

CASE NO. 61

TRIAL OF GENERALOBERST NICKOLAUS VON FALKENHORST

BRITISH MILITARY COURT, BRUNSWICK  
29TH JULY-2ND AUGUST, 1946

A. OUTLINE OF THE PROCEEDINGS

The defendant, Nikolaus von Falkenhorst, a German national and former Generaloberst in the German army, was tried at Brunswick before a British Military Court sitting with a Judge Advocate. The defendant was charged with nine charges pursuant to Regulation 4 of the Regulations attached to the Royal Warrant for the trial of War Criminals, dated 6th June, 1945. The charges covered the period from October, 1942, to July, 1944, and were as follows :

*1st Charge*

Committing a war crime in that he at Oslo, in the Kingdom of Norway, when as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), in an order dated on or about 26th October, 1942, in violation of the laws and usages of war, incited members of the forces under his command not to accept quarter or to give quarter to Allied soldiers, sailors and airmen, taking part in Commando Operations, and, further, in the event of any Allied soldier, sailor or airman taking part in such Commando Operations being captured, to kill them after capture.

*2nd Charge*

Committing a war crime in that he in the Kingdom of Norway, in or about the month of October, 1942, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of two British Officers and six British Other Ranks, Prisoners of War, who had taken part in Commando Operations, with the result that the said Prisoners were killed.

*3rd Charge*

Committing a War Crime in that in the Kingdom of Norway, in or about the month of November, 1942, in violation of the laws and usages of war, when as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), was concerned in the killing of fourteen British Prisoners of War.

*4th Charge*

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of November, 1942, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of nine British Prisoners of War who had taken part in Commando Operations, with the result that the said Prisoners were killed.

*5th Charge*

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of January, 1943, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command, to the Sicherheitsdienst (Security Service) of Seaman Robert Evans, a British Prisoner of War who had taken part in Commando Operations with the result that the said Seaman Robert Evans was killed.

*6th Charge*

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of May, 1943, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of one officer, one Non-Commissioned Officer and five Naval Ratings, British Prisoners of War, who had taken part in Commando Operations, with the result that the said Prisoners were killed.

*7th Charge*

Committing a War Crime in that he at Oslo, in the Kingdom of Norway, when as Commander-in-Chief of the Armed Forces of Norway (Wehrmachtbefehlshaber Norwegen), in an order dated 15th June, 1943, in violation of the laws and usages of war, incited members of the forces under his command not to accept quarter or to give quarter to Allied soldiers, sailors and airmen taking part in Commando Operations, and, further, in the event of any Allied soldier, sailor or airman taking part in such Commando Operations being captured, to kill them after capture.

*8th Charge*

Committing a War Crime in that he in the Kingdom of Norway, in or about the month of July, 1943, in violation of the laws and usages of war, was responsible as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), for the handing over by forces under his command to the Sicherheitsdienst (Security Service) of one Norwegian Naval Officer, five Norwegian Naval Ratings, and one Royal Navy Rating, Prisoners of War, with the result that the said Prisoners were killed.

*9th Charge*

Committing a War Crime in that he at Oslo, in the Kingdom of Norway, when as Commander-in-Chief of the Armed Forces, Norway (Wehrmachtbefehlshaber Norwegen), in a document dated 19th July, 1944 in violation of the laws and usages of war, ordered troops under his command to deprive certain Allied Prisoners of War of their rights as Prisoners of War, under the Geneva Convention.

To each of the nine charges the defendant pleaded Not Guilty.

In his opening speech, the Prosecuting Officer claimed that during the relevant period covered by the nine charges, the defendant was the Commander-in-Chief (Wehrmachtbefehlshaber) of the German Armed Forces in Norway, which included the Army, Navy and the Air Force. In this capacity the defendant was directly responsible to the OKW (the Supreme Headquarters of the German Armed Forces) in Berlin.

