CASE No. 78

TRIAL OF WILHELM GERBSCH

THE SPECIAL COURT IN AMSTERDAM, FIRST CHAMBER
(JUDGMENT DELIVERED ON 28TH APRIL, 1948)

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

The accused, Wilhelm Friedrich Walter Gerbsch, was a guard of the penal camp at Zoeschen, in Germany, during 1944-1945.

The prosecution brought against him a " primary " and an " alternative " charge.

The primary charge was that he carried out " serious ill-treatment, of which Netherlanders, at any rate persons deported or transferred from the Netherlands to Germany " and detained in the camp at Zoeschen were the victims.

The alternative charge was that he committed ill-treatment " as an official in the State or public service of the enemy," and by doing so " intentionally acted contrary to the laws and customs of war, or at any rate of humanity."

Under both charges the accused was prosecuted for offences committed " during the time of the war begun by Germany against the Netherlands on 10th May, 1940, but before 15th May, 1945, making use of the power, opportunity and means offered him by his office and by the enemy and the fact of the enemy occupation of the Netherlands and of the European countries."

2. THE EVIDENCE

A large number of witnesses, all inmates of the camp in which the accused served, were heard, and by their concurrent testimonies the following facts were established :

The inmates of the camp were of different nationalities, including Dutch subjects. The accused used continually and indiscriminately a rubber truncheon with which he beat the inmates. These beatings caused " severe bodily injury," as a result of which the victims " fell down unconscious and in several cases gave no further signs of life." On several occasions the accused used a spade instead of the truncheon, and in many others he savagely flogged the inmates. Because of his cruelty he " was among the most feared guards in the camp." In one case the victim was a Dutchman from Amsterdam, known as " Peters " or " Piet the Amsterdamer." The accused compelled him to push a fully loaded wheelbarrow up and down a slope, during which time he beat the victim without interruption with a rubber truncheon. Peters collapsed several times and every time was beaten until he would get up. He eventually fell unconscious and later died of the ill-treatment. Several other inmates died in the same manner at the accused's hands.

3. THE DEFENCE

The counsel for defence pleaded that the Court had no jurisdiction to try the accused. The reasons given were that the latter was a German, that the offences charged constituted war crimes committed on German territory, and that by committing them the accused acted in the public service of the German state, so that the jurisdiction of the Netherlands court was excluded.

This plea was rejected on the basis of an express provision of Dutch law giving jurisdiction to Dutch courts over offences committed against Dutch subjects or Netherlands interests outside Dutch territory.

4. FINDINGS AND SENTENCE

The accused was found guilty of a crime against humanity in that he " intentionally committed terrorism against Netherlanders and against persons through whom the interest of the Netherlands was or could be harmed." He was also found guilty in the capacity envisaged in the alternative charge, that is as an " official who, during the legitimate exercise of his function, intentionally inflicted on another severe bodily injury which resulted in death, committed several times, making use thereby of the power, opportunity and means offered him by the enemy and the fact of the enemy occupation."

In imposing punishment the Court recognised two mitigating circumstances. It declared that the accused " did not act on his own spontaneous initiative " but " was drawn into the whole abominable system of terrorism and brutality carried out under the higher German Nazi administration against civilians of the occupied nations." On the other hand, the Court established that the accused's " mental faculties were defective and undeveloped " at the time of the crimes as well as at that of the trial.

Gerbsch was condemned to 15 years' imprisonment.(1)

B. NOTES ON THE CASE

1. THE JURISDICTION OF THE COURT

The Court rejected the defence plea concerning its jurisdiction on the basis of Art. 4 of the Extraordinary Penal Law Decree D.61 of 22nd December, 1943. This provision gives jurisdiction to Dutch courts over war crimes or crimes against humanity committed outside the Netherlands against Dutch subjects ; its relevant passages read as follows :

> " . . . The Netherlands penal law applies to any person who outside the realm in Europe is or has been guilty of :
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> (1) A crime described in . . . Articles 26, 27 and 27A of this Decree. . . . if the act has been committed against or in connection with a Dutch citizen or a Netherlands legal person or if any Netherlands interest is or could be harmed thereby."

Art. 27A makes punishable by Dutch courts those " who during the time of the present war and while in the forces or service of the enemy State are guilty of a war crime or any crime against humanity as defined in Art. 6

(1) Appeal was made against this judgment and, at the time of going to press, the appeal was still not decided.

under (*b*) and (*c*) of the Charter belonging to the London Agreement of 8th August, 1945." When war crimes and crimes against humanity " contain at the same time the elements of an act punishable according to Netherlands Law," the maximum punishment is that provided against that act in Dutch municipal law. If they do not contain the elements of such an act, they are punishable by Dutch courts with the penalty prescribed for the act with which they show " the greatest similarity."(1)

An analysis of the nature of the accused's offences with regard to the above provisions will be found later. The Court decided that the ill-treatment committed by the accused fell within the terms of Art. 27A in conjunction with Art. 4 of the Decree. It defined the issue in respect of Art. 4 by stating that, according to this Article, " the Netherlands judge was accorded jurisdiction with regard to anyone " who had committed offences outside Holland " against or in connection with a Netherlander or if any Netherlands' interest was or could be harmed thereby."

