CASE No. 86

TRIAL OF HANS PAUL HELMUTH LATZA AND TWO OTHERS

BY THE EIDSIVATING LAGMANNSRETT (COURT OF APPEAL)
AND THE SUPREME COURT OF NORWAY

18TH FEBRUARY, 1947—3RD DECEMBER, 1948

Liability for War Crimes, including Murder, Delivery of Judgment Contrary to Better Knowledge and Denial of a Fair Trial.

On the 8th February, 1945, a Standgericht was set up in the SIPO (Security Police) Headquarters in Oslo on the orders of the German Reichskommissar in Norway, Joseph Terboven. The accused Hans Paul Helmuth Latza acted as president of the Standgericht. The two other accused occupied the position of assessor judges. The immediate cause for the setting up of the Standgericht was the killing on the same day of the Quisling Chief of Police, General Martinsen.

During that same day the Standgericht sentenced to death four very prominent Norwegians, all of whom were arrested on that day, and another Norwegian belonging to the indigenous police, who had failed to denounce to the German authorities his two brothers-in-law who were involved in certain contemplated acts of sabotage. The sentences were carried out the following morning.

It was alleged by the Prosecution in the Norwegian trials that the sentences passed by this Standgericht were in fact camouflaged acts of reprisals and that the victims had been sentenced to death according to German provisions which were allegedly at variance with the laws and customs of war and in any case had based their decision on evidence which could possibly not justify the passing of a death sentence. After the liberation of Norway the accused were charged with having committed a war crime in that they through a denial of a fair trial and judging against their better knowledge had unlawfully caused the death of the five above-mentioned Norwegian citizens.

The case against them was in the first instance tried by the Eidsivating Lagmannsrett (a Court of Appeal). The accused Latza was found guilty and sentenced to imprisonment for a period of 15 years, whereas the two other accused were acquitted.

An appeal against this sentence was filed with the Supreme Court of Norway by the Prosecution in respect of all the accused as well as by the accused Latza on his own behalf. By the decision of the Supreme Court the sentence and trial of the Lagmannsrett was quashed and a re-trial by the Lagmannsrett, composed of new judges, ordered. After a renewed hearing of the case the Lagmannsrett acquitted all the accused. The

Prosecution once more appealed against the judgment of the Lagmannsrett on questions of law but by the final decision of the Supreme Court the findings of the Lagmannsrett were upheld and the appeal rejected.

In their judgments the Lagmannsrett and the Supreme Court dealt with the important question of the minimum demands required by international law where criminal proceedings are taken by an occupant against citizens of an occupied country.

The evidence before the trial courts and the legal questions discussed are outlined in this report.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURTS

The courts before which this trial was held was the Eidsivating Lagmannsrett (one of the five Courts of Appeal) and the Supreme Court of Norway.[1]

2. THE INDICTMENT

The accused whose names appeared in the Indictment were the following : Hans Paul Helmuth Latza, Reinhold Regis and Christian Kehr. The Indictment filed against the accused reads in pertinent parts as follows :

> " (1) Hans Paul Helmuth Latza, born 6th June, 1908, German citizen ; (2) Reinhold Regis, born 6th January, 1903, German citizen ; (3) Christian Kehr, born 26th October, 1905, German citizen, are hereby charged before Eidsivating Lagmannsrett in accordance with Law No. 14 of 13th December, 1946, Article 1 (with which should be read Article 3) which provides punishment for an enemy citizen who has violated the laws and customs of war, provided the act, by reason of its character, came within the scope of a Norwegian provision of criminal law, and has been committed in Norway or directed against a Norwegian citizen or the Norwegian State, while Article 3 increases the punishment if :
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> (*a*) the act has caused grave bodily injury, grave suffering, prolonged deprivation of freedom, or extensive damage to property ;
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> (*b*) the act resulted in death, even though this outcome was not intended ;
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> (*c*) chapters 21, 22, and 25 of the Civil Criminal Code were repeatedly violated ; or
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> (*d*) particularly aggravating circumstances were present ;
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> with which should be read Article 233 of the Civil Criminal Code, which provides punishment for he who unlawfully causes another person's death, or is an accomplice thereto, and which increases the punishment if the guilty person acted intentionally or committed the murder in order to facilitate or disguise or to escape punishment for another crime, in the case of recurrence, or if other particularly aggravating circumstances are prevailing ;
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> with which should also be read Article 110 of the Civil Criminal Code

[1] For a general account of Norwegian substantive and procedural law applicable in War Crime Trials, see Volume III of this series, pp. 81-92.

which provides punishment for a judge, member of a jury or a judicial surveyor who in this capacity acts against his better judgment, which provision increases the punishment if, as a result of the offence, a death sentence has been executed.

" The following particulars form the basis of the Indictment :

" The accused No. (1) Hans Latza and the accused Nos. (2) and (3) Reinhold Regis and Christian Kehr acted on the 8th February, 1945, at Victoria Terrasse in Oslo as president and assessor judges respectively of a German Sondergericht (Special Tribunal) which sentenced the following persons to death : 1. Haakon Saethre, 2. Jon Vislie, 3. Carl Ferdinand Gjerdrum, 4. Kaare Sundby and 5. Aage Martinsen.

" The verdict and sentences were passed according to provisions of criminal law which were at variance with the laws and customs of war, or in violation thereof were based on evidence which obviously was not sufficient to lead to the passing of a death sentence.

" During the trial the accused acted, as judges, against their better knowledge in so far as the minimum demands required by international law for legal proceedings were not met, in that the guilt of the defendants was not adjudged in a fair way, and in that they had not been given that opportunity to defend themselves and submit counter-evidence which is prerequisite for a fair trial.

" As a result of the accused's acts, death sentences were passed and executed, whereby the accused caused the five persons' death."

3. PROGRESS OF THE TRIAL

The Indictment was served upon each of the accused on the 12th April, 1946. They were arraigned on the 18th February, 1947. Each of the accused entered a plea of " Not Guilty " in the presence of a Norwegian leading counsel and an assistant German counsel of their own choice. The first trial before the Eidsivating Lagmannsrett started on 18th February, 1947. A great number of witnesses were called by the Prosecution as well as by the Defence. Numerous documents were also admitted in evidence on behalf of the Prosecution as well as on behalf of the Defence. Judgment was delivered on the 12th March, 1947. The accused Hans Latza was found guilty and sentenced to imprisonment for a period of 15 years, whereas the two other accused were acquitted. An appeal against the verdict and sentence was filed with the Supreme Court by the Prosecution in respect of all the accused as well as by the accused Latza on his own behalf. By the Supreme Court's decision of 16th September, 1947, the trial and the Judgment of the Lagmannsrett was quashed and a re-trial ordered before the same Lagmannsrett composed of new judges. The re-trial of the case before the Eidsivating Lagmannsrett commenced on the 20th January, 1948, and the Judgment was delivered on the 29th January, 1948. This time all the accused were acquitted. Another appeal was filed with the Supreme Court by the Prosecution, but by the final decision of the Supreme Court, delivered on 3rd December, 1948, the judgment and findings of the Lagmannsrett were upheld and the Prosecution's appeal rejected.

A German interpreter assisted the Court throughout the trial.

4. THE POSITION OF THE ACCUSED

Hans Paul Helmuth Latza, born 6th June, 1908, had graduated in law. At the beginning of 1940 he was appointed judge in the S.S. und Polizeigericht in Praha and went to Norway in May, 1940. He acted as president of the S.S. und Polizeigericht IX and Polizeigericht Nord from that time until the liberation of Norway. He was a member of the N.S.D.A.P. (Nazi Party) and had belonged to the Waffen S.S. since 1933. He obtained the rank of Hauptsturmfuehrer.

Reinhold Regis, born 6th January, 1903, had graduated in Law and was later created a doctor of law. He was first employed in Government administrative service and served later as a Judge in the German Courts. In 1938 he was appointed Oberlandesgerichtsrat and continued in this position until he went to Norway on 15th February, 1942, where he was assigned to administrative duties. He had on a previous occasion served as a judge in the S.S. und Polizeigericht Nord. He was a member of the N.S.D.A.P. from 1933 but had not been a member of the S.S.

Christian Kehr, born 26th October, 1905, studied law for a short period but had not graduated. After the outbreak of war he served in the Ordnungspolizei in various parts of Germany until he was transferred to Norway in January, 1943. He served with the Staff of the Ordnungspolizei in Oslo from April, 1944. He held the rank of Hauptmann.

5. THE EVIDENCE BEFORE THE TRIAL COURTS

The S.S. und Polizeigericht IX, which was set up primarily to deal with members of the German Police and the S.S. in Norway, was by Decrees of 17th September, 1941, and 21st January, 1942, vested with powers to deal with trials of Norwegian citizens and was in this capacity named " S.S. und Polizeigericht Nord."

In June or July, 1944, Hitler decreed that all courts-martial in the occupied territories, except in Denmark, were to be abolished and the S.I.P.O. in every country was vested with discretionary powers to decide on the punishment in cases where offences of a political character had allegedly been committed. The Police could thus without trial pass a decision of execution on any Norwegian citizen whom they arrested, as they saw fit. It occurred, however, on several occasions that death sentences were pronounced on people who had been arrested immediately before the decisions were taken without proper investigations being carried out.

The accused Latza, who was president of the S.S. und Polizeigericht Nord, had gone to Germany in the summer of 1944 to find out whether the same exception which had been made in the case of Denmark, could be applied to Norway, but had to return having accomplished nothing.

On February 8th, 1945, the Quisling Chief of Police, General Martinsen, was shot in Oslo on the way to his office. The Chief of the S.I.P.O., Fehlis (committed suicide), was informed and arrived at the scene of the killing, but the perpetrators had escaped. It was evident that General Martinsen had been killed by members of the underground movement on special orders. Fehlis immediately asked for a conference with Reichskommissar Terboven (committed suicide), and later a meeting was arranged with members of his staff. At a second meeting on the same day Fehlis announced

that Terboven had ordered the setting up of a Standgericht as a countermeasure against the growing sabotage and terror activities of the underground movement. The Standgericht was to try several people who were regarded as the brains behind the movement (intellektual Urheber). Dr. Kolb, a member of the S.I.P.O. who had recently arrived from Germany, was sent to the accused Latza to ask him to preside over the Standgericht. According to the accused Latza's statement, he had, though not categorically refusing, argued with Dr. Kolb that as the S.S. und Polizeigericht Nord had been abolished, he was not the right man to preside over the court. At about noon the accused Latza received orders from Fehlis to go to his office as a conference had been arranged at Terboven's private residence in Skaugum, outside Oslo, for that afternoon. Fehlis, Dr. Kolb and the accused went to Skaugum by car. According to reports from Dr. Kolb and the driver, Fehlis on the way had explained the situation to the accused Latza and the accused had brought up the same arguments against his presiding over the court as he had made to Dr. Kolb in the morning.

At the conference at Skaugum, Terboven, had said that he had recently been to Germany to confer with the Fuehrer on the situation in Norway. Hitler had not agreed to Terboven's proposal to organise a counter-terror (Gegenterror) in Norway as he did not want martyrs. He had given orders for the setting up of Standgerichts to cope with the ever increasing activities of the home front. Terboven had, therefore, decided that the killing of General Martinsen was the opportune occasion for the setting up of such a Standgericht and asked the accused Latza to preside over the court. The accused Latza had again tried to reason with Terboven, arguing that his court had lost the authority to deal with Norwegians and also that he regarded the setting up of a Standgericht without the declaration of a state of emergency as unlawful. He had asked the conference to allow a trial by the S.S. und Polizeigericht Nord. His proposal was refused point blank by Terboven, who had said that Hitler's orders had been to set up a Standgericht without the declaration of a state of emergency. The accused stated : " Realising that Terboven's orders had come direct from Hitler, I no longer hesitated."