The facts were that during 1941 and 1942, the Allied Forces made a series of raids on Norwegian shipping and vital installations in the territory of Norway which were known as "Commando Raids". These raids had a certain damaging effect upon the German war effort and to discourage such raids in the future, Hitler himself issued an order dated 18th December, 1942, referred to in this report as the "Commando Order". This order was received by the defendant, who passed it on to the subordinate military units under his command and also distributed it to the naval and air force commanders in Norway in the latter part of October, 1942. A photostat of the original Commando Order was exhibited in the case, and its contents have been set out here as an authentic version of this well-known order :<sup>(1)</sup>

*Paragraph 1*

"For some time our enemies have been using in their warfare, methods which are outside the international Geneva Conventions. Especially brutal and treacherous is the behaviour of the so-called Commandos who, as is established, are partially recruited even from freed criminals in enemy countries. Their capture orders divulge that they are directed not only to shackle prisoners but also to kill defenceless prisoners on the spot at the moment in which they believe that the latter, as prisoners, represent a burden in the further pursuance of their purpose or can otherwise be a hindrance. Finally, orders have been found in which the killing of prisoners has been demanded in principle.

*Paragraph 2*

"For this reason it was already announced in an addendum to the Armed Forces Report of 7th October, 1942, that in the future Germany in the face of these sabotage troops of the British and their accomplices will resort to the same procedure, i.e., that they will be ruthlessly mowed down by the German troops in combat wherever they may appear.

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(1) See also Volume I, pp. 22-4, and the report upon the *High Command Trial* in Vol. VII.

*Paragraph 3*

"I therefore Order, from now on all opponents brought to battle by German troops in so-called commando operations in Europe or Africa, even when it is outwardly a matter of soldiers in uniform or demolition parties with or without weapons, are to be exterminated to the last man in battle or while in flight. In these cases it is immaterial whether they are landed for their operations by ship or aeroplane or descend by parachute. Even should these individuals on their being discovered, make as if to surrender, all quarter is to be denied them on principle. A detailed report is to be sent to the O.K.W. on each separate case for publication in the Wehrmacht communique."

*Paragraph 4*

"If individual members of such commandos working as agents, saboteurs, etc., fall into the hands of the Wehrmacht by other means, e.g. through the police in any of the countries occupied by us, they are to be handed over to the S.D. immediately. It is strictly forbidden to hold them in military custody, e.g. in PW camps, etc., even as a temporary measure."

*Paragraph 5*

"This order does not apply to the treatment of any enemy soldier who in the course of normal hostilities (large scale offensive actions, landing operations and air-born operations) are captured in open battle or give themselves up. Nor does this order apply to enemy soldiers falling into our hands after battles at sea or enemy soldiers trying to save their lives by parachute after battles."

*Paragraph 6*

"In the case of non-execution of this order, I shall make responsible before the Court Martial all commanders and officers who have either failed to carry out their duty in instructing the troops in this order, or who acted contrary to this order in carrying it out.

Signed Adolf Hitler."

At the end of a supplementary Order issued by the fuhrer on the same day, namely, 18th October, 1942, Hitler set out to explain to his officers why it had become necessary to issue this Commando Order and this Supplementary Order, and ended with this passage, which constituted an addition to the original order :

"If it should become necessary for reasons of interrogation to spare initially one man or two, then they are to be shot immediately after interrogation."

The prosecution submitted that paragraph 3 was illegal and that it constituted an order to deny quarter to combatant troops.

At the same time that Hitler signed this Order, he issued the supplementary order of the same date already mentioned which was addressed to Commanding Officers only, and in which he stated that the main Order was a counter measure to the partisan activities on the eastern front.

The supplementary order also stated that the system of commando operations was an illegal method of warfare in that if commandos were caught in their operation they immediately surrendered, thereby preserving their lives, and if not so caught, they escaped to neutral countries. The importance of the last paragraph of the supplementary order (quoted above) was stressed by the prosecutor.

The defendant received the Commando Order and the Supplementary Order on or about 24th October, 1942, whereupon he re-issued the order himself. No copy of the actual document so issued by the defendant was available at the trial. The re-issuing of the Commando Order formed the subject matter of the first charge against the defendant.