With reference to the defence plea that the Court was not competent on account of the accused's nationality and official position, the Court invoked the principle of the so-called " passive nationality," according to which the jurisdiction of Dutch courts is governed by the nationality of the victims and not of the accused, or by the fact that Dutch national interests, and not those of the accused's country were injured. The court emphasised that this was a principle accepted by many nations as an " internationally recognised legal institution," and that no rule of international law made any exception to it.(2)

Regarding the plea that the accused " acted in the public service of the German State," the Court declared this to be irrelevant as its jurisdiction deriving from Art. 4 of the Extraordinary Penal Law Decree of 22nd December, 1943, was, under the terms of Art. 27A of the same Decree, explicitly accorded in respect of perpetrators " in the service of the enemy State."(3)

2. NATURE OF THE OFFENCES

As stressed in connection with the question of the Court's jurisdiction, the findings were that the accused was guilty under the terms of Art. 27A of the Extraordinary Penal Law Decree of 22nd December, 1943, which is included among the provisions defining the offences committed outside Dutch territory over which Dutch courts have jurisdiction. The acts of ill-treatment were defined by the Court as constituting " crimes against humanity."

Art. 27A of the above Decree makes crimes against humanity punishable by Dutch courts within the terms of the definition of this concept in the Charter of the International Military Tribunal at Nuremberg. Art. 6 (*c*) of the Charter contains the following description of crimes against humanity :

> " . . . Murder, extermination, enslavement, deportation, and *other inhumane acts* committed against any civilian population, before or

(1) For more details on this point see Annex to Vol. XI of this series.

(2) The Court could also have relied upon the principle of the universality of jurisdiction over war crimes. See Vol. I of these Reports, p. 42.

(3) See also Vol. VI, pp. 60-1.

during the war, or persecutions on political, racial or religious grounds . . . whether or not in violation of the domestic law of the country where perpetrated."(1)

Acts of ill-treatment are covered by the terms " other inhumane acts."

The Court gave no reasons why it had established that the accused's acts of ill-treatment constituted crimes against humanity and not war crimes. Art. 6 (*b*) of the Nuremberg Charter defines war crimes as " violations of the laws or customs of war," and explicitly includes the ill-treatment of the civilian population of occupied countries in this concept.

As has been stressed in connection with other trials,(2) the two concepts of war crimes and crimes against humanity may overlap so as to cover at the same time the same criminal act. The concept of crimes against humanity is, however, wider in most senses than that of war crimes, so that there may be more cases in which a war crime constitutes a crime against humanity than the reverse. Certain distinctive features of each concept are to be found in the definitions contained in the Nuremberg Charter. Under Art. 6 (*b*), which concerns war crimes, the emphasis is on offences committed during the war, which is implied in the notion of the " laws or customs of war," and on victims who are " civilian population of or in occupied territory." In Art. 6 (*c*), which concerns crimes against humanity, the emphasis is on offences committed during or before the war,(3) and on victims who are members of " *any* civilian population." This latter element is the most important, as the concept of crimes against humanity was introduced chiefly with a view to punishing offences committed against nationals of the enemy States themselves, such as in the case of German Jews, German Catholics and other Germans victimised on account of their race, religion or political creed.

In the case tried the striking features were that the place of the crimes was in Germany, that the victims of the camp in question were of various nationalities, and that the accused was found guilty of offences against victims including nationals of other countries in addition to those of the Netherlands. This was emphasised by the Court in the following terms :

" The Court is convinced and considers it legally proved that the accused . . . making use of the power, opportunity and means offered him by his office and by the enemy and the fact of the enemy occupation of the Netherlands *and of other European countries*, to wit, employed in German State service as a guard over persons of *various nationalities* . . . which persons had been deported or transferred to Germany . . . applied a system of ill-treatment in the said camp of which *also persons deported or transferred from the Netherlands to Germany* and detained in that camp were the victims."(1)

It will be noted that, when referring to persons deported to Germany from the Netherlands, the Court did not limit its reference to Dutch nationals, which leaves room to believe that nationals of other countries were included.

(1) Italics are inserted.

(2) See *Trial of Josef Altstötter and others*, Vol. VI of this Series, pp. 1-110.

(3) See, however, Vol. IX, pp. 44-8.

The Court's conclusions on the above findings were made on the same lines :

> " The accused . . ., in connection with the war of aggression unleashed by Germany against the Netherlands *and other countries*, . . . intentionally committed terrorism against Netherlanders *and against* persons by the ill-treatment of whom the interest of the Netherlands was or could be harmed."(1)

The reference to the Netherlands interests in connection with persons other than " Netherlanders " is presumably an indication that the court had in mind non-Dutch nationals residing in Holland and transferred to the accused's camp in Germany.