It may be assumed that it was decided at Skaugum that two trials would be held, one against " the brains of the home front " and another against some saboteurs who had been arrested some time ago. There was, however, no mention of the names of those to be tried.

It was further decided at that meeting that the Standgericht should sit the same evening at Victoria Terrasse and that the judges should be the accused Regis and Kehr, who were informed by telephone by the accused Latza to attend the Standgericht.

When the accused Latza arrived with Dr. Kolb at Victoria Terrasse direct from the meeting at Skaugum, he found there, among others, Fehmer, Kriminalrat Weiner (committed suicide), the accused Regis and Kehr and his secretary Silbermann. Fehlis who had not arrived was expected at any moment. All three accused stated that the trial did not start for another hour or so as they had been told that the prisoners had not yet arrived from Grini Concentration Camp. It was, however, established by the evidence that four of the persons to appear before the Standgericht, namely, Saethre, Vislie, Gjerdrum and Sundby had been arrested in the course of the same

afternoon and taken direct to Victoria Terrasse where they arrived shortly before the trial started, whereas the fifth person referred to in the Indictment, Aage Martinsen, had, together with some other alleged saboteurs who were also to be tried, been detained for some time in Grini Concentration Camp.

It was not possible to establish exactly what took place at Victoria Terrasse immediately preceding the trial. According to the accused Latza, he had talked to members of the S.I.P.O., particularly to Kriminalrat Weiner, who had undertaken to act as prosecutor against the so-called intellectual leaders of the home front. It was then, if not before, that the accused Latza was told that the intellectual leaders were to be tried. The accused Latza was given by Weiner some documents concerning the case and going through them, he came across the name of Henry Johannessen, aged 60, who was among those to be tried.

When Fehlis arrived, he gave a résumé of the meeting at Skaugum for the benefit of those who had not been present. The accused Latza then told Fehlis that he did not want to preside over a trial which had not been prepared beforehand by the police and mentioned two persons who, he knew, had been arrested that day. He also refused to try Henry Johannessen because of his age. Fehlis gave in and three names were crossed from the list.

All three accused maintained that they were unaware that Saethre, Vislie, Gjerdrum and Sundby had been arrested the same day. The accused Latza had been sure that they were among those prisoners expected from Grini and that they had already been interrogated by the police.

The trial against the intellectual leaders began between 21.00 and 21.30 hours with the accused Latza presiding and the accused Regis and Kehr as assessors, Weiner as prosecutor and Silbermann as secretary and an interpreter. Dr. Kolb was also present in case Weiner who had no legal education, should need his assistance.

As Weiner acted in a double capacity, both as prosecutor and witness, the accused Latza had reminded him of his duties and responsibilities as a witness before the opening of the proceedings.

Weiner prosecuted from notes. He did not propose to call witnesses as some, according to his explanation, members of the German police, had been sent elsewhere and others, Norwegian denouncers, could not be called for safety reasons. But Weiner had personally vouched for the evidence. All three accused stated that Weiner, whom they hardly knew, had presented his case clearly and exactly, without hesitation. They had all protested against the prosecutor taking the last word, but it was not possible to ascertain how the protest ended.

As customary in German legal procedure, the reasons for the verdict and sentence were set down in writing later. All those tried were told that the court had sentenced them to death but that the sentences had to be confirmed by Rediess (committed suicide) and that the question of reprieve rested with Terboven.

It was not possible to ascertain whether any of the accused had asked for a defence counsel. Of the four people sentenced to death in the first trial, only Dr. Saethre had asked for an adjournment, saying that he had treated many Germans in his hospital and could submit corresponding proof.

The accused Latza had answered that the court did not doubt that he had fulfilled his duty as a medical man.

The first to be tried was Dr. Saethre, a head-physician of Ullevaal Hospital outside Oslo. The hospital was known to be a veritable nest of the home front, according to the German prosecutor, and Dr. Saethre was regarded as the leader of anti-German propaganda and the secret news service. Jewish prisoners who had been sent for treatment to the hospital from prisons, had disappeared and Dr. Saethre was charged with having sabotaged the security measures which the German authorities had laid down for the safeguarding of the prisoners at the hospital. He was also charged with having made financial contributions to the home front.

Dr. Saethre, according to the accused, had admitted having made it difficult for the Germans to carry out their safety measures, and his financial contributions to the home front, but he had denied having taken part in anti-German propaganda although the prosecutor, Weiner, had quoted instances which he read from his notes, allegedly received from reliable witnesses.

Dr. Saethre was sentenced to death in accordance with Article 1, Nos. 2, 4 and 6 of the German occupational decree of 12th October, 1942, for having given financial help to the home front, for anti-German propaganda and for having helped prisoners to escape.

Advokat Gjerdrum, according to the accused, was charged with being an intellectual leader of the home front and with having organised a transport of refugees to Sweden with the aid of the Swedish Vice-Consul von Edelstam. He was also charged with having provided people with faked identity cards and of having hidden students who were wanted by the German police in connection with the German persecution of students and professors at Oslo University. The information had, according to the German prosecutor, been received from von Edelstam's former maid.

Advokat Gjerdrum, according to the accused, had denied all the charges and had only admitted that three months before he had been warned of danger and advised to escape.

Gjerdrum was sentenced to death in accordance with Article 1, Nos. 1 and 5 of the above-mentioned German decree for having worked against the Germans and having helped people to escape from the country.

Director Sundby, according to the accused, was charged with being the leader of a local underground movement and with having organised the delivery of arms to the home front with his own lorries. He was further charged with having listened to news from London. The German prosecutor's case against Sundby had, among other things, been based on a report received from a Swede who had formerly worked with Sundby. According to the accused, Sundby had only admitted to having listened to news from London and to having lent his lorries to the home front, but he had categorically denied any knowledge of their having been used for the transport of arms.

Sundby was sentenced to death in accordance with Article 1, Nos. 2 and 5 of the same German decree for having taken part in illegal activities, in particular for having assisted in the transport of arms for illegal purposes and for having listened to news from London.

Advokat Vislie, according to the accused, had been charged with having been the leader of anti-German propaganda in a suburb of Oslo and with having given financial assistance to patriotic organisations. The accused claimed that Vislie had admitted the financial help to patriotic organisations, but had categorically denied all anti-German propaganda, information on which the German prosecutor had allegedly received from a Norwegian policeman.

Vislie was sentenced to death in accordance with Article 1, Nos. 2 and 4 of the above-mentioned German decree for illegal activities, anti-German propaganda and financial aid to the underground movement.

After an adjournment the Standgericht began the second trial against the seven saboteurs who were all dealt with together. The evidence showed that six of them had without doubt been active as saboteurs, whereas the seventh, Aage Martinsen, referred to in the Indictment, had not been a party or accomplice to any such act. Aage Martinsen was only shown to have been guilty of not having denounced his two brothers-in-law, whom he knew had taken part in such sabotage activities. All seven prisoners, including Martinsen, were sentenced to death according to Article 3 of the above-mentioned German decree.

After the completion of this second trial, the three accused had discussed the question of recommending Dr. Saethre and Aage Martinsen for reprieve. The accused Latza had at once got in touch with Terboven by telephone, but had been met with refusal.

It appeared from a statement made by Fehlis's driver that the latter had been waiting in the ante-room of the Standgericht while the proceedings were in progress. The driver stated that when the seven saboteurs had been taken into the court room, he had heard Fehlis and the German prosecutor Weiner discuss whether Aage Martinsen should be tried too. Thereupon Dr. Braune, who was also present said : " If we keep one back the press has to be held back and the already printed issues have to be scrapped."

All the eleven men sentenced to death were executed by shooting in the early hours of 9th February, 1945.

The morning issue of " Aftenposten " of February 9th, 1945, reported the death sentences passed on eleven people by the Standgericht, tried the night before, and that all eleven had been shot.

6. JUDGMENT OF THE EIDSIVATING LAGMANNSRETT DELIVERED ON 12TH MARCH, 1947

The Lagmannsrett held that the setting up of the Standgericht did not constitute a breach of international law. Its setting up was necessitated by the urgent character of recent activities by members of the home front aimed at endangering the security of the occupation power. Its setting up on that particular date was caused by the killing of General Martinsen. The Germans had a special regulation for procedures of such courts which they called " Verordnung ueber das militaerische Strafverfahren im Kriege und bei besonderem Einsatz," dated 17th August, 1938. Article 1 of the Verordnung contained four points which all three accused had maintained

had been met with during the two trials at issue. These four points provided :

(i) Three judges had to take part in the trial.

(ii) The accused had to be given the last word.

(iii) The sentences had to be passed by a majority vote, put down in writing and to give the reasons.

(iv) The sentences had to be confirmed by a " Befehlshaber."

The Lagmannsrett drew attention to the fact that the archives of the Standgericht had been destroyed. Thus it had been impossible to ascertain how far the sentences were supported by the premises, but it might be said that according to German law, the premises could be set down *after* the sentences had been passed, and the Lagmannsrett could not but accept the statements of the accused that the regulations concerning the reasons for the sentences had been fulfilled.

What had made these particular trials unlawful, in the opinion of the Lagmannsrett, was that several rules intended to safeguard the accused had been disregarded. The trials had been intended to have the effect of reprisals and it must be assumed that the three accused had opened the trial with the intention of meting out particularly severe punishment for preventative reasons. The Lagmannsrett pointed out that in violation of these general regulations :

(i) the accused were not given a counsel for defence,

(ii) they had been arrested on the day of the trial and had thus not been able to prepare their defence,

(iii) the Standgericht had accepted as proof evidence produced indirectly by the prosecutor who had maintained that the witnesses could not be called for safety reasons,

(iv) the judges had not used their right and duty to adjourn the trial for further evidence,

(v) at least Dr. Saethre and Advokat Vislie had been sentenced to death on insufficient evidence for acts which, from the point of view of international law, were hardly punishable by death sentence.

As to Dr. Saethre the Lagmannsrett held that the only evidence on which he could have been properly convicted and sentenced by the Standgericht was his admission of having refused to hand over to the Germans Jewish patients who in reality had taken refuge in the hospital. The Lagmannsrett found that it had not been proved that Dr. Saethre had given financial aid to illegal organisations.

In the case of Advokat Vislie the Lagmannsrett pointed out that the Standgericht had based its sentence on the grounds that Vislie had given financial aid to teachers and clergymen who had been unlawfully dismissed by the Quisling government. The Lagmannsrett held that according to international law those acts could not be punished, and it was obvious that the German Jew-baiting and the persecution of teachers and clergymen in Norway were at variance with international law and therefore Dr. Saethre's help to them was lawful. The fight of the Church and the Schools was a reaction against unlawful nazification. Financial support to teachers and

the clergy were in those circumstances activities which could not be punished according to international law.

The Lagmannsrett held that the position as far as Advokat Gjerdrum and Sundby were concerned was somewhat different as it might be assumed that there had been sufficient evidence before the Standgericht of their having committed acts which could be punished according to international law.

