

surrender, he would be guilty of a violation of the customary rules of sea warfare.

The Court's findings of guilty in the *Davisian* case and of not guilty in the *Empire Dawn* case are in line with the rules of surrender stated by the naval experts. The *Davisian*, after a day attack, stopped, hoisted a reply pennant and the crew took to the lifeboats. (The Court appeared to have disbelieved the accused's evidence that some of the crew of the *Davisian* were running towards the guns.) The *Empire Dawn*, after a night attack, did not stop, did not switch on her lights and the evidence about the signals given by means of a torch was open to doubt. The Court thus seemed to have held that there were generally recognised rules as to what constituted surrender at sea and that a war crime was committed if the attacking vessel continued her attack after her opponent has communicated her surrender in accordance with these rules. The Defence of operational necessity did not avail the accused in this case.

5. UNCORROBORATED EVIDENCE OF AN ABSENT WITNESS

The Prosecution's case with regard to the third charge rested on the affidavit of one of the survivors admitted as evidence by the Court.

On the ninth day of the hearing, the President stated that it had now become clear that the attendance of that witness could not be procured. The Court decided that subject to anything the Prosecutor may have to say, they did not wish to hear any further evidence on that charge. The Prosecutor said that in view of the fact that the third charge rested on uncorroborated evidence of one absent witness, and in view of the gravity of the charge, he did not feel it proper to press that charge any further.

CASE No. 56

TRIAL OF OTTO SKORZENY AND OTHERS

GENERAL MILITARY GOVERNMENT COURT OF THE U.S. ZONE OF GERMANY

18TH AUGUST TO 9TH SEPTEMBER, 1947

A. OUTLINE OF THE PROCEEDINGS

The ten accused involved in this trial were all officers in the 150th Panzer Brigade commanded by the accused Skorzeny. They were charged with participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the armed forces of the United States. They were also charged with participation in wrongfully obtaining from a prisoner-of-war camp United States uniforms and Red Cross parcels consigned to American prisoners of war.

In October, 1944, the accused Colonel Otto Skorzeny had an interview with Hitler. Hitler knew Skorzeny personally from his successful exploit in liberating Mussolini and commissioned him to organise a special task force for the planned Ardennes offensive. This special force was to infiltrate through the American lines in American uniform and to capture specified objectives in the rear of the enemy. The German High Command directed all army groups to seek volunteers who spoke English for a secret assignment. These volunteers were concentrated in a training centre where a special task force called the 150th Brigade was formed. It was furnished with jeeps and other American vehicles, part of their weapons and ammunition was American and the members were issued with American documents. They received training in English, American mannerisms, driving of American vehicles, and the use of American weapons. The Chief-of-Staff of the German Prisoner-of-War Bureau was approached by Skorzeny to furnish the Brigade with American uniforms. These uniforms were mainly obtained from booty dumps and warehouses, but some were obtained from prisoner-of-war camps where they were taken from the prisoners on orders from two of the accused. Some Red Cross parcels were also obtained in this manner.

The accused Skorzeny took over the command of the brigade on 14th December. On the 16th December the Ardennes offensive began. The objectives of the three combat groups into which the brigade was divided were the three Maas bridges at Angier, Anee and Huy respectively. The men were dressed in American uniforms and wore German parachute overalls over these uniforms. Their orders were to follow the spearhead of the three panzer divisions to which they were attached and as soon as the American lines were pierced they were to discard their overalls and, dressed in American uniforms, make for the three bridges. They were instructed to avoid contact with enemy troops and if possible to avoid combat in reaching their objectives. The piercing of the enemy lines by the S.S. Armoured Division was not successful, and on 18th December Skorzeny decided to abandon the plan of taking the three Maas bridges and put his brigade at the disposal of the commander of the S.S. corps to which it had been attached, to be used as infantry. He was given an infantry mission to attack towards Malmedy. During this attack several witnesses saw members of Skorzeny's brigade, including two of the accused, wearing American uniforms and a German parachute combination in operational areas, but the evidence included only two cases of fighting in American uniform.

