

4. *Peter Weingartner*

This accused, a Yugoslav, said that he went to Auschwitz in October, 1942, and, after doing weapon training for three months, was a concentration camp guard until November, 1943. In December, 1944, he was in charge of a Kommando which was digging trenches for regulating the river and had a thousand women employed under him. There were about 30 male guards, and three or four wolf hounds accompanying the Kommando but not under his command. His sole concern was to supervise the women. He never beat any of the women; if he had beaten people while on the Vistula Kommando he would have done it against orders. The women in the Kommando were working from 7.30 in the morning to 3 o'clock in the afternoon; they had to march four or five kilometres to their work and then back again in the evening.

Before the Kommando duty, he was Blockführer of the women's compound doing telephone duties. He never saw any selections and did not know anything about them. He left Auschwitz on about 19th January, 1945, and went to Belsen near the beginning of February. Apart from once beating Sunschein with a piece of hose on the back, he never struck anybody except with his hand, and caused no harm by these blows. He did not recognise Shreier as being in Birkenau in the autumn of 1942. He could remember neither the witness Glinowieski nor his brother: the former's story⁽¹⁾ was untrue.

5. *Georg Kraft*

A Roumanian of German descent, Kraft claimed that he was never at Auschwitz but was at Belsen from 11th April, 1945. The first time he went into the actual concentration camp, however, was on the 22nd April, 1945, under British guard. As far as he knew, the accused Schmitz was not in the S.S.; he joined Kraft quite naked while in prison.

Speaking of the transport of which Stofel was in charge,⁽²⁾ he said that, at Gross Hehlen, front line S.S. troops lined up the prisoners, guarded them, and marched them off themselves. As he had to stay behind with the food trucks he did not know whether any of the prisoners were killed. He saw no shooting of internees on this journey to Belsen.

6. *Franz Hoessler*

Hoessler said that he was at Auschwitz from July, 1943, until 6th February, 1944, during which period he was Lagerführer (Camp Leader) in the women's compound. There were many cases of typhus. He went round the block and tried to improve conditions. He saw the commander of the whole camp, Hoess, and Dr. Wirtz and succeeded in securing a delousing plant.

He did attend selection parades, under orders from Hoess, but did not make any selections. The selections were made by doctors and he was there to see that the internees were guarded. Hoessler did not think that the gas exterminations were right, and when first ordered to attend he protested. He saved several hundred people from being gassed by falsifying the roll. The witness Sunschein⁽³⁾ must have thought that people who were being

⁽¹⁾ See p. 13. ⁽²⁾ See p. 53. ⁽³⁾ See p. 17.

sent by him to the quarantine block to get fit again, and then to go on to other work than the Union Kommando, were actually intended for the gas chambers. All selections were not for the gas chambers; some were intended to recruit working parties or to find who was suffering from scabies. He attended three types of selection parades: parades on the arrival of prisoners, parades in the hospital and parades in the camp.

He returned to Auschwitz during June, 1944, becoming Lagerführer of Auschwitz No. 1. He left Auschwitz for the last time on the 18th January, 1945, and after a period at Dora he went to Belsen, arriving on April 8th or 9th.

He was not the Kommandant of the crematorium as stated by Sompolski or Kommandant at Auschwitz, as stated by Adelaide de Yong. The allegations of both were untrue, as were also those of Alegre Kalderon, Sunschein, Klein and Litwinska.⁽¹⁾ He did not give any order for the hanging described by Hammermasch,⁽²⁾ but he did read out the judgment on that occasion. The girls executed were responsible for a fire which burnt down one of the crematoria in, he believed, October, 1944. They were hanged at the end of November or beginning of December. In reply to Hauptmann's allegation⁽³⁾ he said that it was true that he was on the platform when the train arrived and that it was reported to him that it had come from Herzberg. He did not see anyone shot there, however, and no orders were given by him to shoot prisoners.

Szafran's story about Grese's shooting two girls⁽⁴⁾ was untrue; windows could not be opened in the block in question and Grese was incapable even of loading and firing a pistol. Grese worked in Hoessler's camp and did not have a dog. As an Overseer she worked in the post office and at night she had to help Block Leaders on their roll-call. She was very reliable.

Caleson came to Belsen on a transport under Oberscharführer Hartwig, on about 9th April, 1945. He was responsible for several blocks. Kraft came to Belsen in a transport about the 10th or 11th April, 1945, from Dora.

Hoessler believed that he first saw Schmitz on the 11th April, in Belsen, in his own camp, No. 2. He was a camp prisoner wearing prisoner's clothes. Later when both were prisoners of the British he saw Schmitz, wearing only his underpants; he was given an S.S. uniform to wear and the British guards mistook him for a member of the S.S.

7. *Juana Borman*

This accused denied that she was ever present at any gas selections. She agreed that she had a dog at Auschwitz, but she never made this dog attack internees. Another Overseer named Kuck was very like her, and also had a dog. In any event, she was not at Birkenau until the 15th May, 1943. The allegations of Wolgruch, Szafran, Vera Fischer, Kalderon, Rozenwayg, Keliszek, Silberberg, Kopper and Stein were all untrue.⁽⁵⁾ Replying to them she stated that she never went with Kommandos outside the camp but always worked inside, and that in the summer of 1944, she was not in

⁽¹⁾ See pp. 12, 16, 20, 21, 25 and 28. ⁽²⁾ See p. 14. ⁽³⁾ See p. 27.
⁽⁴⁾ See p. 13. ⁽⁵⁾ See pp. 13, 14, 16, 22, 26, 28, 33, and 67.

Birkenau, which she left at the end of the previous December. She would have been severely punished had she set her dog on prisoners and the beating of prisoners by an Overseer was strictly forbidden.

After being at Birkenau from 15th May to the end of December, 1943, she came to Belsen in the middle of February, 1945, and was engaged in looking after a pigsty. At Belsen she did not come in contact with prisoners beyond her own party of prisoners. The evidence of Dr. Makar regarding her conduct there⁽¹⁾ was untrue. When prisoners disobeyed orders she boxed their ears or slapped their faces but never violently.

8. Elizabeth Volkenrath

This accused stated that she arrived at Auschwitz No. 1 in March, 1942, and was transferred to Birkenau in December, 1942, where she worked in the parcel office and bread store till September, 1944. From then till 18th January, she was in charge of a working party in Auschwitz No. 1.

Volkenrath denied having herself made selections. She attended selections during August, 1942; she had to be present as she was in charge of the women's camp, but she had merely to see that the prisoners kept quiet and orderly and did not run about. Her answer to the allegations of beatings made against her was that she only slapped faces.

Diamant's story⁽²⁾ was untrue; Volkenrath had seen lorries on the road, but whether they went to the gas chamber she did not know. Nor was Vera Fischer's allegation⁽³⁾ true. Volkenrath claimed that she was ill in hospital in August, 1942. She also denied the truth of the accusations made by Kaufmann, Siwidowa, Trieger and Kopper.⁽⁴⁾

She arrived at Belsen on the 5th February, 1945. She had only been there a few days when she went to hospital, returning to work on the 23rd March, 1945. At Belsen she was Oberaufseherin and had to detail the Overseers to their various duties. Here again she never did more than slap prisoners' faces. Her explanation of the events referred to by Hammermasch⁽⁵⁾ was that a prisoner was brought back from an attempt to escape and was beaten by Kramer. She was present but did not beat the girl. She knew nothing of the beating referred to by Herkovitz.⁽⁶⁾ Neiger's story⁽⁷⁾ was untrue, as were those of Singer and Miriam Weiss.⁽⁸⁾ After the 15th April, 1945, when the British took over, it was ordered that entry into Belsen camp was forbidden and she never went there. In connection with Stoppelman's accusation⁽⁹⁾ she said that she only took the food away when the prisoners had too much. She did not remember taking away any cigarettes. The punishment referred to by Stoppelman was known as "making sport". Prisoners had to exercise as a punishment for wrongdoing, for instance the possession of something forbidden. The sport lasted only a short time, and she had not seen any sport in Belsen.

The accused remembered Kopper at Auschwitz in the punishment Kommando. She knew Grese, who, at Auschwitz and Belsen, served under her. She never saw Grese with a dog. Starotska was a Camp Senior at both camps.

⁽¹⁾ See p. 30. ⁽²⁾ See p. 25. ⁽³⁾ See p. 26. ⁽⁴⁾ See pp. 28, 34, 35 and 37.
⁽⁵⁾ See p. 14. ⁽⁶⁾ See p. 27. ⁽⁷⁾ See p. 31. ⁽⁸⁾ See pp. 33 and 36. ⁽⁹⁾ See p. 34.

Ilse and Ida Forster worked in kitchens at Belsen, as did also Frieda Walter. Klara Opitz was in Belsen for only two days. Fiest went to see Volkenrath and the doctor more than once about the overcrowding in the women's compound, to try to secure an improvement, and about medical stores and cleaning material. Sauer worked with Fiest in compound 2. Lisiewitz had been ill for a considerable time during the period that Volkenrath was at Belsen. Hahnel arrived in the first days of April, 1945, possibly the 5th or 6th. She was never in charge of the bath-house. Bothe was in charge of the distribution of wood. Volkenrath said that women's working parties were always taken from women's compound No. 1 at Belsen and not from No. 2.

9. Erika Schopf

This witness, an ex-internee of Auschwitz, said that it was quite easy to tell when a selection was for the gas chamber, because only Jews were paraded. Everybody knew that Block 25 was kept specially for people who were going to the crematorium. She had never seen any Overseers in Block 25. As far as she knew Hoessler did not attend selections, and the accused saved several people from the gas chamber.

10. Herta Ehlert

This accused said that she was called up on the 15th November, 1939, joined the S.S., and went to Ravensbruck. She was sent from Ravensbruck to Lublin as a punishment because she was too kind to the internees. She went to Auschwitz in November, 1944, for a short period and finally arrived at Belsen at the beginning of February, 1945. She later became assistant to Gollasch who deputised for Volkenrath when the last mentioned was away.

The conditions at Belsen when she arrived were the worst she had ever seen and deteriorated further. She went to the Kommandant several times in an attempt to improve matters. She paraded the Block Seniors and they said that there had been no fat in the food for several days. She went to the kitchen and talked to the Overseers in charge and they said that they had had no fat from the stores. She then saw Unterscharführer Muller, the storekeeper, who said that all the wagons were shattered by bombing and that he could not do anything about it. She happened to meet Kramer and told him that the prisoners could not keep alive on vegetable soup. He gave an order for potatoes to be mashed and put in the soup so that the prisoners would feel that they had something in their stomachs. In March she saw Dr. Horstmann about sanitation and he said he had no disinfectants to put into the latrines. Kramer said: "Let them die; we cannot do anything about it; my hands are bound". She asked Kramer to require fewer roll-calls, and he said that there should only be two roll-calls per week. She gave food to the women and small children and she helped the prisoners.

She was not cruel to prisoners. She admitted that she slapped prisoners' faces but only when there was a serious need for it. To cut up blankets to make clothes was not allowed, and if she caught Sunschein or Klein doing that sort of thing she would of course slap their faces.⁽¹⁾ She denied being

⁽¹⁾ See pp. 17 and 20.

implicated in the beating of the escaped Russian girl alleged by Hammermasch. She never beat Herkovitz but simply reported her to the political department for having jewellery.

She said that Frieda Walter worked in a kitchen at Belsen and that she had never seen her beating anyone. There was an Overseer called "Orlt" at Belsen who bore some resemblance to Sauer. Ehlert remembered Ida Friedman at Belsen as being a Jewess from France who had told her fortune on the Saturday before the British arrived. Kopper was a spy for the Gestapo, and well known for her untruthfulness. She was assaulted by her fellow prisoners because of the suffering she caused them. Bothe was in charge of the distribution of wood and had nothing to do with the vegetable Kommando.

11. Jutta and Inga Madlung

Jutta and Inga Madlung, two sisters, came forward on their own initiative to give evidence on behalf of Ehlert, and dealt with the time when she was in the concentration camp at Ravensbruck. Jutta Madlung said that the accused was very good to them as prisoners, and did not harm them or beat them. She gave Jutta Madlung bread for her sister who was ill, and apples. She never saw her ill-treat anyone. She was also very nice to the Russians. The sister in substance corroborated what Jutta Madlung said.

12. Irma Grese

This accused said that she went to Auschwitz in March, 1943, and remained there until 18th January, 1945. At first she did telephone duties in the Block Leader's room. Then she was put in charge of the Strafkommando (Punishment Party) for two days. After this she worked on another Kommando and later censored mail. Then she became an Overseer in Lager C. She only carried a revolver because she was ordered to do so. She never struck anyone so as to cause bleeding or unconsciousness, nor did she kick any prisoners on the ground, or shoot at prisoners. She never took part in selections at Auschwitz, but agreed that selections were made. Szafran's allegations were untrue.⁽¹⁾ Jews were nearly always paraded naked for the gas selection. Her duty at these parades was to keep order, and she admitted that she beat prisoners for running away. She did not know at the time the purpose of the parades. She did not remember the events described by Stein.⁽²⁾ She admitted that she beat people in Lager C with a whip made of cellophane and with a stick, and that even carrying whips was against Kramer's orders. She gave Overseers under her orders to beat prisoners in order to keep discipline and to prevent stealing in the camp of which she was in charge, but she was not authorised to do this. When prisoners tried to evade parades she thrashed them.