It was pointed out by the Lagmannsrett that trials as inadequate as those dealt with by the Standgericht, which had sentenced innocent people to death, were no doubt contrary to international law. The members of that court had acted criminally " at variance with these basic rules of international law, which had become common usage between civilised States, contrary to the laws of humanity and against the dictates of public conscience " (cf. No. IV of the Hague Conventions).

As to the sentence passed by the Standgericht on Aage Martinsen, the Lagmannsrett said that the question arose whether Article 3 of the above-mentioned German decree, according to which he was sentenced, was contrary to international law, as it provided for the death penalty for any person who " gives shelter to or in any other way aids agents or persons who work for the benefit of an enemy state."

The Lagmannsrett pointed out that a state of war existed between Norway and Germany at that time and that thus Article 3 of the said decree, when applied to a Norwegian citizen, who did not disclose to the German authorities information on the activities of the underground movement, was tantamount to punishing Norwegian citizens for not committing treason to their own country. Experts on international law seemed, however, in the opinion of the Lagmannsrett, to regard the legality of such a provision as disputable. Reference was made to Alberic Rolin : " Le Droit Moderne de la Guerre," Volume I, p. 461, where the author distinguishes between ordinary military operations and acts undertaken by " combattants irreguliers," a term well applicable to the Norwegian saboteurs even though the acts of sabotage were ordered by the Norwegian High Command.

The Lagmannsrett considered the quoted German provision to be at variance with international law and found, that from an objective point of view, the sentence passed on Aage Martinsen by the Standgericht, must be regarded as a war crime. It was pointed out, however, that it was, according to Norwegian Constitutional law, a prerequisite for the punishment of a war crime that the act in question was at the same time also covered by a special provision of Norwegian municipal criminal law. In the Indictment it had been maintained that the accused's crimes were covered by Articles 223 and 110(1) of the Civil Criminal Code.

The Lagmannsrett concluded that it was not established by the evidence that any of the accused had acted against their better judgment (Article 110) and went on to discuss whether Article 233 could be applied. It was pointed out in this connection that the question as to whether or not the accused had acted intentionally with the full understanding that by their conduct they had caused another person's death, was different in the case of each individual accused and different in the case of Aage Martinsen as dis-

(1) The contents of these two provisions have previously been quoted. See pp. 50—1.

tinguished from the case against the other persons referred to in the Indictment.

As to the accused Latza, the Lagmannsrett came to the conclusion that he had acted intentionally as far as the sentences against Dr. Saethre and Advokat Vislie were concerned, whereas the position was different in respect to the accused Regis and Kehr.

The Lagmannsrett stressed the fact that the accused Latza had, since 1941, served as a judge with the S.S. und Polizeigericht Nord and had in that capacity taken part in the trial and sentence of a series of political crimes on previous occasions, which had mainly resulted in the death sentence. He was fully aware of the minimum demands necessary for the passing of a death sentence, as he had, during the whole period, been president of that court. As president of the Standgericht in question, he was the person to bear the main responsibility for the trials being conducted in a legal manner. In addition, it was pointed out, the accused Latza had in the morning been told that he would have to preside over the Standgericht, and it had to be taken for granted that he had been informed by Fehlis and Dr. Kolb that persons not directly connected with sabotage acts were to be tried. The Lagmannsrett also stressed the fact that the accused Latza had taken part in the discussions at Skaugum, where he must have learned that the whole trial was nothing but a camouflaged act of reprisal with only one possible outcome to those to be tried—the death sentence. Furthermore, during the conference with the German prosecutor Weiner at Victoria Terrasse, he must have clearly understood that the evidence which Weiner proposed to submit to the Standgericht was insufficient. In the opinion of the Lagmannsrett, the accused Latza must have been fully aware that the intention of the trial was to take reprisals and to clothe them in a cloak of legality. He had thus, unlawfully, wilfully and intentionally caused Dr. Saethre's and Advokat Vislie's death.

As to the accused Regis and Kehr the Lagmannsrett found that the position was somewhat different. Both of these accused had been summoned to act as judges at short notice and knew nothing about the background for the proceedings before they arrived at Victoria Terrasse. The information they had received from Fehlis immediately before the opening of the trial concerned the state of affairs after General Martinsen's killing, and they did not realise that there was also to be a trial of intellectual leaders. Neither did they know what evidence the German prosecutor Weiner was proposing to use, and it could not be held against them that they believed in the evidence submitted by him during the trials. The Lagmannsrett, therefore, did not find that the accused Regis and Kehr had been fully aware that they had been accomplices to the death of Dr. Saethre and Advokat Vislie.

As to the case against Aage Martinsen, the Lagmannsrett pointed out that no one of the accused as members of the Standgericht had gone into the question whether there was any evidence which could support the charge brought against him. From the evidence before the Standgericht it was quite clear that Aage Martinsen himself had not taken part in sabotage. His offence consisted only of having failed to denounce his compatriots. He had, therefore, in the opinion of the Lagmannsrett, been sentenced to death by the Standgericht at variance with international law. The Lagmannsrett found it established, however, that the accused had not been

aware that Article 3 of the said Verordnung was in itself at variance with international law. It was pointed out, as stated above, that experts on international law had declared that it was disputable to say that a person's negative attitude, *i.e.*, not volunteering information to the occupying power on acts of sabotage committed by non-uniformed people, was culpable. Article 3 of the said decree was contained in a Verordnung of 12th October, 1942, from the German Reichskommissar in Norway. This Verordnung was in turn based on the Fuehrer Order of 24th April, 1940. The Lagmannsrett held that from the German point of view the said provision was to be regarded as valid law. Reference was made to Professor Castberg's "*Folkerett*" (*i.e.*, International Law), p. 41, where he states that "it is a general presumption that national law is consistent with international law. Even if formal national law"—in this case the German Verordnung—"expressly lays down regulations at variance with principles of international law, the national law has to be obeyed by all authorities and citizens of that state."

The Lagmannsrett came to the conclusion that the accused had believed that Article 3 of the said Verordnung was consistent with international law and had thus been under a pardonable misconception.

The Lagmannsrett then proceeded to discuss whether Article 239 (having inadvertently caused another person's death) could be applied. It was held that as the illegality of Article 3 of the said Verordnung was disputable according to international law, it could hardly be said that the accused Regis and Kehr had fulfilled the mental qualifications laid down by Article 239 of the Civil Criminal Code when applying the provision of the Verordnung, particularly in the confused situation which prevailed on 8th February, 1945.

The Lagmannsrett found it doubtful whether the ignorance of all three accused as to the legality of Article 3 of the Verordnung in relation to international law should be regarded as covered by Article 42(1) or Article 57(2) of the Civil Criminal Code, but pointed out that even if Article 57 had to be applied their ignorance must be considered excusable.

7. FINDINGS AND SENTENCES BY THE LAGMANNSRETT

The accused Latza was found guilty and sentenced to imprisonment for a period of 15 years. The accused Regis and Kehr were acquitted.

8. THE APPEAL TO THE SUPREME COURT

(i) *The Appeal by the Prosecution*

The Prosecution filed an appeal with the Supreme Court against the findings and the sentence of the Lagmannsrett in respect of all three accused. In their appeal the Prosecution maintained *primarily* :

(1) that the reasons given by the Lagmannsrett were insufficient insofar as they did not expressly state whether the Standgericht trial was

(1) Article 42 of the Civil Criminal Code (regarding misconception of facts) reads : "If a person, when committing an unlawful act, was ignorant of factual circumstances determining or aggravating the punishability of the act, then these circumstances shall not be attributed to him."

(2) Article 57 of the Civil Criminal Code (regarding misconception of law) reads : "If a person, when committing an unlawful act, was ignorant of its illegal character, the punishment may—if the Court does not acquit him for that reason—be reduced below the minimum fixed for that particular offence, or commuted into a milder form of punishment."

in itself intended to be a lawful trial despite its inadequacy, or whether it was only intended to serve as camouflage for reprisals exceeding the limits of criminal law ;

(2) that the Lagmannsrett had wrongly interpreted international law insofar as it appeared to have based its judgment on the view that an occupying power was permitted to employ the death sentence for *any* illegal act committed by the citizens of the occupied territory ;

(3) that the reasons given by the Lagmannsrett were insufficient and inconsistent insofar as they maintained on the one hand that the accused Latza had been fully aware of the illegality of the trial whilst the Lagmannsrett on the other hand, did not find it proved that he had acted against his better judgment. In stating this, the Lagmannsrett had also wrongly interpreted Articles 110 and 233 of the Civil Criminal Code ;

(4) that the Lagmannsrett had wrongly interpreted and applied the term " against their better judgment " as understood in criminal law ;

(5) that the Lagmannsrett had erroneously applied the general presumption of the conformity of national law with international law, as stated by Professor Castberg's " International Law." It should be obvious that that presumption could only be applicable to citizens of the state that had issued the regulations in question ;

(6) that the Lagmannsrett had wrongly assumed that the accused's ignorance as to the legality of Article 3 of the Verordnung of 12th October, 1942, in relation to international law, must be regarded as a misconception of fact and not as a misconception of law ;

(7) that the Lagmannsrett was wrong in finding it excusable on the part of a German judge, who was supposed to be aware of the authority of international law, to apply provisions of national (German) law, which were at variance with international law, on citizens of an occupied territory ;

(8) that it was a mistake by the Lagmannsrett not to have considered the importance and effect of the German Decree of 26th April, 1942, submitted in evidence to the Lagmannsrett. By that decree the Reichstag had authorised Hitler to force, by whatever means and regardless of the laws already in force, every German to do his duty. That decree was also applicable to judges, and the activities of the Nazi courts and their attitude towards international law could not be understood or explained unless against the background of that decree ;

(9) that the reasons given by the Lagmannsrett were insufficient and inconsistent insofar as it had found that the accused Regis and Kehr had not been informed *beforehand* of the trial of the so-called intellectual leaders who had been arrested that day ;

(10) that it was untenable to state, as had the Lagmannsrett, that the accused Regis and Kehr, as distinct from the accused Latza, had not known *before* the trial that the prosecution's evidence against Dr. Saethre and Advokat Vislie was insufficient. It was, in the Prosecution's opinion, immaterial for the question of the accused's guilt, whether or not they had such knowledge, *before* the trial. It would be sufficient

for their conviction if they acquired such knowledge before they delivered their judgment ;

Subsidiarily the Prosecution maintained that in any case the punishment inflicted on the accused Latza was too lenient and proposed that the death sentence be applied.

The Prosecution's appeal concluded with primarily maintaining that the judgment and the findings of the Lagmannsrett should be quashed in respect of all three accused and a re-trial be ordered. In case the judgment and the findings of the Lagmannsrett should be upheld by the Supreme Court, the Prosecution subsidiarily asked that the death sentence should be imposed on the accused Latza.

(ii) *The Appeal by the Accused Latza*

The accused Latza filed an appeal on his own behalf with the Supreme Court against the sentence of the Lagmannsrett. His appeal was based on the following grounds :

(1) that as the Lagmannsrett had found that the Standgericht in the prevailing circumstances must be regarded as legal and in accordance with international law, there could only be the question whether Article 110 of the Norwegian Civil Criminal Code could be applied, and if so that would exclude the application of Article 233 of the said Criminal Code ;

(2) that even if Article 233 was found to be applicable concurrently with Article 110, his acts as a judge had to be examined in the light of German national law, which in this case had to be given preference to international law. In any case his ignorance of the true legal position should be regarded as excusable ;

(3) that there were no provisions of the laws and customs of war which fixed the minimum demands for legal procedure, neither were there any defined provisions of international law as to which acts could be declared punishable by an occupation power ;

(4) that even if Article 233 of the Civil Criminal Code were applicable in the case, the reasons given by the Lagmannsrett as to his personal guilt were insufficient and conflicting ;

(5) that in any case the punishment decided upon was too severe in view of the mitigating circumstances referred to by the Lagmannsrett.