It would thus appear that it is on account of the above circumstances that the Court decided that the accused was, technically, guilty of crimes against humanity and not of war crimes. The main element in this respect would appear to be the conviction of the accused for ill-treating foreign, *i.e.*, non-Dutch citizens in Germany. For, although ill-treatment is a war crime under international law irrespective of the place of the offence, provided the offence is committed against a national or an ally of the State whose courts conduct the trial, the jurisdiction of the Dutch Courts over war crimes is limited to cases affecting Dutch subjects and Dutch interests. It is only when the offences alleged constitute crimes against humanity that cases affecting foreign subjects may fall again within the jurisdiction of Dutch national courts. In such cases the jurisdiction of Dutch or any other national courts is exercised more on the basis of international than national law, and is only instrumental to making the rules of international law effective.

This aspect can best be illustrated in connection with yet another feature of the concept of crimes against humanity. As conceived in Art. 6 (*c*) of the Nuremberg Charter, crimes against humanity do not concern isolated offences. They must have been committed on a wider scale as part of a common pattern repeatedly and systematically carried out, and directed or at least approved by a governmental authority. These features were stressed by some courts on the occasion of trials conducted under Law No. 10 of the Allied Control Council for Germany. Thus, in the case against Josef Altstötter and others, one of the United States Military Tribunals at Nuremberg stated the following with reference to Law No. 10, which gives a definition of crimes against humanity similar to that of the Nuremberg Charter :

> " We hold that crimes against humanity as defined in Control Council Law No. 10 must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority. As we construe it, that section provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic governmentally organised or approved procedures, amounting to atrocities and offences of that kind specified in the act and committed against populations or amounting to persecutions on political, racial or religious grounds."(2)

(1) Italics are inserted.

(2) See *Trial of Josef Atstötter and others*, Vol. VI, pp. 1-110 of this Series.

This view concurred with the opinion previously expressed by the United Nations War Crimes Commission. When studying the nature of the concept of crimes against humanity in contradistinction to war crimes, the Commission had reached the following conclusion :

> " Isolated offences do not fall within the notion (of crimes against humanity). As a rule systematic mass action, particularly if it can be shown to be authoritative, will be necessary to transform a common crime, punishable merely under municipal law, into a crime against humanity which thus becomes also the concern of International Law. Only crimes which either by their magnitude and savagery *or* by their great number *or* by the fact that a similar pattern is applied at different times and places, endanger the international community, *or* shock the conscience of mankind, *warrant intervention by States other than that on whose territory the crimes have been committed, or* whose subjects have become their victims."(1)

It will be noticed that both this description and that of the United States Military Tribunal fits the situation of the case tried. The ill-treatment perpetrated by the accused was not an isolated case as it was notoriously applied at different times and places by the Nazis, and was part of their general criminal policy. It also undoubtedly " shocked the conscience of mankind " as part of that pattern, and therefore clearly warranted the " intervention " of the Dutch court in the case implicating victims other than Dutch subjects. The fact that the accused's acts formed part of a pattern, authoritatively directed, was stressed by the Court in its decision regarding the mitigating circumstances in the case. It will be remembered that one of these circumstances was that the accused " was drawn into the whole abominable system of terrorism and brutality carried out under the higher German Nazi administration."

Finally, it should be observed, with regard to the rule according to which penalties for crimes against humanity are those provided by Netherlands municipal law for identical or similar acts, that the Court's finding was that the offences committed by the accused were punishable under Arts. 300-304 of the Dutch Penal Code, which deal with acts of physical ill-treatment (blows, bodily injury, and the like).

3. GUILT OF THE ACCUSED

The accused was found guilty of the offences described in the primary charge in the circumstances emphasised in the alternative charge, that is, he was found guilty of ill-treatment " as an official in the State service of the enemy " who made use of " the power, opportunity and means offered him by his office."

The responsibility of officials of the State is defined in Art. 21 of the Extraordinary Penal Law Decree of 22nd December, 1943. This Article deals with " every officer, official or any other person, whether serving in a permanent or temporary capacity, employed by the civil or military administration of a hostile power." The effect of Art. 21 is that such officials are

(1) Italics are introduced.

subject to the rule of Art. 44 of the Dutch Penal Code, which reads as follows :

> " If an official by committing a punishable offence violates a particular duty, or in committing a punishable offence makes use of the power, opportunity or means given him by his office, the punishment may be increased by one third."

The increased punishment, which is not mandatory but only optional, was presumably not applied by the Court in the case of the accused on account of the two mitigating circumstances previously mentioned. One was that the accused did not act " on his own spontaneous initiative " but was the instrument of the Nazi system of terror. The second circumstance was that the accused's mental faculties were " defective and undeveloped." This apparently removed the grounds for implementing the punishment of Art. 21, although the accused fell within the categories of individuals covered by it.