Her answer to Rozenwayg's story⁽³⁾ was that she had never been with Lothe on an outside working party, and she never had a dog. Ilse Lothe did not work under her as a kapo. Grese denied the truth of the stories told by Watinik, Diamant, Kopper, Lobowitz and Trieger,⁽⁴⁾ and thought that Dunkleermann's account⁽⁵⁾ of an alleged beating was, if true at all,

⁽¹⁾ See p. 13. ⁽²⁾ See p. 14. ⁽³⁾ See p. 16. ⁽⁴⁾ See pp. 25, 29, 35 and 37. ⁽⁵⁾ See p. 26.

grossly exaggerated. She denied that she made prisoners hold their hands up above their heads with stones in them. She said that the deponent Catherine Neiger⁽¹⁾ was never in her camp.

She came to Belsen in March, 1945. Transports were arriving almost daily, the camp was overcrowded and the prisoners were dirty and ill. Roll-calls were held twice a week. She took over the duty of Arbeitsdienstführerin and went into the woods with working parties, and performed various other duties. She did not beat anyone in Belsen except a kapo who did not work but lay in the sun. She never had any kind of weapon at Belsen, and only struck with her hand. Regarding Sunschein's and Klein's allegation,⁽²⁾ she said that she once saw two parcels which contained meat being thrown away by someone in a group of prisoners. She asked who had done this, and as they would not answer she said that they must make sport until they did. The prisoners made sport for half an hour and then she was told who had thrown the parcels away. She did not report this incident as she thought that the prisoners had been sufficiently punished. Frieda Walter and Irene Haschke, said Grese, worked in No. 3 kitchen at Belsen.

13. Ilse Lothe

This accused said that she went as a prisoner to Auschwitz No. 1 in March, 1942, and that in June, 1943, she went to Birkenau. She was appointed a kapo in February, 1944; she was not consulted on the matter, and merely had to take the job or be punished by receiving 25 strokes. In December, 1944, the Kommandant put her into a punishment Kommando, the Vistula Kommando, and she ceased to be a kapo. In January, 1945, she was sent to Ravensbruck and on March 4th or 5th she came to Belsen. At Belsen she was ill for about three weeks, and then she became a kapo in the vegetable Kommando; she was given this job by Volkenrath. Neither at Auschwitz nor at Belsen did she carry a weapon or stick, beat a prisoner with a stick, knock one down or kick one while on the ground. While a selection was taking place all kapos were put in one block and forbidden to leave. Kapos were punished more often than other prisoners and received no extra food. Lothe had herself received severe punishment from the S.S.

She did not recognise Rozenwayg;⁽³⁾ she was never in her Kommando. Lothe denied ever having worked in the same Kommando as Grese. Rozenwayg's account was untrue as was also that of Gryka.⁽⁴⁾ Nor did she remember the incident referred to by Watinik.⁽⁵⁾ She was not a kapo in the summer of 1943.

On the Vistula Kommando, of which Weingartner was in charge, a halt was made at the top of the hill to allow stragglers to catch up; the dogs were intended to prevent escapes. Stragglers might have been slapped but not beaten. Those who did not work hard were beaten.

Lisiewicz worked on a vegetable Kommando on the first day of Easter at Belsen, but she went off at noon because she became ill. She did not carry a stick on that occasion. Lothe testified that she knew Ida Friedman, whom she believed to be a Polish Jewess. Ten days after the arrival of the British,

⁽¹⁾ See p. 31. ⁽²⁾ See pp. 17 and 20. ⁽³⁾ See p. 16. ⁽⁴⁾ See p. 23. ⁽⁵⁾ See p. 36.

Friedman was in hospital; the accused thought she had typhus. Roth was in hut 199, but as room orderly not night guard.

14. *Hilde Lobauer*

This accused said that she went to Auschwitz No. 1 as a prisoner in March, 1942, and after four weeks to Birkenau, where she stayed till February, 1945. She was a kapo for four weeks around Christmas, 1942, and lost this position because she was not severe enough to the prisoners. She became a member of the Arbeitsdienst at about the end of 1943. She did not ask for the post; she did not want it, but she could not refuse it. She had no duties in regard to roll-calls in the Arbeitsdienst but was concerned with the working parties going in and out of the camp. When the parties working outside had left she had to see that the working parties remaining inside did their work and that the camp was tidy and clean. She had 25 to 30 kapos under her command. In March, 1945, after a period at Ravensbruck, she went to Belsen with Lothe. Here after being sick for a time she again became a member of the Arbeitsdienst.

At Auschwitz she carried a wooden stick, but she did not carry this stick after she left Auschwitz. She denied that she ever carried a rubber truncheon since it was forbidden to do so, and she never used a whip. She agreed that she did strike the prisoners with the stick, but never so as to draw blood. She had never beaten a person for no reason, and she had never so beaten a prisoner that she was left in a dying condition. She would not have dared to do the latter; as a prisoner she would have been reported and punished. Nor had she ever beaten anybody into helplessness or kicked a prisoner on the ground. She herself had been punished by the authorities for not working sufficiently hard. Being a prisoner she had nothing to do with gas parades, although she took the numbers of those selected for working parties. Quite different orders were issued when a selection for the gas chamber was intended, and prisoner officials were not allowed to attend.

She characterised the stories told by Jasinska, Trieger, Triszinska and Herbst⁽¹⁾ as untrue. Regarding the last accusation, the accused said that the kapo Krause, who was said to be dead, was alive and that in August, 1942, the accused was in hospital with typhus. The ditch mentioned was not so deep that anyone could be drowned in it; it was intended to prevent people reaching the barbed wire which was electrified.

Ehlert was in charge of the convoy with which she (Lobauer) and Lothe arrived at Belsen. Miriam Weiss's story⁽²⁾ might possibly be true; on the March inspection everyone was ordered to remain in the blocks. In reply to Borenstein's allegation⁽³⁾ she agreed that she took away blankets from women who put them round their feet, but they did not have to go barefooted as they still had their shoes on.

15. *Josef Klippel*

Josef Klippel, a Yugoslav of German descent, said that he arrived at the Bergen-Belsen Wehrmacht barracks at about 5 o'clock on the 11th April,

⁽¹⁾ See pp. 27, 28 and 35. ⁽²⁾ See p. 36. ⁽³⁾ See p. 24.

1945, as a member of the S.S. He was told on the 13th April, by Hoessler, to take charge of kitchen No. 24. He carried on with his duties there until the 16th April, when he was arrested by the British at 9 o'clock at night. Up to this time he had never been in Belsen concentration camp itself, and the first time he saw Kramer was in Celle prison. There were no woman prisoners in his kitchen. He had never beaten a woman with a rubber stick, or killed a woman.

Klippel said that he knew Kraft in Mittelbau camp, and that the latter was there until January, 1945, and arrived at Belsen a few hours before Klippel. Klippel slept in the same room as Kraft in the Wehrmacht barracks until the 16th April. Klippel said that he saw Calesson in the barracks at Bergen-Belsen. Klippel claimed to have been in the Kommando B.12 at Dora, but he could not remember Ostrowski being there.

The accused saw Schmitz in March, 1945, in the clothing store in Mittelbau, dressed as a prisoner. He saw Schmitz next on the 17th April, when a British guard brought him into a room wearing only a pair of pants. To Klippel, who was also in the room, Schmitz explained that he had had a fight and had escaped to the area occupied by the British guards. Schmitz was never a member of the S.S.

16. *Paul Kreutzer*

This witness, a member of the S.S., said that he had seen Klippel as late as 5th April, at Mittelbau Camp.

17. *Emmi Sochtig*

This witness, an ex-employee at Mittelbau, stated that she knew Klippel as having worked in the camp at Mittelbau, and that she saw him regularly there between January, 1945, and the 5th April, 1945. She last saw him on the 7th April at Tettenborn station.

18. *Emil Kltscho*

Kltscho, an ex-Rottenführer in the S.S., said that he arrived with Klippel at Bergen-Belsen from Mittelbau on 9th, 10th or 11th of April. He said that he slept in the same room as Kraft and Klippel in the Wehrmacht barracks until the 16th April.

19. *Stefan Hermann*

Also a member of the S.S., this witness said that he saw Klippel at Mittelbau regularly until 5th April. Hermann also said that Kraft was at Buchenwald between July and September, 1943, and then went to Mittelbau.

20. *Oscar Schmitz*

Schmitz, a German, born in Cologne, stated that he was arrested and was eventually sent to Bergen-Belsen, arriving at No. 2 camp in the Wehrmacht barracks on the morning of the 10th April, 1945. Here, he claimed, he was made a Camp Senior by the prisoners. He went to Hoessler and insisted that something must be done about food; as a result, food was prepared.

All during this time he was wearing the striped clothing of a prisoner and he had no arms. After being in charge of 28 prisoners, he then became Camp Senior over 1,500 and between the 12th and the 15th April, 1945, he was engaged in supervising the segregation of these prisoners into different nationalities and advising Hoessler on this matter. On the 17th April, after the British arrived, he was attacked by a band of internees, who made him get undressed until he wore only his underpants and socks. He escaped to the protection of the British guards, found an S.S. uniform, and put it on, finding that it was a reasonable fit. Then he tried to explain the position to the guards, but they did not understand German. In the same room were Klippel, Kraft, Kltcho and a certain Stephan. Because of the S.S. uniform the British guards detained him and he was treated as an S.S. man.

21. *Karl Francioh*

This accused said that he was drafted into the S.S. on the 17th April, 1940, coming from the Wehrmacht. He became a cook and went to Auschwitz. He came to Belsen between the 10th and 15th March, 1945. On about the 27th or 28th March, he was given a job in kitchen No. 2 in the women's compound. He worked for two days and was then arrested because he had been to visit his wife in Bergen without permission; he was under arrest for two days, and then went to kitchen No. 3. Then he served a ten days' sentence, being in prison from the 2nd April to the 12th April. He was sentenced to this punishment by Kramer. After this he went back to kitchen No. 3. He had to cook for about 16,300 people and tried to get more food from Unterscharführer Muller but could not. After the liberation, a Brigadier spoke with a kapo in charge of the prisoners, who said that the prisoners were satisfied with Francioh. Then the British officer told the accused to carry on, and he did so until he was arrested on the 17th or 18th April. When the British troops came in he was not in the camp: he was standing with his wife in front of Kramer's office, and he then went to Bergen with her. They had prepared to go away with her luggage, and he could have escaped with her if he had wanted to. He was so fond of the prisoners, however, that he thought it was his duty to stay and look after them.

Francioh denied all the accusations made against him. He had a pistol but he did not carry it on duty. He carried it only off duty when he went to Bergen to see his wife. He did not know Dr. Bimko, and Szafran did not work in his kitchen.⁽¹⁾ He estimated the distance between his kitchen and Block No. 224 at 150 metres.⁽²⁾

The accused stated that Frieda Walter worked in No. 3 kitchen and, like Irene Haschke, was an Overseer there. He did not recognise Sauer as an Overseer from kitchen No. 2; Hempel held that position but did not beat prisoners in the kitchen. Ida Forster was an Overseer in No. 3 kitchen, but not in his part. In kitchen No. 3 no S.S. woman had a rubber tube or beat prisoners. After the food had left the cookhouse and went to the blocks, its distribution was left to the internees.

22. *Affidavit of Raymond Dujou*

This deponent said that he knew Schmitz. He never saw him beat anyone.

⁽¹⁾ See pp. 11-12 and 13. ⁽²⁾ See p. 90.

but his friends told him that the accused often beat them. The deponent said that Francioh was always kind and never beat anyone.

23. *Ladislav Gura*

This accused, a Slovak, said that he was a member of the S.S., at Auschwitz, was put under arrest in June, 1944, and went on 17th February, 1945, to Belsen. He denied the allegations made against him. He had seen both Block Seniors and S.S. beating prisoners at Auschwitz though not often. He believed that Francioh was released from prison two or three days before the 12th April, 1945.

24. *Fritz Mathes*

Mathes said that he arrived at Belsen as a member of the German army, on the 22nd or 23rd November, 1944, and worked in the S.S. kitchen until the 10th or the 15th January, 1945. After this he was employed in the bath-house till the 15th April, 1945. On 1st February, his pay-book was withdrawn and he received a new pay-book from the S.S. and was given an S.S. uniform. He was never in the prisoners' part of Belsen except once, about Christmas. He never worked in cookhouse No. 2 and consequently could not have committed the offences alleged by Cech, Grunwald and Lichtenstein.⁽¹⁾ Cech may have mistaken the accused for Henkel, chief of the kitchen, whom he resembled. He never shot or ill-treated prisoners.

Egersdorf was with him in the bath-house on occasions; the former did not have anything to do with the bath-house, but only slept there and worked in the food store.

25. *C.S.M. J. Mallon*

This witness came forward as a volunteer on behalf of Schmitz and said that, while on guard duty at Belsen after the liberation, he saw outside Headquarters a man, naked from the waist upwards, dressed only in underpants, and being threatened by a crowd of internees. The man was put into a room along with S.S. prisoners for safety, but the witness had the impression that he was a prisoner himself. The man obtained German clothing from somewhere. The witness thought that the incident started in the mid-afternoon. He identified Schmitz as the man involved.

26. *Johanna Therese Kurd*

In a letter which was entered as evidence, Johanna Kurd said that she was employed in the S.S. kitchen at Belsen when Mathes was an Overseer there. He was at first a Wehrmacht man who cursed the Hitler regime, and later was made an S.S. man and spoke of this with disgust. He treated prisoners well and gave them extra food, and told Kurd the allied radio news.

