

CASE NO. 62

TRIAL OF MAX WIELEN AND 17 OTHERS

THE STALAG LUFT III CASE

BRITISH MILITARY COURT, HAMBURG, GERMANY,
1ST JULY-3RD SEPTEMBER, 1947

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The court was presided over by a Major-General and consisted of three army officers and three representatives of the Royal Air Force, in accordance with Regulations 5 (1) of the Royal Warrant.⁽¹⁾ (F.O. 81/1945.)

2. THE CHARGES

All the accused were charged with :

- (i) Committing a war crime in that they at divers places in Germany and German occupied territory, between 25th March, 1944, and 13th April, 1944, were concerned together and with SS Gruppenführer Mueller and SS Gruppenführer Nebe and other persons known and unknown, in the killing in violation of the laws and usages of war of prisoners of war who had escaped from Stalag Luft III.
- (ii) Committing a war crime in that they at divers places in Germany and German occupied territory, between 25th March, 1944, and 13th April, 1944, aided and abetted SS Gruppenführer Mueller and SS Gruppenführer Nebe and each other and other persons known and unknown, in carrying out orders which were contrary to the laws and usages of war, namely, orders to kill prisoners of war who had escaped from Stalag Luft III.

The other charges were as follows :

- (iii) (Against the accused Emil Schulz and Walter Breithaupt) : Committing a war crime in that they between Homburg and Kaiserslautern, Germany, on or about 29th March, 1944, when members of the Saarbrücken Gestapo, in violation of the laws and usages of war, were concerned in the killing of Squadron Leader R. J. Bushell and Pilot Officer B. W. M. Scheidhauer, both of the Royal Air Force, prisoners of war.
- (iv) (Against the accused Alfred Schimmel) : Committing a war crime in that he in the vicinity of Natzweiler, occupied France, on or about 6th April, 1944, when Chief of the Strasbourg Gestapo, in violation of the laws and usages of war, was concerned in the killing of Flight Lieutenant A. R. H. Hayter, Royal Air Force, a prisoner of war.

⁽¹⁾ See Volume I, p. 106.

- (v) (Against the accused Josef Albert Andreas Gmeiner, Walter Herberg, Otto Preiss and Heinrich Boschert) : Committing a war crime in that they in the vicinity of Natzweiler, occupied France, on or about 31st March, 1944, when members of the Karlsruhe Gestapo, in violation of the laws and usages of war, were concerned in the killing of Flying Officer D. H. Cochran, Royal Air Force, a prisoner of war.
- (vi) (Against the accused Emil Weil, Eduard Geith and Johann Schneider): Committing a war crime in that they in the vicinity of Schweitenkirchen, Germany, on or about 29th March, 1944, when members of the Munich Gestapo, in violation of the laws and usages of war, were concerned in the killing of Lieutenant H. J. Stevens and Lieutenant J. S. Gouws, both of the South African Air Force, prisoners of war.
- (vii) (Against the accused Johannes Post, Hans Kahler and Artur Denkmann) : Committing a war crime in that they in the vicinity of Roter Hahn, Germany, on or about 29th March, 1944, when members of the Kiel Gestapo, in violation of the laws and usages of war, were concerned in the killing of Squadron Leader J. Catanach, D.F.C., Royal Australian Air Force, Pilot Officer H. Espelid, Royal Air Force, Flight Lieutenant A. G. Christensen, Royal New Zealand Air Force, and Pilot Officer N. Fuglesang, Royal New Zealand Air Force, prisoners of war.
- (viii) (Against the accused Oskar Schmidt, Walter Jacobs and Wilhelm Struve) : Committing a war crime in that they in the vicinity of Roter Hahn, Germany, on or about 29th March, 1944, when members of the Kiel Gestapo, in violation of the laws and usages of war, were concerned in the killing of Pilot Officer H. Espelid, Royal Air Force, Flight Lieutenant A. G. Christensen, Royal New Zealand Air Force, and Pilot Officer N. Fuglesang, Royal New Zealand Air Force, prisoners of war.
- (ix) (Against the accused Erich Hermann August Zacharias) : Committing a war crime in that he in the vicinity of Moravska-Ostrava, occupied Czechoslovakia, on or about 29th March, 1944, when a member of the Zlin Grenzpolizei, in violation of the laws and usages of war, was concerned in the killing of Flying Officer G. A. Kidder, Royal Canadian Air Force, and Squadron Leader T. G. Kirby-Green, Royal Air Force, prisoners of war.

All the accused pleaded not guilty to the charges brought against them.

In the Prosecution's interpretation, the first two charges were charges of conspiracy against all the accused jointly for participation in the killing of 50 Royal Air Force officers who were shot between 25th March and 13th April, 1944. Charges 1 and 2 were not alternative charges. In charges 3-9 six groups of accused were each charged with the killing of one or several officers of the R.A.F. and Dominion Air Forces. Every accused with the exception of Max Wielen figures in one of these charges, no accused figures in more than one.

3. THE CASE FOR THE PROSECUTION

On the night of 24th-25th March, 1944, 80 officers of the Royal Air Force and other Allied Air Forces who were prisoners of war at the prisoners of war camp Stalag Luft III at Sagan, in Silesia, escaped from that camp through an underground tunnel. The escape had been carefully planned and the officers, furnished with partly civilian clothes and false papers, fanned out in all directions in an effort to reach the borders of the Reich, mainly France and Belgium in the west, Czechoslovakia in the south and Denmark in the north. 80 officers escaped from the camp through an underground tunnel. Four were recaptured shortly afterwards in the vicinity of the camp, 76 got away. Only 3 of these 76 reached home safely. 15 were returned to Stalag Luft III and 50 were shot by the Gestapo and of the remaining 8, 4 were sent to a concentration camp, 3 were held by the Gestapo headquarters in Czechoslovakia, and of one, the witness had not heard anything at all.

The German authorities were perturbed by the escape, and the Head of the Criminal Police at Breslau, in whose area it had occurred, ordered a "Grossfahndung" in accordance with the regulations on important escapes. This was a nation-wide hue and cry and meant that every policeman and quasi-policeman in Germany and occupied Europe had the task of looking for the escaped officers, whose photographs were published in the German Police Gazette. On 26th March the news of the escape reached Hitler at Berchtesgarden and after consultations with Goering, Keitel and Himmler, he gave the verbal order that "more than half of the escapees" were to be shot. The order was eventually issued from the R.S.H.A. (Reichs-Sicherheits-Haupt-Amt, the German Central Security Office), by teleprint to the various regional Gestapo headquarters which it concerned. The teleprint itself could not be produced, but in the recollection of the witness Mohr, who had repeatedly dealt with it in his department (Amt 5) at the Central Security Office, it read something like this :

"The frequent mass escapes of officer prisoners constitute a real danger to the security of the State. I am disappointed by the inefficient security measures in various prisoner of war camps. The Führer has ordered that as a deterrent, more than half of the escaped officers will be shot. The recaptured officers will be handed over to Amt 4 for interrogation. After interrogation the officers will be transferred to their original camps and will be shot on the way. The reason for the shooting will be given as 'shot whilst trying to escape' or 'shot whilst resisting' so that nothing can be proved at a future date. Prominent persons will be exempted. Their names will be reported to me and my decision will be awaited whether the same course of action will be taken."