In the first case, Lieutenant O'Neil testified that in fighting in which he was engaged about 20th December his opponents wore American uniforms with German parachute overalls, some of them who were captured by him said "that they belonged to the 'First', or the 'Adolf Hitler', or the 'Panzer' Division". The second case was contained in an affidavit of the accused Kocherscheid, who elected not to give evidence in the trial. He said in his affidavit that during the attack on Malmedy he and some of his men were engaged in a reconnaissance mission in American uniform when they were approached by an American military police sergeant. Kocherscheid, fearing that they would be recognised, fired several shots at the sergeant.

Skorzeny's brigade was relieved by other troops on 28th December and was subsequently disbanded.

All accused were acquitted of all charges.

B. NOTES ON THE CASE

1. THE USE OF ENEMY UNIFORMS, INSIGNIA, ETC.

It is a generally recognised rule that the belligerents are allowed to employ ruses of war or stratagems during battles. A ruse of war is defined by Oppenheim-Lauterpacht (*International Law*, Vol. II, paragraph 163) as a "deceit employed in the interest of military operations for the purpose of misleading the enemy". When contemplating whether the wearing of enemy uniforms is or is not a legal ruse of war, one must distinguish between the use of enemy uniforms in actual fighting and such use during operations other than actual fighting.

On the use of enemy uniforms during actual fighting the law is clear. Lauterpacht says: "As regards the use of the national flag, the military insignia and the uniforms of the enemy, theory and practice are unanimous in prohibiting such use during actual attack and defence since the principle is considered inviolable that during actual fighting belligerent forces ought to be certain of who is friend and who is foe". The Defence, quoting Lauterpacht, pleaded that the 150th Brigade had instructions to reach their objectives under cover of darkness and in enemy uniforms, but as soon as they were detected, they were to discard their American uniforms and fight under their true colours.

On the use of enemy uniforms other than in actual fighting, the law is uncertain. Some writers hold the view that until the actual fighting starts the combatants may use enemy uniforms as a legitimate ruse of war, others think that the use of enemy uniforms is illegal even before the actual attack.

Lawrence (*International Law*, p. 445) says that the rule is generally accepted that "troops may be clothed in the uniform of the enemy in order to creep unrecognised or unmolested into his position, but during the actual conflict they must wear some distinctive badge to mark them off from the soldiers they assault".

J. A. Hall (*Treatise on International Law*, eighth edition, p. 537), holds it to be "perfectly legitimate to use the distinctive emblem of an enemy in order to escape from him or draw his forces into action".

Spaight (*War Rights on Land*, 1911, p. 105) disagrees with the views expressed above. He argues that there is little virtue in discarding the disguise after it has served its purpose, i.e. to deceive the enemy. "If it is improper to wear the enemy's uniform in a pitched battle it must surely be equally improper to deceive him by wearing it up to the first shot or clash of arms".

Lauterpacht observes (*International Law*, Vol. II, p. 335, note 1) that before the second World War "the number of writers who considered it illegal to make use of the enemy flag, ensigns and uniforms, even before the actual attack, was becoming larger".

Article 23 of the Annex of the Hague Convention, No. IV, 1907, says: "In addition to the prohibitions provided by special conventions it is especially forbidden . . . (f) to make improper use of a flag of truce, of the national flag, or of the military insignia or uniform of the enemy, as well as the distinctive badges of the Geneva Convention". This does not carry the law on the point any further since it does not generally prohibit the use of enemy uniforms, but only the improper use, and as Professor Lauterpacht points out, it leaves the question what uses are proper and what are improper, open.

Wheaton (*International Law*, Vol. II, sixth edition, p. 753), points out that Article 23(f) by no means settles the question, and adds that "each case must necessarily be judged on its merit, and determined conformably to the basic principles of war law, special regard being paid to the element of *bona fides*". (As an example for a *bona fides* use of enemy uniforms, he gives the case where no other uniforms are available to the belligerent army.)