27. *Gisela Koblischek*

This witness said that she was employed in kitchen No. 2 as an Overseer. The chief of that kitchen was Oberscharführer Heuskel. Mathes worked in the bath-house and she never saw him in kitchen No. 2.

⁽¹⁾ See pp. 25, 26 and 29.

28. *Otto Calesson*

Calesson said that he was forced to join the S.S., and was eventually sent to Bergen-Belsen, arriving on the 10th April, 1945. He said that he was not in charge of the train which brought him, but had a coach to himself because he had to look after some equipment. There were also about 124 S.S. men on the train, and he was not responsible for the security of the convoy. Zamoski's, Gutman's and Muller's allegations were untrue.⁽¹⁾ His answer to Raschiner's allegation⁽²⁾ was that on the 2nd April he was not in Belsen but Nordhausen. He hit a prisoner on the backside with a broom for not cleaning out a room in Block 88 in the Wehrmacht barracks, but that was the only violence he ever perpetrated against any internee.

29. *Karl Egersdorf*

This accused said that he was conscripted into the S.S. on the 13th March, 1941, and went to Auschwitz No. 1, working in the cookhouse. He left Auschwitz on the 21st January, 1945, and arrived in Belsen on about the 7th or 8th April, 1945. Here he worked in a food store. There was a girl Dora employed in the store, who came from Salonika. He believed she was the girl who made the statement under the name of Dora Almaleh.⁽³⁾ He dismissed her because she would not work, two days before the British arrived. He never shot or ill-treated any prisoner. If prisoners stole food he simply took it away from them.

He slept in the bath-house at Belsen, where Mathes was employed. He did not know when the latter ceased to be employed there, but he was there when the British arrived.

30. *Anchor Pichen*

Originally a Dane, this accused claimed that he later became a Polish national and was conscripted on the 25th May, 1940, into the German army. On the 20th November, 1942, he was wounded and crippled in his left arm. He arrived with Francioh at Bergen-Belsen on about the 10th March, 1945. He never wore S.S. uniform, and never knew whether he was accepted for the S.S. On the 27th March, 1945, he started work in kitchen No. 2 under Heuskel. After four days he took charge of cookhouse No. 1 and worked there until he was arrested on the 17th April, 1945. He was never in charge of a bath-house. He had an unloaded pistol at Belsen, but did not carry it in the kitchen. He used to carry it on his way to and from the kitchen but never used it. He was on good terms with all the internees working for him, and never had any need to beat prisoners. He denied the allegations of Halota.⁽⁴⁾ He agreed that there were always turnips in front of kitchen No. 1, but he said that nothing was ever stolen from kitchen No. 1 because it was outside the compound. In answer to Litwinka's allegation,⁽⁵⁾ he said that, all the S.S. men being called away to parade he locked up his kitchen, and that after the parade he did not go back to the kitchen but went to his own barrack room. The parade of S.S. men was on the 13th or 14th April, 1945.

⁽¹⁾ See pp. 22, 26 and 31. ⁽²⁾ See p. 32. ⁽³⁾ See p. 23. ⁽⁴⁾ See p. 27. ⁽⁵⁾ See p. 12.

Mathes was never in kitchen No. 1 at Belsen while Pichen was there. Ilse Forster was an Overseer in kitchen No. 1 for a few days. Lisiewicz was in the peeling department for a short period in No. 1 kitchen. Hahnel worked in kitchen No. 1, during the last week before the arrival of the British troops. Pichen did not know Opitz. Barsch was not in No. 1 kitchen during Pichen's time; nor did the latter think that Barsch was ever on the staff of any of the Belsen kitchens.

31. *Walter Otto*

This accused stated that he joined the German Forces on the 15th October, 1940, and was then conscripted into the S.S. and sent to Auschwitz, where he remained until the 21st January, 1945. He came to Belsen on the 4th February, 1945. When he arrived he was told to start work as an electrician, and he started on the next day. He was never a Block Leader. He had never been near Block 213 which was closed to him; he did once work in Block 209 with Dr. Horstmann, and on the 10th or 11th March he was in Blocks 195 to 203, on repair work. In Block 201 the Block Senior was called Aldona, and she was Polish. He never beat internees at Belsen. On April 6th, he did some work in the bath-house: Mathes was present.

32. *Franz Stofel*

This accused, a member of the S.S., said that he and Dorr left Klein Bodungen on the 5th April, 1945, with a convoy of internees, with Neuen-gamme as the probable ultimate destination. In the event it was forced to go to Belsen. Stofel was in charge and Dorr was second in command. There were 610 prisoners in good physical condition and 45 guards. At Salzgeitter, a roll-call revealed 5 prisoners missing. Later, at Gross Hehlen, on 10th April, the prisoners were put in a big barn at about 6 p.m. and ten minutes later a field officer told Stofel to leave at once, as the village was in the fighting area. The accused refused several times, and then an S.S. officer with 30 men was told to move the prisoners. The S.S. went to the barn and shooting started at once. Some prisoners had had some food, some had not. The S.S. took the prisoners away at the double. Everything was in confusion. Stofel later found the prisoners in a wood three or four kilometres from Gross Hehlen. When he reached them a Block Leader, Kunertz, reported that four or five prisoners had been shot partly because they tried to escape and partly because they could not keep up the pace. The shooting had been done by men of the field unit. His guards were not with the prisoners during the shooting; they were in the village and only reached the convoy later on. The convoy arrived at Belsen on the 11th April at about 4 p.m. and a roll-call showed 590 prisoners present. Apart from the incident related there were no shootings by anyone during the journey. Grohman's story regarding Dorr was untrue.⁽¹⁾

33. *Heinrich Schreier*

A Roumanian of German descent, this accused said that he was called up into the Luftwaffe on the 10th October, 1941, and that he had served in the

⁽¹⁾ See p. 26.

Luftwaffe at all material times. He was never anywhere near Auschwitz and was never at Belsen till after his capture by the Allies. He worked as a medical attendant in Block 29 and never in 22. He first saw Diamant⁽¹⁾ when he was confronted with her in prison, but Diamant took along with her a friend who was supposed to be able to identify him and could not. With regard to a photograph which he acknowledged as having been found on him when he was arrested, he said that when he was with his fiancée and a friend they exchanged uniforms and he was photographed in S.S. uniform. He stated that he was wearing in the box the uniform in which he was arrested and explained that the S.S. trousers he acquired from a wounded man on the way from Schwerin, where he surrendered, to prison. He acknowledged that a second photograph had been found in his wallet on capture; this bore the likeness of a girl, and on the back was the inscription: "My dear Heinz, for permanent memory of a night in Soltau". The accused stated that he met this girl in February or March, 1945, but maintained that he had never been in either Soltau or Belsen (which were very near to one another) and could not say why the former was mentioned on the photograph.

34. *Maria Schreirer*

This witness, the mother of the accused, also claimed that he served in the Luftwaffe from his call-up onwards.

35. *Wilhelm Dorr*

This accused said that, as assistant to Stofel, he helped to take a convoy of prisoners from Klein Bodungen on 5th April, 1940. The convoy consisted of 610 people. They arrived at Gross Hehlen at about 6 p.m. and were distributing the rations by a big barn when an officer from the field force arrived and spoke to Stofel. The officer said that this was a fighting area and that the convoy had to move. On Stofel's refusing the prisoners were chased away by soldiers and there was some shooting into the air. Dorr heard further shooting from the direction in which the prisoners were chased. The latter were later collected together again. The next day, the 11th April, 1945, they went to Bergen. On arrival there were 590 in the column. The allegations of Grohmann, Linz and Poppner were untrue.⁽²⁾

36. *Gertrud Neuman*

This witness said that she was one of two S.S. women accompanying Stofel and Dorr with the transport. When they arrived at Gross Hehlen, they noticed Waffen S.S. in the village. While food was being distributed to the prisoners, someone came from the S.S. and told Stofel that the prisoners must leave the village as it was a defence position. Stofel protested unavailingly and eventually the prisoners were ordered to line up; somebody then fired in the air, causing a panic amongst the prisoners, and the prisoners moved off. They could not go as fast as the Waffen S.S. wanted and when they went shots were fired. Neuman and others tried to catch up but could not. They saw at least eight dead prisoners lying by the side of the road.

⁽¹⁾ See p. 25. ⁽²⁾ See pp. 26, 29 and 32.

They eventually caught up with the prisoners. At no stage in the journey did she see the guards of the prisoners shooting the latter.

37. *Ilse Steinbusch*

This witness said that she was an S.S. woman who accompanied the convoy under Stofel. She corroborated substantially everything that was said by Neuman.

38. *Erika Ceconi*

Ceconi, an inhabitant of Gross Hehlen, said that she remembered the prisoners from a concentration camp being marched out of the village on 10th April, in good order though apparently tired. She heard two shots but did not know where they came from. The firing took place just before the prisoners marched off. It was about seven or eight o'clock, at dusk. In the village at the time were infantry, S.S. and Panzer units.

39. *Heinrich Brammer*

This witness, a civilian of Gross Hehlen, said that on 10th April, 1945, a party of prisoners was in Gross Hehlen and left at 9 p.m. This party was the only party of concentration camp prisoners he had ever seen. A commission found three bodies, about a kilometre from Gross Hehlen, some six or eight weeks after the prisoners had gone. The bodies were disinterred in his presence and buried in the churchyard. The bodies when found were clothed in striped prison clothing and wrapped in blankets. He did not know how the men died. He did hear some gunfire on the 10th April, but he did not see any German troops in the village. The witness stated that he became Burgomaster of Gross Hehlen at the end of the following May.

40. *Albert Tusch*

This witness, a farmer at Gross Hehlen, said that there were German troops in Gross Hehlen in April, 1945, and that they left on the 11th April. On the 10th April he saw a party of concentration camp prisoners arriving at Gross Hehlen; they looked tired and weak. They left at about 9 p.m. on the same day but he was not present when they left. He had seen no bodies and heard no shots.

41. *Dr. Ernst Heinrich Schmidt*

This witness, an S.S. doctor, said that Calesson might have travelled on a transport going to Belsen from Mittelbau from 5th-8th or 9th April, but that he was not in charge of it. He never saw any of the guards on the transport shoot prisoners. Nor did he see the accused shoot or beat anyone in Belsen. From 8th or 9th April onwards Barsch was a medical orderly in No. 2 camp Belsen, under the witness's command. During the last few days before the British arrived the accused was sick with stomach trouble under the witness's care.

42. *Dr. Alfred Kurzke*

This witness said that he worked as a doctor at Belsen, where he was

assisted by Barsch as a medical orderly. The accused arrived at Belsen early in April, but was ill with gastritis rather later.

43. *Erich Zoddell*

This accused said that he came to Belsen as a prisoner on the 27th March, 1944, and remained until the 18th April, 1945. After three days he became a Block Leader in the hospital, and stayed in this post until January, 1945, when he became third Camp Senior of compound No. 1. As Camp Senior he had, for instance, to supervise the camp and see that food came from the cookhouse and was sent to the blocks. From the beginning of March, 1945, all working people were in his compound and no one died of starvation, though in the last four weeks they were having little bread. If he was short of rations he simply asked for more and was given them.

He beat people but never after they had fallen to the ground, and never so that he drew blood. Glinowieski's allegation⁽¹⁾ was untrue. Sometimes the accused assisted in the food distribution, though it was not his responsibility; it was that of the kapos or the Block Senior. When people behaved like animals to get at the food he might have struck them with his hands or a stick. He had never beaten people to or on the ground or kicked them. He agreed that he had a walking-stick, because he had a lame leg, but he did not always carry a stick. The evidence of Lozowski and Zuckermann⁽²⁾ was not true. The accused denied ever being Camp Senior of compound 2. Mathes was employed in the bath-house on the 14th or 15th April; Zoddell often saw him there.

44. *Ignatz Schlomowicz*

Schlomowicz, a Viennese Jew, said that after being arrested several years previously, he eventually arrived at Belsen at about 11 p.m. on the 8th April, 1945. Barsch and Glinowieski were with this party. Ede the Camp Senior appointed him as Block Senior for Block 12 because all the German prisoners and S.S. had marched away from Belsen on the 12th April, 1945. He had not been a Block Senior before. His main duties were in connection with the distribution of food and the maintenance of discipline inside the block, but the latter was impossible. There were 800 internees in the block, to which his transport added 300 more. He distributed the little food that was available and never beat anyone. He had suffered much hardship and pain in concentration camp life himself and he gave strict orders to the people working under him for his two days in office that beatings must cease. He denied ever having beaten anyone with a rubber cable or a stick, and pointed out that out of the hundreds of people in his block only two had apparently heard the words alleged.⁽³⁾ He continued as Block Senior until the 20th April, by which time he was suffering from typhus, and later he was removed to hospital. He told of a visit which was paid to him in hospital by his two accusers Judkovitz and Basch⁽⁴⁾ who brought him cigarettes and chatted with him. He suggested that they had themselves been so ill with typhus that they were in a low state mentally and physically, which must have been the reason for their making these accusations.

⁽¹⁾ See p. 15. ⁽²⁾ See pp. 30 and 36. ⁽³⁾ See p. 24. ⁽⁴⁾ See pp. 24 and 28.

The accused said that he never saw or heard of any Russian being killed by Aurdzieg. He had seen Aurdzieg beating people on food distribution but not with any weapon. He denied that Polanski was ever assistant Block Senior during his, Schlomowicz's time at Belsen. He did not know Jozef Deutsche,⁽¹⁾ but Polanski could not have beaten anyone while Schlomowicz was Block Senior in No. 12.