The chart at page 52 illustrates the chain of command within the branches of the Central Security Office and the way the order, once given by Himmler, was carried out, can be followed on this chart. It was sent by teleprint to all Gestapo regional headquarters through Amt 4 and to all Kripo (Criminal Police) regional headquarters through Amt 5. It was thus the task of the Kripo (Criminal Police), headed by Amt 5 at the Central Security Office, to apprehend the escaped officers and on recapture to select more than half of them to be handed over to the Gestapo "for interrogation", i.e. to be

shot. It was the task of the Gestapo to take the escaped prisoners of war over from the Kripo and to carry out the shooting. As soon as the news of the recapture of some prisoners of war was reported by the local Kripo to the Central Security Office at Berlin, Amt 5 gave out orders to the Kripo regional headquarters to hand over these prisoners to the Gestapo and Amt 4 gave out orders to the regional headquarters of the Gestapo to take over a certain number of enemy prisoners of war to be shot and to report the killing to Berlin. The orders were given out by teleprint to the Kripo and Gestapo regional offices throughout the country.

Charges (iii)-(ix) relate to the shooting of 12 officers carried out by six Gestapo regional headquarters, Saarbrücken, Karlsruhe, Strasbourg, Munich, Kiel and Zlin frontier police. All the accused in charges (iii)-(ix) were members of the staff of these six regional headquarters, ranging from officers commanding down to duty drivers. Identical orders were given to these six regional headquarters and the execution of these orders followed the same pattern in each case. In every case the officer commanding received orders from the Central Security Office in Berlin. He then made the necessary arrangements for their execution. The party carrying out the shooting usually consisted of either the Commanding Officer himself or another officer detailed by the Commanding Officer to be in charge of the party, of one or more Gestapo officials as escort and of a driver. Those detailed were briefed by the Commanding Officer as to their duties and pledged to absolute secrecy by hand-shakes and by a reminder of the SS oath to the Führer. They then set out at night in one or more cars to fetch the prisoners from the local goal where they were handed over by the Kripo. After a short drive the car stopped by the roadside, the excuse being always that the prisoners wanted to relieve nature. The place selected was always near a crematorium. The driver or another man remained by the car to see that no cars or passers-by would stop in the vicinity. The other Gestapo officials would take out the prisoners and kill them by shooting them in the back, usually only a short distance from the road. The bodies were inspected by the nearest doctor, who issued a death certificate, and then cremated and the urns sent to the Kripo regional headquarters at Breslau for onward transmission to Stalag Luft III, as set out in the orders. After the shooting a report was sent by the regional Gestapo headquarters concerned to Amt 4 saying: "Orders carried out, prisoners shot whilst trying to escape". A few weeks afterwards when the German authorities had learned from a statement made by the British Foreign Secretary in the House of Commons that the news had leaked out, an official from each of the Gestapo headquarters concerned was summoned to Amt 4 in Berlin or received a message to the effect that their reports had to be re-written as they were all identical. They had to be made "more realistic" and more varied because a visit from the Protecting Power was to be expected and the representatives of the Protecting Power would almost certainly want to see the scene of the shooting and would also require a description of what had occurred.

Based on these facts, the prosecution alleged "that these 18 accused were concerned with their masters in Berlin, General Müller and General Nebe and with other persons known and unknown—and, of course, that includes Hitler, Himmler and Kaltenbrunner—in the killing of prisoners of

war who had escaped from Stalag Luft III" and that they were acting for a common purpose.

So far as *mens rea* is concerned, the prosecutor based his case on the fact that owing to the "Grossfahndung" (the nation-wide search), notified to every police headquarters, all policemen in Germany must have known that prisoners of war were at large and that therefore the accused, being members of the Gestapo, could not be heard to say that they did not know the identity of the prisoners they went out to kill.

The position of Max Wielen, who was officer commanding the Kripo regional headquarters at Breslau, differs from that of the other accused in that :

- (1) he was only charged with his participation in the general conspiracy (charges (i) and (ii)) and not with participating in any of the particular murders (charges (iii)-(ix)) ;
- (2) he was the only Kripo official in the dock, all the other accused being members of the Gestapo ;
- (3) he was the only one among the accused who was called to Berlin personally and was shown the Hitler order ;
- (4) the escape occurred in his area, 36 out of the 76 officers who had escaped were recaptured in his area and 27 of them were handed over by the Kripo under his command to the Gestapo and shot.

When informed of the mass escape from Stalag Luft III, which was in his police area, Wielen ordered the "Grossfahndung" and the central control of this nation-wide search remained in his hands until its completion. As a result of the search nearly half of the escapees were captured in his area and it was therefore natural and logical that the central authorities in Berlin should seek his co-operation when dealing with the execution of the Hitler order.

Wielen was then summoned to the RSHA, where General Nebe showed him the order signed by Kaltenbrunner and instructed him to put nothing in the way of the Gestapo carrying out their task.

Kripo regional headquarters at Breslau was to furnish the list of the ring-leaders of the escape to enable General Nebe to select the victims ("more than half of 80, in accordance with the Hitler order"). This list was sent to the RSHA by Wielen's headquarters. General Nebe selected the names of those to be shot to make up "more than half" of the 80, to comply with Hitler's orders. He put some cards on one pile with remarks like "He is still very young, he may live" and some on another pile with remarks like "He is married but has no children, it will get him". After Wielen's return from Berlin he contacted his opposite number in the Gestapo in Breslau, Dr. Scharpwinkel, and informed him of the Hitler order.

At that time some of the officers recaptured in the Breslau area were removed from Sagan gaol to Goerlitz gaol, further away from Stalag Luft III, to which they should have been returned. This was done, in the prosecution's submission, to concentrate the prisoners and facilitate the handing over to the Gestapo of those to be shot.

Having seen the Hitler order and having been briefed by General Nebe, Wielen knew that the handing over of any one of these prisoners to the Gestapo was tantamount to handing them to their executioner. Yet, 27 out of 36 were handed over, it is to be assumed on Wielen's orders, and subsequently shot by the Gestapo. The nine officers not handed over, of whom the witness Wing Commander Marshall was one, were returned to Stalag Luft III.

The urns containing the ashes of the murdered officers from all over Germany were sent to Wielen's office. From there they were forwarded to Stalag Luft III with the explanation that these prisoners had been shot whilst attempting to escape. Wielen was thus covering up the actions of the Gestapo.

After the news of the shooting of the 50 R.A.F. officers had been given out in the House of Commons, Wielen was summoned, together with Scharpwinkel, to a conference in Berlin with General Müller and General Nebe. There, the orders for the whitewashing of these shootings were given and the details of the faked reports were settled. In the prosecution's submission, Wielen would not have been asked to attend this conference on a Top Secret matter if he had not played an important part in the earlier stages of the affair, looking after the Kripo side, whereas Scharpwinkel was looking after the Gestapo side of it. There was, in the prosecution's submission, perfect co-operation between the Gestapo and the Kripo on the top level at the RSHA, i.e. between General Müller and General Nebe, and it was an irresistible inference that unless there had also been such co-operation on the next lower level between regional headquarters of the Gestapo and Kripo, the smooth execution of the Hitler order would have been impossible.

4. THE CASE FOR THE DEFENCE

The defence contended that in order to prove his case the prosecutor had to prove :

- (i) that all the accused knew that 80 prisoners of war had escaped from Stalag Luft III in Sagan ;
- (ii) that all accused knew that Hitler had given the order that 50 of these 80 prisoners of war would be shot ;
- (iii) that all accused knew that the prisoners whom they were accused of having killed were some of those officers who had escaped from Stalag Luft III ;
- (iv) that in view of this knowledge they were aware of the fact that the shooting of these British officers was illegal ;
- (v) that they had the power to prevent this shooting.

To establish points (i) and (ii) the prosecution had relied mainly on two facts :

- (a) that in view of the nation-wide search published in the Police Gazette, every member of the Gestapo must have had knowledge of the escape of the prisoners and the Hitler order, and
- (b) on the teleprints which were sent out by the RSHA to all Gestapo regional headquarters.

As to the Police Gazette, this was a publication to facilitate the apprehension of criminals or escapees. Since such apprehension was the job of the Kripo (Criminal Police) and not of the Gestapo, most Gestapo officials would not be concerned with this Gazette and therefore would not read it. Also, the special issue of the Gazette was published on 28th March, 1944; the shooting with which the accused were charged occurred between 29th and 30th March, 1944. Bearing in mind the state of communications in Germany at that time, and the constant allied bombardment, the relevant copy of the Police Gazette could not have reached the accused many hundreds of miles away from Berlin in two or three days. The prosecution's arguments that every policeman or quasi-policeman in Germany must have known that there was a "Grossfahndung" on had been refuted by the witness General Westhoff, who stated in cross-examination that the number of prisoners who escaped in 1943 amounted to 4,200, and by the witness Mohr, who testified that 5 or 6 nation-wide searches took place in 1943 and that there had already been 2 or 3 such searches in 1944, previous to the one after the Stalag Luft III escape. Thus, these searches were such a common occurrence that the over-worked Gestapo officials did not take much notice of them.

As to the teleprints, counsel for the defence argued that, supposing even that they were sent to and received by all heads of Gestapo regional headquarters concerned, the prosecution had failed to prove that they were communicated to all the individuals accused by their commanding officers. On the contrary, the evidence produced by the prosecution showed that some of the accused were not informed of the teleprints, some were even deliberately misled about the contents of these teleprints by their commanding officers. The fact that the teleprints were marked "Top Secret" showed that they were designed for the officers commanding regional headquarters only, and not to be communicated to such junior officials as were some of the accused.

The defence maintained that the prosecution had clearly failed to prove point (iii), i.e. that the accused were aware of the identity of the prisoners they were to shoot, partly because of the clothes the prisoners of war were wearing for purposes of camouflage, partly because of their day-long treks across country, causing them to look more like tramps than like British officers. In view of these facts, the accused assumed or believed when they were told, that these escapees were saboteurs, spies or enemy agents found in civilian clothes and that it was not only legal but necessary in the interest of German security to shoot them and that they therefore raised no objections when they were ordered to take them over from the Kripo and carry out the executions. The handing over of these prisoners by the Kripo to the Gestapo was not suspicious in itself, since interrogations dealing with foreigners, saboteurs and agents were outside the sphere of the Kripo and came within the proper field of the activities of the Gestapo.

The defence pointed out that there was no connection between the different local Gestapo officers and officials in carrying out the shooting. They did not know of each other's activities, e.g. the members of the Kiel Gestapo did not know what members of the Munich Gestapo at the other end of Germany were doing on 29th April, 1944, the day on which all but one of the alleged murders were committed. "The accused prepared nothing, planned nothing, plotted nothing. They had no consultations among them-

selves nor with their colleagues in the Kripo, nor with their superiors in Amt 4 in Berlin." Thus, "every factor was lacking from which collaboration and participation in a common plan or conspiracy could be deduced which would bear out the prosecution's contention that they were together concerned or that they were aiding or abetting the commission of the alleged crimes. The very thought that two SS Generals, Mueller and Nebe, on the one hand, and two simple drivers like the accused Denkmann and Struve on the other hand, should have planned something together is absurd and contrary to all principles of a dictatorship, with its strict discipline and blind obedience to orders".

With regard to the accused Wielen, the defence pointed out that if there had been a conspiracy, the conspirators were Hitler and Himmler, who had committed suicide, Goering and Keitel and Kaltenbrunner, who had been sentenced to death by the International Military Tribunal at Nuremberg, General Mueller, who was dead, and General Nebe, who was executed for complicity in the attempt on Hitler's life in July, 1944, and Scharpwinkel, who was in Russian custody. Instead of all these, the accused Wielen was in the dock alone as a scapegoat.

Referring to the case for the prosecution, point by point, the defence case was as follows :

To organise a nation-wide search and to re-arrest escapees was his duty as a Kripo officer and was in accordance with international law. That the whole search and the scheme for the recapture should be centred at Breslau was logical in the circumstances and showed no special participation or eagerness on the part of Max Wielen.

He was summoned to Berlin by his superior officer, General Nebe. The evidence shows that he was called not to obtain his co-operation, but to eliminate the possibility of his resistance. Nebe stated categorically that the responsibility for the execution of the Hitler order lay with the Gestapo and threatened Wielen with an SS court martial should he make trouble. It was not proved that Wielen had ever received a written order.

As to the list of ringleaders, such a list was requested by the RSHA. It was compiled by the investigating Gestapo officials and only contained a few names. It was sent through ordinary staff channels and therefore passed through the regional headquarters at Breslau, but it was never a list of "officers to be shot". The only long list of names in existence was a list of "officers shot" compiled after the execution of the 50 officers and forwarded to Stalag Luft III with the urns.

Mohr's evidence proved that Nebe based his selection of the 50 officers, not on any list from Wielen, but on the officers' index cards showing their age and family ties obtained from the Central Registry of Prisoners of War.

On his return from Berlin, Wielen telephoned Scharpwinkel, but there is no evidence that he gave any orders for handing over any of the 36 prisoners in his area, or any of the prisoners outside his area, to the Gestapo. Scharpwinkel acted on the orders received from his superiors at Amt 4. The Gestapo fetched the officers from the prisons. Since every Gestapo official

could demand the handing over of prisoners from the police for interrogation as of right, there would have been no need to give any orders to the Kripo for handing the prisoners over and there was no evidence that Wielen ever gave such orders.

That the urns with the ashes of the dead officers should be collected at Breslau regional headquarters of the Kripo for onward transmission to Stalag Luft III for a military burial means only that they were sent through ordinary staff channels and does not reflect on Wielen.

About the conference in Berlin, the prosecution witness Mohr said :

“ I have never been able to find out why Wielen was asked for this meeting at all. Our presence was absolutely useless. The whole thing was nothing but the chief of Amt 4 verbally giving orders to the chief of the Gestapo at Breslau ” and further “ Nebe said to Mueller that the Kripo could do nothing in this matter.”

As to Wielen's acts of omission : even by sacrificing his life, Wielen could not have prevented the shooting of these 50 officers after they had been ordered by Himmler and agreed to by Goering and Kietel.

5. SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate advised the court to disregard the first two charges. He said : “ The real gravamen of the accusation against the accused apart from Wielen is what they did when they were present or when they were ordering these shootings. If they are not guilty of that, is it likely that you will find them guilty of the first and second charge ? In my view it is because the prosecution say they did what is set out in the charges (iii)-(ix), that they bring them into charges (i) and (ii).”

With regard to the accused Wielen the Judge Advocate said that there could be no doubt that Wielen went to Berlin and there learned from his General, General Nebe, the contents of the Hitler order. “ It is clear that Wielen is telling you that he did not see any way out and he goes back to Breslau and as far as I can see he is not going to take any steps that lie within his power to make the handing over of these officers to the Gestapo difficult.”

The Judge Advocate pointed to an early statement made by Wielen in which the latter said that Amt 5 sent a copy “ for the information ” of the Kripo containing a list of officers who were to be shot by the Gestapo so that the Kripo would know about it when the officers were asked for. Wielen later denied this statement. The Judge Advocate said “ Gentlemen, it seems to me an irresistible inference that this scheme of Hitler's to shoot secretly these 50 officers could not go through without the connivance and co-operation of the Kripo and the Gestapo and, Gentlemen, why should that cease when you come down to the lower stage of the ‘ Leitstellen (regional headquarters) level ’ ? Is it not going to be equally effective to say ‘ When we come down to the Leitstelle Breslau, we must ensure that Scharpwinkel and Wielen work together ? If they do not, then it won't work smoothly

and there is a risk of secrecy being allowed to be interfered with and that, Gentlemen, as I see it, is the real case for the Prosecution."

6. FINDING AND SENTENCE ON CHARGES (i) AND (ii)

The Court found all accused with the exception of Wielen not guilty of the first and not guilty of the second charge.

The accused Wielen was found guilty of the first and of the second charge and sentenced to life imprisonment.

7. EVIDENCE ON CHARGES (iii)-(ix)

The essential features of the evidence are the same in all six cases : The receipt of the Hitler Order by the Officer Commanding the Regional Headquarters, the orders given and the arrangements made for the execution of this order, and the actual shooting of the prisoners in which the accused participated under the leadership of the Commanding Officer himself, or of an officer appointed by him. A further common feature was that the prosecution's case rested entirely on the depositions made by the accused. The general line of the defence was that some of the depositions were obtained under duress and therefore none of them should be relied upon. In court the accused (with the exception of Gmeiner and Schimmel, who had only given orders) all admitted that they were present when the airmen were shot. The issues to be decided by the court, therefore, were : (1) what part the individual accused played in the shooting of the prisoners, and (2) whether they knew that the prisoners were prisoners of war. The sixth case formed an exception to the abovesaid, inasmuch as there was some independent evidence and the accused pleaded in his defence that the prisoners tried to escape and were shot in the attempt.

(i) *The Saarbrücken Gestapo Case (Killing of Squadron Leader Bushell, R.A.F., and Pilot Officer Scheidhauer, R.A.F.)*

(3rd Charge)

Accused : Emil Schulz and Walter Breithaupt.

Dr. Spann (now dead), who was Officer Commanding the Gestapo regional headquarters at Saarbrücken, received a teleprint from the RSHA on the night of 28th/29th March, 1944, to the effect that two British officers, who were in the local gaol, had to be taken out and shot. He collected for this purpose two members of his staff, the accused Schulz, who was on night duty, and the accused Breithaupt who, as the officer in charge of transport, slept in the room above the garage. The three men fetched the prisoners, drove out on to the autobahn, stopped the car there, the prisoners were taken out and Spann fired two shots at them from behind. Both prisoners collapsed and then he ordered Schulz to fire. Schulz, on his own evidence, fired twice, once without aiming in his excitement, and the second time delivering the *coup de grâce* to the second officer who was on his knees. Breithaupt did not fire. The prosecutor suggested that he acted as an escort and was informed of the purpose of the journey by Schulz, as Schulz stated in his sworn deposition, whereas Breithaupt himself gave evidence to the effect that he only acted as a driver and only learned of the purpose of the journey from Dr. Spann when they arrived at the scene of the shooting.

(ii) *The Strasbourg Gestapo Case (Killing of Flight Lieutenant Hayter, R.A.F.)*

(4th Charge)

Accused : Alfred Schimmel.

Schimmel was the Commanding Officer of the Gestapo regional headquarters at Strasbourg. He was a lawyer and his rank was equivalent to that of Lt.-Colonel. About 6th April, 1944, some officers of the local Kripo brought a British officer, a prisoner of war, to his office to hand him over to the Gestapo. Later in the day Schimmel received a teleprint from General Mueller, his superior at Amt 4, saying that the British prisoner of war handed over to him by the Kripo was to be shot. The teleprint then gave the essentials of the Hitler order. Schimmel rang up Mueller and remonstrated with him, but when the latter threatened him with an SS court martial, Schimmel gave in and detailed two of his officials, Diesner and Hilker, to take Flight Lieutenant Hayter out on the autobahn in the direction of Breslau and shoot him. Next morning they reported the execution of the order and Schimmel sent a teleprint to General Mueller to inform him accordingly. A few weeks later the report had to be re-written on General Mueller's orders, to make it "more realistic" in case there should be an enquiry by the Protecting Power.

Schimmel had the report re-written and sent Hilker, one of the two men who had shot Hayter, to Amt 4 to deliver the report personally.

Diesner and Hilker were not before the court. Of Schimmel, the Judge Advocate said in his summing up: "If you detail people and make all arrangements and if you have the power to stop it if you like to take the risk, can you say that Schimmel was not concerned in the killing in a way which was really something more than just passing on an order?"

(iii) *The Karlsruhe Gestapo Case (Killing of Flying Officer Cochran, R.A.F.)*

(5th Charge)

Accused : Josef Gmeiner, Walter Herberg, Otto Preiss and Heinrich Boschert.

Gmeiner was the Commanding Officer at regional headquarters of the Gestapo at Karlsruhe. He was a lawyer and his rank the equivalent to that of Lt.-Colonel. About 31st March, 1944, he received a teleprint from Amt 4 ordering that the British airman held by the Karlsruhe Kripo was to be shot. The teleprint contained all the essential points of the Hitler order. Gmeiner then ordered the three men whom he had chosen to carry out the order to his office and told them: "Herberg, you know all about it and you are responsible for seeing that the matter is carried out in the way that you have suggested to me. You, Boschert, will drive the car and be at Herberg's disposal, and you, Preiss, will carry out the shooting". He then pledged all present to secrecy by handshakes. The shooting was carried out according to this plan.

Gmeiner's defence was that he only acted as a conduit pipe passing on the order received from Amt 4 to Herberg. Herberg's defence was that he tried to evade, but could not as it was Gmeiner's order. Preiss' defence was

that he did not know that Cochran was an escaped prisoner of war and also that he acted under duress. Boschert's defence was that he was only the driver—though later he became Gmeiner's adjutant—and that he never even took his pistol out of its holster, but was turning the car round whilst Preiss shot the prisoner, and learned only afterwards that Cochran was a prisoner of war.

Summing up, the Judge Advocate said : “ Gmeiner is making and checking over the arrangements and deciding exactly what people will do. He is not merely saying ‘ do this ’ and leaving it to Herberg, but on his own showing he is allotting the tasks. There can be no doubt that Herberg was in charge and that Preiss shot Cochran. Whether or not Boschert was a party with full knowledge, is a matter which you will carefully consider later on. But the case for the prosecution is that they were all jointly concerned in this crime and that Boschert was not only a driver but was present and was acting as a guard and as an escort to make sure that the unfortunate officer was killed ”.

(iv) *The Munich Gestapo Case (Killing of Lieutenant Stevens and Lieutenant Gouws, S.A.A.F.)*

(6th Charge)

Accused : Emil Weil, Eduard Geith and Johan Schneider.

Schaefer, the Commanding Officer of the Gestapo regional headquarters at Munich, received a teleprint with the Hitler order on the night of 29th March. It was after duty hours, and he sent his car to collect some of his staff. The car returned with his second in command, Schermer, as well as Geith and Schneider. They were joined by Weil, who was the duty officer. After a short conference with his second in command, Schaefer summoned the others and explained to them that on orders from the RSHA two captured British prisoners held at Kripo headquarters were to be shot. He briefed them in accordance with the Hitler order. It was decided that Schneider, who had a tommy gun, should do the shooting and that Schermer should be in charge of the party. All participants were pledged to secrecy by handshakes. The order was executed according to the plan. Schneider shot both prisoners near the autobahn when ordered to do so by Schermer. Geith and Weil stood by. Schermer, the second in command of the headquarters, was not before the court. Schneider's defence was that he thought the two prisoners were looters and desperadoes. Geith's defence was that he did not hear the orders given by Schaefer at the conference. Weil, whilst admitting that he heard Schaefer's orders at the conference, thought that the prisoners had been tried by a tribunal and convicted.

(v) *The Kiel Gestapo Case (Killing of Pilot Officer Espelid, R.A.F., Flight Lieutenant Christensen, R.N.Z.A.F., Pilot Officer Fuglesang, R.N.Z.A.F., and Squadron Leader Catanach, D.F.C., R.A.A.F.)*

(7th and 8th Charge)

Accused : Johannes Post, Hans Kahler and Artur Denkmann (7th charge); Oskar Schmidt, Walter Jacobs and Wilhelm Struve (8th charge).

Fritz Schmidt was the Officer Commanding the regional headquarters of the Gestapo at Kiel. On 29th March, 1944, he summoned the six accused to his office at the headquarters and told them : " I have to acquaint you with a Top Secret matter. It is an order from the Führer. Four prisoners, who are with the Kripo at Flensburg, will be shot at a place determined by me. They are enemy agents who were condemned to death and have tried to escape to Denmark. You, Major Post, will go to Flensburg and interrogate the prisoners. It is not expected that they will make any statement. You will leave Flensburg by car and shoot them at a pre-arranged spot. Oskar Schmidt will see that the cremation is carried out and all formalities complied with. For the firing, service pistols will be used, but you will shoot from behind between the shoulders. If, contrary to expectations, an escape should be made, service rifle will be used as pistols will not be sufficient. Kahler, you get a rifle and ammunition. The drivers will keep the road clear of curious passers-by. Post, you will be officer in charge and will be responsible for seeing that the orders are carried out in the way which I have indicated ".

No special task was allotted to Jacobs. The party set off to Flensburg and shortly interrogated the four prisoners there ; Post ordered that each member of the party was to shoot the prisoner he interrogated. When they left Flensburg, Post and Kahler were in one car driven by Denkmann, with Catanach as the only prisoner. During the journey this car got separated from the other and arrived at the pre-arranged place first. Catanach was taken out, led through a gate into a field and shot. Post stated that Kahler's rifle misfired, and he had to give the prisoner the *coup de grâce* himself, whereas Kahler denied having fired at all. Denkmann stood by the car.

Then the other car arrived with the second party, of which Oskar Schmidt was in charge, with Jacobs as an escort and Struve as a driver, and with the remaining three prisoners. Post was waiting for them at the gate. The three prisoners were led into the same field and shot. Post and Jacobs admitted having fired the shots at them, and Post stated that Oskar Schmidt also fired, but Schmidt denied this. Struve the driver remained with his car. Then they all drove back and Post reported to the Commanding Officer. At some later date the report had to be re-written and it was suggested by the Commanding Officer and Post that the report should say that Denkmann and Struve shot one prisoner each as they tried to run away, but both were indignant and refused to sign. The defence of Post and Jacobs was that they were misled by their Commanding Officer as to the identity of the airmen and thought they were spies and saboteurs. They admitted, however, that when Catanach was interrogated he stated that he had been in the R.A.F. Kahler's defence was that he hung back as Post and the prisoner left the car and never fired at all. Oskar Schmidt gave evidence to the effect that he never fired and that he was reported by Post to the Commanding Officer for failing to obey orders and was rebuked. The defence of the two drivers, Denkmann and Struve, was that they were conscripted into the Gestapo and were not members of it, and that they had nothing to do with the whole affair and were merely driving their cars. Struve admitted having been at the Commanding Officer's conference whereas Denkmann was the only one of the six accused who denied taking part in the conference. The Judge Advocate, summing up, said : " If people are all present, aiding and abetting one another to carry out a

crime they knew was going to be committed, they are taking their respective parts in carrying it out, whether it be to shoot or whether it is to keep off other people or act as an escort whilst these people were shot, they are all in law equally guilty of committing that offence, though their individual responsibility with regard to punishment may vary ”.

(vi) *The Case of the Zlin Frontier Police (Killing of Flying Officer Kidder, R.C.A.F., and Squadron Leader Kirby-Green, R.A.F.)*

(9th Charge)

Accused : Erich Zacharias

Ziegler, the Officer Commanding the Zlin Frontier Police, summoned the accused Zacharias and one Knüppelberg to his office on 29th March, 1944, and told them that two British officers had been caught in the neighbourhood.

Then the evidence by the accused differs from the evidence for the prosecution. The prosecution relied on a deposition made by Zacharias and on an affidavit sworn by a man called Kiowsky, who was their driver, according to which Ziegler told Zacharias and Knüppelberg that the two prisoners were British officers and prisoners of war and were to be shot on orders from Berlin, and that Knüppelberg and his driver were to take one prisoner out in their car, and Zacharias and his driver Kiowsky were to take the other prisoner in their car and that both prisoners were to be shot.

The defence maintained that Zacharias' deposition was not a voluntary statement, but was made under duress and that Kiowsky's affidavit could not be relied upon as he was really an accomplice who had been charged with murder and tried by the Czech Government. The court should therefore rely on Zacharias' evidence in the witness box, which was to the effect that the Commanding Officer told them that the two officers were saboteurs and spies, and had to be shot on orders from Berlin, and that, however, they did not have to carry out this order since the two officers made a determined attempt to escape, so that he and Kiowsky had to shoot them in carrying out their duty as a military escort.

The Judge Advocate, in his summing up, pointed out that it was a matter for the court to decide whether the statement was a voluntary one, and also what weight to attach to the statement of the driver Kiowsky, who could not be cross examined. If the court came to the conclusion that both carried no weight, they would have to consider whether the story of Zacharias in the witness box was plausible or whether it should be disbelieved.

8. FINDINGS ON CHARGES (iii)-(ix)

All accused (with the exception of Wielen) were found guilty of the charges (iii)-(ix) brought against them.

9. SENTENCES ON CHARGES (iii)-(ix)

Emil Schulz, Walter Breithaupt (3rd charge), Alfred Schimmel (4th charge), Josef Gmeiner, Walter Herberg, Otto Preiss (5th charge), Emil Weil, Eduard Geith, Johan Schneider (6th charge), Johannes Post, Hans Kahler (7th charge), Oskar Schmidt, Walter Jacobs (8th charge) and Erich Zacharias (9th charge) were sentenced to death by hanging. Heinrich Boschert (5th charge)

was sentenced to death by hanging, his sentence, however, was commuted to life imprisonment by the Confirming Officer.

Artur Denkmann (7th charge) and Wilhelm Struve (8th charge) were sentenced to 10 years' imprisonment.

B. NOTES ON THE CASE

I. THE JOINT CHARGES

The Prosecutor alleged that all 18 accused had joined in a general conspiracy to kill 50 officers.⁽¹⁾ He rested his case on the notoriety of the Sagan escape in view of the nation-wide hue and cry, on the publication of it in the Police Gazette and on the uniformity of the orders received by the various Commanding Officers of the regional headquarters. The two main arguments for the defence were a legal and a factual one (i) that there could be no conspiracy between military superiors and their subordinates, and (ii) that there was no evidence of any connection between the accused or of any co-operation between their various regional headquarters.

The Judge Advocate did not deal with these arguments or give any reason for his advice to the court to disregard the first two charges, but it is clear that the first argument is not sound. This argument was rejected in the Nuremberg judgment when dealing with the conspiracy between major war criminals :

“ The argument that such common planning cannot exist when there is a complete dictatorship is unsound. The plan, in the execution of which a number of persons participated, is still a plan even though conceived by only one of them, and those who executed the plan do not avoid responsibility by saying that they acted under the direction of the man who conceived it.”⁽²⁾

As to the second argument, it seems that the court found that though there was evidence that the members of every group of accused were together concerned in the killing of the officers handed over to them, and were therefore guilty of one of the charges (iii)-(ix), there was not enough evidence beyond that to show that they knew what had been planned in Berlin or what was happening outside their region and therefore, *a fortiori*, not enough evidence that they were together concerned in the killing of 50 out of the 80 escaped officers.

In the case of Max Wielen, unlike that of the other 17 accused, there was evidence of his participation both in the preparation and in the concealment of the crime. It seems that, basing its conclusions on this additional evidence which was not available against the other accused, the court found him guilty of being concerned, together with Generals Nebe and Mueller, in the killing of the 50 officers.

⁽¹⁾ It should be noted that none of the charges in this trial were charges of conspiracy as such. It is worth recalling that in his summing up in the trial of Georg Tyrolt and others, before a British Military Court, Helmstedt, Germany, from 20th May-24th June, 1946, the Judge Advocate said that : “ There is nothing magic about a joint charge except that it enables you to try more than one person at one time. . . .”

⁽²⁾ *British Command Paper*. Cmd. 6964, p. 43.

Regarding charges (iii)-(ix), the Judge Advocate thus defined the term "concerned in the killing": "I do not think the prosecution can ask you to consider a case of a minor official who was concerned with some administrative matter. What they had in mind is that the persons concerned must have been part of the machine doing some duty, carrying out some performance which went on directly to achieve the killing, that it had some real bearing on the killing, would not have been so effective or been done so expeditiously if that person had not contributed his willing aid."

By finding the accused Schimmel and Gmeiner guilty, the court indicated that being "concerned in the killing" does not necessarily require the presence of the accused on the scene of the crime, since both Schimmel and Gmeiner gave instructions to their subordinates but were not present at the shooting. This has been held by the courts in previous war crimes trials.⁽¹⁾

The degree of participation may vary within the term "concerned in the killing." Whereas all participants were found guilty whether they had given the order or fired the fatal shot themselves or acted as an escort or kept off the public, the prominence of the part they played found expression in the sentences. Whereas the Commanding Officer who gave the order and the men who fired the shots or acted as escorts were sentenced to death, the two drivers, Struve and Denkmann, were sentenced to imprisonment for 10 years.⁽²⁾

2. THE PLEA OF SUPERIOR ORDERS

This defence was relied on by all accused in view of the order from Hitler. It was also relied upon by some of the junior ranks amongst the accused, who pleaded that they acted under orders from their Commanding Officers. The defence quoted paragraph 47 of the *German Military Penal Code* :

"If in the execution of an order relating to service matters the penal law is violated, the Commanding Officer is solely responsible. Nevertheless, the subordinate obeying the order is subject to a penalty as an accomplice : (1) if he transgressed the order given, (2) if he knew that the order of the Commanding Officer concerned an action, the purpose of which was to commit a general or a military crime or misdemeanour."

Counsel argued that paragraph 47, sub-paragraph (2), required positive knowledge of the illegality of the order on the part of the accused, and that the accused in this case had no such positive knowledge, though they may have had doubts as to the legality of the order.

The Judge Advocate, after quoting extensively from Professor Lauterpacht's article in the *British Year Book of International Law*, 1944, read paragraph 433 of Chapter 14 of the *Manual of Military Law* ;⁽¹⁾ and with regard to the last sentence of that paragraph that the accused could not escape liability "if in obedience to a command they committed acts which both violated unchallenged rules of warfare and outraged the general sentiment of

⁽¹⁾ See for instance Volume V of this series, pp. 45-53.

⁽²⁾ For a similar case on degrees of participation, see the *Almelo Trial*, Volume I, p. 43.

⁽³⁾ See Volume I, p. 18.

humanity", the Judge Advocate said : " I think there can be no doubt apart from any other matter, that none of the accused in this case would be outside those concluding words, if he really knew that he was taking part in the killing of recaptured prisoners of war who had done nothing else but escape." (1)

This case seems to furnish a practical illustration of the contention that if any other interpretation of the plea of superior orders were to prevail only a very small number of high ranking persons, if anyone at all, could be punished for flagrant breaches of international law. Since the orders for the killing in this case were given by the Head of the State himself, only he could have been punished for the murder of the 50 officers.

3. THE PLEA OF DURESS

Counsel for the defence submitted that to support a plea of duress the threat need not be immediate but may be one of future injury. Counsel quoted a case before the German High Court (R.G.E. 66, page 98) where two defendants charged with perjury pleaded that before giving evidence in criminal proceedings against a political organisation, they had been threatened by the members of that organisation with serious physical injury at some future date if they told the truth. The plea was successful and the two accused were acquitted.

The Prosecutor in his closing address quoted paragraph 10, Chapter 7, of the *Manual of Military Law* :

"An act may also be excused if committed by a person acting in subjection to the power of others providing that he is compelled to act as he does by threats of death or serious physical injury continued during the whole time that he so acts and that the part taken by him in the unlawful act or acts is throughout strictly a subordinate part."

He argued that with the exception of the two drivers it could not be said that any of the accused had played a strictly subordinate part.

The Judge Advocate, quoting from Archbold's *Criminal Pleadings* (1943 Edition, page 19), said : " The same principle which excuses those who have no mental will in the perpetration of offences protects from the punishment of the law those who commit crimes in subjection to the power of others and not as a result of an uncontrolled free action proceeding from themselves. But if a merely moral force is used as threats, duress of imprisonment, or even an assault to the peril of his life in order to compel the accused to kill, this is no excuse in law."

4. THE LLANDOVERY CASTLE CASE

In this trial, as well as in many other war crimes trials (2) the decision in the above case was quoted, both by the Prosecutor and by the defence.

The case was cited by the prosecution to support the proposition that the plea of superior orders provides no excuse in international law, but

(1) As to the defence of Superior Orders generally, see p. 24, note 2.

(2) See also Volume I, p. 19 ; Volume II, pp. 106 and 107.

only goes to mitigation of punishment. The defence tried to distinguish the *Llandoverly Castle Case* by saying that in that case the court found "as a fact" that the accused were fully aware that the firing on survivors by a U-boat was a crime, and therefore the court held that they were responsible under paragraph 47/2 of the *German Military Penal Code*. If, however, the accused, as in the *Stalag Luft III* case, had no such positive knowledge of the criminality of their action, they must be acquitted.

It may thus prove useful to analyse shortly the judgment in the *Llandoverly Castle Case* which was tried before the German Supreme Court at Leipzig in July, 1921. The judgment is in its entirety based on German municipal law.

(i) *The Facts*

The "Llandoverly Castle" was a British hospital ship which was sunk by a German submarine. The submarine commander, in an attempt to eliminate all traces of the sinking, gave orders to fire on the life boats. All persons in two of the three lifeboats were killed. The Commander, Patzig, was not on trial, the two accused being both lieutenants on board the submarine.

(ii) *The Plea of Superior Orders*

The court, applying paragraph 47 of the *German Military Penal Code*,⁽¹⁾ said in its judgment: "Patzig's order does not free the accused from guilt. It is true that according to paragraph 47 of the *German Military Penal Code*, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable the superior officer issuing such an order is alone responsible. According to sub-paragraph (2), however, a subordinate obeying such an order is liable to punishment if it was known to him that the order of his superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favour of the military subordinates that they are under no obligation to question the order of a superior officer and they can count upon its legality, but no such confidence can be held to exist if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases, but this case was precisely one of them for in the present instance it was perfectly clear to the accused that killing defenceless people in the lifeboats could be nothing else but a breach of the law."

"In estimating the punishment, it is in the first place to be borne in mind that the principal guilt rests with the commander, Patzig, under whose orders the accused acted. They should certainly have refused to obey the order. This would have required a specially high degree of resolution. This justifies the recognition of mitigating circumstances in determining the punishment under paragraphs 213, 49 and 244 of the *State Penal Code*. A severe sentence must, however, be passed".

(iii) *Absence of Mens Rea as a Defence*

The court pointed out that any violation of the law of nations in warfare is a punishable offence, so far as in general a penalty is attached to the deed.

(1) See p. 46.

The killing of enemies in war is in accordance with the will of the State that makes war (whose laws as to the legality or illegality on the question of killing are decisive) only insofar as such killing is in accordance with the conditions and limitations imposed by the law of nations. The fact that his deed is a violation of international law, must be well known to the doer, apart from acts of carelessness in which careless ignorance is a sufficient excuse. In examining the question of the existence of this knowledge, the ambiguity of many of the rules of international law, as well as the actual circumstances of the case, must be borne in mind because in war time decisions of great importance have frequently to be made on very insufficient information. This consideration, however, cannot be applied to the case at present before the court. The rule of international law which is here involved is simple and is universally known.

(iv) *The Defence of Duress*

This defence was rejected in the judgment in the following words : " The defence finally points out that the accused must have considered that Patzig would have enforced his orders, weapon in hand, if they had not obeyed them. This possibility is rejected. If Patzig had been faced by a refusal on the part of his subordinates he would have been compelled to desist from his purpose as then it would have been impossible for him to attain his object, the concealment of the torpedoing of the 'Llandovery Castle.' This was quite well known to the accused who had witnessed the affair. From the point of view of necessity (paragraph 52 of the *Penal Code*) they could not then claim to be acquitted."

It would seem therefore that the decision supports two propositions : (1) that according to German law the maxim *Respondeat superior* does not apply to cases where the order involves the violation of a rule of international law, if that rule is " simple and universally known " ; (2) that the plea of duress or necessity will not succeed if the accused, by refusing the orders of his superior officer could have forced him to desist from his illegal purpose.

The first proposition shows that on the question of superior orders German law is roughly in line with international law as conceived in other countries, and thus serves to refute the argument put forward by several counsel in the Stalag Luft III case that by applying paragraph 443 of the British *Manual of Military Law*, British Military Courts apply *ex post facto* legislation, if there were indeed any force in this argument at all, in view of the fact that the *Manual of Military Law* is not a legislative instrument, but a War Office publication intended to acquaint army officers with those branches of the law with which they may have to deal in the execution of their duty.

The second proposition seems to be a valuable one. The judgment leaves the question open whether in a case where the military superior forces the military subordinate at pistol point to obey his illegal orders, the combined defences of superior orders and duress would avail the accused. But the court made it clear that these two defences will not avail the accused if no such threat has actually been uttered and where the accused by refusing the illegal order could have frustrated the intention of his superior officer to keep the crime that has been or is about to be committed secret. This secrecy and the absence of actual threats from essential elements of most cases of clandestine

killings of prisoners of war or enemy civilians on orders of a higher authority which so frequently are the subject of trials before military courts.⁽¹⁾ It would appear from the judgment in this case that also according to German law—not only according to English law—the defence of duress does not avail the accused in such cases.

5. THE DEFENCE OF LEGALITY UNDER MUNICIPAL LAW : THE CONFLICT BETWEEN MUNICIPAL LAW AND INTERNATIONAL LAW.

The defence argued that according to the law prevailing at the time of the offence in Germany, any order emanating from the Head of the State was a legal order. Disobeying this Hitler order would have been a criminal offence according to German law. On the other hand, obeying the order was an offence according to international law. International law must not place the subject in an insoluble dilemma where he has only two possible courses of action, both of which are criminal, thus leaving him no "way out". In order to be able to say that a person has committed an offence, there must be an alternative course open to him which does not constitute an offence. Some writers, according to counsel, take the view that in any conflict between municipal law and international law, municipal law is supreme and commands the undivided loyalty of all citizens, but—whatever view is taken of this question—in the sphere of criminal law, the individual must be protected and a man who has no "way out" cannot be punished.

The Judge Advocate did not deal with this argument and the court by finding all accused guilty, obviously held it invalid. It would seem that whatever view is taken once the conflict between municipal and international law arises, the main weakness of the argument lies in the fact that one of its premises, i.e. that the action of the accused were legal under German law, is very doubtful. Though some of the philosophers and propagandists of Hitler Germany insisted that the Führer's word was law, there does not seem to be any statute or decree—and there was no evidence produced in this trial—to the effect that a spoken command of the Head of the State had legal force or, as some counsel suggested, could replace the finding and sentence of a court of law. Assuming the legality under municipal law was established, the trend of legal opinion is that international law must prevail over municipal law and courts in recent years have treated this defence in a way similar to that of superior orders.⁽²⁾

6. THE ABSENCE OF *Mens Rea* AS A DEFENCE

This defence was raised in two different ways : (1) amounting to a mistake of law, i.e. the defendants were not aware of the illegality of their action. In a case like this the maxim *ignorantia iuris non excusat* certainly applies.

⁽¹⁾ See *Almelo Trial*, Volume I, p. 35 ; *Jaluit Atoll Case*, Volume I, p. 21, *Dreierwalde Case*, Volume I, p. 81.

⁽²⁾ See Volume V, pp. 22-4. Cf. for instance Article 6 of the Charter of the International Military Tribunal : "The following acts or any of them are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility . . . (c) crimes against humanity . . . whether or not in violation of the domestic law of the country where perpetrated." As to an attempt to reconcile the dilemma in which the subordinate is placed, see Gluck, *War Crimes, Their Prosecution and Punishment*, pp. 155-156, and Volume III of this series, p. 64.

Professor Lauterpacht in the *British Year Book of International Law*, 1944, page 76, says : "No person can be allowed to plead that he was unaware of the prohibition of killing prisoners of war who had surrendered at discretion ;" (2) amounting to mistake of fact, i.e. the accused did not realise that the prisoners were prisoners of war, they thought that they were spies and saboteurs. The Prosecutor in his closing address said that if the court found that the accused acted in such a belief they should acquit them. The Prosecutor in this trial obviously felt confident that he had proved beyond reasonable doubt that the defendants knew these prisoners to be prisoners of war and therefore apparently to facilitate the argument, reduced it to an issue of fact : "Did the defendants know or did they not know that the prisoners they killed were prisoners of war ?" The implication, however, that the accused would have been entitled to an acquittal if they had reasonable grounds to believe that the persons they killed were spies or saboteurs, is not correct. Even a spy is entitled to a trial. In case these prisoners had been spies, the relevant question would have been whether they had been given a regular trial. It was said by the Judge Advocate in the Almelo Trial that the decisive question was "whether the accused honestly believed that the men they shot had been tried according to law and that they therefore believed that in shooting them they carried out a lawful execution".⁽¹⁾

The Judge Advocate, in summing up, pointed out that in this case it must have been obvious from the circumstances to the meanest intelligence that this was not a lawful execution.

7. CIVILIANS AS WAR CRIMINALS

Counsel for the defence argued that war crimes could only be committed by combatants or, in exceptional cases, by non-combatants when they exercise governmental functions in occupied territories. Against this argument the Prosecutor quoted paragraph 441 of Chapter 14 of the *Manual of Military Law* : "The term 'war crime' is a technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment or capture of the offenders."

The decision of the court supports the rule that anybody who commits a war crime can be punished by a military court, regardless of his status.⁽²⁾

8. CORROBORATION

Both the Prosecutor and the Judge Advocate pointed out that the prosecution's case was to a large extent based on the uncorroborated evidence of an accomplice or of accomplices and that one accused cannot corroborate another. Both warned the court of the danger of acting on the uncorroborated testimony of an accomplice, but added that the court could convict on such evidence if they were clearly satisfied that the evidence given was true. By so doing, the Judge Advocate applied *mutatis mutandis*, and on the plane of international law a rule of practice followed in English criminal courts, that it is the duty of the Judge to caution the jury as to the danger of conviction

⁽¹⁾ See Volume I of this series, p. 44.

⁽²⁾ For other examples see *Zyklon B. Case*, Volume I, p. 103 ; *Essen Lynching Case*, Volume I, pp. 82-92, and *Hadamar Trial*, Volume I, pp. 46-52.

on the evidence of an accomplice without some corroboration in a material particular which connects the prisoner with the witness's story.⁽¹⁾

9. VOLUNTARY NATURE OF CONFESSIONS

Counsel for the accused Zacharias objected to a deposition made by his client being admitted as evidence on the grounds that it was obtained by duress. The accused Zacharias alleged that he was put in fear of severe physical injury as well as struck by an interrogating officer.

The Judge Advocate quoted Regulation 8 (i) of the Royal Warrant (A.O./81, ix 1945) : " . . . A military court convened under these regulations may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, and notwithstanding such statement or document would not be admissible as evidence in proceedings before a Field General Court Martial."

He went on to say : " In view of this, I am prepared to advise the court that if they are satisfied by the evidence of Lieutenant-Colonel Scotland that a confession was in fact made and you think to examine it will assist in proving or disproving the charge, against Zacharias, then you may admit it ". "At a later stage in my view, it would be proper if Zacharias wishes to do so, to give his version of how this confession was obtained, and when you have heard him, that may detract or add to the weight of the statement."

The decision of the court to admit Zacharias' statement is in line with other decisions by military courts.⁽²⁾ In practice in trials under the Royal Warrant the defence cannot object to the court receiving in evidence a confession by an accused on the grounds that it was not made voluntarily. The defence is, however, entitled to call evidence to prove the involuntary nature of the confession and it is thus left to the court to decide what weight they eventually place on such a confession.

⁽¹⁾ *R. v. Baskerville* (1916), 2.K.B. 658.

⁽²⁾ See Volume III, p. 71 and Volume II, pp. 135 ff.

