severe maximum punishment were clear enough.

(v) *Judge Larssen*

Judge Larssen agreed with what had been said by Judge Skau and pointed out that it had been laid down by the provisions of international law that acts like those dealt with in the case in hand were war crimes and could be punished as such by the death sentence. The defendant was bound by those rules at the time of the perpetration of his crimes. That would have been quite clear if international criminal law could have been made directly applicable by the national court as was the case in some other countries.

He recalled that Judge Schjelderup had said that in his opinion such direct application of the provisions of international law could be made by Norwegian courts. So far it had, however, been commonly accepted that Art. 96 of the Constitution vetoed trials by Norwegian courts except according to Norwegian law. Judge Larssen fully endorsed that view but added that it was quite possible that the provisions of international law would have to be applied directly by the national courts. As the Provisional Decree of 1945 had incorporated the provisions of international law into Norwegian law, however, it was not necessary to discuss that question any further.

As to the question of whether the application of the Provisional Decree of 1945 to the case in hand would be at variance with Art. 97 of the Constitution, it would not be correct to discuss what the defendant's position would have been if the Civil Criminal Code only were to be applied. His guilt was determined by the fact that his acts were, at the time of their perpetration, subject to international law (i.e., they were war crimes which were punishable even by the death sentence). It would not alter his legal position even if those provisions of international law could not at that time be directly applied by Norwegian courts because of Art. 96 of the Constitution. The consequence would only have been that the trial would have had to be carried out by a special court established according to international law, as had been the case with the major war criminals. In view of the fact that the Provisional Decree of 1945 had merely incorporated the relevant provisions of international law into Norwegian law, he agreed with Judge Skau that the new terms of punishment did not place the defendant in a less favourable legal position than he was already in before the passing of that Decree. That implied that the retroactive application of that Decree was not at variance with Art. 97.

Judge Larssen then said that the consequence of the minority vote would be that the defendant would not be charged as a war criminal but would instead be charged with having violated the provisions of the Civil Criminal Code regarding bodily injury, which would mean his being charged for crimes of a quite different and far less serious character than he had actually committed. Art. 97 had in its general terms expressed a principle of justice. There would need to exist strong and decisive reasons before it would be possible to accept the minority interpretation referred to above, which would lead to a conclusion which, as Judge Holmboe also maintained, would offend the natural sense of justice. Such reasons were not present as far as he could discern.

(vi) *Judge Alten*

Judge Alten substantially agreed with Judge Skau's arguments and conclusions. He further endorsed Judge Larssen's views which, according to his opinion, were in agreement with what had been said by Judge Skau.

(vii) *Remaining Judgments*

Of the remaining seven judges, five (Grette, Evensen, Stang, Bahr and Berg) supported the majority vote, whereas two (Founger and Berger) supported the minority.

B. NOTES ON THE CASE

1. The Offence Alleged

Arts. 228, 229 and 232 of the Norwegian Civil Criminal Code, for breach of which Klinge was charged, provide as follows :

Art. 228. He who commits an act of violence against another person or in any other way inflicts bodily harm on him, or is an accomplice to such an act, will be fined or sentenced to imprisonment for a period of up to six months. If the act has resulted in some injury to body or health or considerable pain, a term of up to three years imprisonment can be inflicted and up to five years if the act resulted in death or grave injury. . . .

Art. 229. He who causes harm to another person's body or health, or puts another person into a state of helplessness, unconsciousness or any similar state, or who is an accomplice to such an act, will be punished by a term of up to three years and up to six years if the act has resulted in sickness or disability to work lasting more than two weeks, or permanent injury, and up to eight years if the act has resulted in death or considerable injury to body or health. . . .

Art. 232. If an act mentioned in Arts. 228-231 was premeditated and carried out in a particularly painful way or by means of poison or other similar substances which are highly dangerous to the health, or with a knife or other particularly dangerous instrument, a term of imprisonment must always be inflicted. Life imprisonment may be inflicted for crimes against Art. 231 carried out under the same conditions. For crimes against Arts. 228-229 the term of imprisonment fixed by those paragraphs can be increased by a term of up to three years.

There can be no doubt that Klinge's acts were also offences against the laws and usages of war, in so far as they constituted gross breaches of the duties of an occupant during wartime in territory under his control. Torture, said Judge Skau in the course of his judgment, was not only criminal according to Norwegian law ; it was also a violation of the " laws of humanity " and of the " dictates of the public conscience " which were referred to in the introductory paragraphs to the Hague Regulation IV concerning land warfare,[1] and of Arts. 46 and 61 of the Geneva Convention concerning prisoners of war.[2] In the list of war crimes worked out for the Versailles Peace Conference of 1919, he added, torture was listed as crime No. III.

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(1) Judge Skau was making reference to the following passage : " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."

(2) " Article 46. Prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces.