45. *Deposition of Daniel Blicblau*

Blicblau, a Polish Jew, said that he came to Belsen as a prisoner on the 6th April, 1945, and that Schlomowicz was the Camp Senior in room 12. He had not seen him beat anyone, but had heard of him hitting prisoners with his hands. The accused only punished people who stole, and behaved well as a kapo at previous camps at which the deponent knew him.

46. *Ilse Forster*

This accused said that she arrived at Bergen-Belsen with Hempel on the 17th or 18th February, 1945. For two or three days she worked in the bath-house and then she went into kitchen No. 1 in the men's compound. Here her duty consisted in the general supervision of staff. She tried to get more bread for the internees from Charlotte Klein and succeeded in doing so. The kitchen staff always got the food they required but many internees who did not get enough food came round the kitchen and tried to steal it. If they did not go away when told she beat them with her hand and sometimes with a stick. She never had a rubber truncheon and had never even seen one till she went to prison after capture. The people who came to the kitchen were mostly men and she could do nothing with them except hit them. She denied that she ever beat prisoners until they were unconscious or bleeding or that she left anyone bleeding on the floor.

Litwinska's story⁽²⁾ was untrue. Ilse Forster remembered a Russian girl; she had some kind of a beating but returned to work the next day. The accused was on good terms with her staff in the kitchen and she never beat Litwinska or anyone else on her staff.

She agreed that if Bialek⁽³⁾ stood at the door she could have seen beatings such as she described but she denied taking prisoners into a special room and beating them. Lippman's story was untrue.⁽⁴⁾ So was Ehlert's.⁽⁵⁾

The accused said that she visited the bath-house on the 13th or 14th April, 1945, and saw Mathes there in a billet where he slept; at about 3 or 4 p.m. she saw him in bed there. Pichen was in charge of kitchen No. 1; he had a pistol but never carried it in the kitchen; it was kept in a locked drawer. She had never seen him shoot anyone or heard that he had done so. The relations between Pichen and the internees in the kitchen were intimate. He never beat them. She had never seen Barsch in kitchen No. 1.

Ilse Forster believed that Lisiewitz came to Belsen at the end of February, 1945. She worked in kitchen No. 1 in the peeling department. In the

⁽¹⁾ See p. 25. ⁽²⁾ See p. 12. ⁽³⁾ See p. 24. ⁽⁴⁾ See p. 29.

⁽⁵⁾ See p. 37. Ehlert's evidence regarding Ilse Forster is an example of the contradictions mentioned.

middle of March for a few days she was ill, then came back for a short time, was sick again, and never returned. When she was ill another Overseer called Lippman took her place. Hahnel worked with Ilse Forster in No. 1 cookhouse. She arrived at Belsen the first week in April and worked there until the British came. She was never in charge of the bath-house; she always worked in the kitchen.

Under cross-examination the witness said that there was a concrete pond close to kitchen No. 1 at Belsen, but she never saw any bodies in it. She heard of a male body being pulled out, in March, 1945.⁽¹⁾

47. *Ida Forster*

Ida Forster said that she came to Belsen on the 28th February, 1945. For a fortnight she had a small working squad taking offal from the kitchen, and then she went to work in No. 2 part of No. 3 kitchen as an Overseer. She had the duties of general supervision but had nothing directly to do with the feeding of the internees. Stein's story⁽²⁾ was untrue; she never beat anyone. Frieda Walter worked in the same kitchen. In the other part of the kitchen was the accused Francioh. Ida Forster claimed that she never saw anyone shot or beaten at Belsen and that the people who worked in her kitchen had a pleasant time. She knew an Overseer named Orlt who worked in kitchen No. 3 at Belsen, and who resembled Sauer.

48. *Klara Opitz*

This accused stated that she arrived at Belsen on the 13th April. During the two days before the British came she was working in the kitchen in Block 9 peeling vegetables near the bread store, but for her first three days at Belsen she did nothing. She never saw any prisoners beaten and denied that she herself ever beat prisoners at Belsen.

49. *Charlotte Klein*

The accused Charlotte Klein said that she went to Belsen between the 20th and 26th February, 1945, with Bothe. Her duties commenced in the bath-house and the wood Kommando, and then she went into the bread store for a week. She was ill for four days, and went back to the bread store until 29th March, 1945. She became ill again and returned to the bread store again on the 5th April, 1945, where she remained until the day the British came. The bread was taken round in carts to various parts of the camp. She went with the carts, but she never had to beat the prisoners on the bread Kommando. They worked well and she always treated them well. Stealing by other prisoners happened very frequently, partly from the hand-carts and partly from the store when the door was open. If she found anyone trying to steal bread she merely took the bread away and slapped their faces. She never had a stick or a rubber truncheon at Belsen. The people in her Kommando never stole bread because there was plenty of bread and they could eat as much as they liked. Until the 11th April, 1945, bread was still being brought from Soltau, though not regularly. She never beat anyone till they died.

⁽¹⁾ See Rozenwayg's assertion regarding Haschke on p. 16. ⁽²⁾ p. 14.

During her period in the bread store Egersdorf never came to the store, and she could remember no shooting. She did issue extra bread to Forster at her request. She said she wanted some bread as her prisoners worked long hours. Bread was scarce, but she gave her some. Klein shared her room with Bothe but she never saw Bothe with a pistol. She said Hempel went to her for more bread, and she gave Hempel some.

50. *Herta Bothe*

This accused said that it was between the 20th and 26th February, 1945, when she came to Belsen. On her third day she did some duty in the bath-house. For a few days in February she was working at the kitchen in the men's compound carrying away swill, and about the middle of March she was put in charge of a wood Kommando with sixty or sixty-five prisoners in it. She had nothing to do with the ordinary run of prisoners in the camp and she never had a pistol. Everybody had to work their share on the wood Kommando, but she would not say that it was really too much for their strength. The accusations made by Schiferman, Triszinska and Grunwald⁽¹⁾ were untrue. Kitchen No. 4 was opposite where the wood Kommando worked, but she never went into kitchen No. 4. She had never beaten anyone to death. She had beaten internees with her hands for stealing, and when she found that the internees had stolen articles from the S.S. men's billets. She has never beaten anyone with a stick, rod or truncheon. There was a vegetable Kommando in Belsen, but she had nothing to do with it. She delivered wood to the bath-house where Mathes was the S.S. man in charge. She thought she saw him working there; the last time she delivered fuel to the bath-house was about the 9th or 10th April, 1945. Bothe said that Charlotte Klein shared her room with her.

51. *Gertrud Rheinholdt*

This witness said that she joined the S.S. on the 1st July, 1944, and went to Belsen between the 20th and 25th February, 1945. She knew Herta Bothe at Belsen and slept in the same room as she did. She confirmed that the accused was ill part of the time at Belsen. She never saw Bothe with a pistol, but she was not sure whether she had one or not. She did not see Bothe during the day at all. The witness became ill on the 7th March and was in hospital from the 10th to the 29th.

52. *Frieda Walter*

Frieda Walter claimed that she arrived at Bergen-Belsen on the 24th or 25th February, and worked at various times in kitchen No. 3, a Kommando which was putting stones into ditches, the gardening Kommando and kitchen No. 2.

Her reply to Siwidowa's accusation⁽²⁾ was that she certainly hit a woman with her hand, because she stole potatoes just as others did. She hit with her hand prisoners who stole, but she confessed that she had no right to do so. Triszinska's story⁽³⁾ was untrue. She never had a stick or a rubber truncheon.

⁽¹⁾ See pp. 26, 33 and 35. ⁽²⁾ See p. 34. ⁽³⁾ See p. 35.

Francioh was put in prison in about the middle of March and was in kitchen No. 3 from the 25th March, 1945, until the 11th April, 1945. She had seen Francioh beating prisoners with a stick. She saw Kopper some five or six times in the women's compound in front of kitchen 3, in Belsen. Kopper was in the camp police who had to see that prisoners did not crowd in on the kitchen. She never saw her beat anyone or carry a stick.

53. *Irene Haschke*

The accused Irene Haschke testified that she arrived at Belsen on 28th February, 1945, and, among other functions, she worked three days in kitchen No. 2, then in kitchen No. 3, which had two portions. The S.S. man Francioh was in charge of her portion and another Overseer called Ault also worked there.

The allegations of Stein, Rozenwayg, Neiger and Triszinska⁽¹⁾ were untrue. Although beating was forbidden, she admitted that she had beaten prisoners when they took food from others, and she had beaten them with her hands sometimes. She used also an ordinary wooden stick, but she would hit people only once or twice. She denied that she ever had a rubber stick or that she kicked prisoners.

Francioh came about the middle of March, 1945, to kitchen 3, and he often went away to his wife. His story of his being in prison in April was untrue. He, like Haschke, when he beat prisoners, did it openly.

54. *Gertrud Fiest*

The date of Fiest's arrival at Belsen, she said, was the 28th February, 1945, and among other duties she took roll-calls twice per week in the women's compound. She counted the prisoners with the Block Seniors and a clerk. The roll-calls lasted about one and a half hours to two hours. She never made them last longer than was necessary and it was untrue to say that they lasted six hours. The sick and dying were not forced to attend. They were counted inside the block and it was left to the female doctor to decide who was fit to attend roll-call or not. She agreed that she had on occasions hit prisoners with her hand. Anita Lasker's and Berg's accusations⁽²⁾ were untrue. Once she made four women prisoners kneel on the order of the Overseer Gollasch, when the four had been caught stealing. She did march a party to the gate but none of the party fell down, and she never kicked anyone.

55. *Gertrud Sauer*

The accused Sauer said that she came to Belsen on the 28th February, 1945. She worked, among other places, in kitchen No. 2 of the men's compound and in the women's compound No. 3. She was in kitchen No. 2 on the 9th, 10th and 11th April taking the place of Hempel who was ill. She had hit prisoners near kitchen No. 2 with her hand when she caught them stealing vegetables. She always endeavoured to make the regulations more lenient for prisoners. She never saw a riding whip at all. She merely

⁽¹⁾ See pp. 15, 16, 31 and 35. ⁽²⁾ See pp. 22 and 24.

slapped girls' faces and only when she caught them stealing vegetables. She denied that she ever pulled anyone's hair or that Sunschein⁽¹⁾ was beaten in her kitchen. She never beat girls without reason. Neuman's story⁽²⁾ was untrue; the accused had never been near No. 1 kitchen and never worked in kitchen No. 3. She never beat anyone with a stick. Before relieving Hempel she was in charge of the bath-house. She testified that Hahnel was never seen by her to take a bath parade, and was never in charge of the bath-house.

56. *Hilda Lisiewitz*

This accused said that it was the 3rd March, 1945, when she arrived at Belsen, where she performed various functions. From the 13th to 20th March, she was employed in bringing vegetables to various cookhouses, and later spent a week in the cookhouse No. 1 in the men's Lager. She denied the truth of Almaleh's and Siwidowa's allegations.⁽³⁾ If she found anyone stealing she took what they had from them and smacked their faces. Her Kommando had enough to eat, but she admitted they did eat raw turnips. She had no stick. Working under her in her working party were only Russians and no Greeks.

She said she knew Pichen. When in kitchen No. 2 he did not carry a pistol, but kept it in a locked drawer. His relations with the internees in the kitchen were good and she had never heard of his shooting anyone.

57. *Johanne Roth*

Roth claimed that she came to Belsen on the 27th January, 1945, as an ordinary prisoner and remained so throughout her stay in the concentration camp. She first went to Block 213 and was in the block for six weeks, and was transferred to Block 199 on the 6th March, 1945, and made a Stubendienst, a sort of orderly. She did not want the job and she did not ask for it, because it was a hard and thankless task. She had to get up at six in the morning and go to roll-call but the Block Senior was responsible for discipline on these occasions. Block 199 received sufficient food; they received more soup than other blocks, because the kapos claimed for 300 persons when they should have claimed for only 250.

Her answer to Helene Klein's allegation⁽⁴⁾ was that she, Roth, was never a night guard. She remembered Ida Friedman in Block 199 but she never beat her and had nothing to do with her death. Friedman was a Polish Jewess and the accused saw her two days before the British arrived. The allegations of Rorman and Rosenzweig⁽⁵⁾ were untrue: she never beat prisoners for no reason at all, and never beat any old woman who was lying in bed. She did beat people in Belsen, mostly during the food distribution, when they tried to get a second helping, or crowded round the containers. She never carried a stick or rubber truncheon. She only beat prisoners with her hand, except on occasions, when she used a small leather belt.

58. *Anna Hempel*

Hempel said that she arrived at Belsen on the 17th February, 1945. She

⁽¹⁾ See p. 17. ⁽²⁾ See p. 31. ⁽³⁾ See pp. 23 and 34. ⁽⁴⁾ See p. 20. ⁽⁵⁾ See pp. 32 and 33.

was soon sent to kitchen No. 2 in the men's compound, of which Heuskel was in charge. She was an Overseer working at first alone and later joined by Overseer Rosenthal. In the cookhouse there were about 34 female internees and 18 men cooking for 17,000 people. The rations were not enough for the prisoners. She approached Charlotte Klein, who worked in the bread store, and got some extra bread from Klein. She also secured some extra ingredients from Muller, so as to make the soup thicker. She had to work for 14 or 16 hours every day in the cookhouse. She stopped working in kitchen No. 2 on the 8th April, because she was ill with typhus, and she went to hospital on 9th April, 1945, in the Wehrmacht barracks. She was arrested there on the 16th April, 1945. Sunschein's evidence was untrue: she never beat anyone in her private room, because she did not have one. She never had a rubber truncheon. She agreed, however, that when it was necessary in cases of stealing she beat prisoners, but not the staff in her kitchen. They worked very well, but she had to drive them hard. If she caught any of them stealing they asked her not to send them away from the kitchen but to beat their faces. She beat internees with her hands except in the case mentioned by Triszinska.⁽¹⁾ Regarding Triszinska's evidence she said that she did catch a man stealing turnips. She hit him with a stick, but she did not call for anyone else and he did not collapse. The evidence of Helene Klein⁽²⁾ was quite untrue and the accused never had any riding-whip. Diamant's evidence⁽³⁾ was also quite untrue. Mathes was never employed in No. 2 cookhouse; he was employed in the bath-house.