In the document dated 15th June, 1943, the defendant issued a second document addressed to officers only in which he referred to the original Commando Order of 18th October, 1942, in these terms :

"Saboteurs. . . . I am under the impression that the wording of the above order" (the Commando Order) "which had to be destroyed, is no longer clearly in mind, and I therefore again bring to particular notice paragraph 3" (above quoted).

In a later passage in the same document appeared the words : "A further order of the Wehrmacht Commander, Norway, Top Secret, of 26.10.42, since destroyed, lays down : 'If a man is saved for interrogation he must not survive his comrades for more than 24 hours'." The issuing of that document by the defendant was relied upon by the Prosecution to substantiate the 7th charge.

The intervening charges, 2-6 inclusive, and charge No. 8, all dealt with specific instances in which British or Norwegian prisoners of war were killed by German troops in Norway or were handed over to the S.D., with the result that they were killed by that agency. In each case the captured commandos were wearing uniform, with the addition that in the case of those captured and killed as alleged in the third charge, they were wearing ski-ing clothes underneath their uniforms. Further, in each case the commandos were engaged on attacking targets directly connected with the German war effort.

The 9th charge was in respect of a document which the defendant had issued in July, 1944, and was of a different nature from the Commando Order, being an order whereby certain prisoners of war, e.g. Jews, were not to be held in prisoner of war camps but were to be handed over to the S.D.

The evidence produced in support of these charges by the prosecution consisted of the oral evidence of a former German officer, Major-General von Behrens, who served under the defendant at the relevant time and in whose area of command those victims were killed whose death formed the subject matter of the 3rd charge. There was also the oral evidence of Colonel Scotland, who gave formal evidence as to the statements of the defendant made prior to trial, and expert evidence as to the position of the defendant when Wehrmachtbefehlshaber in Norway. The witness giving this last-mentioned testimony stated, *inter alia*, the following :

"His (the defendant's) duties would be to act as the representative of the O.K.W. to pass on any orders which were issued to him by the O.K.W. and these orders through him would reach all branches of the armed forces in Germany. It was in evidence that the Fuhrer's Commando Order had been received by the defendant from the O.K.W."

On this point the witness was asked the following question and gave the answer stated :

Q. "You know the Fuhrerbefehl which is addressed to Norway. Would it be the duty of the Wehrmachtbefehlshaber to forward that on to everybody, whether of the army, navy or the air force : " A. Yes, such an order, coming from the highest authority, his would be the only final channel through which it could reach the armed forces in Norway."

The remaining evidence for the prosecution consisted of documentary evidence in the form of affidavits put in under Regulation 8 (i) (a) of the Royal Warrant, most of which dealt with the fate of allied service personnel who were captured on Commando raids and were either shot by the armed forces or handed over to the S.D. and shot by that agency at a later stage.

Although the prosecution did not suggest that any of the victims in the various charges met their death as a result of his direct order, they contended that the evidence showed that the death of the victims or their being handed over to the S.D. and subsequent death was the result of the defendant's re-issuing the Commando Order in October, 1942, and republishing it in 1943, with the amendment to the original order providing that those spared for interrogation should be liquidated within 24 hours.

The prosecution withdrew the fifth charge relating to the victim Seaman Robert Evans in the course of the trial, apparently on the ground that at no time was this prisoner of war in the custody of the German armed forces, but was an S.D. prisoner from the beginning.

The accused was acquitted on charge No. 2, apparently on the ground that the execution of the victims named in that charge was carried out in Germany by the S.D., and also that they were in Wehrmacht custody as long as they were within the defendant's command in Norway.

On all other charges the defendant was found guilty, and sentenced to death. His sentence was, however, commuted to one of life imprisonment.

## B. NOTES ON THE CASE (1)

### I. THE STRUCTURE OF THE CHARGE SHEET

It will be observed that the nine charges resolve themselves into three groups : (1) charges dealing with the issuing of an illegal order, that is the Commando Order of 1942, its republication in 1943, (2) the charge of issuing the so-called Prisoner of War Order in 1944, (3) the charges claiming that the defendant was concerned in the killing or in the handing over to the S.D. by forces under his command of allied prisoners of war. The defence of the German advocate on this form of the charge sheet is not without interest.