Paragraph 43 of the Field Manual published by the War Department, United States Army, on 1st October, 1940, under the title "Rules of Land Warfare", says: "National flags, insignias and uniforms as a ruse—in practice it has been authorised to make use of these as a ruse. The foregoing rule (Article 23 of the Annex of the IVth Hague Convention), does not prohibit such use, but does prohibit their improper use. It is certainly forbidden to make use of them during a combat. Before opening fire upon the enemy, they must be discarded". The American *Soldiers' Handbook*, which was quoted by Defence Counsel, says: "The use of the enemy flag, insignia and uniform is permitted under some circumstances. They are not to be used during actual fighting, and if used in order to approach the enemy without drawing fire, should be thrown away or removed as soon as fighting begins".

The procedure applicable in this case did not require that the Court make findings other than those of guilty or not guilty. Consequently no safe conclusion can be drawn from the acquittal of all accused, but if the two above-mentioned American publications contain correct statements of international law, as it stands today, they dispose of the whole case for the Prosecution, apart from the two instances of use of American uniforms during actual fighting.

The first case, that of Lieutenant O'Neil, has to be disregarded as the evidence does not seem to disclose with sufficient certainty the connection between the men dressed in American uniform whom Lieutenant O'Neil captured and the 150th Brigade. In the second instance, the case of the accused Kocherscheid who in an affidavit admitted that he fired on an American military police sergeant when dressed in American uniform, the accused stated in his affidavit that he fired several shots at the sergeant, but there was no evidence to show that he killed or even wounded him as was alleged in the charge.

2. ESPIONAGE

Two Counsel in defence of the accused Kocherscheid, argued that he was on an espionage mission in "no man's land" when he met the military police sergeant. He believed, on reasonable grounds, that he and his men were discovered and shot at the military police sergeant to protect his own life and the lives of his men. Counsel argued that as he returned from the espionage mission to his own lines he was protected by Article 31 of the Hague Convention and could therefore not be punished afterwards for his acts as a spy.

Article 29 of the Annex to the Hague Convention, 18th October, 1907, defines espionage as the "act of a soldier or other individual who clandestinely or under false pretences seeks to obtain information concerning one belligerent in the zone of belligerent operations with the intention of communicating it to the other belligerent". According to Article 31 of the same Convention, a spy who is not captured in the act but rejoins the army to which he belongs and is subsequently captured by the enemy, cannot be punished for his previous espionage but must be treated as a prisoner of war.

The argument put forward by Defence Counsel appears to be unsound. Article 31 gives immunity to a spy who returns to his lines in so far as he cannot be punished as a spy. The accused in this case, however, were not tried as spies but were tried for a violation of the laws and usages of war alleged to have been committed by entering combat in enemy uniforms. Articles 29-31 of the Hague Convention have therefore no application in this case and it would appear that the accused Kocherscheid's acquittal was based on lack of sufficient evidence, as he did not give evidence at the trial and the Prosecution's case rested entirely on his pre-trial affidavit.

3. THE TAKING OF UNIFORMS, INSIGNIA, ETC., FROM PRISONERS OF WAR

Article 6 of the Geneva (Prisoner-of-War) Convention, 1929, provides that: "All effects and objects of personal use, except arms, military equipment and military papers, shall remain in the possession of prisoners of war. . . ." The taking of uniforms of prisoners of war is therefore a violation of the Geneva Convention.

Article 37 of the same Convention states that: "Prisoners of war shall be allowed individually to receive parcels by mail containing food and other articles intended for consumption or clothing. Packages should be delivered to the addressees and a receipt given". To appropriate such packages before they reach their addressees is therefore also a violation of the Geneva Convention.

As mentioned above, the Court had not to give any reasons for their findings, but it is possible that having acquitted the accused of the main charge the Court applied the maxim *de minimis non curat lex*, also acquitting the accused of what were lesser violations of the Geneva Convention (cf. Vol. III, p. 70, of this series).