59. *Stanislawa Starotska*

This accused claimed that she was arrested on the 13th January, 1940, by the Gestapo because she was a member of the Polish underground movement. On the 28th April, 1942, she was sent as a prisoner to Auschwitz No. 1; in Auschwitz she was badly treated and almost starved to death. She eventually became a Block Senior because of her knowledge of German, and in August, 1942, she went to Birkenau. Conditions at Birkenau were terrible. There was no light and no drainage system throughout the autumn and winter. She continued to be Block Senior for some time, going from block to block, and she found it difficult to control some of the inmates because they were criminals who had long sentences to serve and had no moral principles. She tried persuasion, but that had no effect; she had therefore to resort to beating.

She ceased to be a Block Senior on July 1943, when she went to hospital, but when she came out of hospital she was promoted to Camp Senior in August. She did not look forward to the job, but she put herself forward in an attempt to help her fellows. Her friends also advised her that this step would help in the fight against the Germans. She said that officials were punished like anybody else if they did not do their duties, including the Block Seniors. She agreed that she was responsible for making arrangements for parades. At gas chamber parades, a doctor chose the sick and the unfit cases. Her duties were the same in almost all the parades in which she took part, gas parades or otherwise. She had to look after the parade and

⁽¹⁾ See p. 35. ⁽²⁾ See p. 20. ⁽³⁾ See p. 25.

see that the prisoners stood properly and were behaving themselves. During these selections she did not help the staff of the concentration camp. She did everything she could to help prisoners. She tried to secure that people in hospital were not called out on parade, she helped hard-worked prisoners to get extra food, she helped certain prisoners to obtain easier jobs and she used to change Block Seniors or kapos if they were cruel. Prisoners in Auschwitz were badly treated and had lice and bad accommodation. Most of the Block Leaders carried sticks and used them, and some of the aufseherin had whips and sticks. Dogs were set on the prisoners; Borman regularly walked around with a dog.

Starotska mentioned what she called "general selections". If only Jews were ordered to parade everybody knew what was happening and, therefore, there was utter chaos and confusion. It was, therefore, the practice later to turn out the whole camp with the Jews on one side and Aryans on the other and only Jews were selected.

Of Szafran's testimony⁽¹⁾ she said that she could not, on sentimental grounds, apart from humane reasons, make selection on her own, and that she had not the requisite authority. She might have selected a working party or found out which prisoners had scabies or some lesser skin disease. This action might have confused the witness. It was true that beatings were frequent, but she only resorted to them in Block 21 when she was a Block Senior. She never beat anyone while acting as Camp Senior and it was then that she worked on bath parades. Glinowieski⁽²⁾ could not see her on parades because the parades of men took place at the same time as the women. Regarding Rozenwayg's evidence,⁽³⁾ the accused admitted that she wrote down the numbers of prisoners selected for the gas chamber. She tried to secure this job, which was normally done by a clerk, as she knew she could strike out some numbers from the list, not very many but just a few. Her comment on Lasker's accusation⁽⁴⁾ was that she had to pretend to work for the authorities in order to gain their confidence. Her activities were really a fight for the prisoners but she could not tell the prisoners so.

Rozalja's statements⁽⁵⁾ were wholly inaccurate. It was a great exaggeration for Szymkowiak to say that she beat people on every occasion, or without grounds. She never denounced prisoners to the German authorities because she knew that hundreds would be punished by a sort of collective punishment. She admitted to making prisoners kneel on parades but this was done on a superior order. Of Synowska's evidence⁽⁶⁾ she said that everybody knew that there was a deep ditch full of water in advance of the electric wire. The wire was not electrified by day, and it would be most difficult to get to at night because of the ditch. She denied that she beat prisoners until they collapsed, but she might have slapped their faces when it was necessary. It could have happened that she deloused a woman's hair by putting her head in water.

She came to Belsen on about the 4th or the 5th of February, 1945. She was Camp Senior of the large women's compound from the 5th or 6th onwards. Block 213 was never empty. She never heard of a Block Senior being beaten in Block 201 and she would certainly have heard if this had

⁽¹⁾ See p. 13. ⁽²⁾ See p. 15. ⁽³⁾ See p. 16. ⁽⁴⁾ See p. 21. ⁽⁵⁾ See p. 32. ⁽⁶⁾ See p. 35.

happened.⁽¹⁾ Mathes was responsible for part of the bath-house at Belsen. He was employed there, but she could not say for how long; at any rate until the 10th April, 1945. She said she knew Kopper at Auschwitz and she found Kopper at Belsen as Block Senior, she thought, of Block 205. Kopper was not suited to be a Block Senior as she was on the point of a nervous breakdown owing to her long stay in the camps. Starotska asked Gollasch to put her on camp police and this was done.

Hoessler, as Lagerführer at Auschwitz, looked after the interests of the prisoners very well.

60. *Anna Wojciechowska*

This witness said that she was a prisoner who was selected for the gas chamber and sent to Block 25. After the selection Starotska approached her, and asked why she was not with her Kommando. The witness said it was because she had no shoes. Whereupon Starotska took 20 girls, including the witness, to the stores and issued them with shoes and they were sent to work. Further, she was caught by the accused reading a letter for which she would have been punished if caught by the camp staff, but Starotska advised the witness to destroy this letter and to run away.

61. *Krystyna Janicka*

This witness said that Starotska behaved very well in Auschwitz. She was very energetic and tried to maintain order and obtain a fair distribution of food. Once when the prisoners were ordered on to parade the accused told the witness and others to look their best and, as a result, no one was selected from their block. From other blocks many people were chosen and later it was found that the parade was for the gas chamber.

62. *Stanislawa Komsta*

Komsta said that she attended many selections and that Starotska was always present as Camp Senior. She never held selections on her own initiative; she was not entitled to do so as she was also a prisoner herself. On the contrary, when a selection was held she was able to save some people chosen during these selections; she did her best to do so. The accused did beat people but such action was necessary under the circumstances.

63. *Sofia Nowogrodzka*

This witness said that Starotska behaved very well to the internees, especially to the Poles. Nowogrodzka remembered when 20 Polish women were chosen for the gas chamber. They were sent to Block 25 and Starotska went there and brought those women back. She never made selections on her own initiative but had to attend parades to write down the numbers of those selected. The accused obtained permission for prisoners to wear their winter clothes for a longer period.

⁽¹⁾ See p. 34 for an accusation made against Otto.

64. *Antoni Polanski*

This accused, a Pole, claimed that he was sent to Belsen as a prisoner, arriving about 10 or 11 o'clock at night on the 7th or 8th April, 1945. He was in Block No. 12 for two days and then went to Block No. 16. He took no part in helping to get people on to parades, and he did not help in the food distribution. The people in Block No. 16 were engaged in digging graves, and when these were ready they all had to drag corpses to the graves. Deutche's story⁽¹⁾ was false because during his stay in the camp he never beat anyone and held no office. Burger's and Sander's⁽²⁾ evidence was also untrue.

Aurdzieg, he thought, distributed food very fairly and he had never known of his demanding any money for soup. His block was No. 16. The only roll-calls which took place in either Block 12 or Block 16 were in the latter place before the prisoners left for work on mornings.

65. *Ziegmund Krajewski*

This witness said that he had known Polanski in Auschwitz and was with him in a number of concentration camps. He corroborated that the accused was in Block No. 12 for two or three days, perhaps four, and then in Block No. 16 until the liberation. The accused, he said, "did not do anything". He and the accused were both dragging corpses themselves on the 12th, 13th and 14th April.

66. *W. Rakoczy*

Rakoczy said that in his experience Polanski behaved very well. The accused was a few days in Block 12 and then went to Block No. 16, holding no functions in the camp at all as far as the witness knew. He and the accused both took part in dragging the corpses.

67. *Lt. M. Tatarczuk*

This witness claimed to have known Polanski very well because they were in the same block. He was a decent man, a good friend and self-controlled, and he used to try to help people by getting extra food from the Block Senior. The witness corroborated the statement of the accused that he lived in Block No. 12, then Block No. 16. He had never heard of any allegation made against Polanski, even while he, Tatarczuk, was a member of a Polish committee formed, after the liberation, to investigate alleged atrocities in the camp.

68. *Helena Kopper*

This accused stated that she went as a prisoner to Auschwitz on the 21st or 22nd October, 1942, and that she was there until the 20th December, 1944. She was employed "in a normal block" at Auschwitz for two weeks and then was sent to the punishment Kommando, where she stayed up to the time when she went to Bergen-Belsen. She was not too badly treated therein because she knew what she should do and should not do.

⁽¹⁾ See p. 25. ⁽²⁾ See pp. 24 and 33.

After moving to Belsen on the 27th or 28th December, 1944, she was first sent to Block No. 27 in camp No. 1, and then to Block No. 205 when Kramer came. She was Block Senior until the 5th February, 1945. She was too nervous to carry on the work and therefore asked the Camp Senior to remove her. She was then appointed a camp policewoman and she remained in the police until the 1st March, 1945, when she received a beating from Ehlert and she was taken to prison. She was in prison with Francioh and left prison with him on the 25th March. After her release she became an ordinary prisoner until the British came. She went to Block No. 224 and she was completely exhausted and ill. When she got to Block No. 224 she became Block Senior. In Block 224 the percentage of sick was very high and she persuaded Gollasch to agree to count the strength of the prisoners inside the block instead of having them out in the open; the same had been the case in Block No. 205. She was arrested by the British on the 8th June, 1945.

She admitted that she was an informer and a spy, but claimed that she only informed truthfully. When she saw one prisoner stealing from another she thought it her duty to report the matter.

Guterman's allegations⁽¹⁾ were untrue. The accused said that the deponent was her assistant. During her absence Guterman gave internees water instead of jam or altered the quality of it. Kopper gave her a beating to undermine her prestige. Gollasch was the woman who passed by and made the enquiry when Kopper made the internee kneel. On hearing the explanation Gollasch told Kopper to dismiss Guterman from her job. The next day Guterman became an ordinary prisoner and went to another block. She had to kneel for 20 minutes, and Kopper never beat her, because she was a functionary in the block. Fischer was still alive in Belsen, claimed the accused. The allegations of Synger⁽²⁾ were untrue. Kopper's explanation of the incident related by Koppel⁽³⁾ was that she told Koppel that she could not have any soup but could have a double ration the next day. Koppel became aggressive and Kopper, therefore, had to resort to beating her. Kopper said she was told the next day that she fainted, but it was for a different reason. She put on a light in an air raid and a guard shot into the block.

Bialek's account⁽⁴⁾ was untrue. Kopper denied ever having beaten anyone with a stick. She only used a belt, because she had suffered so much as a prisoner. The belt was a narrow one made of dress material. She had nothing to do with keeping order in alerts. She agreed that she beat prisoners while she was Block Senior of Block 205 when she had to get the prisoners on roll-call, but rarely. She shouted more often. On one occasion only did she order a woman to kneel and she was her own Stubenälteste (Room Senior), Guterman. It was untrue to say that she beat a woman until she died. She caused no harm by her beatings. She denied that she was ever beaten by fellow-prisoners. Of Rosenberg's allegation⁽⁵⁾ Kopper said that at the relevant time she was in prison or on police duty and so had nothing to do with food.

⁽¹⁾ See p. 19. ⁽²⁾ See p. 19. ⁽³⁾ See p. 19. ⁽⁴⁾ See p. 24. ⁽⁵⁾ See p. 33.

Kopper said that she was bitten by Borman's dog, which was dark brown, and whose marks were still on her arm. Kopper made an allegation that she was beaten by Ehlert because she was in possession of leaflets dropped by British planes. She never heard that Otto had beaten anyone. He was the only S.S. man who was good to prisoners. Block 213 was never empty.⁽¹⁾

Kopper said that collective punishments, for a whole block or the whole camp, were commonly inflicted at Belsen; they took the form of deprivation of food.

69. *Vladislav Ostrowski*

This accused, who was born at Lodz, stated that after periods at various prisons and camps he went with a transport to Belsen, arriving there on the 10th April, 1945. He claimed that the whole of his time at Belsen until the British arrived was spent in Block 19, that he was sick throughout the whole time and that he performed no duties but was attended by an internee doctor. The stories of Iwanow, Kalenikow, Karobkjenkow, Njkrasow, Sulima and Promsky⁽²⁾ were, therefore, untrue. If he had no functions to perform in the camp he had no need to try to keep order and discipline and therefore, to beat anyone or get them out on roll-call. He could not influence the distribution of food.

70. *D. Soloman*

This witness said that Ostrowski was ill in Block 19 between arriving at Belsen and the liberation by the British. He had no function but the witness had seen him fetching water to the block because of the lack of a supply.