(1) For the British law relating to the trial of war criminals, see Volume I, pp. 105-10.

He pointed out that the defendant was being accused both of issuing an illegal order, and of being responsible for events that occurred as a direct consequence of his issuing that order. That, he contended, was improper and it was analogous to accusing the defendant in the same charge sheet with incitement to murder, and also with the actual murder that took place as a result of his incitement, and he added that such a charge could not be laid by German law. To this it must be said that the law governing this trial was not German law, but that contained in the Royal Warrant, namely, the laws and usages of war and the Army Act and Rules of Procedure thereto. The point that the Defence was making may be looked upon from one angle as substantive, and from another as procedural. It seems to have been decided that the actual issuing of an illegal order by a responsible Commander can be a war crime in itself<sup>(1)</sup> although no criminal acts were proved to have arisen as a result of that issuing. The procedural point seems to be that a charge sheet should not charge a defendant with the same thing twice, called by a different name or arising from a different grouping of the same facts. The defence advocate did not elaborate this argument, but it would seem that he was trying to suggest that the method whereby the defendant was accused of being "responsible for the killing" or "concerned in the killing" or "concerned in the handing over to the S.D." was the defendant's issuing of the very orders which form the subject of charges 1 and 8 respectively, so that in effect the defence said that the defendant was being charged with the same set of acts twice over. In any event this argument was not accepted by the court and must be treated as having been decided against the defendant.

## 2. THE DEFENCE OF SUPERIOR ORDERS<sup>(2)</sup>

This aspect of the case can conveniently be considered under four headings : (a) Superior orders as a defence to the charge, (b) Superior orders purported to be reprisals as a defence to the charges, (c) Duress as a defence, and (d) Superior orders as a ground for mitigation of sentence after the finding of guilty.

With respect to the defence of duress, this has rarely been pleaded in war crimes trials and indeed was not in this case now under review.

The circumstances in which duress may be pleaded as a defence to a crime by English law is stated in Kenny's *Outlines of Criminal Law*, 15th Edition, page 84, in these terms :

"Duress *per minas* is a very rare defence ; so rare that Sir James Stephen, in his long forensic experience, never saw a case in which it was raised. . . . It is, however, clear that threats of the immediate infliction of death, or even of grievous bodily harm, will excuse some crimes that have been committed under the influence of such threats. . . . It certainly will not excuse murder."

Now it is appreciated that in a case such as this, where the order in question emanated from the Fuhrer, who, if he was not always a supreme legal authority in the Reich always represented the supreme physical power, that

<sup>(1)</sup> See p. 22.

<sup>(2)</sup> On this question see also Volume V, pp. 13-22, Volume VII, p. 65, Volume VIII, pp. 90-2 and Volume X, pp. 174-5.

this may be looked at as a very severe threat, particularly when one studies the last paragraph of the Fuhrer Order of 18th October, 1942, wherein it is stated that officers failing to comply with the order expose themselves to court-martial. Nevertheless, it would appear on the facts that no threat of the immediate infliction of death or even of grievous bodily harm would have been presented to the defendant in this case. No case is yet known in which the plea of duress has been successfully raised as a complete defence to a charge of committing a war crime, although instances have been proved in the course of trials where, in concentration camps, one prisoner has been forced at the point of a pistol of an SS man to commit an atrocity on another prisoner. Such a grouping of facts is very remote from the circumstances of a German Commander-in-Chief such as the present defendant.

With regard to the defence of superior orders alone, this was urged by the defence and it was dealt with by the Judge Advocate in his summing up to the court. He quoted the passage from the British *Manual of Military Law* which has so often been cited in British war crime trials,<sup>(1)</sup> and which is based on a well-known passage in Oppenheim's *International Law*, Volume II, 6th Edition, pages 452-3.<sup>(2)</sup> The court in this case decided that this defence was not open to the defendant and they may have arrived at this decision on either of two grounds, as follows :

- (a) that they were not satisfied that the defendants did not willingly participate in carrying out the Fuhrer's order relating to commandos ;
- (b) that as a matter of law the rule of warfare that was violated by the Fuhrer's order is an unchallenged rule of warfare and that the acts of the defendant violated such a rule of warfare and at the same time outraged the general sentiments of humanity.

