

CASE No. 30.

TRIAL OF KARL ADAM GOLKEL AND THIRTEEN OTHERS

BRITISH MILITARY COURT, WUPPERTAL, GERMANY
15TH-21ST MAY, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused, Karl Adam Golkel, Hans Hubner, August Geiger, Karl Bott, Heinrich Klein, Hans Limberg, Josef Pilz, Emil Pahl, Walter Jantzen, Walter Schmidt, Heinrich Thilker, Georg Zahringer, Ludwig Koch and Horst Gaede, were charged with committing a war crime in that they " at La Grande Fosse, France, on 15th October, 1944, in violation of the laws and usages of war, were concerned in the killing of " eight named members of No. 2 Special Air Service Regiment, a British unit, when prisoners of war. They pleaded not guilty.

It was shown that the victims, were captured British parachutists who, after being interrogated and kept imprisoned for several days, at the headquarters of the Kommando Ernst at Saales, were taken to a wood and shot. All of the accused were under the command of Sturmbannführer Ernst, on whose orders the executions were carried out. None of the accused were proved to have taken part in the actual shooting, but one of the Prosecution's witnesses, the former secretary of Ernst's Kommando, testified that Geiger, Koch, Gaede and Hubner took part in the " less important interrogations " of prisoners at Saales.

Golkel was a captain and the only accused who had at the time of the offence held a commissioned rank. Despite this fact, he claimed that a certain Oppelt had been put in charge of the executions by Ernst and that he himself had to be present only as a formality as he was an S.S. officer. He admitted having previously sought and found out a suitable site for a grave for the victims. On the day of the shooting he was driven to the scene by Klein and claimed only to have arrived near the completion of the offence ; on the exact time of his arrival, however, the other evidence was conflicting, and Zahringer went so far as to state that Golkel ordered that the prisoners should be made to undress and that he indicated where they were to be shot. After the execution Golkel reported its completion to Ernst, but he claimed in Court that he did so only to show Ernst that he had been present as ordered.

Koch, a corporal, admitted that he was one of the guards on the lorry which conveyed the victims to the wood and that he and Hubner led one of them to the prepared grave. He claimed, however, that, on being ordered by Oppelt to shoot, both he and Hubner refused to do so.

Hubner, another corporal, was also a guard on the lorry. He said that Oppelt had ordered himself and Koch to shoot a prisoner and that both refused, his own objection being that he had not been ordered to be present as one of the executioners.

Zahringer, a corporal, drove the lorry ; according to Golkel, he also accompanied the latter when he went to choose the site for the shooting. Zahringer's account of his part on the day of the execution was that he stayed by his lorry until the last prisoner left it, and that he followed this one into the wood and saw him shot.

Geiger, a corporal, admitted that he was present at the interrogation of one of the victims, and also that he helped in widening the ditch intended to receive the bodies of the prisoners. His claim to have spent the whole of the time of the shooting in preventing all traffic and persons from approaching the scene was corroborated by Hubner and Koch.

Klein, a corporal, said that he was ordered by Ernst to drive Golkel to the wood and that he did so, stopping on the way but later catching up with the lorry again. At the scene of the shooting his duty was merely to act as a guard and assist in filling in the grave. Koch asserted that Klein was present for the purpose of shooting prisoners but, under cross-examination, he admitted that he did not actually see this fellow-accused kill any prisoners.

Jantzen was a staff-sergeant and, according to the Kommando secretary mentioned above, he conducted some of the " more important " interrogations of prisoners ; the accused admitted that he took a minor part in the questioning of the eight English parachutists who were later shot. Golkel said that Jantzen was Ernst's right-hand man and was much influenced in his decisions by his advice. Hubner's evidence was that Jantzen was in the unit office when Ernst gave the order for the shooting, and that he thought that Jantzen was also present in the wood. Klein in a pre-trial statement, said that Jantzen got into the back of Golkel's car and was among those around the lorry at the wood, but in Court he said : " It was also a mistake when I quoted Jantzen as being present in the wood."

Gaede was a driver. In his statement made before trial he said that he was told by Golkel to get a car ready in order that the latter might find a suitable spot for the execution. He did take Golkel on this mission and he claimed that he expressed his concern to Golkel about the proposed shootings. In the witness box he testified that he drove Oppelt and one Dietrich to the scene of the shooting on the day thereof and then obeyed an order by Oppelt to park the car and stay on the road. Geiger, however, said that Gaede helped to widen and deepen the grave, and Zahringer and Koch said that the same accused conducted one of the prisoners to the place of shooting.

The only evidence against Schmidt, who was Ernst's batman, was that of Klein, who said : " I am not sure if Schmidt was around the lorry, but I know he was ordered to be present." Schmidt's denial of this evidence was corroborated by Golkel and Geiger.