71. *Medislaw Burgraf*

Burgraf stated that he was born in Poland and was arrested by the Germans in 1940, and was eventually sent to Drütte concentration camp. At this camp he became a foreman, at the end of May, 1944, and his duties were to see that the prisoners worked and that none got away. He left Drütte on the 7th April, and arrived at Belsen about 4 p.m. on the 9th April, 1945. Here he went first to Block 16 and the next day to Block 19. In Block 19 he was employed as an ordinary prisoner, but he was appointed privately by the Block Senior to assist him in the food distribution. He was given the job of stopping prisoners in the block from getting a second helping and of preventing people from other blocks from getting food in Block 19. He did beat people if he had grounds, but he did not admit that he was a kapo at Drütte or a Stubendienst (Room Orderly) at Belsen.

Burgraf did not know a man called Grabonski and he did not know anything about any incident of the kind related by Marcinkowski.⁽³⁾ Marcinkowski came to his block and asked for a second helping of soup; he refused it and then he was told by the deponent that he was a bad Pole because he only looked after other nationalities and not Poles. Marcinkowski became aggressive and Burgraf had to hit him; there followed a fight in which the deponent was beaten. All of Marcinkowski's and Kobriner's⁽⁴⁾ allegations were untrue.

⁽¹⁾ See p. 92. ⁽²⁾ See pp. 27, 28, 31, 32 and 34. ⁽³⁾ See p. 30. ⁽⁴⁾ See p. 29.

72. J. Trzos

This witness said that he arrived at Belsen six or seven days before the British came. He was put into Block 19 and was joined a day later by Burgraf. The latter was first of all in the camp police and later an assisting Stubendienst as well. The accused was very keen on securing order, and therefore, had sometimes to beat prisoners, for instance when they tried to push forward for food. It was difficult to keep people in order at Belsen. They were hungry and even a beating with a stick would not keep them back.

A week before he gave evidence in Court he met the deponent Marcinkowski in Luneburg, and asked him why he was accusing Burgraf. The deponent replied that once, when unloading grenades, Burgraf had hit him in the face. Trzos then said: "For one blow you accuse a man?" and the reply was: "Yes, because apart from that I saw Burgraf hit a man on the arm so that he died". Marcinkowski did not say who the victim was.

The witness said that whenever he saw Ostrowski in hut 19 he saw him lying on a bed in the room where the other prisoners slept. He never saw the accused taking part in food distribution.

73. Antoni Aurdzieg

This accused, a Pole, said that he was sent as a prisoner to Bergen-Belsen, where he arrived on the 22nd or 25th March, 1945. He was put in Block No. 12, where the Block Senior was a French Jew. He stayed in this Block until the British came. One day the Camp Senior, who was not Zoddell, came up and said that he must assist the Stubendienst, especially with sweeping the floor. He also helped to serve the food. He was never Stubendienst or Block Senior.

In Hannover, after the liberation of the camp, he was stopped by the deponent Pinkus,⁽¹⁾ who said to him: "Do you remember me from the camp? You refused to give me a second helping. I did not starve as a result of it, and now I am going to take my revenge." The accused was arrested on the same day, the 4th July, 1945, by the German police. He was taken to prison and there was forced at the pistol-point by two officers who sounded French to make a statement in the nature of a confession, which was quite untrue.

He admitted that he did beat people. The prisoners at the time were like wild animals, and if food was not being distributed fairly they would have killed the functionaries. He never used a bar or a rubber truncheon. The allegations of Pinkus were untrue. The Russian who was mentioned was punished by two strokes for trying to eat part of a body; he was later molested by two gipsies who thought the punishment insufficient. Pinkus had asked for two portions of soup and the accused told him that he was entitled to only one; this was why he had made the allegations against Aurdzieg and "got the others to join him in doing so". The accounts told by Bialkiewicz and Melamed⁽²⁾ were untrue; the accused said that he was too young and too small to kill people.

⁽¹⁾ See p. 32. ⁽²⁾ See pp. 24 and 31.

74. M. Andrzejewski

This witness said that he never saw Aurdzieg in Belsen getting money or jewels in exchange for food. The accused did beat prisoners who were fit and who tried to take food from others who were unfit, but only with his hand. He was sweeping the floor at the other end of the block when the Block Senior and others killed a Russian on the day the British arrived.

75. Hermann Muller

This witness, previously an Unterscharführer in charge of the food stores at Belsen, stated that, according to the records, meat and bread were being sent there even on 11th April.

Grese never had a whip or a stick at Belsen. Cross-examined by Captain Roberts, the witness said that when standing at Block No. 224 one could not see what was happening in kitchen No. 3 because of trees in the way. The distance between the block and the kitchen was 250 to 300 metres. He knew Francioh as the cook in No. 3 kitchen, who up to the 29th March when the witness left Belsen had worked in the cookhouse for two or three days and had then had six days' punishment which started on about the 22nd or 23rd March, 1945. Charlotte Klein did her work well. Muller had to reprimand her because she was too familiar with her bread Kommando and used to give them extra food.

I. THE CLOSING OF THE CASE FOR THE DEFENCE

1. Colonel Smith's Closing Address on Behalf of All the Accused⁽¹⁾

From the outset of the trial the Defence felt the need of the services of an expert on International Law. For instance, they wished to attack the Charge Sheet, but they thought that they could not do so until they had had expert advice.

On the first day of the trial the Court decided that it was desirable to hear the evidence and that they would preserve the right of the Defence to object to the validity of the charge at some suitable time during the proceedings, when the Defence felt competent to deal with the argument in law.

On 27th September, 1945, one of the Defending Officers applied for Colonel H. A. Smith, then Professor of International Law at London University, to be made an additional Defending Officer.

The spokesman of the Defending Officers explained that if this application succeeded, Colonel Smith would become a Defending Officer. At a time to be arranged, he would exercise the right, which the Defence had reserved, and which had been granted, to object to the charges as disclosing no offence. He would also deal with certain other legal matters on behalf of all the accused.

⁽¹⁾ Since Colonel Smith's remarks were made on behalf of all the accused no reference is subsequently made in these pages to points at which Counsel defending individual accused adopted, *in toto* and without further treatment, Colonel Smith's remarks on various questions discussed by him.

Reference was made by the Judge Advocate to Regulation 6 of the Royal Warrant, according to which the accused was not entitled to object to the President, any member of the Court or the Judge Advocate, or to offer any special plea to the jurisdiction of the Court. He added, however, that he was not clear what the particular objection of the Defence was going to be. The spokesman of the Defence replied that Regulation 6 had been present in their minds, and that the original application was to reserve the right to object to the charge, on the grounds that it disclosed no offence. It was upon Rule of Procedure 32 that the argument would be based.⁽¹⁾

The Judge Advocate quoted the marginal note to Rule 32 (*Objection by Accused to charge*) and added that to Rule of Procedure 34, providing for another type of objection, there was a marginal note *Special Plea to the Jurisdiction*. The wording of Regulation 6 of the Royal Warrant was the same as that in the marginal note to Rule of Procedure 34. There seemed then to be some force in the argument put forward by the Defence and adopted by the Prosecution, that the Defence could attack the charge, but could not attack the jurisdiction of the Court to try war crimes.

The Court decided that it was prepared to hear Colonel Smith as a Defending Officer representing all the accused, provided that the Defending Officers first obtained the sanction of the Convening Officer to this request. An order adding Colonel Smith as an additional Defending Officer was made by the Competent Commander and the former delivered his address immediately after the close of the evidence for the defence.

Colonel Smith began his address by reminding the Court that it was concerned solely to determine whether the accused were guilty or not guilty of a war crime. Any decision that one or more of the accused were not guilty of a war crime under the Law of Nations did not prejudice any future proceedings in which they were charged upon the same or similar evidence in Courts administering other law. Every case which originated in Poland, at Auschwitz, could be tried by a Polish Court as an offence against Polish law. It could also be tried under German law under the control of the Military Government.

Furthermore, no acquittal could in any way limit the responsibility of the German Government. The German Government remained liable, under Article 3 of the Hague Convention No. IV, for all the acts done in its name, and the German Government was responsible for paying the fullest compensation to every non-German subject who had suffered in the concentration camps, or to the dependants of those who had perished.

Expounding his view that the Court administered only International Law, Counsel submitted that the Court was exactly similar to a Prize Court which sat in time of war to decide upon the legality or illegality of captures made by His Majesty's ships. The Prize Court was constituted by the King's Commission, it was a British Court, but did not administer a law laid down

⁽¹⁾ Under Rule 32 of the Rules of Procedure, 1926, which, under Regulation 3 of the Royal Warrant, also applies in Military Courts for the trial of war criminals, the accused, when required to plead to any charge, may object to the charge on the grounds that it does not disclose an offence under the Army Act (in this case under the Royal Warrant) or is not in accordance with the Rules of Procedure.

by the King or by Parliament; it administered the Law of Nations. The present Military Court was constituted by Royal Warrant which laid down the procedure to be followed by the Court, just as the Order in Council laid down the procedure to be followed by the Court of Prize. But neither Court took its law, as distinct from its procedure, from the King or from Parliament. Parliament could intervene, but Parliament did not. The principle involved was made clear in the case of "The *Zamora*" ([1916] 2 A.C. 77), in which the question in issue was whether the Prize Court was bound by certain rules laid down by Order in Council, and the Privy Council said that the Prize Court could not be bound by an Order in Council so far as the law was concerned; it could be bound like every other Court by Acts of Parliament, but there were none in issue. So too it was clear that the present Court must use its own judgment independently of the *Manual of Military Law* or of any other such authority.

The next point which Counsel emphasised was that, generally speaking, it was a fundamental principle of all criminal law in civilised countries that a man could not be punished for a crime which was not definitely a crime under the relevant law at the time when the act in question was committed.

No one would disagree with that outside Germany; indeed, the first law of the Military Government had laid this down: "No charge shall be preferred, no sentence imposed or punishment inflicted for an act, unless such act is expressly made punishable by law in force at the time of its commission."⁽¹⁾

The argument that International Law was progressive and that, whatever it was according to the books, the Court should if desirable create a new precedent was most dangerous. By a law of 10th May, 1935, Hitler, very impatient with the irritating tendency of the German judges to decide cases according to law, laid it down that people were to be punished, although they committed no offence against the law, if what was called sound public opinion demanded their punishment. That German law meant the abrogation of the rule of law. The Court was in danger of following the same course. It was no function of the Court to ask itself whether the law was a good law or not, or whether it was adequate. Drawing a contrast with the forthcoming trial at Nuremberg, Counsel claimed that nobody pretended that that was to be a trial under the law existing in 1939. It was a special case governed by special international agreement of all the Powers concerned. The present Court, on the other hand, did not rest upon any international agreement; it was constituted by purely British authority, and its duty was purely to administer the law as it found it at the time of the alleged offence.

Turning to his main argument, Colonel Smith said that he would deal, first with the question of what is and what is not a War Crime, and secondly, with the question of responsibility.

The first problem was what is and what is not a War Crime? In every crime one had to consider three elements: the Act, the Perpetrator, and the Victim. In each case the Prosecution had to prove the accused guilty in all three respects. In most cases the last two elements did not matter, but there

⁽¹⁾ The first sentence of paragraph 7 of Article IV of Military Government Law No. 1.

were some crimes which could be committed by some people only, and certain crimes could only be committed against certain people.

Pursuing his argument along these lines, Counsel asked first what acts constituted war crimes? He directed the attention of the Court to Chapter XIV of the *Manual of Military Law*. That chapter was technically not an authority in the sense in which lawyers understood the word; that is to say, as something which was legally binding. It was not meant for lawyers but for serving officers, as a practical working instruction. He thought, however, that for the most part it was perfectly sound in law. Paragraph 441 of Chapter XIV of the *Manual* which was substantially the same as the relevant provision in the American Basic Field Manual, *Rules of Land Warfare*, said: "The term 'War Crime' is the technical expression for such an act of enemy soldiers and enemy civilians as may be visited by punishment on capture of the offenders. It is usual to employ this term, but it must be emphasised that it is used in the technical military and legal sense only, and not in the moral sense." Paragraph 442, which enumerated four classes of war crimes, in sub-paragraph 1, specified: "Violations of the recognised rules of warfare by members of the armed forces."

When one read "Violations of the recognised rules of warfare by members of the armed forces" and then read paragraph 443, which gave a long list of examples of violations, it could be seen that they had only one thing in common; they all had something to do with war. They were all concerned with military operations, ending with treatment of the inhabitants of occupied territory. Counsel claimed that when the Prosecutor quoted Paragraph 442 (1) he had overlooked the words "by members of the armed forces".

In its general arrangement, the *Manual* corresponded, broadly speaking, to the rules of warfare attached to the Hague Convention No. IV Relative to the Laws and Customs of War on Land. The greater part of this chapter was devoted to explaining what could and could not be done in actual operations. If the chapter were read as a whole, it could be seen in the right perspective. The only purpose in making a war crime punishable on the individual was to secure legitimate warfare; without this terror hanging over individuals there was no certainty that mere international action on the intergovernmental level would secure legitimate warfare.