9. JUDGMENT OF THE SUPREME COURT, DELIVERED ON 16TH SEPTEMBER, 1947

Judge Schei, the first judge of the Supreme Court to give his comments on the appeal, first dealt with the more general objections raised by the Prosecution and the accused Latza against the judgment delivered by the Lagmannsrett.

Judge Schei pointed out that the accused Latza had maintained under point three of his appeal that the acts for which he had been convicted, did not constitute a war crime which could be regarded as covered by Article 1 of the Norwegian Law No. 14 of 13th December, 1946. The accused Latza had argued that there existed no such provisions of the laws and customs of war which stipulated the minimum demands as regards court procedure ;

neither did there exist any provisions of international law as to which acts could be declared punishable by an occupation power. In any case, such provisions would, in Latza's opinion, have to recede in favour of national (German) law. The accused maintained that German procedural and substantive law was binding for the members of the Standgericht and he could thus not be convicted or punished unless he had violated German national law at the same time.

Judge Schei found that these points of the accused's appeal were obviously untenable. The fact that a war crime had been committed by an enemy citizen in his capacity as judge, obviously did not mean that such a crime was beyond the scope of the Norwegian law on the punishment of foreign war criminals. Even though it was often difficult to decide what was lawful according to international law and what was not, there was, in Judge Schei's opinion, no doubt that international law laid down certain minimum demands which were to be regarded as binding for the administration of justice of an occupying power. These minimum demands comprised among other things that an accused person could not be sentenced without a fair trial and without being given the opportunity to defend himself and present counter evidence. If a German court based a death sentence on manifestly insufficient evidence, as in the case at issue, where the accused Latza had been aware of the inadequacy of the evidence, it was, in Judge Schei's opinion, clearly at variance with basic principles of justice as expressed in the Preamble to the Hague Convention No. IV of 1907. Once international law acknowledged certain basic regulations as inviolable, these regulations must be adhered to irrespective of whether or not they were disregarded by national law.

Judge Schei then turned to point 1 of the Prosecution's appeal, where it was maintained that the reasons for the verdict given by the Lagmannsrett were insufficient insofar as it had failed to express clearly whether the Standgericht trials had in themselves been intended to be lawful trials despite its inadequacy or whether they had only been intended to serve as camouflage for reprisals and thus exceeding the limits of criminal law. He did not find it necessary to go into that question in detail. The decisive point was, in Judge Schei's opinion, whether the trials before the Standgericht had fulfilled those minimum demands which had to be regarded as indispensable for a proper trial, primarily whether the Standgericht as an independent and impartial tribunal had reached its decisions after a thorough investigation of the guilt of the accused, or whether the outcome had been determined beforehand by directives given to the court. Judge Schei agreed with the Prosecution that the Lagmannsrett had not sufficiently clearly expressed what conclusion they had reached on that important point.

Judge Schei pointed out that *on the one hand* the Lagmannsrett had stated :

(*a*) that the accused Latza during the discussions at Skaugum must undoubtedly have been aware of the fact that the whole legal machinery was in reality an arrangement for effecting reprisals on the assumption that those brought before the Standgericht should be sentenced to death ;

(*b*) that the accused Latza had been fully aware that the persons, who were to appear before the Standgericht, were the so-called intellectual leaders, who had been arrested immediately prior to the opening of the trial ;

(*c*) that the accused Latza had been fully aware that the evidence which the German prosecutor before the Standgericht, Weiner, was going to submit, could not possibly be regarded as sufficient ;

(*d*) that the accused Regis and Kehr, who had not taken part in the meeting at Skaugum, had been informed by Fehlis before the opening of the proceedings, of the measures decided upon by Terboven in connection with the liquidation of General Martinsen ; and

(*e*) that the Standgericht had been set up as a counter measure against the constantly increasing acts of sabotage and liquidations carried out by the Norwegian home front.

These statements by the Lagmannsrett had left Judge Schei with the impression that the Lagmannsrett might have been of the opinion that the Standgericht in reality had had no choice in the outcome of the trials and consequently that it would have been of minor importance to what extent the question of the guilt of those brought before the Standgericht could be sustained. That impression had been strengthened by what the Lagmannsrett had said in connection with the procedure of the Standgericht. Thus the Lagmannsrett had held that the Standgericht had disregarded the basic rights for the safeguarding of the accused when accepting as evidence indirect information presented by the prosecutor whose assertion that the witnesses concerned could not appear in person, was obviously untenable, and that the Standgericht had sentenced at least Dr. Saethre and Advokat Vislie to death on obviously insufficient evidence and for acts which could not be punished according to international law.

On the other hand, Judge Schei pointed out, the reasons given by the Lagmannsrett contained statements, which, in his opinion, were contradictory to those mentioned above. Thus the Lagmannsrett had described as less pertinent the account given in the Indictment that the setting up of the Standgericht had been a direct result of the various acts of sabotage which had culminated in the liquidation of General Martinsen. The Lagmannsrett had further stated that the aim of the Standgericht had been to effect reprisals and that it had felt satisfied that the judges of the Standgericht, when beginning the proceedings, were determined to impose severe penalties intended to have a general preventative effect. By making these statements, the Lagmannsrett had, in Judge Schei's opinion, intended to make it clear that even though the acts of sabotage and the liquidation of General Martinsen had constituted the immediate cause for the setting up of the Standgericht, it was not justifiable to draw further conclusions to the effect that the trial had not been intended to be a proper trial. The argument that the judges of the Standgericht had made up their minds beforehand to impose heavy penalties intended to have a preventative effect, could, in Judge Schei's opinion, only be understood to mean that the Lagmannsrett had assumed that the meting out of the punishment had been within the power of the court. The acquittal by the Lagmannsrett of the accused of having acted against their better knowledge (Article 110) seemed likewise, in Judge Schei's opinion, to indicate that the Lagmannsrett had assumed that the trials before the Standgericht had been real ones. This view, however, could, Judge Schei pointed out, not be reconciled with what could be extracted from the other statements by the Lagmannsrett quoted above. That impression of obscurity, which the reasons given by the Lagmannsrett had

left on such an important issue, would, in Judge Schei's opinion, be sufficient to lead to the quashing of the entire judgment and findings of the Lagmannsrett.

Judge Schei then turned to points of the appeal which were of a more specific nature and which were primarily concerned with the application of law.

He mentioned that the accused Latza in point 1 of his appeal had maintained that the Lagmannsrett had misinterpreted the law when finding that both Article 110 and Article 233 of the Civil Criminal Code could be applied cumulatively. In the accused Latza's opinion, only Article 110 was applicable, and the application of that provision would, in his view, exclude the application of Article 233. Judge Schei could not accept this view. He pointed out that Article 110 of the Civil Criminal Code contained no provision as to murder. It stipulated the punishment for a judge, a member of the jury or a juridical surveyor having acted against their better judgment without making it a condition for defendant's guilt that the act should result in harmful consequences. When paragraph three of that provision allows for an increase of punishment, *e.g.*, if a death sentence has been executed as a consequence of the unlawful act, it was only to be regarded as a directive as to the measurement of punishment as distinct from the question of guilt. That particular provision was, Judge Schei pointed out, applicable even though the execution of the death sentence was not contemplated or intended, as distinct from Article 233 where it is a condition that the defendant had such knowledge or intention. Thus, as the crime and the factual and mental prerequisites described in Article 233 were incongruous with the crime described in and the qualifications required by Article 110, the Lagmannsrett had, in Judge Schei's opinion, rightly assumed that it was possible to apply both provisions cumulatively.

Judge Schei then drew attention to point 3 in the Prosecution's appeal where it was claimed that the acquittal of the accused in respect of Article 110 was the result of an erroneous interpretation of law and that the reasons given by the Lagmannsrett on that point were insufficient and inconsistent. Judge Schei agreed with the Prosecution on that point and drew the Court's attention to the fact that the Lagmannsrett on the one hand had found that it had not been possible to prove that any of the accused acted against their better judgment in their capacity as judges. On the other hand, when considering the accused's responsibility for the death of Dr. Saethre and Advokat Vislie, the Lagmannsrett had hesitated to sustain that the accused Regis and Kehr had been fully aware of the fact that they had, contrary to law, contributed to the murder of these two persons. According to Article 110, however, Judge Schei pointed out, it was not material whether the accused understood that they by their acts would cause the death of the person concerned.

As to the accused Latza, Judge Schei pointed out that the Lagmannsrett had found that the accused had acted intentionally in the case of Dr. Saethre and Advokat Vislie. The Lagmannsrett had stated that the accused Latza was fully aware that the evidence submitted could not possibly be regarded as sufficient and that he had known that the whole legal machinery was in reality a measure for effecting reprisals with the presupposition that those brought before the Standericht should not escape being sentenced to death.

The Lagmannsrett had failed, Judge Schei pointed out, to indicate which of the prerequisites for the conviction of the accused according to Article 110 had been absent in those circumstances.

Considering the inadequacy and inconsistence of the Lagmannsrett's attitude on that point, Judge Schei agreed with the Prosecution that the acquittal of all three accused for violation of Article 110 must be quashed.

Judge Schei then went on to say that the same wrong interpretation of law, which the Lagmannsrett seemed to have applied as regards the mental requirements laid down by Article 110, also applied to the acquittal of the accused Regis and Kehr as far as the charge for violating Article 233 was concerned. According to the latter provision it was immaterial, contrary to what the Lagmannsrett seemed to have presupposed, whether the accused had been fully cognisant that they *unlawfully* contributed to the murder. They might have acted intentionally even though they had not been aware of their acts having been unlawful, cf. Article 57 of the Civil Criminal Code (concerning the effect of a misconception of law).

As to point 6 of the Prosecution's appeal, Judge Schei agreed that the accused's ignorance as to the legality of Article 3 of the Verordnung of 12th October, 1942, in relation to international law, must be regarded as a misconception of law, cf. Article 57 of the Civil Criminal Code. He did not find it necessary to elaborate on that point as he considered that the Judgment of the Lagmannsrett, in view of what he had stated above, would have to be quashed in its entirety.

In conclusion Judge Schei said that he did not find it necessary to deal with the remaining points of the appeals and voted for the quashing of the judgment and the findings of the Lagmannsrett on the basis of the arguments already presented by him.

The remaining judges of the Supreme Court, Holmboe, Berger, Jensen, Eckhoff, Evensen, Fougner, Johannessen and Stang supported the vote. Judges Holmboe, Berger and Jensen, however, in supporting the vote expressed a dissenting view on some minor points touched by Judge Schei.

10. DECISION OF THE SUPREME COURT

By decision of the Supreme Court pronounced on the 16th September, 1947, the trial, verdict and sentence of the Lagmannsrett were quashed.

11. RE-TRIAL BY THE EIDSIVATING LAGMANNSRETT

A re-trial by the Lagmannsrett composed of different judges was instituted as a consequence of the decision of the Supreme Court to quash the proceedings and sentence of the previous trial.

