CASE NO. 36

TRIAL OF GERHARD FRIEDRICH ERNST FLESCH, SS OBERSTURMBANNFÜHRER, OBERREGIERUNGSRAT

FROSTATING LAGMANNSRETT (NOV.-DEC. 1946) AND SUPREME COURT OF NORWAY (FEBRUARY, 1948)

Denial of fair trial. The plea of justifiable reprisals. Superior orders.

A. OUTLINE OF THE PROCEEDINGS

1. THE INDICTMENT

The defendant Flesch was charged by the Director of Public Prosecutions with having committed war crimes amounting to murder and torture, in violation of:

§ 1, cf. §3 of the Provisional Decree of 4th May, 1945, cf.
§ 233 of the Civil Criminal Code, cf.
§ 229, cf. § 232 of the Civil Criminal Code, cf.
§ 242 of the Civil Criminal Code, cf.
The Law of 6th July, 1946.

The individual counts of the indictment made the following charges:

Count I

(*a*) In November, 1942, the defendant gave orders to the Commandant of Falstad Concentration Camp for the shooting of three Norwegian citizens of Jewish descent.

(*b*) In February, 1943, the defendant gave orders for the shooting of the Norwegian citizen Toralf Berg.

(*c*) In March, 1944, the defendant gave orders for the hanging of nine Russian prisoners of war. The defendant himself supervised the execution.

(*d*) In August–September, 1944, the defendant gave orders for the hanging of 15 Russian prisoners of war. The defendant himself supervised the execution.

(*e*) In October, 1944, the defendant gave orders for the shooting of the Norwegian citizens Kjell Barre, Kaare Storaas, Hans Fredrik Bye and three other persons, to take place while they were being arrested. As a result Kjell Barre and Hans Fredrik Bye were shot.

(*f*) In October, 1944, Johnny Pevik was hanged on the defendant's orders.

(*g*) In February, 1945, the Norwegian citizens Ingar Troøen and Ole Kvernrød were shot on the defendant's orders while being arrested.

Count II

(*a*) In March, 1942, the defendant took part in the " verschärfte Vernehmung " of Hans Konrad Ekornes.

(*b*) In the autumn of 1942, the defendant gave orders to his subordinates to employ flogging as an ordinary means of punishment for Jewish prisoners in Falstad Concentration Camp.

(*c*) In February, 1944, the defendant gave orders for the " verschärfte Vernehmung " of Peter Helland Hansen.

(*d*) In May, 1944, the defendant gave orders for the " verschärfte Vernehmung " of Magne Flem.

(*e*) In November, 1944, the defendant gave orders for the " verschärfte Vernehmung " of Arne Tømmeraas.

(*f*) In March, 1945, the defendant gave orders for the " verschärfte Vernehmung " of Ingeborg Holm.

Count III

In September, 1943, the defendant, who was at that time Chief of Falstad Concentration Camp, refused permission for the taking to hospital of prisoner Erling Borge who was suffering from acute diphtheria. Borge died as a result of the illness on 22nd September, 1943.

The Public Prosecutor acting in the trial was Høyesterettsadvokat J. C. Mellbye. Counsel for the defence was Høyesterettsadvokat Adam Hioth.

2. THE POSITION OF THE ACCUSED

The evidence showed that Gerhard Friedrich Ernst Flesch was born on 8th October, 1909, in Poznan. In 1934, he took his degree in law and was appointed by He drich to the Gestapo where he was in control of the religious sects of Germany. In 1948, he took part in the German march into the Sudetenland, and in 1939, in the annexation of Bohemia and Moravia, and was later appointed political adviser to Gauleiter Sauckel in Thuringia. After the outbreak of the war in September, 1939, he became leader of an " Einsatzkommando " in Poznan. In 1940, he joined an SS Totenkopf-division in their march into France.

The defendant came to Norway on 23rd April, 1940, as Kommandeur of the Sipo and the SD in Bergen, and from October, 1941, held the same position in Trondhjem and district, covering most of Northern Norway. As Kommandeur of the district, he was also chief of Falstad Concentration Camp outside Trondhjem and the prisons in Trondhjem. He was given the rank of Obersturmbannführer and received the title of Oberregierungsrat. His immediate superior was Fehlis.

3. JUDGMENT OF THE FROSTATING LAGMANNSRETT OF 2ND DECEMBER, 1946

Flesch was found guilty on all counts, except points *a* and *c* of Count I, and was sentenced to death by shooting. The reasons of the Lagmannsrett for reaching its decision are set out below.

Count I (a)

During the state of emergency in the Trondhjem area in the autumn of 1942, all male Jews were arrested and taken to Falstad Concentration Camp. Among them were Schidorsky, aged 55, Glick, aged 65, and Abrahamsen, aged 70. All three were sick men and were allowed to lie in a loft during the day. One day in November, the defendant came to inspect the

camp. When he saw the three sick men, he said : " Sick Jews lying about ! There is only one thing to do, dig a grave and everything will be right." (Aber Sie lassen doch keine kranken Juden liegen. Draussen ein Grab graben und alles ist in Ordnung.)

The defendant denied having said anything to that effect but the Lagmannsrett felt bound to believe three witnesses, one of whom was Dr. Eitinger, the German M.O. in charge of the sick. Some days later Dr. Eitinger had gone to the Lagerkommandant and asked for permission to take one of the sick Jews to hospital. The Lagerkommandant had thereupon gone to Trondhjem to get a permit for the transfer of all three sick men to hospital. When he returned the same evening, the three men were taken from the camp.

Since then these three Jews had not been heard of, neither had it been possible to trace their names in any hospital register. The only evidence that has come to light is a letter from the Sipo to the Swedish Consulate General in Oslo, dated 31st May, 1943, which, in reply to some investigations started by Schidorsky's relatives in Sweden, stated that Schidorsky had died of pyæmia in Falstad Camp on 13th November, 1942.

The defendant insisted that he had not seen the Lagerkommandant as he had been in Germany at that time. It has not been possible to ascertain that it was the defendant who saw the Lagerkommandant or that it had been he who had given the actual orders for the extermination of the three Jews, and the court, therefore, felt bound to acquit him on Count I (*a*).

Count I (b)

Toralf Berg, who had been one of the leaders of the local branch of the Military Organisation—the Norwegian underground movement—had been arrested on 15th August, 1942, and was sent to Falstad Camp where he had been badly ill-treated during several interrogations. He was shot on 16th February, 1943, on the defendant's orders.

The defendant had admitted to having given the orders but had maintained that Berg had been sentenced to death by a German military court in Dombaas, about 150 miles from Trondhjem. The Lagmannsrett could not accept that explanation. Berg had shared a cell with seven other prisoners to whom he had spoken freely but to whom he had never mentioned having been tried or court-martialled. Nor was there any proof that Berg had been taken from the camp to Dombaas where the court had ostensibly sentenced him to death. A letter received by Berg's father from the Sipo informing him of his son's suicide also contradicts defendant's statement.

The Lagmannsrett found that the defendant was guilty of having caused Berg's death without a trial, and that he had thus violated the laws and customs of war.

Count I (c) and (d)

The defendant had admitted having given the orders for the execution of two lots of Russian prisoners of war. He had stated that the prisoners had been sent to Falstad from various camps in the district and had all been guilty of criminal acts, such as attacks with explosives, murder and preparations for mass escapes. He maintained that every one of the prisoners had been sentenced to death by a Wehrmacht court martial. The reasons

why they had not been executed by the Wehrmacht, but sent to him, were that he had been commissioned to investigate through interrogations how far Norwegians and Norwegian illegal organisations had been implicated in those subversive activities.

On the basis of the evidence submitted in the case, the Lagmannsrett assumed that before 1943 prisoners of war who had committed offences while in camp were dealt with by the Wehrmacht, and that the Wehrmacht courts martial only were considered competent to try such cases. In 1943, however, it had been decided that the Sipo should take over cases against prisoners of war who had escaped from the camps and had committed criminal acts while at liberty. After Himmler in July–August, 1944, had become in charge of matters concerning prisoners of war, it was decided that the Sipo should also take over cases against prisoners of war who had committed crimes while in camp without formal sentence being passed. Circumstances indicate that no sentences whatever had been passed on any Russian prisoners of war or at any rate not on those referred to in Count I (*c*) and (*d*).

As far as the prisoners of war referred to in point (*c*) are concerned, the evidence submitted to the court did not, however, prove sufficient to dismiss the defendant's statement that they had been sentenced by a court martial. Assuming that to be correct, the defendant's acts could not be characterised as being at variance with the laws and customs of war, in particular Article 8 of the Hague Convention concerning land warfare. The prosecution had not succeeded in proving that these prisoners of war had not been court-martialled and the Lagmannsrett, therefore, acquitted the defendant on that point.

As regards point (*d*), however, the Lagmannsrett could not accept the defendant's statement. Several German witnesses who had been in charge of the investigation into the cases against a number of these prisoners of war had stated that none of them had been sentenced for if they had been tried, they would in the course of their duties have been informed whether they had been sentenced or not. The Lagmannsrett, therefore, found it proved beyond doubt that the prisoners referred to in point (*d*) had been executed without a previous trial and that defendant had been cognisant of the fact. His actions, therefore, were at variance with the laws and customs of war, in particular Article 8 of the Hague Convention regarding land warfare. As the defendant had committed those acts knowingly and intentionally, he had also violated § 233 of the Norwegian Civil Criminal Code.

The Lagmannsrett regarded as immaterial the defendant's plea that the German treatment of Russian prisoners of war must be adjudged in the light of the Russian treatment of German prisoners of war.

Count I (e)

The Lagmannsrett found it proved that in October, 1944, defendant had given orders for the arrest of a number of Norwegian citizens, and that in the course of the arrest six of them were to be shot from behind as if hit while escaping. Of the three Gestapo men who were in charge of the arrests, Roth arrested his seven men but did not shoot two of them as ordered. Koczy shot Barre but not Bye, who, he stated, was wanted in connection

with some investigations. Bye was shot later by Koczy ostensibly while trying to escape. The third Gestapo man, Dudeck, had made his arrests but had not carried out the order as to the shooting of two of the men.

The defendant had stated that he gave those orders in accordance with written directives received from Fehlis who had said that the men to be shot had already been sentenced by a Standgericht. The conclusion is inevitable, however, that the real reasons for the arrests and the shooting were reprisals against the Norwegian underground movement whose activities were allegedly in violation of international law.

According to defendant, he had sent a report to Fehlis mentioning the persons who, in his opinion, would be arrested, and Fehlis, relying upon the authority of an Erlass from Himmler concerning subversive activities in occupied countries, had decided which of them were to be shot.

The defendant's orders to his underlings had been to shoot the six men as soon as they were identified. The Lagmannsrett found that even though the six persons may have been guilty of subversive activities, the whole procedure was at variance with the laws and customs of war. According to Article 30 of the Hague Convention regarding land warfare, even spies caught *in flagrante delicto* could not be shot without trial, and persons who had committed such acts as the six men had been charged with could obviously not be placed in a less favourable position. As mentioned above, the defendant had maintained that he had been told by Fehlis that all six persons had been sentenced to death by a Standgericht, but the Lagmannsrett found that even if defendant were to be believed on this point, he must have known that such " sentences " were actually only administrative decisions taken by Fehlis which could not be regarded as a sentence in the sense as understood by international law. The defendant himself had admitted that the shooting of the persons in question was an act of reprisal camouflaged by a Standgericht sentence. It must be remembered that of those doomed persons who had not been shot by the Gestapo men on the spot, not one was executed later.

The Lagmannsrett could not accept the defendant's plea that the procedure applied in these instances could be regarded as justifiable acts of reprisal. Experts on international law are divided in their opinion as to the legality of reprisals. Whatever the legal position, an act of reprisal can in no circumstances be pleaded in exculpation unless it was, at the time, announced publicly as such, or it appeared from the act itself that it was intended as a reprisal and showed clearly against what unlawful acts it was directed. None of the incidents in question fulfilled any of these minimum demands. Gestapo man Dudeck had stated that defendant had given explicit orders to shoot the persons in question from behind so as to make it seem as if they had been shot while escaping. It was not at all clear from these acts of alleged reprisals against what definite kinds of breaches of international law or German criminal provisions they were intended to serve as reprisals. The defendant had maintained that the acts of reprisal in question were directed against a number of subversive acts described in quite general terms, such as sabotage, guerrilla warfare, etc. The Lagmannsrett, however, could not regard guerrilla warfare in general as a breach of international law. It is a fact that soldiers had been sent to Norway from England to sabotage

factories and military objectives, but in dealing with cases like that, the Germans had never distinguished between such acts having been executed by men in uniform or by soldiers in civilian disguise. When such acts of sabotage had been carried out by soldiers in uniform, they did not constitute a breach of international law.

The Lagmannsrett thus came to the conclusion that the acts in question could not be regarded as reprisals but must be considered as acts solely intended to terrorise the population in order to stem the underground movement. It was significant in the Lagmannsrett's opinion that the defendant's underlings had reacted against the inhumane orders by trying to avoid carrying them out.

The Lagmannsrett found that the shooting of Barre had been carried out in accordance with detailed instructions. Consequently this act was a violation of § 233 of the Norwegian Civil Criminal Code. As regards the defendant's orders for the shooting of the others, the Lagmansrett found that this constituted attempted murder, an act punishable according to § 233, cf. § 49 of the Civil Criminal Code.

Count I(f)

Pevik was arrested in the autumn of 1943, on suspicion of having smuggled arms and taken part in sabotage. During various interrogations he had been cruelly ill-treated until in October, 1944, the defendant had given orders for his hanging.

The defendant had made several contradictory statements on that count. In the first place he had maintained that the execution was based on a sentence by the SS und Polizeigericht Nord in November or December, 1943, but had been postponed pending investigations into other cases. Later he had stated that Pevik was kept alive because he was regarded as a hostage, later still that he was to be exchanged for a German prisoner. In October, 1944, the defendant had allegedly received orders from Fehlis to execute the sentence. The defendant denied the ill-treatment.

The Lagmannsrett found it proved that Pevik had not been sentenced by any court. Several German witnesses closely connected with the SS und Polizeigericht Nord, among them the secretary to the court, denied that Pevik had been tried, and one German witness had stated that the defendant had told him that Pevik was to be executed pursuant to the " Nacht und Nebel Erlass ". In the light of all the available evidence, the Lagmannsrett found that Pevik had been executed at variance with the laws and customs of war. As the defendant had committed those acts knowingly and intentionally, he had also violated § 233 of the Norwegian Criminal Code.

Count I(g)

The Lagmannsrett found it proved that the defendant on 15th February, 1945, gave orders for the arrest of Ingar Troøen and Ole Kvernrød and for their shooting while being arrested. Troøen was shot while he was leaving his house, whereas Kvernrød was arrested to begin with, but shot later when allegedly trying to escape. Even though Troøen and Kvernrød as section leaders of the Military Organisation were liable to be sentenced to death by

a German court martial, the Lagmannsrett found that the procedure followed by defendant, as far as Troøen was concerned, was at variance with international law. As to Kvernrød, however, the Lagmannsrett could not but accept the possibility that it might have been true that he was shot while trying to escape as stated by the German witness who had shot him. As defendant had acted knowingly and intentionally, he had at the same time violated § 233, cf. § 42 of the Norwegian Civil Criminal Code.

Count II

In accordance with what defendant himself had explained, the Lagmannsrett found it proved that the so-called method of " verschärfte Vernehmung " of prisoners, in order to extract information, was brought into force in Norway in 1940–41. The Polizeikommandeurs were vested with the authority to issue written permits for the application of that method. Later the individual investigators (Sachbearbeiter) were delegated with authority to use this method if they found it necessary.

The Lagmannsrett then turned to the individual instances of torture covered by Count II and found it proved that all the victims had been tortured in the most appalling way by the application of the most vicious and sadistic methods of torture ever employed by the Germans, and that these acts of torture had been carried out either on special orders or with the connivance or approval of the defendant. As, however, these acts of torture did not give rise to any legal problems, it is considered beyond the scope or purpose of these present Reports to go into further detail as regards the evidence of the individual acts of torture. It will suffice to state that the Lagmansrett, on the basis of the overwhelming evidence submitted to the court, found that these acts were committed in violation of § 229 of the Civil Criminal Code as all the acts of torture referred to had been carried out according to the authority or general directives from defendant who must have been aware of the fact that these would result in grave bodily harm. The defendant thus violated § 232 of the Civil Criminal Code in so far as the acts had been committed knowingly and intentionally and in a particularly painful way.

The defendant had pleaded that all his acts had been carried out on superior orders either according to general or special directives. The Lagmannsrett, however, found that as the defendant had been aware that his acts were in violation of international law, superior orders could not be invoked in exculpation.

Count III

Erling Borge was taken to Falstad Concentration Camp on 8th September, 1943, suffering from diphtheria. The M.O. repeatedly asked the camp commandant for permission to have the patient taken to hospital but was refused. The Lagmannsrett found it established that the camp commandant had applied to defendant for permission to move Borge to hospital but that the defendant had said that the patient was going to die in any case and could thus as well remain in his cell. Borge died on 22nd September.

The Lagmannsrett found that the defendant, by refusing Borge's admission to hospital, had wilfully and knowingly violated § 242 of the Civil Criminal Code.

4. THE APPEAL TO THE SUPREME COURT OF NORWAY

The defendant appealed to the Supreme Court against the sentence of the Lagmannsrett primarily on the grounds that:

(*a*) the Lagmannsrett had wrongly applied the provisions of the law on criminal procedure, and

(*b*) the Lagmannsrett had wrongly interpreted and applied the provisions of international and Norwegian substantive law.

He also appealed on the grounds that the punishment decided upon by the Lagmannsrett was too severe.

The details of the points of the appeal will appear from the account of the decision of the Supreme Court.

5. THE DECISION OF THE SUPREME COURT ON 12TH FEBRUARY, 1948

The defendant's appeal was unanimously rejected.

Judge Soelseth in giving the reasons for the court's decision dealt with defendant's appeal point by point.

The defendant had maintained that whilst the preparations for the trial were going on, he had been taken to Bergen and other places for interrogation purposes. Because of that he had not been able to study the voluminous material submitted to the court and to prepare his defence as thoroughly as he would have liked to. Furthermore, during the trial his opportunity to confer with his German counsel had been limited, and according to prison regulations, he had not been allowed to work on his defence after 10 p.m. This complaint was ruled out by Judge Soelseth who found that defendant had been given ample time to prepare his defence, confer with his counsel and explain himself in court.

The defendant had complained that the Lagmannsrett had refused to summon or order the interrogation of four German witnesses, one of whom could have testified that death sentences had been passed on the Russian prisoners of war mentioned in Count I (*d*) of the indictment whilst the other witnesses could have stated that death sentences had also been passed on Toralf Berg and Johnny Pevik, cf. Count I (*b*) and (*f*) respectively. Judge Soelseth observed that according to the records of the Lagmannsrett trial, the court had requested the prosecution to try to trace these German witnesses. The prosecution had done its utmost but had not been able to trace them. The Lagmannsrett had found that there was not sufficient reason to adjourn the trial because of this as it was considered doubtful whether their evidence would have been of any decisive importance in view of the convincing evidence already submitted to the court. Before the case came up before the Supreme Court, two of the witnesses had been found and interrogated but their evidence, quite unexpectedly to the defendant, had supported the prosecution's contention.

Judge Soelseth then went on to discuss the defendant's allegation that the Lagmannsrett had wrongly applied the law. The defendant had contended that the Lagmannsrett had erroneously assumed that the executed persons mentioned in Count I (*b*), (*e*), (*f*) and (*g*) of the indictment could not be legally executed without a previous trial. According to the defendant, these persons were franc-tireurs whose actions were at variance with international law and consequently they were not entitled to be treated according

to regulations laid down by international law. Judge Soelseth ruled out this objection. In his opinion it was quite clear that in the prevailing circumstances the fight of the underground movement against the Germans could not in itself be regarded as being at variance with international law. The question whether such resistance against the occupying Power was a breach of international law or not had no bearing on the question at issue, namely, what procedure the occupying Power was bound by international law to apply against people who had taken part in subversive activities. Judge Soelseth held that it was an unquestionable principle of international law that punishment could not be inflicted unless the guilt of the accused had been established through judicial procedure and he made reference to Konz's *Kriegsrecht und Neutralitätsrecht*, page 97. He also recalled that the Supreme Court had taken the same view in the cases against Oscar Hans,(1) and against Latza and two others.(2) It might not be clear according to international law what requirements the tribunal or the authorities which take the decision must fulfil, but Judge Soelseth felt satisfied that the minimum demand for such procedure was that the accused could not be sentenced without having his guilt investigated in a proper and fair manner. To ensure this result, it was necessary that the accused be informed of the charge and the evidence brought against him, and that he be given opportunity to defend himself and to offer counter-evidence. The Lagmannsrett found that as regards the Norwegian citizens who had been executed, no such trial or proper investigation had been instituted. Judge Soelseth agreed with the Lagmannsrett that the procedure applied by the German authorities in these instances did not fulfil the minimum demands as laid down by international law. Thus it had been established as regards the persons mentioned in Count I (*e*) and (*g*) respectively, that they had been arrested subsequent to the decision for their execution, and that they had not been interrogated at all.

Judge Soelseth agreed with the view held by the Lagmannsrett to the effect that the execution of the Norwegian citizens without previous trial could not be regarded as constituting justifiable reprisals and made reference to what had been held by the Supreme Court in the case against Bruns and others.(3)

As to the Russian prisoners of war referred to in Count I (*d*) of the indictment, the defendant had maintained that the Lagmannsrett had wrongly considered it immaterial that the Russians shot German prisoners of war. In this connection the counsel for the defence had pointed out that Russia had not become a signatory to the Geneva Convention and that she had decreed that she would not treat members of the German armed forces in accordance with the Geneva Convention. Counsel for defence claimed that German prisoners of war were shot by the Russians when taken prisoners, a fact which in his opinion justified the Germans to shoot Russian prisoners of war without trial, at any rate those who were guilty of criminal offences. Judge Soelseth did not find it necessary to deal with the question whether or not Russia had complied with the provisions of the Geneva Convention in her treatment of German prisoners of war. He found it sufficient to point

(1) See Volume V of this series, pp. 82-93.
(2) It is hoped to report this trial in a later volume of this series.
(3) See Volume III of this series, pp. 15-22.

out that it did not follow from the fact that Russia had not become a signatory to the Geneva Convention that the general provisions of international law should not be complied with by the Germans when dealing with Russian prisoners of war.

Defendant had pleaded superior orders and maintained that he could not be held responsible unless it could be shown that he had known that the orders were illegal. Judge Soelseth observed, however, that superior orders could not be pleaded in exculpation, cf. § 5 of Law No. 14 of 13th December, 1946, and it was clear from what had been stated by the Lagmannsrett that defendant had in all instances been aware that he had acted in violation of international law.

As to Bye and Kvernrød, cf. Count I (*e*) and (*g*) respectively, defendant had maintained that he could not be found guilty of the attempted murder of these persons. Although he had given the orders for their execution, they were not actually shot as a consequence of these orders. In their attempt to escape, a new situation had arisen which constituted the immediate cause for their shooting. Thus it had come to a break in the causative relation between his orders and the shootings. Judge Soelseth felt satisfied that the Lagmannsrett had interpreted the law correctly when finding defendant guilty of attempted murder in the cases of Bye and Kvernrød.

A subsidiary appeal had been launched by defendant against the degree of punishment imposed by the Lagmannsrett. Judge Soelseth held that in view of the fact that the defendant had held the high position of a Kommandeur of the Sipo since October, 1941, he could justly be made personally responsible for the acts carried out by his underlings. According to Judge Soelseth it could not be pleaded in mitigation that it might have been possible that several of the executed persons would have been legally sentenced to death by a proper tribunal. On the other hand, however, it had to be remembered that the defendant had by his orders and actions deprived these persons, who were in his power, of the opportunity of having the charges against them tried in a proper way. Thus Judge Soelseth agreed with the Lagmannsrett that the supreme penalty had to be applied in the case in hand.

The remaining Judges, Berger, Schei, Stenersen, Krog, Gaarder, Holmboe, Bonnevie and Stang concurred in Judge Soelseth's opinion.

B. NOTES ON THE CASE

Among the most important aspects of the present case is the definition by Judge Soelseth of the minimum requirements of a fair trial.[1] This has been referred to at the appropriate points in the commentary to the *Justice Trial*.[2]

It may be added that the position of Russian prisoners of war, which was also referred to by Judge Soelseth, received treatment in other trials, including the *Milch Trial* conducted before a United States Military Tribunal in Nuremberg.[3]

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(1) See p. 119.
(2) See footnotes on p. 103.
(3) To be reported in Volume VII of this series.

7646. Wt. P. 1405. Ps. 9960. C. & C. (W.) Ltd. 12/48. Gp. 553.