The question arises whether it should be shown by the prosecution as a matter of proof that the defendant knew that in passing on the Fuhrer's order he was violating an unchallenged rule of warfare and outraging the general sentiments of humanity, or whether it is the case of ignorance of law being no excuse, and provided the defendant passed on the order with full knowledge of the consequences that would ensue if his order were obeyed, then his knowledge of the legal nature of his acts did not enter into the problem. This amounts to whether the standard laid down in Oppenheim's text book is an objective standard or a subjective standard. In all these points the present case must be taken to have been decided against the defendant, although it is not clear on which ground the court placed emphasis in arriving at its decision since in a military court the Judge Advocate merely proffers advice on points of law to the court and does not give a direction in the way that a Judge does to a jury.

Superior orders becomes a more complicated matter when it is joined with the defence that the superior order relied on purported or was thought by the defendant to have been a measure of reprisal by his own government against the enemy (see Professor Lauterpacht's Article in *British Yearbook*

(1) See Volume V of these Reports, p. 14.

(2) *Ibid.*, p. 43.

*of International Law, 1944.*<sup>(1)</sup> The defendant in this case, through his counsel, appears to have taken the line in defence that on questions of reprisal he, a soldier, was entitled to assume that the appropriate legal considerations had been entered into by his own government, before they launched the order as a reprisal order which he, as a Commander-in-Chief, was being required to carry out. Before this point can be taken to arise, unless a clean case of reprisal has already been made out, it is thought that the defendant must first show that he had valid reason for believing as a matter of fact that the order he was asked to carry out was intended as a reprisal order and if the court is not satisfied on that initial point, which is a question of the court believing the defence or not, then the legal problems do not really arise. Should a defendant establish, as a matter of fact believed by the court, that he really thought that the order of his government was meant to be a reprisal, then the question arises whether, if his government exercised the right of reprisal on inadequate grounds or in bad faith, then to what extent is the defendant exonerated in carrying out such an order if there is no proof that the defendant knew of the inadequate grounds or the bad faith that purported to give rise to the reprisal by his government.

The question whether such a matter should be dealt with on the actual facts or according to the belief of the accused then becomes very important to the defendant. Whereas as a matter of military knowledge a senior soldier such as the defendant would be deemed to know the outstanding rules of warfare after some 20 years of senior service, and also as a human being to have knowledge of the accepted standards of humanity, it does not necessarily follow that he would know the exact circumstances in which a right to reprisal may be exercised which is not only a controversial matter among lawyers, in legal text books and other publications, but is a very difficult matter to determine in any specific case of reprisals. Possibly the defendant might be expected to know that great care must be exercised before reprisals are launched, but to that he might well say that those at the source from which this order emanated would have the best legal advice that can be obtained and that, as a military commander in a war, he could not be expected to have to go into such questions.

It would seem that in this case as in others, the defence of superior orders, raised with the question of reprisal, has not been strongly stressed by the defence. It is true that Dr. Müller, the defending counsel in this case, said in his closing address : " In fact, General von Falkenhorst at that time took this measure as a reprisal. . . . I should like to point out that in the beginning it seemed to him as to other officers, to be a measure of reprisal as had been stated by the Fuhrer himself, and, of course he, the accused, was not in the position to verify whether these facts, which have been portended (*sic*) by the Fuhrer were right or not. Whether they were founded or not, he must take them as such as he had got them from the headquarters at Berlin "

In the summing up of the Judge Advocate, no reference can be found to this point, which is only mentioned, as it were, in passing, by the defence, and it may well be that there were no facts upon which the court could find that the defendant really believed that the Fuhrer Order purported to be a reprisal

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(1) Entitled *The Law of Nations and the Punishment of War Crimes.*

order, notwithstanding the fact that in the preface to the Order itself it stated though not in specific terms, that it is a reprisal order, and Hitler and Keitel issued it in that form. As is stated above, once it is rejected as a matter of fact that the defence believed it was a reprisal order, then other more controversial matters do not arise. Possibly there is no more difficult subject in the ambit of the law relating to war crimes than a correct application of the principles in a case where reprisal and superior orders are raised by the defence in respect of one and the same order which the defendant is alleged to have carried out. The whole basis of the wrongfulness of disobeying an unlawful order may fall to the ground because a reprisal is defined as "where one belligerent retaliates upon another by means of otherwise than legitimate acts of warfare in order to compel him and his subjects and members of his forces to abandon illegitimate acts of warfare and to comply in future with the rules of legitimate warfare." (Oppenheim, 6th Edition, Revised, page 446.)

Perhaps it is for this very reason that the laws of war demand that there must be a concurrence of a considerable number of factors before an occasion to exercise the right of reprisal arises. Finally, Article 2 of the Geneva Convention of 1929 forbids measures of reprisal being taken against prisoners of war.

### 3. COMMANDO OPERATIONS AND SABOTEURS

The defence also relied upon the peculiar nature of commando operations and endeavoured to suggest that they really partook of the nature of sabotage, and therefore might be considered as a form of war treason and here the question of uniform worn by people participating in commando operations becomes, it is submitted, of the greatest importance.

It is thought that an examination of the law relating to war treason will show that acts which were carried out during the war as in this case, under the name of "commando operations" would probably constitute war treason if the members of the forces of the belligerent who carried them out operated in disguise or civilian clothes. Oppenheim states in Volume II of his *International Law*, 6th Edition, on pages 454-5 :

"War treason consists of such acts (except hostilities in arms on the part of the civilian population, spreading sedition propaganda by aircraft and espionage) committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy. . . . Enemy soldiers—in contradistinction to private enemy individuals—may only be punished for war treason when they have committed the act of treason during their stay within the belligerent's lines under disguise. If, for instance, two soldiers in uniform are sent to the rear of the enemy to destroy a bridge they may not, when caught, be punished for war treason because their act was one of legitimate warfare. But if they exchange their uniforms for plain clothes and thereby appear to be members of the peaceful private population, they may be punished for war treason."

It is suggested that this is the very example that most nearly covers the type of activity committed by the commando troops of the allies during the recent war, as is evidenced in the case now being reviewed.

It will be observed that the question of what is the objective is, for the purpose of the law regarding war treason, not the point, but the question of whether it is committed by members of the armed forces and whether they committed it in uniform. Further, that it is not properly a matter of war crime but of war treason, which nevertheless means that the perpetrators may be tried and punished in the same way as war criminals.

Dr. Müller endeavoured to say that sabotage activity was a development of modern warfare not contemplated by the Hague Regulations of 1907. But the law relating to war treason existed indeed before those regulations, of which one of the most notable cases occurred in 1904, during the Russo-Japanese war, when two Japanese were caught trying to destroy a railway bridge by explosives in Manchuria in the rear of the Russian forces and while they were disguised in Chinese clothes. For this they were tried, sentenced and shot.

It would also seem that the legal advisers of the Fuhrer in the O.K.W. had provided two items of the Fuhrer Order which put it clearly in the category of an illegal order even if it were meant to be an order combatting acts of war treason.

The first provision was that there should be no military courts, for even a war traitor is entitled to a trial, and the second provision was that a commando order was to apply to troops engaged on commando operations whether in uniform or not and therein lay the clear criminality of the order, apparent to every officer who had a working knowledge of the rules of war.