12. ADDITIONAL EVIDENCE DURING THE RE-TRIAL

During the re-trial the same witnesses were heard and in addition to the existing documentary evidence, additional evidence was submitted. As the factual evidence has been fully reported above under heading 5, it is only necessary here to deal with new facts and aspects which emerged during the re-trial.

The Prosecution did not succeed in proving that the three accused, contrary to what the accused had maintained themselves, had been aware that Dr. Saethre, Advokat Vislie, Advokat Gjerdrum and Sundby had been arrested on the very day of the trial before the Standgericht.

Neither did the Prosecution succeed in proving that the accused Latza, as maintained by the Prosecution, had had a talk with the German Prosecutor, Weiner, before the trial, on the evidence which the Prosecutor proposed to submit or that the accused Latza had gone into the evidence thoroughly before the trial started.

13. SECOND JUDGMENT OF THE LAGMANNSRETT, DELIVERED ON 20TH JANUARY, 1948

After reviewing the facts and evidence the Lagmannsrett turned to the legal issues involved.

The Lagmannsrett held that although there were no express provisions of international law in force as regards court procedure to be followed by an occupation power, there were certain minimum demands which were indispensable, namely :

(*a*) that the tribunal or court in question shall be an impartial one and not bound by directives or orders from above.

In this connection the Lagmannsrett found that the Prosecution had not been able to prove that the accused had received any such directives or orders intended to have those accused before the Standgericht found guilty regardless of the evidence or to have death sentences imposed regardless of the degree of guilt ;

(*b*) that those accused before the tribunal or court in question shall be manifestly made acquainted with the concrete points of the charges brought against them. It could, however, not be regarded as essential that a written charge sheet be served upon the accused before the trial.

As to the case in hand, the Lagmannsrett found that that point had been complied with in so far as each individual accused brought before the Standgericht had been made acquainted by the Standgericht of the charges brought against him ;

(*c*) that the accused before the tribunal or court in question must be given opportunity to explain themselves and state their case freely and to counter each and every point of the charge.

The Lagmannsrett found that it was shown by the evidence that the accused before the Standgericht had been given such opportunity ;

(*d*) that the evidence submitted to the tribunal or court in question must be manifestly adequate to sustain the verdict and sentence.

The Lagmannsrett held that the Prosecution had not succeeded in proving that the accused before the Standgericht were not substantially guilty of the acts with which they had been charged, which acts could, according to German criminal provisions lead to the passing of the death sentence. It was pointed out that the evidence submitted to the Lagmannsrett indicated that Dr. Saethre, Advokat Vislie, Advokat Gjerdrum and Sundby had in fact been active in the underground movement. Thus, it appeared that Advokat Gjerdrum had helped prisoners to escape ; Sundby had been

district leader of the underground military organisation ; Dr. Saethre had given financial aid to the underground movement and had sabotaged safety measures imposed by the Germans in order to prevent the escape of prisoners from the hospital, and Advokat Vislie had given economic support to the underground movement and had been active as a leader of his district ;

(*e*) that the accused before the tribunal or court in question shall be given opportunity to offer and submit their counter-evidence.

As to the case in hand, the Lagmannsrett found that it had not been proved by the Prosecution that the accused before the Standgericht, apart from Dr. Saethre, had asked for an adjournment in order to submit counter-evidence. It was admitted by the accused that Dr. Saethre had offered to furnish evidence to the effect that he had conscientiously treated German patients in his hospital. An adjournment had, however, been found unnecessary as the Standgericht did not doubt that Dr. Saethre had fulfilled his duty as a medical man both to Norwegian and German patients. In these circumstances a refusal to adjourn the proceedings because of this particular point could not be considered to be contrary to the principles of procedural law.

As to the question whether or not an accused before such a tribunal or court was, according to international law, entitled to have the assistance of a defence counsel, the Lagmannsrett only observed that it had not been proved by the Prosecution that any of the accused before the Standgericht had demanded the assistance of a defence counsel.

As to the kind of evidence which might be admitted and accepted according to international law by such a tribunal or court the Lagmannsrett ruled that it could not be considered an indispensable principle of international law that the evidence submitted must necessarily be direct in the sense that witnesses had to appear in person before the tribunal or their names to be revealed. In that connection the Lagmannsrett made reference to the regulations issued by the Allied Occupation Authorities in Germany, applicable to ordinary military tribunals, according to which both oral evidence and affidavits may be used in evidence. In exceptional cases submission of evidence could even be denied, cf. Military Gazette, Germany, p. 15.

The Lagmannsrett pointed out that in the case in hand the Prosecutor before the Standgericht, Weiner, had acted in a double capacity—both as prosecutor and as witness. He had, however, been cautioned by the accused Latza before the opening of the proceedings as to his responsibilities and duties as a witness. It had further been proved that Weiner had quoted from witness reports which had ostensibly been submitted partly by the German police and partly by Norwegian denouncers, who, because of the confused situation and for security reasons, could not be allowed to appear in person.

The Lagmannsrett then turned to the point raised by the Prosecution that the punishment meted out by the Standgericht was out of proportion compared with the crimes for which the accused before the court had been convicted. It was pointed out by the Lagmannsrett that according to the provisions of the German Verordnung applied by the Standgericht, death sentences could be imposed for offences of the kind with which the accused

before the Standgericht had been charged, and the Prosecution had not contended during the present trial that that provision was in itself at variance with international law. The Prosecution had, however, maintained that in no case could the acts for which the accused before the Standgericht had been convicted lead to the passing of the death sentence. It was pointed out that the accused Latza had admitted that the punishment inflicted by the Standgericht, would probably have been more lenient in less turbulent times but in the prevailing circumstances, the punishment had to be severe if the setting up of the Standgericht were to have any meaning at all.

The Langmannsrett maintained that the meting out of punishment was always a matter of discretion where the generally preventative effect had to be taken into consideration. If certain offences showed a tendency of growing into dangerous proportions, tribunals were forced to mete out more harsh punishments than they would normally do. Considering what the situation must have looked like to the accused Latza, Regis and Kehr at that time, the Lagmannsrett could not find that the passing of the death sentences for those crimes allegedly committed and proved before the Standgericht could be regarded as a miscarriage of justice.

The Lagmannsrett then went on to discuss the point raised by the defence that, even if the procedure before the Standgericht had to be considered as being at variance with the requirements of international law, the accused must be acquitted because the procedural and substantive law applied by the Standgericht was in compliance with German national law, and in their submission, national law had priority over international law.

The Lagmannsrett ruled that even on the assumption that in normal circumstances international law had to recede in favour of national law, the situation was clearly different when it came to the application of that national law on citizens of an occupied territory, who were in all circumstances entitled to the benefit of the rights accorded to them by international law. The Lagmannsrett had, however, no doubt that the accused themselves had believed that the national law was always binding and, therefore, they were considered to have acted under a misapprehension of law which in the circumstances then prevailing, must be regarded as excusable.

As the Lagmannsrett had found that neither the procedure nor the meting out of the punishment by the Standgericht in respect of Dr. Saethre, Advokat Vislie, Advokat Gjerdrum and Sundby could be regarded as a violation of international law, they were acquitted on this Count.

The Lagmannsrett then discussed whether the Standgericht's trial of the fifth person referred to in the Indictment, Aage Martinsen, constituted a violation of international law. Attention was drawn to the fact that the Prosecution had maintained that Article 3 of the German Verordnung of 12th October, 1942 (previously quoted), according to which Aage Martinsen had been convicted, was in itself at variance with international law. The Lagmannsrett pointed out that there were different and contradictory opinions among legal experts as to whether a provision of that character was at variance with international law. The Lagmannsrett observed that international law did not contain any express provisions on that particular question. Reference was made to the fact that the British during the Boer War had introduced regulations declaring punishable the failure to denounce to the British authorities people who they knew were in illegal possession of

arms. Reference was also made to the fact that in Article 3 of the Regulations issued by the British Occupation Authorities in Germany, it was considered lawful to sentence to death people for not denouncing contemplated attacks which could endanger the Allied armed forces. The Lagmannsrett ruled that in these circumstances Article 3 of the said German Verordnung could hardly be regarded as a violation of international law. Furthermore, even on the assumption that that provision was at variance with international law, the accused had acted under an excusable misconception of law which must lead to their acquittal on this Count. The Lagmannsrett felt satisfied that Aage Martinsen had admitted to the knowledge of the intended acts of sabotage in question and that he had expressed his sympathy with them. When sentencing Martinsen to death, the Standgericht had taken into consideration his duties as a member of the indigenous police force, in which capacity he was under a special obligation to inform the authorities of any acts of sabotage. The Lagmannsrett held that in these circumstances the passing of the death sentence on Martinsen could not be regarded as disproportionate.

One of the lay judges of the Lagmannsrett was of the opinion that all three accused must be regarded guilty on both counts in so far as the passing of the death sentences for the acts in question could not be justified and in that they had passed the death sentences against their better judgment although they had acted under duress. He accordingly voted for their conviction and for the imposing of a term of imprisonment.

14. VERDICT OF THE LAGMANNSRETT, PRONOUNCED ON 20TH JANUARY, 1948

All three accused were found not guilty and acquitted.

15. THE PROSECUTION'S SECOND APPEAL TO THE SUPREME COURT

The Prosecution once more filed an appeal with the Supreme Court against the judgment and verdicts of the Lagmannsrett. The Prosecution's appeal reads in pertinent parts as follows :

" I. In its judgment the Lagmannsrett states, *inter alia* :

" It has not been established by the Prosecution that the accused " (before the Standgericht) " were *not* on the whole guilty of the acts for which they were convicted, which acts could, according to the German provisions then in force, lead to the passing of the death sentence. The evidence also seems to indicate that they had been active members of the underground movement. As to Gjerdrum it must be regarded as proved that he, in collaboration with von Edelstam, had been active in helping people to escape from the country. As to Sundby it has been proved that he was a detachment leader of the underground Military Organisation and had been engaged in comprehensive patriotic activities. As to Saethre it has been proved that he had supported the underground movement, and he had, during the trial before the Standgericht, partly admitted that he had impeded the security measures imposed by the police. Vislie had admitted before the Standgericht that he had given financial support to teachers and the clergy. The Prosecution has not proved that his financial support had been confined to these circles and the Standgericht had based its decision

on the assumption that his support had had a wider scope. There could be no doubt that Vislie had been an active member of the underground movement and was known to be so on the place where he lived."

" These arguments," the appeal went on, " were based on a wrong interpretation of international law insofar as :

" (*a*) The arguments seem to be based on the assumption that it is sufficient for a conviction according to international law that the accused have on the whole been guilty of acts which, according to the German provisions then in force, could lead to the passing of the death sentence. That is not true as those provisions cannot be applied to persons who had themselves opposed—or helped others to oppose or escape persecution which had been instigated by the occupation power in violation of international law.

" It appears from the judgment that Vislie at any rate had been convicted for such acts as financial support to teachers and the clergy. The fight of the teachers and the clergy was a fight against the persecution instigated by the occupying power in violation of international law. The same applies to Gjerdrum who had been convicted among others for having hidden students. The students had to flee in order to escape a persecution instigated against them by the occupation power at variance with international law. Insofar as Gjerdrum had helped students, his activities could not be regarded as an offence according to international law.