Colonel Backhouse had quoted paragraph 383 of the *Manual*, which said: "It is the duty of the occupant to see that the lives of the inhabitants are respected, that their domestic peace and honour are not disturbed, that their religious convictions are not interfered with. . . ." That passage was a paraphrase of Article 46 of the rules attached to the Fourth Hague Convention. He had failed to see that the words "It is the duty of the occupant" refer only to the enemy state. Throughout the Hague Convention the words: "The occupant" were always used in the sense of the enemy state. When it was a question of making a case against individuals these provisions concerning the duties of the occupant were entirely irrelevant. It was the duty of the occupying power to see that everything was done properly in occupied territory; and if the occupying power failed in that duty it had, under Article 3 of the Convention, to make compensation.

It was easy to misunderstand these sections if one did not bear in mind

that the primary purpose of the rules was to secure the responsibility of the enemy government, and that it was only in certain exceptional cases, which were carefully defined in the *Manual*, that responsibility rested upon the individual.

These paragraphs were all bound together by the common principle that all the acts cited were directly connected with the operations of war, and the purpose of the punishment of war crimes was to secure the legitimate conduct of the operations of war. In the present trial, however, Counsel submitted that the Court were dealing with incidents, which certainly occurred in time of war, but which had no logical connection with the war whatever. They were done in accordance with what was begun in peace as a peacetime policy and was intended to be carried on as a permanent and long-term aim until its purpose was achieved, the extermination of the unfortunate races involved. The only difference which the war made to this long-term policy was to increase the geographical area over which it could operate. In what way did it assist the security of the British forces to punish someone who had been guilty of misbehaviour in a German concentration camp?

The American Manual was in this respect substantially the same as the British, and there seemed to be a substantial general agreement among the various military manuals as to what a war crime was. They all had this in common, that it must be a crime connected with the prosecution of the war in some way or another, either with hostilities which were still proceeding, or with resistance against occupation in a territory under Military Government.

Counsel referred to the fact that the Court was, under Article 8 (iii) of the Royal Warrant, instructed to take judicial notice of the Laws and Usages of War. He suggested that what he had been trying to define was in fact what every soldier would regard as a war crime.

When a member of the Court pointed out that in modern total warfare between nations everybody was involved, Colonel Smith replied that the point which he had been explaining was a completely different matter from the distinction between combatant and non-combatant. He agreed that the circumstances of modern war made it much more difficult to draw the old distinction between combatant and non-combatant. It was, however, irrelevant whether the perpetrators were combatant or non-combatant. The important point was that whatever was done in these camps had nothing to do with the operations of the war, because it began long before the war and would have continued long after it. Probably the tasks on which the unfortunate people were employed had something to do with the war effort because all work was connected with the war effort, but the accused were not being tried in connection with tasks performed, but with ill-treatment in the camps, which was entirely another matter.

Colonel Smith dealt next with the positions of the perpetrator and the victim. Concerning the perpetrator, he drew the attention of the Court again to paragraph 442 of Chapter XIV of the British *Manual* (which was substantially identical with the provision contained in the American Manual) of which the first sub-paragraph was: "Violations of the recognised rules of warfare by members of the armed forces". Civilians could commit war

crimes such as espionage, war treason, and marauding, and a civilian could be guilty of the murder of a prisoner of war, but that was all. If he committed any of these acts he would be committing an act of hostility and an illegitimate act of hostility, for which he could be punished under the second sub-paragraph⁽¹⁾, but none of the acts charged in the charge sheet before the Court, except possibly one, came under that head.

In one of the few instances charged where the victims were prisoners of war, a British subject who had been captured as a prisoner of war was transferred to the concentration camp. This was a clear international wrong, but the wrong consisted in ceasing to treat him as a prisoner of war, in taking him out of the camp where he was protected by the Geneva Convention, and putting him in a concentration camp where he was exposed to the same treatment as any other inmate. The responsibility rested with those who sent him to Auschwitz or Belsen, but the responsibility of the people at Auschwitz and Belsen was the same in regard to that man as to any other inmate. Counsel did not know whether they even knew he was a prisoner of war. In any case they had no option but to treat him as anyone else. That was why he emphasised the importance of drawing a clear distinction between the responsibility of the German state and the responsibility of the individual in each particular case.

The victims must be Allied nationals. It was no part of the business of the Court to punish crimes committed by one German against another, or to punish Germans for crimes committed against their allies. There were references to Hungarian and Italian victims who were certainly not Allied nationals, even though some of them had changed sides. The words "Allied Nationals" had a definite meaning and related only to those who were nationals of the countries known as the "United Nations".

Among the victims, Poles were, he thought, in the large majority together with some Czechoslovakians and possibly Austrians. Paragraph 443 of the *Manual* included among war crimes the ill-treatment of the inhabitants of occupied territory. The British Government regarded Poland and the greater part of Czechoslovakia as territory occupied by the Germans in the sense of the Hague Convention. Yet what were the accused to do? Should they obey the law of their own country or act upon International Law?

Counsel submitted that wherever there was a conflict between International Law and the law of a particular country it was the duty of the citizen of that country to obey his national law. For that there was overwhelming legal authority from which he selected two cases. The first was that of *Mortensen v Peters* heard in 1906 in the Scottish High Court of Justiciary (8 Sessions Cases, 93: 43 Scottish Law Reports 872). The British Parliament had passed an Act prohibiting certain forms of fishing in the whole of the Moray Firth in Scotland, including a considerable area beyond the recognised limits of territorial waters. A Norwegian fished outside territorial waters, but within the area covered by the Statute. He was convicted in a Scottish Court and the High Court of Justiciary on appeal unanimously held that they were not concerned as to whether the Statute violated Inter-

⁽¹⁾ Which specifies that war crimes include, "Illegitimate hostilities in arms committed by individuals who are not members of the armed forces."

national Law or not. The Law of the land, expressed in an Act of Parliament, was binding on the court and they had to uphold the conviction. Counsel commented that if Parliament inadvertently overstepped the limits of International Law that was a matter not for the individual citizen or judge, or policeman, but for discussion between the governments concerned.

The facts of the second case, *Fong Yare Ting v. United States* (93,149 United States Reports 698) heard by the Supreme Court, were that Congress passed legislation restricting Chinese immigration in direct violation of a Treaty with China. The decision was that the provisions of an Act of Congress passed in the exercise of its constitutional authority must, if clear and explicit, be upheld by the Courts, even in contravention of the stipulations in an earlier Treaty.

The attitude of the German Courts was exactly the same. The principle that where there was a conflict between International Law and municipal law the citizen was bound to obey his municipal law did not diminish the responsibility of the State towards the offended State for its failure to make its internal law correspond with its international obligations.

Naturally Great Britain did not recognise the annexation of Poland or of the greater part of Czechoslovakia, but by German law, which Kramer and all the other defendants had to consider, part of the western half of Poland was German territory; it was formally annexed to Germany. The annexation of the western part and the establishment of the so-called "General Government" in the eastern part of German-occupied Poland were both equally permanent; the Polish State, from the German point of view, had ceased to exist, and German law with minor variations was equally applied to both. Every German in those territories, including Auschwitz which was in the annexed part, was bound by German law. It was no longer temporarily under military occupation in the sense of the Hague Convention. German law was applied by German authority, and the Polish State and Polish nation had ceased to exist.

It might be that the annexation was premature. A precise parallel had occurred during the South African War. In May, 1900, about eight months after the beginning of war, the British Government prematurely published a proclamation annexing permanently the Transvaal and the Orange Free State. Would any officer of the Court, if he had been an officer serving in South Africa at that time, have ventured to say to his superior: "I am afraid the Government has been premature in annexing these countries, and I am afraid I cannot obey your orders"? They would, suggested Counsel, have had to obey the articles of the proclamation and leave it to the higher authorities to settle the question in the normal way on the international level.

So far as all the accused were concerned, Auschwitz was Germany, and the people in it were German subjects. They were not German citizens because the citizenship in Germany belonged to a privileged class by virtue of the Nuremberg law of 1935, which restricted German citizenship to pure Germans, but they were subject to the full force of German law, and owed allegiance to Germany. This analysis applied also to Czechoslovakia. The dismemberment of Czechoslovakia was piecemeal but the substance of the matter was the same, and from the point of view of any German that country,

except the parts ceded to Hungary or Russia, was German territory either by direct annexation or by a Protectorate; between which there was only a technical difference.

It might be argued by the Prosecution that by the books or by the authorities the alleged acts were not war crimes, but that it was necessary to bring the law up to date. International Law was not static; it was continually developing. It had to adapt itself to meet new situations as they arose. Therefore, the Prosecution might say, something which was not a war crime according to the books and according to the precedents of history was about to be a war crime from the time the Court gave its decision.

Counsel admitted that International Law was not static, but submitted that its development always took the form of the application of accepted principles to new situations and never of a reversal of these principles. For instance, at the beginning of the war Britain had made a proclamation which treated almost everything as contraband. Certain neutrals objected and pointed out, quite rightly, that Britain had never gone so far before. The answer which his Majesty's Government put forward was also perfectly sound. The principle of contraband, however, argued Counsel, was that the belligerent was entitled to stop and capture any cargoes which were going to help its enemy in carrying on the war, and the technical and physical requirements of modern armed forces had brought practically every article of commerce within the principles of contraband.

Did the same principle apply to the present case? Could it be said that some circumstance had arisen which compelled the Court to treat as a war crime something which had nothing whatever to do with the war? The Court was not faced with a new problem. The facts, unfortunately, were not new except in their intensity and atrocity and if it were said that modern International Law ought to punish maladministration in concentration camps in a country conquered, the Court was faced with the fundamental principle that it must not make its law after the event.

Turning to the question of individual and state responsibility, Counsel asked whether the accused could be individually punished for the various things they were accused of doing. In International Law the general principle was that the State and not the individual was responsible. For an example, when a British ship made a capture which was subsequently proved to be illegal and was condemned as such by the Prize Court, the result was not that the captain of the vessel was punished. Instead, the Government must pay compensation for the ship and its cargo. The general principle involved was well established and for obvious reasons. To it there were a few exceptions, of which one was that of the pirate. International Law had always permitted a pirate to be punished by anybody who caught him because he was an enemy of the human race. There were other exceptions created by a large number of treaties which dealt with such things as the opium trade and white slave traffic. Another exception was that of the war criminal, the reason being that in the absence of a right to punish a war criminal on the spot it would be impossible to carry on operations of war in security. No such reason applied to the case now before the Court. It was dealing with these cases only after the war was ended, and nothing that had happened in

concentration camps had affected British operations in the slightest degree while the war was still in progress.

Counsel next suggested that, in so far as the accused obeyed orders, all these orders were legal. There had been in Germany a most extraordinary situation in which there was not and could not normally be any conflict between a legal executive order and one illegal in the sense that a law did not permit it. In the very first stages of Hitler's regime the Reichstag abandoned all its powers and Hitler became the Executive and Legislator in one. Not only did Hitler himself combine all these powers but he also delegated them to certain persons who were directly responsible to him. The orders of each of these had the force of law within his limits, and among their number was Himmler. By various stages Himmler became head of the police, including the Gestapo and S.S., and in 1943 he became Minister of the Interior. Under the German legal framework he could issue an order which as such had the force of law. That was reinforced by a law of 10th February, 1936, which put the Gestapo and, in fact, all police activities beyond the reach of the law in so far as they were of a political nature. The substance of it was that no action undertaken by the Gestapo or by any police, in so far as it had a political character, was subject to any control of the courts; and, Counsel commented, the word "police" had a wide meaning in German. Neither could any police action be questioned by anybody except at the peril of his life. Counsel could not produce a law legalising the gas chambers at Auschwitz, but submitted that all that was needed was an order from Himmler saying: "Have a gas chamber". That order was a law which every German had to obey in so far as it concerned him. In the case of the average German it was impossible to have the kind of conflict which might arise in England, where a man might question the order of his superior officer and say: "You cannot give me that order under the Army Act."

Kramer had stressed the fact that all decisions on matters of policy, including those regarding the gas chamber for instance, came from above, that he was a mere administrator who carried on the routine work of the camp, and that it was outside his power to decide, for example, who was to be put into the camp or taken out of the camp, for death or for any other purpose. Kramer's evidence on this point was not, Counsel believed, contradicted anywhere.

At Auschwitz, Kramer was merely the head of one section of this vast camp. Colonel Smith submitted that from the evidence it seemed that the Kommandant of the camp held a very humble rank indeed, and, *a fortiori*, that all the people under him were nothing more than the humblest kind of administrators.

Turning to the defence of superior orders, Counsel pointed out that the original text of paragraph 443 of the *Manual of Military Law* stated: "It is important, however, to note that members of the armed forces who commit such violations of the recognised rules of warfare as are ordered by their government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress which are dealt with in this chapter." In April, 1944, the provision was altered, so as not

to destroy, but greatly to weaken, the defence. Counsel submitted that the original text was right and the amendment wrong, and repeated that the Court was its own judge of law and was not bound to take it from the War Office, the Privy Council, or any other authority. The original text was in accordance with the ordinary experience of the necessities of military discipline and was, moreover, in precise agreement with the American Manual. In paragraph 347 of the American Manual it was said that "Individuals of the armed forces will not be punished for these offences in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall". It would surely be most unfortunate if the Court were to condemn people, in cases where the defence of superior orders was pleaded, by virtue of an amendment to the British *Manual*. The text was at variance with the American and other official manuals, as a result of a change introduced in April, 1944, whereas the dates in the Charge Sheet began in October, 1942.