In pre-trial statements the accused Klein, Golkel, Hubner and Geiger gave evidence incriminating Pahl, Pilz, Limberg, Thilker and Bott, but in Court they wholly or in large part withdrew this testimony. A certain amount of evidence was also called by the Defence on behalf of these accused.

Bott, Limberg, Pilz, Pahl, Schmidt and Thilker were found not guilty.

Golkel, Klein, Gaede, Hubner, Geiger, Jantzen, Koch and Zahringer were found guilty, and sentenced to the following terms of imprisonment : Golkel ten years, Klein and Gaede eight years, Hubner, Geiger and Jantzen four years, Koch three years, and Zahringer two years.

These sentences were all confirmed by higher military authority with the exception of that passed on Jantzen ; this accused was later sentenced to death in another trial concerning other war criminals, and this last sentence was confirmed.

B. NOTES ON THE CASE

1. THE RELATIVE VALUE AS EVIDENCE OF PRE-TRIAL STATEMENTS

It may fairly be said that five accused, Pahl, Pilz, Limberg, Thilker and Bott, were found not guilty as a direct result of the fact that Klein, Golkel, Hubner and Geiger withdrew in Court wholly or in large part the evidence which they had given in pre-trial statements. There were also less sensational but similar recantations of evidence relating to others among the accused. These circumstances gave rise to some discussion as to the relative value as evidence of pre-trial statements produced in Court in documentary form and of oral testimony delivered in the witness box.

For the Defence it was argued that the oral evidence before the Court was the more reliable ; the previous statements were often in error though not through deceit. Mistakes were due to the circumstances in which they were made. It was said that : " It is obvious that when the accused were questioned after their arrest they were in a state of great excitement ; unprepared, they were taken out of their civil life and were confronted with facts and questions for which they were not prepared in any way. Names were read out to them too in connection with the question of whether the persons mentioned had participated in any actions. This might easily have caused confusion ; the general excitement also helped. In the meantime the accused had the opportunity to let these incidents pass through their minds in peace and to think everything over. This has clarified the picture. I think that the fact of the later discussion amongst the accused has contributed less to the clarification of the picture than the cold reflection on the part of the accused themselves."

The Prosecutor, on the other hand, submitted that the statements should be accepted as true, whether the retractions were due to untruth or confusion.

In his summing up, the experienced Judge Advocate made some valuable comments on the relative value of different kinds of evidence and on the way in which evidence should be judged. His words were as follows :

" There is no method of placing evidence in rigid categories and saying that one category must be believed rather more than another category. You should consider each piece of evidence and consider its source, and then decide for yourselves what weight you think should

be attached to that source. It is usual to say that evidence given in the witness box on oath is likely to receive more weight than a statement made not on oath and not subject to cross-examination. In this particular case each of the statements which were made by the accused out of court were made in fact on oath ; so that in each case if you are going to compare the statements they made in the witness box with the statement they made before the trial, in each case what they said was on oath, and the only difference is that in one case they knew that afterwards they might be open to cross-examination.

“ You have to consider the relative value which you attach to the statement made on oath before Court and the statement made here in Court in the light of all the circumstances. You are entitled to consider, and should consider, the circumstances in which the original statement was made—apparently made before contact with any other accused, before knowing who was going to be accused, the defence would say, and before perhaps they had turned the matter over in their minds, at any rate as much as they had by the time they came to court.

“ When you consider the evidence that they gave in court you are entitled to bear in mind that all of them have been in contact with each other for a certain length of time, and the vast majority of them for quite a long time. We have had that put in the evidence, and that there was therefore an opportunity for consultation and discussion as to what actually did take place. It is a matter for you to decide what influence you think that has had on the evidence they have given. It might be argued on one side that that meant that any errors that were discovered were corrected ; on the other side it might be argued that there had been opportunity to discuss what it was best to say.

“ Those are general considerations for you to consider when you consider the weight to be attached to each source of evidence which you take into account. Look in each case at the source ; look first and foremost at the man who makes the statement, and make up your minds what you think of him—whether you think he is honest, whether you think he is dishonest, whether you think he is accurate, or merely inaccurate just because he has got a faulty memory, or because he was not really in a good position to see what was happening, whereas another man may have been in a very good position to see what was happening. I think the point made by one of the defence counsel was that the driver of the lorry was at a vital spot, he ought to have seen exactly which persons were there and which persons were not. Take all these matters into consideration when you consider the value which you think it right to place on each piece of evidence which is given before you.

“ I would only add on this matter one thing. Each accused has gone into the box. He was not compelled to go into the box ; he did so entirely voluntarily. Sometimes one is apt to say, or tempted to say : ‘ Well, he is the accused person. You cannot really place much reliance upon what he says.’ That would be an entirely wrong attitude in which to approach his evidence. Consider him just as any other witness in the box ; weigh him up, weigh up whether you think he is

honest or not, whether you think he is accurate or not, and matters of that kind, and let only one of your considerations be that he is the accused person. Weigh him up just as you would weigh up any other witness to see if you think you can rely upon what he tells you."