" (*b*) The arguments seem to be based on the assumption that it is sufficient for a conviction according to international law that the accused had committed certain punishable acts, irrespective of whether they had actually been charged with those particular acts before the Standgericht. Such an assumption is wrong, as it must be deemed to be a minimum requirement that the charges be made known to the accused at the trial.

" In any case it did not appear clearly from the parts of the judgment quoted above, whether the Lagmannsrett had based its findings on the correct interpretation of law as indicated above under (*a*) and (*b*). It must, therefore, be considered to be a mistake in the application of procedural law that the Lagmannsrett did not go further into these rules of substantive law. As regards Saethre and Gjerdrum, evidence had been submitted to the Lagmannsrett which showed that they had been sentenced by the Standgericht for acts which the occupation power was not allowed by international law to declare punishable, namely, in the case of Saethre, for having helped arrested Jews, and, in the case of Gjerdrum, for having helped students to flee the country, after the instigation of the persecutions against them. It is alleged to be a mistake in the application of procedural law that the Lagmannsrett failed to go further into the question as to whether or not Saethre and Gjerdrum could legally have been convicted for such acts. In the case of Vislie the judgment stated that ' He had given financial support to teachers and the clergy.' It is alleged to be a mistake in the application of procedural law that the Lagmannsrett failed to go further into the question as to whether or not Vislie could legally have been sentenced for such acts.

" II. The Prosecution maintains that during a trial before the courts of the occupying power oral information given to the German Security Police, or written reports submitted by agents or Germans, or depositions from

other persons who have been interrogated, may not be admitted as evidence unless the accused are permitted to peruse such evidence in its entirety. Extracts from such reports or indirect oral information should not be admitted as evidence. Information which did not reveal its source may in no case serve as a basis for conviction according to the principles of a fair trial. Even on the assumption that indirect evidence may be admitted, it must be regarded to be a minimum demand that the court and the accused shall have access to such evidence in the form in which it appears before the Prosecution. It must be considered an essential demand that the courts of the occupying power have the opportunity to scrutinise and sift and independently adjudge the evidence presented. A different conception of law would be contrary to the principles of international law as expressed in the Introduction to the Hague Convention No. IV of 1907.

" In the Judgment of the Lagmannsrett the following appears :

> " ' Weiner acted in a double capacity during the trial. He had obtained his information partly from German investigators, who, because of the unruly situation after the liquidation of the Chief of Police, Martinsen, were busy in their fields of work, partly from Norwegian agents. For security reasons the Prosecutor was prevented from letting the latter witnesses appear in person, but he had referred to the reports in his possession and quoted from them. Accused No. 1 [Latza] had reminded Weiner of his responsibilities as a police officer and according to his oath of office, and it has been stated that Weiner, in pleading the Prosecution's case, had given the impression of clearness and conviction. The Court [*i.e.*, the Lagmannsrett] cannot regard it an indispensable principle that the evidence, in order to meet with the requirements of international law in respect of court procedure, must be direct, and that the decision of the court cannot be based on reports and the like. For ordinary courts-martial such as the Allies had set up in occupied Germany it had thus been laid down that both oral and written evidence may be used. In exceptional cases submission of evidence may, for security reasons, be denied (Military Government Gazette, Germany, p. 15).'

" The way in which the Lagmannsrett had expressed itself on these points seems to indicate that it has based its arguments on a wrong conception of law.

" In any case does it not appear as clearly as one could have wished from the reasons given by the Lagmannsrett on what interpretation of law it had based its arguments on this particular point. This constituted a mistake in the application of procedural law. It is in particular alleged to be a mistake in the application of procedural law that the Lagmannsrett has failed to go further into the question under what circumstances and in what way such indirect evidence could legally have been admitted and accepted in the case in hand.

" III. In the case of Aage Martinsen the Lagmannsrett has based its decision on the assumption that the provision contained in Article 3 of the Reichskommissar's Verordnung of 12th October, 1942, is in accordance with the laws and customs of war. This is considered to be wrong and inconsistent with the basic principles of human justice as accepted by all civilised nations and as expressed in the preamble to the Hague Convention

No. IV of 1907, as well as with the principles laid down in Articles 23 i.f., 44, 45 and 46 of the Regulations regarding land warfare. Of particular importance is Article 44 which reads :

> " A belligerent is forbidden to compel the inhabitants of territory occupied by it to furnish information about the army of the other belligerent, or about its means of defence."

" In pronouncing the decision of the Supreme Court in the case against Gerhard Flesch,(1) the first Judge to give his reasons held, with the support of the remaining Judges, that the fight of the underground home forces was in accordance with international law. It may be concluded from this that the information demanded from Aage Martinsen concerned measures of defence, which were legal according to international law as laid down by Article 44. The argument of the Lagmannsrett that the legality according to international law of such a provision [*i.e.*, Article 3 of the above-mentioned Verordnung] was disputable, is considered to be wrong. The fact that similar provisions were in force in Germany at present, could not be considered decisive, as Germany was no longer a belligerent country.

" It is in any case considered to be a mistake in the application of procedural law that the Lagmannsrett failed to discuss the importance and bearing of the rules of international law referred to above.

" IV. The Prosecution maintains that a possible misconception of law on the part of the judges [*i.e.*, the accused] cannot be considered excusable. We are dealing here with principles of fundamental importance for the relationship between the occupation power and the citizens of the occupied territory, principles which in particular have a bearing upon the administration of justice by the occupation power. The Lagmannsrett's argument that a misconception on this point is excusable, is based on a wrong interpretation of law. . . .

" V. Subsidiarily it is submitted that the Lagmannsrett has based its finding on an erroneous interpretation of law when stating that the meting out of punishment is always a matter of discretion. Even on the assumption that the accused [*i.e.*, the accused before the Standgericht] could legally be punished for the acts with which they had been charged, it is maintained that the passing of the death sentence in all five instances was so exorbitant as to constitute a denial of justice."

16. ADDITIONAL DOCUMENTARY EVIDENCE BEFORE THE SUPREME COURT ON CERTAIN QUESTIONS OF LAW

In order to throw more light on the provisions applied and the practice followed by British Courts during the Boer War and in the British Zone of Occupation in Germany after the end of the Second World War in respect of failure on the part of citizens of the occupied territory to report to the occupation authorities on contemplated acts of sabotage, etc., referred to by the Lagmannsrett, the following exchange of minutes took place between the former Norwegian Representative to the United Nations War Crimes Commission, and the British Authorities concerned on the request of the acting prosecutor. The minutes issued by these British Authorities were

(1) See Volume V, pp. 111-120.

admitted in evidence by the Supreme Court. The minutes exchanged are in pertinent parts quoted below under (*a*) and (*b*).[1]

(*a*) *Exchange of Minutes relating to Regulations and Practice during the Boer War*

Letter of 27th July, 1948, from the former Norwegian Representative on the United Nations War Crimes Commission to the Under-Secretary of State, British War Office :

> " . . . It is alleged by the Prosecution that the three defendants in their capacity as president and members respectively of a Standgericht in Oslo, at the beginning of 1945, had committed war crimes in that they unlawfully and at variance with the recognised principles of international law had, through denial of a fair trial and miscarriage of justice, caused the death of a number of Norwegian citizens. Among the victims was one young Norwegian police constable who was sentenced to death and executed because he had failed to denounce his two brothers-in-law, who he knew were guilty of certain acts of sabotage directed against the German interests in Norway, and who were also sentenced to death by the Standgericht at the same trial.
>
> " In finding the defendants ' Not Guilty ' on this latter point, the Trial Court (Eidsivating Lagmannsrett) made reference to the fact that the British Authorities during the Boer War had introduced regulations providing for the death penalty for a similar conduct (*i.e.*, failure to report or denounce certain criminal activities endangering the security of the British Forces). The British Regulations referred to seem to have been the Martial Law Regulations of 1901, as amended in 1902. They are cited by Spaight : ' War Rights on Land,' p. 341, Section 1, para. 2, which reads as follows : ' Persons knowing of other persons being in possession of arms, etc., were liable to punishment for not informing the military authorities.' Article 25 reads : ' Persons failing to report the presence of the enemy or giving the enemy information, money, food, etc., are to be punished.'
>
> " The Prosecution is very anxious to be informed whether or not these provisions were ever actually applied by the British Courts-Martial during the Boer War, and if so, whether or not the death sentence was ever passed and executed as a result of proceedings pursuant to such charges. If death sentences have been passed, the Prosecution would appreciate it very much if it could be informed of particulars of any such cases."

Letter dated 17th August, 1948, from the Judge Advocate General's Office to the Norwegian Representative on the United Nations War Crimes Commission :

> " Your minute addressed to the Under-Secretary of State dated 27th July, 1948, has been passed to us for reply, and it is hoped that the following information may be of assistance to you and the Supreme Court of Norway.

(1) It is considered to be of importance to report this evidence because it throws light on the question of whether or not a provision like Article 3 of the German Verordnung of 12th October, 1942, according to which a citizen of an occupied territory may be sentenced—even to death—for failure to denounce his compatriots to the occupying authorities, is valid according to international law.

" 1. This office has had made available to it the official papers relating to the administration of martial law in South Africa, which have been procured from the War Office library. From an explanatory memorandum in these papers it appears that ' the invasion of Natal and Cape Colony by Boer Forces of the Transvaal and Orange Free State necessitated the proclamation of martial law in the districts invaded.' The first Army Order on the subject of martial law in these areas was published on 7th December, 1899, and this order indicated that a memorandum on the subject of the rules for the administration of martial law was being issued to all concerned. By January, 1900, 14 cases only appear to have been tried by military courts, the most severe sentence being imposed being one of five years for high treason and rebellion by aiding and abetting the enemy in the destruction of a river railway bridge.

" 2. On the 1st May, 1901, the General Officer Commanding Cape Colony District distributed a pamphlet dealing with martial law and its administration, and set out the actual martial law regulations. This pamphlet indicated that the persons to whom the proclamation of martial law was applicable were all persons within the proclaimed areas who were not subject to military law. Certain offences became triable by military court, *e.g.* :—' Being actively in arms against His Majesty or inciting others to take up arms against His Majesty, or actively assisting or aiding the enemy, or by committing any other act by which the safety of His Majesty's Forces or subjects is endangered.'

" 3. Breaches of the martial law regulations, except those which rendered the offender liable to trial by military court, were dealt with summarily by an officer or magistrate, who could impose a maximum of a £10 fine or imprisonment for 30 days.

" 4. By Regulation 3 of the martial law regulations it was provided as follows : ' Any one knowing of the fact of any person or persons having in their possession custody or control or on property occupied by them any firearms, ammunition, dynamite or other explosives as above (the person in possession, etc., not having reported the fact and not holding the required permit) is liable to prosecution if he or she does not inform the nearest military authority of the fact as soon as possible.'

" By Regulation 28 of the same regulations is provided (*a*) ' In regard to all offences under martial law regulations the officer or magistrate holding the preliminary investigation shall have jurisdiction and may impose penalties not exceeding £10 fine or 30 days' imprisonment or one or other of such punishments. (*b*) For any offence which may be dealt with by a military court the offender will be liable to death, penal servitude, imprisonment or fine.'

" 5. These regulations were published in the district of the Cape Ports on the 17th October, 1901, in an unaltered form. It will therefore be seen that the offence of failing to denounce a person for illicitly holding ammunition were not of the class of offences triable by a military court but summarily.