2. *Major Winwood's Closing Speech on Behalf of Kramer, Dr. Klein, Weingartner and Kraft*

Major Winwood did not dispute the fact that Kramer, Klein and Weingartner were for certain periods members of the staff at both camps and therefore, to a certain degree, responsible for their administration. The degree of their responsibility should be considered according to the period during which they were at the camps and the positions which they held. He would, however, invite the Court to say that Kraft was never at Auschwitz, that he spent three days in the Wehrmacht barracks at Bergen, and that he was never a member of the staff of Belsen concentration camp. Any remarks that he would make with regard to the conditions and responsibility at Auschwitz or Belsen should therefore be considered as confined to Kramer, Klein and Weingartner.

He drew a distinction between Auschwitz and Belsen. At Auschwitz thousands of people were killed in the gas chamber; at Belsen thousands of people died.

Counsel submitted that orders regarding the gassing of victims at Auschwitz came, not from Kramer as Kommandant of Birkenau but from the Kommandant of Auschwitz No. 1. There was a political department at Auschwitz No. 1 which was responsible for the incoming transports and there was evidence that a member of this department used always to be present at the selections of the incoming transports. The political department was the organisation responsible within the camp Auschwitz, under the Camp Kommandant of Auschwitz, for bringing internees into the camp and for their ultimate disposal. Over this disposal, Kramer had no authority, and his real position should be compared with that of a Commanding Officer of a transit camp, whose responsibility was confined to the administration of the people inside the camp until a posting order was received. Reference was made to the evidence of Kramer, Dr. Klein, Dr. Bendel and Hoessler in this connection.⁽¹⁾

⁽¹⁾ See pp. 20, 36, 39, 41 and 42.

On behalf of Klein, Counsel pleaded superior orders. The accused had admitted that, acting on orders by his superior officer, he made the selections of the incoming transports. He further said that he never protested against people being sent to the gas chamber, although he had never agreed with it. One could not protest when in the Army. The order which he was given and which he carried out, was in itself lawful, namely to divide prisoners into those fit for work and those unfit for work. If he had refused to make the selections himself other doctors would have done it. A British soldier could refuse to obey an order and he would face a Court Martial when he had an opportunity of contesting the lawfulness or unlawfulness of the order which he had been given. Dr. Klein had no such protection.

The names of many doctors had been mentioned in connection with experiments but nowhere had the name of Dr. Klein been mentioned, and he himself had said that he had no direct knowledge of such experiments.

Klein had said that the actual selecting was done exclusively by the doctors. Kramer admitted that he often, in the course of duty, stopped and watched the selections, and he denied categorically that he himself made the selections, and he also denied that on behalf of his S.S. staff.

As to the extent of Kramer's responsibility, Counsel said the quarter-master side of the administration of Birkenau was carried out by Auschwitz 1. The issue of food, clothing and everything else was the responsibility of the Kommandant of Auschwitz No. 1. What could be laid at the door of Kramer was what actually happened inside Birkenau from the point of view of the administration of that camp. The evidence of Grese, Borman and Weingartner⁽¹⁾ showed that beating was done without his authority and without his knowledge. Counsel invited the Court to consider the many difficulties that arose in the course of roll-calls and the people who had to cope with them, and to accept Kramer's word against the uncorroborated allegations contained in Rosenthal's affidavit⁽²⁾ Counsel denied that the accused was at Auschwitz at the time alleged by Glinowieski.⁽³⁾

Regarding the allegation of Glinowieski against Weingartner, ⁽⁴⁾ Counsel said that there was evidence that Glinowieski's brother had committed twice in quick succession a very serious offence against camp orders, namely being in possession of unauthorised articles. There was a reasonable doubt that it was Weingartner who was responsible for the beating; the witness had not actually seen it happen.

Counsel asked the Court to remember, when considering Sunschein's allegations,⁽⁵⁾ the difficulties which Weingartner would have to contend with while having to supervise 1,000 women.

The evidence of Hermann, Klippel and of Kraft himself ⁽⁶⁾ indicated that the last was never at Auschwitz.

As to Kramer's responsibility for conditions at Belsen, Counsel maintained that the Court had had placed before it sufficient evidence to have a picture of Belsen during the period of December, 1944, until the liberation, when the order which Kramer established changed into disorder, and when disorder

⁽¹⁾ See p. 42. ⁽²⁾ See p. 33. ⁽³⁾ See p. 15. ⁽⁴⁾ See p. 15. ⁽⁵⁾ See p. 16.
⁽⁶⁾ See pp. 42 and 49.

changed into chaos. Belsen, in itself, was an example of what was happening to Germany as a whole country. More and more people were sent to the camp and Kramer was inadequately provided with medical facilities. Even when he closed the camp in order to avoid further sick people from contracting typhus, which existed in the camp, he was ordered to keep it open. On the 1st March, he realised that nothing was going to be done, and so he wrote a dispatch to his superior officer, Glucks, telling him what the present position was at the date and prophesying a catastrophe. Volkenrath's evidence supported Kramer's claim to have written this letter.⁽¹⁾ Counsel submitted that if blame could be attached to anybody in these chaotic months before V.E. day, it should be laid at the feet of the men at Oranienburg who left Kramer in the lurch.

If the evidence regarding food shortage was analysed it would be clear that the witnesses were nearly all speaking about the period from about the last week in March to the date of the liberation. At the beginning of April, food was scarce in Germany as a whole; transport had broken down and chaos had started. The numbers entering Belsen were meanwhile ever increasing; Muller issued the food to the cooks who cooked it and issued it to the internees, and once it left the cookhouse it became the responsibility of people other than the S.S. to distribute it, as Francioh, Bialek and Szafran had shown.⁽²⁾

The Court had heard that when Kramer came to Belsen the roll-calls began. Roll-calls were a part of concentration camp life and it was the only way of being able to make out a strength return for rations, and the return which had to go to Oranienburg, especially when transports were coming in at the rate at which they were coming in. Counsel pointed out the evidence of Grese, Ehlert, Synger, Kopper and Polanski which showed that roll-calls were not unreasonably frequent or oppressively administered.⁽³⁾

Regarding beatings, Counsel claimed that certain force was necessary to restrain the internees, particularly when the shortage of food came.

He suggested that the story of Bimko and Hammermasch⁽⁴⁾ with regard to the kicking of the four Russians and the possible death of one was a pure invention thought out by these two witnesses for the sole purpose of exercising revenge on Kramer, their former Kommandant. It was also for this reason that these two witnesses accused him of taking an active part in the selections at Auschwitz.

Klein was a locum at Belsen for ten days in January and when he returned he was under Horstmann's orders. He was not the senior doctor. He had said that Dr. Horstmann specifically allocated to him the task of looking after the S.S. troops and S.S. personnel and that it was only three days before the British came that Dr. Klein did become the chief medical officer and the only medical officer at Belsen concentration camp.

The beating alleged by Sunschein against Weingartner⁽⁵⁾ was in the circumstances reasonable and Counsel suggested that the extent of the beating and the injuries caused were grossly exaggerated by the witness.

⁽¹⁾ See p. 37. ⁽²⁾ See pp. 13, 24 and 50. ⁽³⁾ See pp. 19, 45, 47, 65 and 66.
⁽⁴⁾ See pp. 11 and 14. ⁽⁵⁾ See p. 16.

Against the evidence of Sompolinski⁽¹⁾ Counsel submitted that there was overriding evidence that Kraft did not arrive at Belsen until the night of the 11th-12th April. The accused Klippel had said that he met him at the aerodrome on the night of the 10th-11th April. The accused Schmitz had said that, because of typhus, the ordinary S.S. men could not go from Camp No. 2 to Camp No. 1. Apart from Sompolinski there was no evidence that Kraft ever set foot in No. 1 Camp.

Another Defence Counsel would deal with the question of concerted action and all that Major Winwood wished to say was that there could not have been any concerted action in the chaos of Belsen.

3. Major Munro's Closing Speech on Behalf of Hoessler, Bormann, Volkenrath and Ehlert

Major Munro began by submitting that it was not the task of the Court to judge the policy of the extermination or persecution of the Jews. The Court had to judge people called upon compulsorily by their government to undertake the execution of its policies, just as he and the members of the Court had been called upon by their Government under the emergency powers granted to it by Parliament. When there was a conflict between Municipal and International Law, a man was not presumed to know International Law and apply it in defiance of his own law.

Counsel submitted that, while hearsay evidence was admissible before the Court, when hearsay evidence appeared in an affidavit it ought to be discounted altogether.

The witnesses who claimed to have seen Hoessler taking part in selections might have seen him sorting out people on parade, for what they would not realise at the time were quite different purposes. Witnesses, because they knew that there had been gas chamber selections, jumped to the conclusion that if people were picked out on parade and never seen again that they were sent to the gas chamber. It was clear that on these parades people were also selected for working parties and that those thus selected were sometimes sent away from the camp to work somewhere else and were never seen again. There were also selections of those suffering from scabies. There was positive evidence that the persons did not know what a parade was for. A panic or stampede would be the inevitable reaction if they had such knowledge, and there was no satisfactory or convincing evidence that any scenes of this kind did occur.

Counsel submitted that Hoessler's reply to Sunschein's allegation⁽²⁾ was a reasonable explanation. Counsel pointed out that the witness Helene Klein did not say that it was Hoessler who selected her. Did the Court believe that if the circumstances had been as described by this witness, and Hoessler had actually taken the attitude described, this girl would and could possibly have escaped so easily? Or that if she had done so she would not have been recaptured again very quickly?

There was evidence before the Court that Hoessler did everything he could, not only to save as many people as possible from death, but also to improve the conditions in the camp and the lot of the prisoners.

⁽¹⁾ See p. 21. ⁽²⁾ See pp. 17 and 42.

Some weeks elapsed between the revolt in the crematorium ⁽¹⁾ and the executions alleged to have been ordered by Hoessler. It was impossible to tell from the evidence whether the women executed were given a trial or not. It could not be assumed that during that long period there was no trial, in the absence of Prosecution evidence. The accused was in exactly the same position as a public hangman and he could not be held liable for carrying out what the Court could not say was not a lawful sentence of death.

Counsel's comment on Adelaide de Yong's affidavit ⁽²⁾ was that Hoessler was not the Kommandant of the camp. The Kommandant of the camp was either Kramer or his predecessor, or more likely Bauer, the Kommandant of Auschwitz No. 1. How could the accused have given such orders? The deponent had been confused on the matter of the identity of the camp Kommandant. Regarding Hauptmann's allegation ⁽³⁾ Counsel said that it was usual in all courts of criminal law, when somebody was charged with murder, to prove that the alleged victim was in fact dead.

Borman had suggested that witnesses had confused her with a certain Kuck. This confusion over identity did not arise only from a suggestion made by the accused herself; for instance some witnesses said that she had a black dog and some said it was a brown dog.

The accounts of Wolgruch and Szafran ⁽⁴⁾ of the incident of April, 1943, at Auschwitz were suspiciously alike and if the latter was arrested on May 9th, 1943, as she said, then the attack which she alleged must have taken place before she was arrested. Why, further, was the incident not mentioned in the witness's original affidavit, in which she was recorded to have recognised the accused? The Court was entitled to wonder whether this girl's evidence was not the result of a conversation between her and Wolgruch. In any case the accused insisted that she did not arrive in Birkenau until the 15th May, 1943, a month later. The learned Prosecutor had not cross-examined her on this date, and it would seem therefore that her evidence must stand.

Bormann admitted that she did keep discipline by hitting with her hands. The Prosecution witnesses admitted this was sometimes necessary. Counsel made the general observation that the English word "beat" could have rather a different meaning from that of the German word "schlagen" which could signify anything from a single blow up to a beating. The English word "beating" involved repeated blows and severe blows.

In relation to alleged selections by Bormann, Counsel's argument was the same as that for Hoessler, namely that she must have been seen on some parade or other sorting people out and sending them away and that the deponents made a mistake. Did the affidavit of Malachovska ⁽⁵⁾ prove anything beyond the fact that the selection involved was not a gas chamber selection? There were no doctors present. Only 50 girls were taken out of a party of 150 and they were sent outside the camp. It was perfectly obvious that they were being transferred from one Kommando to another.

Borman admitted that she was on gas chamber parades a few times but only to keep order, and she took no selecting part. As with Hoessler, there was no satisfactory proof that she did any selecting. Counsel also applied

⁽¹⁾ See p. 43. ⁽²⁾ See p. 25. ⁽³⁾ See p. 27. ⁽⁴⁾ See pp. 13 and 22. ⁽⁵⁾ See p. 30.

to her the defence of acting under coercion in so far as she was present on parade at all.

It was true that technically Ehlert was at Auschwitz, in so far as she was at a sub-camp called Raisko. The only connection which that camp had with Auschwitz was that it was administered from the Headquarters at Auschwitz No. 1, and it had no connection whatsoever with Birkenau, with which that Court had been largely concerned. It would further appear from the evidence that she had no connection with the gas chamber, and no evidence had been produced against her in respect of Auschwitz.

If Herkowitz ⁽¹⁾ was beaten, in Counsel's submission she was beaten in the political department with which the accused had nothing to do. The first part of Loffler's affidavit ⁽²⁾ could not be accepted, since it did not specify what part the accused took in the alleged offence.

Counsel concluded by examining the question of "concerted action" in relation to Regulation 8 of the Royal Warrant. First of all, what was "concerted action"? The dictionary meaning of "concerted" was "planned together," "contrived" or "mutually arranged" and he submitted that the word could have no other meaning than its "normal, common-sense dictionary meaning."

Where was the evidence in this case of any such "planning", "contriving" and "arranging"? There was none. Could it be said, for instance, that it was mutually arranged and planned to send all these millions to the gas chamber, or that Hoessler, Borman, