

## CASE No. 44

### THE TRIAL OF ALBERT KESSELRING

BRITISH MILITARY COURT AT VENICE, ITALY,  
17TH FEBRUARY—6TH MAY, 1947

#### A. OUTLINE OF THE PROCEEDINGS

##### 1. THE CHARGES

The accused was charged with "being concerned in the killing as a reprisal of some 335 Italian nationals," in the Ardeatine Caves (first charge), and with "inciting and commanding . . . forces . . . under his command to kill Italian civilians as reprisals in consequence of which a number of Italian civilians were killed" (second charge).

##### 2. THE EVIDENCE

###### (i) *Evidence on the first charge*

Most of the evidence was agreed upon by Counsel for the Defence and Counsel for the Prosecution.

The evidence on the bomb explosion in Rosella Street, on the 23rd March, 1944, and on the mass shooting in the Ardeatine Caves, on the 24th March, 1944, was substantially the same as the evidence given with regard to these events in the Mackensen trial.<sup>(1)</sup> The accused returned from the front to his headquarters on the evening of the 23rd and the events of Rosella Street were reported to him immediately. Then two telephone conversations took place. A staff officer from Hitler's headquarters spoke to Kesselring's chief-of-staff and informed him that the Führer had ordered that as a reprisal for the bomb attack, 10 Italian hostages were to be killed for every German policeman who had died as a result of that bomb attack.

With regard to the second telephone conversation which took place between the head of the SD (Security Service) in Rome and the accused, the evidence for the Prosecution and the evidence for the Defence are at variance. The head of the SD testified that he informed the accused that he had enough persons "worthy of death" to carry out the reprisal. This, he explained, meant persons under sentence of death or charged with offences for which the death penalty could be imposed. The accused maintained that he was informed by the head of the SD in the course of this telephone conversation that he had sufficient persons actually sentenced to death in the prisons of Rome. The accused then issued the following orders to General Mackensen, the commander of the 14th Army, which was one of the armies under the accused's command:

"Kill 10 Italians for every German. Carry out immediately."

Later, during the night a second order from the Führer's headquarters was received at Kesselring's headquarters. It repeated the first order and added that "the execution was to be carried out by the SD." This order was passed down to 14th Army by the accused's chief-of-staff, who, also, informed the accused.

The case for the prosecution on this evidence was that the accused had ordered reprisals at the rate of ten to one, which was excessive, and that

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<sup>(1)</sup> Pp. 1-8 of this volume.

as he had passed the orders to subordinate army formations, he was responsible for the way in which they were carried out. The case for the defence was that on receiving the news of the bomb attack, the accused had ascertained that there were sufficient persons already sentenced to death to carry out the reprisal without killing innocent people.

The two main arguments of the defence were: (1) that in passing down the order received from the Führer to the 14th Army, the accused had deliberately left out the word "hostages" to avoid any persons not sentenced to death being killed. He thus carried out the orders he was given in the most humane way that was open to him. (2) That the second order charged the SD with the execution and thus freed the accused from all responsibility for carrying out the execution and that therefore after passing on the second order the accused never enquired into the manner in which it was carried out.

The Judge Advocate said: "The Field Marshal's real defence is: "I never carried out any orders at all, all I did was to pass along the chain of communication, a message to the SD."

(ii) *The Evidence on the second charge*

On 1st May, 1944, Field Marshal Keitel, as Commander-in-Chief of all German forces, issued an order which gave the accused, as Commander-in-Chief of all German forces in Italy, the overall command and direction in the fight against Italian partisans who had become a serious menace to the security of the German forces in that theatre. For this particular purpose all SS and police forces in Italy, as well as the fighting services, were brought under his command. On the 17th June, 1944, the accused issued an order to his troops concerning "new regulations for partisan warfare," which contained the following passage: "The fight against the partisans must be carried out with all means at our disposal and with the utmost severity. I will protect any commander who exceeds our usual restraint in the choice and severity of the means he adopts whilst fighting partisans. In this connection the old principle holds good, that a mistake in the choice of the means to achieve an objective is always better than failure to act or neglect . . . partisans must be attacked and destroyed."

On 28th June, 1944, the accused issued an appeal to the Italian population over the wireless in which he condemned the method of fighting adopted by the allies in Italy. He alleged that the allied commanders had issued a number of proclamations in which they had incited the Italian population to assail German military posts, attack sentries by stabbing them in the back and to kill as many Germans as possible. He continued: "Up to now I have proved that to me the respect of human principles is a matter of normal logic . . . However, as a responsible commander I can no longer hesitate to prevent by the most repressive means this despicable and mediæval method of fighting. I give warning that I shall use these means forthwith. Followers of the Allies and subversive elements are warned not to continue the behaviour shown hitherto."

On 1st July, 1944, the accused issued a second order to his troops in which he pointed out that his broadcast announcement was not to be an empty threat. The order said, "where there are considerable numbers of partisan groups a proportion of the male population of the area will be arrested. In the event of acts of violence being committed these men will be shot.

The population must be informed of this. Should troops, etc., be fired on from any village, the village will be burned down. Perpetrators or ring-leaders will be hanged in public." The order ends with the sentence: "All counter measures must be hard but just. The dignity of the German soldier demands it."

During the months of July and August many punitive actions were carried out by the German forces in Italy, both against the partisans and against the civilian population, in the course of which over a thousand Italians, amongst them women and children, were killed. The prosecution submitted affidavit evidence of over twenty instances of indiscriminate killing of Italians by German troops during the relevant period. On the 21st August, 1944, the accused acknowledged these facts in an order to his troops in which he pointed out that "instances have occurred within the last few weeks which caused the greatest harm to the dignity and discipline of the German armed forces, and which had nothing to do with punitive measures."

On the 24th September, 1944, the accused, in another order to his troops, stated: "The Duce has furnished me with fresh instances which are revolting in the manner in which they have been carried out and are driving even the peaceful elements of the population into the enemy's camp or to the partisans."

Relying on these facts, the Prosecutor said: "the orders of 17th June and 1st July, were contrary to the laws and usages of war. The order of the 17th June was an incitement to the troops under the accused's command to commit excesses, and the prosecution obviously relies on the expression 'I will protect any commander,' etc. I say no more than that this is an *incitement*, but in the order of the 1st July the accused goes further and *orders* his troops to take reprisals and it is not until 24th September that he says 'this must stop.' That is the gravamen of this charge."

The Prosecution further maintained that these orders on the one hand and the atrocities alleged to have been committed by the German troops in Italy on the other were cause and effect and that the accused must therefore be held responsible for the actions of the troops under his command.

The case for the defence was that the orders of the 17th June and 1st July were not illegal and that they, in effect, said to the German forces, "You must be hard, you may do many severe things but you must keep within the law." The defence submitted that in the first order the assurance to officers that they would be protected if they attacked partisans was necessary, as in the past commanders had been taken to account for action against partisans as politically undesirable. The re-stating of the "old principle" which for a century had appeared in most training pamphlets for the German army was appropriate in these circumstances.

With regard to the second order, the defence maintained that it outlined the taking of hostages and the infliction of reprisals both of which were legal as everything set out in the order was conditioned by the last sentence, that all measures taken "must be hard, but just." As far as instances of unlawful killings by German troops were concerned, the defence denied some instances altogether, attacking the credibility of the Prosecution's evidence which on this point was predominantly affidavit evidence, and admitting other instances while pleading that they occurred not as a result

of the accused's orders but as a result of independent actions by the troops or by local commanders.

The issue which the court had to decide was, therefore, in the words of the Judge Advocate, whether the accused's orders were "a definite incitement to kill Italians or just badly worded orders which were rather carelessly drafted," and whether all or any of the instances of indiscriminate killings of Italians by German troops were a direct consequence of these orders.

### 3. FINDINGS AND SENTENCES

The accused was found guilty on both charges and sentenced to death by shooting. The sentence was commuted by the confirming officers to one of life imprisonment.

## B. NOTES ON THE CASE

### 1. THE LEGALITY OF KILLING INNOCENT PERSONS BY WAY OF REPRISALS

In presenting the Prosecution's case on the first charge the Prosecutor conceded that the German authorities were justified in imposing reprisals after the bombing attack in Rosella Street. After quoting some authorities on the subject,<sup>(1)</sup> he pointed out that whereas there was authority for destruction of property and incarceration of nationals of occupied territory as reprisals, there was no authority for the taking of human life. The defence argued that in extreme circumstances the taking of human life in the course of reprisals was permissible. A commentary on German Military Law published during the second world war, was quoted by Counsel in this context. The author says: "Hostages are held in a kind of safe custody. They vouch with their lives for the lawful conduct of the opponent. According to the usages of war it must be announced that hostages are being taken and for what purpose. Above all, the taking of hostages has to be brought to the notice of those for whose lawful conduct the hostages are a guarantee. If the event which was to be prevented by the taking of hostages occurs, e.g. if the opponent continues his unlawful conduct, the hostages can be killed."<sup>(2)</sup> Defence Counsel argued that the first step towards the inflicting of reprisals is the taking of hostages. He said that "any military commander in the course of reprisals is authorised to arrest civilians in case partisans should attack his troops or military establishments. If at a later stage outrages against the troops of the occupying power are committed, prisoners belonging to the group detained as hostages may be killed in the course of reprisals." In support of this proposition Defence Counsel quoted section 358(d) of the American *Rules of Land Warfare*.<sup>(3)</sup> "Hostages taken and held for the declared purpose of ensuring against unlawful acts by the enemy forces or people may be punished or put to death if unlawful acts are nevertheless committed."

The Judge Advocate said in his summing up: "I have come to the conclusion that there seems to be on the part of writers a very deliberate attempt not to come out in the open and answer the very question that the Court

(1) They are fully set out on pp. 3-7 of this volume.

(2) Waltzog, *Recht der Landkriegsführung* (Laws of War on Land), 1941, p. 83.

(3) FM. 27/10, *Rules of Land Warfare*, 1940.

wants answered and this is 'Can you shoot, in certain circumstances, an innocent person by way of reprisal'? . . . International Law is generally on a high level. It is about what one belligerent may do to another belligerent, but what Field Marshal Kesselring had to deal with were not countries which were organised with governments but irresponsible people in the main whom he could not negotiate with, people in respect of whom he could not say to responsible leaders 'You must control your followers.' Therefore I do suggest that if there ever were circumstances in which one would have to resort to reprisals if one failed after proper application to find the real culprit that that is the sort of thing in which a reprisal must have been considered appropriate. . . . I have come to the conclusion that there is nothing which makes it absolutely clear that in no circumstances and especially in the circumstances which I think are agreed in this case that an innocent person properly taken for the purpose of a reprisal cannot be executed. I feel that if there is some doubt in the law, the benefit of that doubt must be given to the Field Marshal and therefore I am not prepared to put this case to you on the basis that if you are satisfied that the Field Marshal was deliberately shooting one innocent person by way of reprisal, that that in itself is a war crime of which he should be convicted."

The issues before the court on the first charge were these :

- (1) Were the German armed forces, represented by the accused, or the Security Service, represented by the head of the SD in Rome, responsible for the shootings ?
- (2) Was the shooting of 335 Italians a legitimate reprisal or a war crime ?

With regard to the first question, the Judge Advocate advised the court in his summing up, that : "if you feel that it is right on the evidence as a whole that the shooting was clearly the responsibility of the Security Service and that all responsibility had passed from the Wehrmacht, then to my mind you are bound to acquit the accused." It seems then that the court found that the accused bore the responsibility for these shootings.

With regard to the second question, the court found that the shootings constituted a war crime but this finding does not supply an answer to the question whether the taking of human life as a reprisal is permissible or not as the finding of the court could be supported either by holding that the ratio of 10 to 1 was excessive or by the fact that 335 persons were killed instead of 330 as ordered. The Judge Advocate said in his summing up : "whatever you may think about International Law and reprisals, clearly five of these 335 Italians were murdered. That was a war crime and you cannot get away from it. There was no Führer order to cover it and it was quite outside the reprisal."

The issue before the court on the second charge was not merely whether the measures ordered by the accused were legitimate reprisals or not but, as the Judge Advocate pointed out in his summing up : "The charge is a much more serious and grave one and that is that the Field Marshal deliberately and knowingly when he produced the relevant orders, was having them produced in such form that he knew what the results would be and that he intended by bringing these orders into existence, to bring

about these results. That is what the Prosecution have to prove on this charge."

Thus, the finding of the court on both charges leaves the question of the legality of killing of innocent persons as a reprisal, open.

## 2. HOSTAGES AND REPRISALS

The killings of Italian nationals with which the accused was charged, were in both charges described as reprisals. The shooting in the Ardeatine caves which was the subject of the first charge was no doubt a reprisal and was described as such by the German authorities. The order of the 1st July which forms the main subject of the second charge orders both the taking of hostages (. . . "proportion of the male population of the area will be arrested and in the event of acts of violence being committed these men will be shot") and the infliction of reprisals (. . . "should troops, etc., be fired on from any village, the village will be burned down"). The Prosecution described both parts of the order as reprisals; Defence Counsel treated the taking of hostages as the first step towards inflicting reprisals. The Judge Advocate did not refer to the distinction in his summing up. This distinction was also made in the judgment of the American Military Government Court in the *United States v. List and others*:<sup>(1)</sup> "For the purpose of this opinion the term 'hostages' will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken. The term 'reprisal prisoners' will be considered as those individuals who are taken from the civilian population to be killed in retaliation for any offence committed by unknown persons within the occupied area . . . where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than an infliction of a reprisal. . . . Throughout the evidence in the present case we find the term 'hostages' applied where a 'reprisal' only was involved."

Professor Lauterpacht<sup>(2)</sup> points out that the taking of hostages "must not be confused with the still existing practice of seizing enemy individuals for the purpose of making them the object of reprisals."

It is usual to speak of "hostages" in occupied territories when the occupying forces imprison members of the community of the occupied territory announcing at the same time that they will be treated as hostages if the community does not refrain from certain activities against the occupying forces. The term "reprisal" is used in this connection for measures taken by the occupying forces in retaliation for the unlawful conduct of unidentified members of the community of the occupied territory. Thus hostages are taken *before* the act of illegitimate warfare committed by the enemy whereas reprisals are inflicted *after* such an act.<sup>(3)</sup>

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<sup>(1)</sup> See p. 61 of this volume.

<sup>(2)</sup> Oppenheim-Lauterpacht, *International Law*, Vol. II, p. 460.

<sup>(3)</sup> See also p. 79.