" 6. This office has also scrutinised the official statistics of cases

tried before military courts under these regulations and no case is shown in respect of the regulation in question for the simple reason that it was not triable before a military court. It therefore follows that the maximum penalty that could have been imposed, if it was ever imposed for such an offence, was a £10 fine or 30 days' imprisonment.

" 7. From a scrutiny of the cases in Cape Colony in which the death sentence was imposed, it appears that the classes of offences were high treason, murder and robbery, arson and marauding, etc.

" 8. An analogous offence of a negative nature, such as neglecting to give information to the military authorities attracted a fine of £25 according to the case records and further negative offences such as failing to report and withholding information of the presence of the enemy attracted a penalty of 18 months' hard labour. It will be appreciated that these offences were in respect of omissions that are not of the same class as failing to denounce a third person who is in possession of ammunition.

" 9. In conclusion, it may therefore be said that an offence under the regulation in question would not appear to have been triable before a military court at all, or if it was so triable, then it appears from the records that it was not so tried in fact."

Letter dated 3rd September, 1948, from the former Norwegian Representative on the United Nations War Crimes Commission to the Judge Advocate General :

" . . . The Prosecutor states in his letter [in which he acknowledged receipt of the letter quoted above] that on the basis of the information you have given, it now seems clear that the British, during the Boer War, regarded themselves justified according to international law to punish the population of South Africa for not imparting information to the British about the whereabouts of the Boer Forces. He agrees on the whole with the view expressed . . . . . , that delicts of the nature referred to above do not come into exactly the same category of *delicti per ommisionem* as that of not denouncing a person for being in possession of arms or ammunition. The difference here, he maintains, is, however, probably of a rather quantitative than qualitative nature, if such an expression can at all be used in this connection. The Prosecution expects the Defence to make the objection that, considering the development in modern partisan warfare, two or three saboteurs form in fact a hostile unit and if a person knowingly omits to report its whereabouts to the occupying power, he may, based on what has been said before, be punished for not having imparted the information. . . . The acting Prosecutor has asked me to approach you once more with the view to establishing, if possible, in what circumstances the sentence of 18 months' hard labour, referred to in your letter, was passed for failure to give information to the British authorities about the movements of enemy forces. It would be particularly interesting to know whether those sentenced committed the offences in territories where the occupation was not yet completed and where war operations were still going on or could still be expected to take place. The Prosecutor feels that the factual circumstances in these instances may be such as to help to explain and clarify these convictions. . . ."

Letter dated 8th September, 1948, from the Judge Advocate General to the former Norwegian Representative on the United Nations War Crimes Commission :

" With reference to your minute dated 3rd September, 1948. I have now caused inquiries to be made in the library and records of the War Office in an endeavour to secure for you the further information required in the last paragraph of your minute now being acknowledged.

" 1. I have now ascertained that the War Office holds only the statistics of the trials for military courts under the martial law regulations in force during the Boer War in Cape Colony and the other provinces, but the actual proceedings of such trials are no longer available. It is therefore apparent that I am not in a position to give you details of the circumstances in which the offence was committed for which a sentence of 18 months' hard labour was imposed for failure to give information to the British authorities about the movement of the enemy, that is, Boer forces.

" 2. No doubt you will be the first to appreciate that there is a considerable difference between failure to disclose the movements of rebel troops in a colony where there has been a revolt and the circumstances which arose in Norway in your case where one Norwegian civilian failed to denounce his brother-in-law for being an active member of the Norwegian Resistance at a time when Norway was an independent sovereign state merely occupied by the German Military. Such was far from the circumstances in which the Boer War operations took place as a reference to any authoritative work on the Boer War will clearly show.

" 3. It is regretted that in this minute I can be no more specific than this, but I can only emphasise that many of the defendants before the British Military Courts were naturally British Subjects as it was a revolt in a British colony and an invasion of such colonies by Boer forces that led to the proclamations of martial law now in point."

(*b*) *Exchange of Minutes relating to Regulations and Practice in the British Zone of Germany*

Letter dated 27th July, 1948, from the former Norwegian Representative on the United Nations War Crimes Commission to the Foreign Office, German Internal Department :

" . . . It is alleged by the Prosecution that the three defendants " (in the Latza case) " in their capacity as president and members respectively of a Standgericht in Oslo, in the beginning of 1945, had committed war crimes in that they unlawfully and at variance with the recognised principles of international law had, through denial of a fair trial and miscarriage of justice, caused the death of a number of Norwegian citizens. Among the victims was one young Norwegian police constable who was sentenced to death and executed because he had failed to denounce his two brothers-in-law who he knew were guilty of certain acts of sabotage directed against German interests in Norway, and who were also sentenced to death by the Standgericht at the same trial.

" In finding the defendants ' Not Guilty ' on this latter count, the Trial Court (Eidsivating Lagmannsrett) made reference, and attached

considerable importance to the fact, that the Allied Authorities after this war, had introduced in their respective occupation zones in Germany regulations which provided for the punishment of persons failing to report to the occupation authorities certain subversive actions, cf. Military Gazette, Ordinance No. 1, of 16th August, 1945, Art. 39.

" The Prosecution is, of course, aware of the fact that the legal status according to international law of occupied Germany and the powers of the Occupying Authorities differ substantially from those appertaining to territory provisionally occupied by an enemy whilst the war is still going on. Nevertheless, the Prosecution considers it to be of great importance to the outcome of the pending trial to be informed whether or not death sentences have been passed and executed according to these provisions for *delicti per ommissionem* and if so, to be informed of particulars of any such cases. . . ."

Letter dated 4th August, 1948, from Foreign Office, German Internal Department, to the former Norwegian Representative on the United Nations War Crimes Commission :

" I am answering your letter of 27th July about prosecution for failure to inform occupying powers of acts of sabotage. There are two main points I should make :

(1) That Section 39 of Ordinance No. 1 falls under Article II of the Ordinance, that is to say offences punishable by such penalty *other than death* as a Military Government or Court may impose.

(2) That the actual wording of the Section is ' aiding, or failing to report any person known to be wanted by the Allied Forces.'

" You will see from (1) above that there is no question of any executions having taken place. I am advised that the words ' known to be wanted ' imply that some notice must have been given by the Allied Force of their desire to apprehend the wanted man, and that failure to denounce a saboteur could not be included under this article.

" It may be of interest to you to know that Germans have been prosecuted for denouncing their fellow Germans to the Nazis, and that the Allies therefore discourage rather than encourage denunciations.

" If you would like to know the number of convictions of Germans under Article II Section 39 of Ordinance 1, I will gladly inquire. . . ."

Letter dated 16th August, 1948, from Foreign Office, German Internal Department to the former Norwegian Representative on the United Nations War Crimes Commission :

" You will recall our telephone conversation about prosecutions for failure to inform occupying power of acts of sabotage. I can now let you have the complete information as far as is possible.

" First, as I said in my letter of 4th August . . . Section 39 Article II of Ordinance No. 1 in the British Zone of Germany does not cover such an offence but only failing to report any person *known* to be wanted by the Allied Forces.

" Secondly any offence under it is punishable to such penalty *other than death* as a Military Government Court may impose.

" Finally, no prosecution or at most very few indeed have ever been instituted under it. I am sorry that I cannot be more precise, but it would take a disproportionate amount of labour to go through all our case records in Germany which have unfortunately not been classified throughout the period of occupation. During the time they have been classified there is no trace of any such prosecution, and inquiries amongst the persons concerned with prosecutions during the earlier part of the occupation has revealed no known case. Owing to changes in personnel, I cannot say definitely that there were no such cases before the classification of records, but it appears highly probable that if there were any, sentences were very light, since no prisoner still in custody was sentenced for such an offence."

Letter dated 14th September, 1948, from the former Norwegian Representative on the United Nations War Crimes Commission to the Foreign Office, German Internal Department :

" . . . There is, however, another Section (3) of the same Article " (*i.e.*, Article II of Ordinance No. 1 for the British Zone of Germany) " about which the Prosecution would be grateful to have some information.

" Section 3 reads as follows : ' Communication of information which may be dangerous to the security or property of the Allied Forces or unauthorised possession of such information without promptly reporting it, and unauthorised communication by code or cypher. . . .'

" According to Section 39, aiding or failing to report any person known to be wanted by the Allied Forces is punishable.

" The Prosecution would be most grateful to learn whether or not this provision (Section 3) implies that a German citizen is under unconditional legal obligation to impart to the Allied Occupation Authorities information which he more or less incidentally has gathered, provided the failure to give such information is apt to endanger the security of the Allied Forces or their property. In other words, whether Section 3 has a wider scope than Section 39."

Letter dated 21st October, 1948, from Foreign Office, German Internal Department to the former Norwegian Representative on the United Nations War Crimes Commission :

" I am directed by Mr. Secretary Bevin to reply to your recent inquiry about the interpretation of Section 3 of Military Government Ordinance No. 1 promulgated in the British Zone of Germany.

" I am to say that Mr. Bevin would have been happier to have been able to quote the ruling of a Control Commission Court on the interpretation of this Section. After exhaustive research, however, in the British Zone of Germany it has been found that no German has been charged under that Section as far as can be ascertained. No Control Commission Court has, therefore, ruled whether any given set of facts constitutes an offence under that Section or not.

" Mr. Bevin appreciates that the Norwegian Supreme Court would have preferred a judicial decision in this matter. In default of one I am to say that it is the opinion of Mr. Bevin's Advisers that the second limb of the paragraph is the one which is relevant to the case against

Hans Latza *et al.* It is true that Section 3 is in very wide terms and on the face of it the second limb would appear to make it possible to prosecute someone who, for example, overheard two other persons planning to carry out an act of sabotage and failed to report it. It would, however, be contrary to the principles of English legal interpretation to stretch a general provision like Section 3 and apply it to circumstances for which a limited and specific provision is included in the same Law or Ordinance. Now Section 39 of this same Ordinance No. 1 is the provision which deals with the reporting of persons—as opposed to information—and that provision is limited to persons known to be wanted by the Allied Forces. It is, therefore, very unlikely that a prosecution for failure to denounce could successfully be brought in a Control Commission Court under Section 3. . . ."

17. FINAL JUDGMENT OF THE SUPREME COURT, DELIVERED ON 3RD DECEMBER, 1948

Judge Berger, who expressed the unanimous opinion of the Supreme Court Judges, first dealt with the Prosecution's contention that the reasons given by the Lagmannsrett were on several points not sufficient to show whether or not the Lagmannsrett had based its decision on the right interpretation of law. In his opinion this point of the appeal had to be rejected because the elaborate reasons given by the Lagmannsrett were sufficient for the Supreme Court to decide whether or not a correct interpretation of law had been applied.

Judge Berger then turned to the Prosecution's contention that the German tribunal in question was not a Standgericht in the proper sense of that term, and that, in the circumstances then prevailing, a Standgericht was not competent to deal with the case. Judge Berger did not find it necessary to go into this question as this point was not covered by the Indictment. Furthermore, he made reference to the following observations made by Judge Schei, who was the first Judge to give his opinion when the Supreme Court delivered its previous Judgment on September 16th, 1947 : " I do not find it necessary here to go into the question, raised by the Prosecution before the Supreme Court, as to whether the Tribunal, which was set up, was actually a Standgericht in the proper sense of the term, and, if so, whether a trial before a Standgericht was permissible according to international law in the circumstances then prevailing and for cases of the kind in question, or whether the tribunal instituted was actually a special court set up for a particularly speedy and efficient dealing with those cases selected for trial. In my opinion what is decisive is not whether the tribunal belonged to this or that category, but whether the procedure before the tribunal met with the minimum demands which form the prerequisites for proper court proceedings—in the first instance whether the tribunal as an independent court took its decision after a fair investigation of the question of guilt, or whether the outcome of the trial was predetermined by directives given to the tribunal."