It is not possible to say that troops who engage in acts of sabotage behind the enemy lines are bandits, as Hitler declared them. They carry out a legitimate act of war, provided the objective relates directly to the war effort and provided they carry it out in uniform. The only difficulty in this case on this point lies, in fact, in respect of some of the commando operations which were the subject matter of the charges; the commando troops may have been wearing uniform with skiing clothes underneath, the intention being that they would carry out the sabotage operation in uniform and then proceed to the Swedish boundary in skiing clothes as civilians. It is not necessary to decide this point for the purpose of this case, because the evidence shows that they were captured in uniform, whether or not they were wearing skiing clothes underneath, and were treated as service personnel by the people who captured them. An interesting point would arise if the commando troops, after having destroyed the installations while they were in uniform, had then discarded their uniform and were then in process of flight as civilians when they were caught by the enemy agencies. Should they then be tried as war traitors, or possibly as spies on the ground that they are clandestinely (as civilians) seeking to obtain information concerning the belligerent in the zone of belligerent operations with the intention of communicating it to the other belligerent? That would be a question of fact and if it were proved that the defendants were merely fleeing to a neutral country from the scene of their devastation, espionage would not be in point. Strictly, it would seem that if so caught, as mentioned above, they should be apprehended and upon them satisfying the authorities that they were members of the armed forces who had carried out the sabotage they should be placed in a prisoner of war camp and treated rather as troops of a belligerent army

who are fleeing from the scene of operations in disguise. It is not thought that this point has ever been determined in any war crime trial to date.

#### 4. THE ISSUING OF AN ILLEGAL ORDER WITH NO PROOF OF COMPLIANCE. (1)

What is the position where, as in the 9th charge in this case, the accused has been charged with issuing an illegal order, and it is proved either that it was never carried out or that it was impossible to carry it out? This seems to be the circumstances in respect of the order dated 19th July, 1944, whereby certain classes of prisoners of war, namely Jews, were to be transferred to S.D. custody. It was proved that no allied Jewish prisoners were so transferred in Norway, and in fact all prisoners of war, after temporary transit, were sent to Germany. There were, of course, large numbers of Russian prisoners of war in Norway, but they do not appear to have been the subject matter of this case.

A senior officer, when he issues the order, has done all he can to secure compliance, but the question of whether he, the author, faces trial as a war criminal turns on an accident of whether anybody was able to comply with his order or not. The question of the state of mind of the accused when he issued the order becomes important from the point of view of *mens rea*, because if he knew that the order could not be carried out, then no question of criminality should arise. It is only when he thought that it could be carried out but was surprised to find that it could not or was not, that criminality may occur. The fact that the accused was found guilty on the 9th charge is further evidence that it may occur.

#### 5. THE POSITION OF THE DEFENDANT AS COMMANDER-IN-CHIEF, NORWAY

This point is purely one of fact and of military knowledge, and it is not thought that for the purpose of this trial it has any legal interest. The court seems to have decided on the evidence as a matter of fact, that the position of the defendant did seem to give him the power to order all three services in Norway and it was proved that the Commando Order and its variations had been passed down by the defendant to the army, navy and air force in Norway.

#### 6. DENIAL OF QUARTER

It will be remembered that in the text of the Commando Order of 1942, allied commando troops were to be denied quarter in battle or in flight and this seems to be a clear and serious contravention of international law.

On the subject of quarter, it is stated on page 270 of Oppenheim's *International Law*, Vol. II, 6th Edition: "But combatants may only be killed or wounded if they are able and willing to fight and to resist capture. . . . Further such combatants as lay down their arms and surrender or do not resist . . . may neither be killed or wounded but must be given quarter. These rules are universally recognised and are expressly encouraged by Article 23 (c) of the Hague Regulations, although fury of battle frequently makes individual fighters forget and neglect them."

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(1) See also Volume VIII, p. 90, Volume IX, p. 81, and a comment on the *High Command Trial* in Volume XII.

There are, indeed, certain circumstances in which quarter may be denied as for example as a reprisal for refusal of quarter by the other side. Nowhere in Hitler's explanation to the Commando Order, although he talks in terms of reprisal, does he state that the reason for the Commando Order is that allied troops have denied quarter to German troops. Therefore, it may be taken that the Commando Order was, on the face of it, clearly illegal in this point. The question of denying quarter in flight is a rather more difficult matter, as it will be remembered that the most frequent cause that was given out by the German agencies for the shooting of prisoners of war was "shot in flight" or "shot while trying to escape". That seems to be a question of fact as to whether or not any given prisoner was trying to escape and whether or not shooting was the only way in which the escape could have been prevented. Such circumstances cannot by any stretch of the imagination have been deemed to have arisen in the way in which the commandos in this case met their death.