Officers, non-commissioned officers or private soldiers, prisoners of war, undergoing disciplinary punishment shall not be subjected to treatment less favourable than that prescribed, as regards the same punishment, for similar ranks in the armed forces of the detaining Power.

All forms of corporal punishment, confinement in premises not lighted by daylight and, in general, all forms of cruelty whatsoever, are prohibited.

Collective penalties for individual acts are also prohibited."

" Article 61. No prisoner of war shall be sentenced without being given the opportunity to defend himself.

No prisoner shall be compelled to admit that he is guilty of the offence of which he is accused."

2. THE QUESTION OF THE RETROACTIVE APPLICATION OF THE DECREE OF 4TH MAY, 1945

Assuming that the Ministry was speaking purely of the situation as seen from the point of view of International Law, the legal position regarding the prosecution of war criminals is stated very clearly in the following passage from the Ministry's memorandum: "International law asserts that violations of the laws and customs of war are crimes and are punishable as such. In other words, the authority to prosecute has been sanctioned by international law and comes into effect as soon as a state of war exists. As a result there is no question of punishment with retroactive effect in this respect, even though the provisions of the national criminal code applicable to war criminals may have to be promulgated after the crime was committed."

Nor is there any doubt that the sentence of death passed on Klinge was permissible under International Law. Judge Skau quoted authorities to show also that all war crimes could legally be punished with death under the laws and customs of war.

It may be added that no shadow of an objection could be raised to the sentence on the ground that it constituted an unjust use of the discretion thus permitted by International Law, since it was shown that a death had resulted from the ill-treatment meted out by the accused.

The questions argued during the trial therefore turned upon the interpretation of certain provisions of Norwegian law. It was not denied that Klinge had infringed Arts. 228, 229 and 232 of the Civil Criminal Code, but the Defence claimed that the punishment meted out should not have exceeded the provisions of Arts. 228, 229 and 62; of which the last runs as follows:

Art. 62. If several kinds of crime, each punishable by different terms of imprisonment, have been committed by the same person by one or several acts, the terms of imprisonment passed must exceed the minimum term of the gravest crime but must in no case exceed its maxium term by more than half. . . ."

This plea was not upheld by the Court.

The examination of Klinge's appeal involved the judges in an interpretation of one of the most fundamental provisions of the Norwegian constitution. It was perhaps in the circumstances inevitable therefore that interesting arguments based on principles of justice and public policy should have been raised. Thus, Judge Skau pointed out that circumstances like those facing the Court could not have been foreseen when the constitution was drafted, and expressed the opinion that it seemed unreasonable that provisions made for the protection of the community could be relied upon by an enemy of the same community. To allow such a plea to be put forward by foreign war criminals would be a violation of the high principles which were the foundation of Art. 97 and the claim for justice which it supported. Judge Holmboe, on the other hand, clearly regarded Art. 97 of the Constitution as a safeguard against despotism, whose full effect was worth preserving even if complete justice would, in consequence, not be done in the present case in so far as Klinge would be punished too leniently. Judge Larssen said that the acceptance of the view of the minority among the judges would offend the natural sense of justice.

Judge Schjelderup and Judge Larssen seem to have considered it correct to interpret the word " law " in Art. 97 as including the laws and customs of war as well as Norwegian law, in cases like the one before the Court.

3. THE DEFENCE THAT THE DEATH SENTENCE WAS NOT JUSTIFIED EVEN ACCORDING TO THE PROVISIONAL DECREE

The Defence entered a second plea, based on Art. 5 of the Provisional Decree,[1] that the sentence was too severe even if the Provisional Decree could be applied. The defending counsel stressed the exhorbitant pressure exercised by the Nazi system on the German people and the fact that subordinates were intentionally misled as to the lawfulness of the Nazi methods.

In making reference to " exhorbitant pressure " the Defence was raising the defence of necessity, while the suggestion that Klinge was deliberately led to believe that Nazi methods were legal seems to indicate that the Defence were relying also on the argument that in some circumstances superior orders may lead to such a mistake of fact as may itself be put forward as a defence. In this connection it is of interest to quote certain comments made later on Art. 5 of the proposed Law on the Punishment of Foreign War Criminals, by the Ministry of Justice and Police.[2]

> " It cannot possibly be admitted as a defence that a German soldier or policeman has ill-treated Norwegian civilians, devastated and burned Norwegian property, etc., in order to save himself from criminal or disciplinary punishment. There may, however, be important reasons for the mitigation of, or even complete exemption from, punishment. . . .
>
> " The paragraph should naturally not be taken to mean that circumstances resulting from superior orders cannot be exculpatory. If the superior order has given the subordinate justifiable reason to believe that the actual circumstances of the act were other than they were, exculpation may be the consequence."

The Supreme Court rejected this plea put forward by the Defence.

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(1) *See* p. 85.
(2) *See* p. 81.