Judge Berger then mentioned that the Prosecution had maintained that the accused Latza's subsequent conduct in connection with the confirmation of the sentences by the " Gerichtsherr," which took place over the telephone, showed his unfairness in dealing with the case. Judge Berger

did not find it necessary to deal with this point as it was covered neither by the Indictment nor the Appeal.

Judge Berger observed that the Prosecution's appeal was in the first instance based on the assertion that the Lagmannsrett had wrongly found it sufficient that the accused before the Standgericht had been guilty of acts, which, according to German provisions then in force, could lead to the passing of death sentences. It was contended by the Prosecution that these German provisions could not be brought to bear on citizens of an occupied country who by their acts had only resisted persecution instituted by the occupation power in violation of international law. In Judge Berger's opinion this point of the appeal could not be accepted. He drew attention to the fact that Dr. Saethre, Advokat Vislie, Advokat Gjerdrum and Director Sundby were, according to what the Lagmannsrett had established, sentenced also for having committed other acts than those enumerated in the appeal, namely for help rendered to the students, the teachers and the clergy—on a basis which was unquestionable according to international law. Judge Berger, therefore, did not find it necessary to elaborate upon the question to what extent the illegal persecution instituted by the Germans against these groups of persons, justified the resistance resorted to by the Norwegians. In this connection Judge Berger only wished to observe that it did not follow from the fact that the resistance movement was held to be consistent with international law, that its members had the benefit of the protection of international law.

As to the contention that the Lagmannsrett had based its decision on the supposition that it was sufficient for their conviction that the accused before the Standgericht had been found guilty of certain punishable acts, regardless of whether or not they had been formally charged with these acts before the Standgericht, Judge Berger observed that in his opinion it appeared clearly from the premises of the Lagmannsrett's Judgment that the Lagmannsrett had found it proved that the accused before the Standgericht had in fact been served with the charges made against them.

Judge Berger then turned to the contention made by the Prosecution that the procedure before the Standgericht did not constitute a fair trial. The Prosecution had in particular maintained that the way in which the evidence had been procured and submitted was illicit as the German prosecutor had cited reports from persons whose names had not been revealed, without letting the accused make themselves acquainted with the evidence in its entirety. In this connection Judge Berger observed that a series of weighty objections could be made against the way in which the Standgericht had conducted the trial. He particularly pointed out that the charges made against the accused before the Standgericht had not been put down in writing beforehand, that the accused had not been assisted by a counsel for the defence, that the evidence presented and accepted had been of an indirect nature only, that the proceedings had taken a short time and were of a summary character, and that the confirmation by the "Gerichtsherr" seemed to have been procured and prepared in a very superficial way. Judge Berger found that these shortcomings could not be justified by a reference to the fact that it was considered to be desirable for the Germans to have the trial finished with as soon as possible. He thought that these shortcomings deserved very strong criticism and were likely to throw doubt on

the tenability of the trial as a whole. Judge Berger could, nevertheless, not find that any of these shortcomings, individually or all of them together, were decisive in themselves. What was above all decisive in his opinion, was whether there had been a fair trial before independent judges who delivered their judgment according to their free conviction. In this connection Judge Berger stressed that the Lagmannsrett had established that the Standgericht went through each and every charge with the accused and that they were given full opportunity to explain themselves. It also appeared from the Judgment of the Lagmannsrett that the accused before the Standgericht had partly admitted charges brought against them. This procedure might have been considered to be sufficient by the judges of the Standgericht.

Judge Berger concluded that the question as to whether or not the trial before the Standgericht had been a fair one, depended in fact on circumstances, regarding the presence of which the Lagmannsrett, upon the evidence presented, and in particular after having heard the detailed explanations given by the accused, had had the best possible material to judge ; the Supreme Court was in possession of no material sufficient to set aside the Lagmannsrett's discretionary finding on this particular point.

Judge Berger then went on to deal with the Prosecution's contention that Article 3 of the Reichskommissar's Verordnung of October 12th, 1942, according to which Aage Martinsen had been sentenced to death for failure to denounce his two brothers-in-law for certain contemplated acts of sabotage, was in clear violation with international law and the Hague Convention No. IV of 1907, in particular Article 44 of the latter. Judge Berger pointed out that in his opinion neither Article 44 nor any others of the provisions of the Regulations of Land Warfare, referred to by the Prosecution, could be directly applied in the present case. In his opinion it would have been more consistent with the laws of humanity and the dictates of public conscience to veto the imposition of punishment for a failure to impart to an occupation power information on the activities of a patriotic movement. He did not venture to claim, however, that this view had already been established as an unquestionable rule of international law. In this connection Judge Berger made reference to what had been maintained by the Lagmannsrett in its first Judgment delivered on 12th March, 1947. He also made reference to what had been maintained by Professor Castberg in his expert opinion submitted to the Lagmannsrett during the re-trial in which he said :

> " The provision contained in Article 3 of the Verordnung " (referred to above) " for the punishment of failure to impart information regarding activities against the occupying power, can, in my opinion, hardly be justified from the point of view of international law. It seems hardly possible to reconcile a demand for denunciation of this kind with the principle laid down by Article 52 of the Hague Regulations of Land Warfare, which forbids the occupying power to demand from the population of the occupied country that they shall take part in war operations against their own country. In so far as imminent actions by regular forces, belonging to the enemy of the occupying power, is concerned, it is maintained by Rolin" (Alberic Rolin : 'Le Droit Moderne de la Guerre,' Volume I, p. 461) " that inhabitants of the occupied country cannot be punished for failure to impart the knowledge of which

they might have got possession. At the same time Rolin states, however, that it is more doubtful whether such duty to denounce may not be imposed insofar as imminent acts, inconsistent with international law, by irregular combatants are concerned. He is himself of the opinion that nothing beyond passivity can be demanded from the population. I, for my part, agree with this view. However, the fact that this question has been considered to be doubtful by an author of Rolin's authority, may no doubt be of importance when it comes to the reconsideration, in the light of criminal law, of the sentence passed by the Standgericht on Aage Martinsen."

With reference to this Judge Berger held that the accused could not be punished for having applied the said German Verordnung in the case before the Standgericht.

Judge Berger finally dealt with the Prosecution's contention that the passing of the death sentences by the Standgericht on all five persons referred to in the Indictment was in any case so exorbitant that it must be considered tantamount to a denial of justice. Judge Berger observed that he could not agree with the Prosecution on this point. He maintained that from the German point of view it must have been considered to be of particular importance that severe punishment be inflicted in order to stem the Norwegian resistance, taking into consideration the peculiar circumstances then prevailing.

Judge Berger concluded by voting for the rejection of the appeal.

The remaining Judges of the Supreme Court : Fougner, Soelseth, Krog and Stang concurred with the opinion expressed by Judge Berger and supported the vote.

18. FINAL DECISION BY THE SUPREME COURT

By decision of the Supreme Court, pronounced on 3rd December, 1948, the judgment and findings of the Lagmannsrett was upheld and the Prosecution's appeal rejected.

B. NOTES ON THE CASE

The two questions of most importance raised in the *Latza Trial* were (i) that of the legality under international law of the enforcement of a provision punishing failure, on the part of inhabitants of occupied territory, to impart information to the occupying power regarding the activities of other inhabitants against the occupying power ; and (ii) the requisites of a fair trial under international law.

The Lagmannsrett, when the case first came before it, was of the opinion that the enforcement of a provision punishing failure to denounce was illegal under international law,(1) but the question was left in doubt in the Supreme Court by Judge Berger, who apparently felt that, since the question was regarded by expert opinion as being in doubt, he was not entitled to hold that the accused could be guilty of a war crime in that they enforced the German Verordnung prescribing punishment for failure to denounce.(2)

(1) See pp. 58 and 59-60 ; compare pp. 69-70.

(2) See p. 83.

The question of the denial of a fair trial to Allied victims has already received attention in Volume V of these Reports, pp. 73-77, and in Volume VI, pp. 96-104. In the present trial, the Lagmannsrett held that it was evidence of the denial of a fair trial that, for instance, certain Allied accused before a German court were not given defence counsel and acquainted with the charges made, were arrested on the day of trial and were not able to prepare and present a defence, and were sentenced to death on insufficient evidence for acts which in any case, from the point of view of international law, were hardly punishable by a death sentence.(1) The facts just described bear a strong resemblance to some of the facts which have been regarded by other Allied courts as constituting evidence of a fair trial, as set out in Volumes V and VI.

The Supreme Court, however, while holding that proof of a fair trial was necessary before killings of Allied victims such as were alleged could be regarded as legal,(2) was content to define the concept of a fair trial in very broad terms. The accused person must be given an opportunity to defend himself and present counter-evidence, and if a death sentence was based on manifestly insufficient evidence it was clearly contrary to the basic principles of justice as expressed in the Preamble to the Hague Convention No. IV of 1907. The decisive point was whether the trials before the Standgericht had fulfilled those minimum demands which were to be regarded as indispensable for a proper trial, primarily whether the Standgericht as an independant and impartial tribunal had reached its decisions after a thorough investigation of the guilt of the accused, or whether the outcome had been determined beforehand by directives given to the court.(3) Judge Berger held that, even if taken all together, the following facts did not decisively prove the denial of a fair trial: that the charges made against the accused before the Standgericht had not been put down in writing beforehand, that the accused had not been assisted by a counsel for the defence, that the evidence presented and accepted had been of an indirect nature only, that the proceedings had taken a short time and were of a summary character, and that the confirmation by the " Gerichtsherr " seemed to have been procured and prepared in a very superficial way.(4) Judge Berger stressed that the Lagmannsrett had established that the Standgericht went through each and every charge with the accused and that they were given full opportunity to explain themselves. It also appeared from the Judgment of the Lagmannsrett that the accused before the Standgericht had partly admitted charges brought against them. This procedure might have been considered to be sufficient by the judges of the Standgericht, and Judge Berger did not feel entitled to say that the Standgericht had made an illegal use of their discretionary powers.(5)

While the Supreme Court may be thought to have taken a view of the denial of a fair trial which was more favourable to persons accused of such

(1) See pp. 57 and 67-8.

(2) See pp. 63, 80 and 82. Judge Berger stressed that the important point was not the type of court which conducted certain proceedings but whether such proceedings constituted a fair trial; compare Vol. VI, pp. 94-6.

(3) See pp. 63 and 80.

(4) See pp. 81-2.

(5) See p. 82.

denial than the view taken by some other authorities,(1) its finding does serve to underline the truth of the statement made in the notes to the *Justice Trial*(2) that the denial of any one of the rights enumerated on pp. 103-104 of Volume VI would not necessarily amount to the denial of a fair trial, and the courts have had to decide in each instance whether a sufficient number of the rights which they have regarded as forming part of the general right to a fair trial were sufficiently violated to warrant the conclusion either that the offence of denial of a fair trial has been committed, or that the defence plea that a killing or other injury was justified by the holding of a previous trial has been disproved.(3)

(1) See again Volumes V and VI as cited on page 84.

(2) Vol. VI, p. 104, note (2).

(3) As to these two possible legal deductions see Vol. VI, pp. 102-103.