At a later point, the Judge Advocate stressed again : " There is no rule that evidence given in the witness box must be given more weight than evidence, statements, taken on oath outside the Court. As I said earlier, take into account all the circumstances. . . ."

2. QUESTIONS OF SUBSTANTIVE LAW

The facts of the present case resemble in various ways those of the *Trial of Karl Buck and Ten Others*⁽¹⁾ and of the *Trial of Werner Rohde and Eight Others*,⁽²⁾ particularly the former.

In both the former of these cases and the present one, the offence consisted in taking prisoners of war to a wood and shooting them without legal justification. As the Judge Advocate stated in his summing up in the present trial, such acts were in violation of Articles 2 and 3 of the Geneva Prisoners of War Convention of 1929. These provisions run as follows :

" Art. 2. 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."

" Art. 3. Prisoners of war are entitled to respect for their persons and honour. Women shall be treated with all consideration due to their sex.

" Prisoners retain their full civil capacity."

The victims, like a number of those whose killing was alleged in the *Trial of Karl Buck and Ten Others*, were members of the Special Air Service, and the defence pleaded was similar to the one put forward in that case ; it was claimed on behalf of all of the accused that they acted under superior orders, that they believed that the victims had been tried and condemned to death for acting in support of the Maquis, and that the accused were not in a position to find out whether the shooting was illegal and had not the knowledge of International Law necessary to judge for themselves.

(i) *The Defence of Superior Orders*⁽³⁾

Although Dr. Isselhorst, here a Prosecution witness, was cross-examined by Defence Counsel regarding the Führerbefehl of 18th October, 1942, ⁽⁴⁾

⁽¹⁾ See pp. 39-44.

⁽²⁾ See pp. 54-9.

⁽³⁾ As to the defence of superior orders see also p. 13.

⁽⁴⁾ See p. 42, footnote 2.

few references were made to it in the speeches for the Defence, where it was simply claimed that, in so far as any of the accused could be shown to have been concerned in the killings alleged, they were acting under superior orders in performing the acts concerned.

Counsel acting on behalf of all the accused quoted the following passage from paragraph 60 of Chapter VIII (*The Courts of Law in Relation to Officers and Courts-Martial*) of the *British Manual of Military Law* :

“ . . . How far a subordinate could plead the specific commands of a superior officer—such commands being not obviously improper or contrary to law—as justifying an injury inflicted on a civilian, is somewhat doubtful. In most cases the fact of the orders having been given would no doubt prove the innocent intent of the subordinate, and lead in practice to his acquittal on a criminal charge.”

Counsel claimed that the same applied in the present instance, and went on to quote from paragraph 443 of Chapter XIV of the *Manual* the following words : “ Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. . . .”

The provisions of German Military Law in force at the time of the deed were, according to Counsel, even more favourable to the accused. According to German law, the soldier would only escape punishment on disobeying an order if he knew of its illegality ; it was not enough to show that he was in a position to suppose its illegality. If he carried out the order, he could only be punished if he exceeded his instructions or if he knew that they entailed a breach of criminal or military law. Such references to German law, said Counsel, were made relevant by a principle of International Law that a soldier could not be punished for an action which the law of his country compelled him to do. He added that International Law recognized that subordinates were not compelled to probe into the legality of an order. Only if an order was obviously unlawful was it wrong for the soldier to follow the order. Counsel claimed that the orders binding the accused were more precise than those given to the persons found guilty in the “ *Llandoverly Castle* ” Case ;⁽¹⁾ none of the present accused could have referred to the decision in this case of the German Supreme Court, in the event of disobedience on their part ; and in any case, German courts were not bound by precedent.

Counsel admitted that Koch had in fact refused to obey the order of Oppelt that he should take part in the shooting, but he pointed out that these two accused were both N.C.O.'s and claimed that the order was, therefore, not binding.

⁽¹⁾ *Annual Digest of Public International Law Cases*, 1923-24, Case No. 235 ; British Command Paper (1921) Cmd. p. 45. In that case, two officers of the crew of a German U-Boat were found guilty of firing at survivors from a sunken hospital ship, despite the fact that they were acting on order from the U-Boat Commander.

In his summing up the Judge Advocate made reference to the well-known passage from Oppenheim-Lauterpacht, *International Law*, 6th Edition revised, pp. 452-453, which is reproduced in paragraph 443 of Chapter XIV of the *Manual of Military Law*.⁽¹⁾ It was no defence to plead superior orders when these were *obviously unlawful*, as they were in the “*Llandovery Castle*” Case. Nor did the defence hold good if an accused either *knew that the orders were unlawful or must be deemed from the surrounding circumstances to have known that they were unlawful*.⁽²⁾

(ii) *The Remaining Defence Arguments*

The Defence did not claim that in fact a trial of the victims had been held ; the plea put forward was that both Isselhorst and Ernst were lawyers and the accused had to assume that the order which they received was justified. The latter were not able to judge scrupulously the legality of their orders but could only ask themselves whether these orders could be legal. In this connection Counsel claimed that the accused all knew of the leader order which Isselhorst had mentioned. The accused knew that there was some connection between the parachutists and the Maquis, which were operating in the district, and it was therefore reasonable for them to assume that the actions of the parachutists were illegal since the Maquis movement itself was, according to the Defence, a violation of International Law. As the latter constituted an example of civilian intervention into warfare and did not fall within the scope of Articles 1 and 2 of the Hague Convention No. IV of 1907, it was contrary to International Law, and it was therefore not necessary for the Defence to touch on the question whether the armistice between Germany and France made the Maquis movement an illegal one.

Articles 1 and 2 of the Hague Convention, to which the Defence referred provide as follows :

“ Art. 1. The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions :—

- (1) They must be commanded by a person responsible for his subordinates ;
- (2) They must have a fixed distinctive sign recognizable at a distance ;
- (3) They must carry arms openly ; and
- (4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “ army.”

“ Art. 2. The inhabitants of a territory not under occupation who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly, and if they respect the laws and customs of war.”

⁽¹⁾ See pp. 14-15.

⁽²⁾ See p. 16.

The Prosecutor regarded paragraph 37 of Chapter XIV of the British *Manual of Military Law* as a correct and relevant statement of International Law :

“ It is not, however, for officers or soldiers in determining their conduct towards a disarmed enemy to occupy themselves with his qualifications as a belligerent. Whether he belongs to the regular army or to an irregular corps, is an inhabitant or a deserter, their duty is the same : they are responsible for his person and must leave the decision of his fate to competent authority. No law authorizes them to have him shot without trial, and international law forbids summary execution absolutely. If his character as a member of the armed forces is contested he should be sent before a Court for examination of the question.”

He claimed that further paragraphs of Chapter XIV corresponded to the provisions of the Geneva Prisoners of War Convention, 1929, regarding the trial of prisoners, were binding on the authorities holding the captives whose execution was alleged. The relevant passages of the Geneva Convention are contained in Articles 60-67. Article 60 states : “ At the commencement of a judicial hearing against a prisoner of war, the detaining Power shall notify the representative of the protecting Power as soon as possible, and in any case before the date fixed for the opening of the hearing. . . .” Article 62 gives an accused prisoner the right to be assisted by a qualified advocate of his own choice. Article 66 provides that : “ If sentence of death is passed on a prisoner of war, a communication setting forth in detail the nature and the circumstances of the offence shall be addressed as soon as possible to the representative of the protecting Power for transmission to the Power in whose armed forces the prisoner served. The sentence shall not be carried out before the expiration of a period of at least three months from the date of the receipt of this communication by the protecting Power.”

The Judge Advocate said that there was evidence, not of any trial, but only of a decision taken by Dr. Ernst, possibly in consultation with Dr. Isselhorst. He agreed with the view that, even if the victims had been carrying on operations in breach of International Law, it was not lawful to execute them without trial.

The Prosecutor said that there was ample evidence that the victims were in uniform when captured, and, in support of his claim that their activities were legal, he quoted paragraph 45 of Chapter XIV of the *Manual* : “ Train wrecking, and setting on fire camps or military depots are legitimate means of injuring the enemy when carried out by members of the armed forces.” He submitted that the activities of the British troops involved were covered by these terms. As the Judge Advocate reminded the Court, however, the Defence claimed, not that the activities of the parachutists were actually illegal but only that it was reasonable in the circumstances for the accused to regard them as illegal. The Judge Advocate concluded that it would be possible for the Court to proceed on the assumption that the victims were entitled to the protection of the Geneva Prisoners of War Convention.

(iii) *The Scope of the Words "Concerned in the Killing"*

The trial is also of legal interest in that it illustrates the various courses of action which have been held to make an accused guilty of the war crime of being "concerned in the killing" of prisoners of war. On this wording the Judge Advocate, in his summing up, made the following comment :

"It is for the members of the Court to decide what participation is fairly within the meaning of those words. But it is quite clear that those words do not mean that a man actually had to be present at the site of the shooting ; a man would be concerned in the shooting if he was 50 miles away if he had ordered it and had taken the executive steps to set the shooting in motion. You must consider not only physical acts done at the scene of the shooting, but whether a particular accused ordered it or took any part in organizing it, even if he was not present at the wood."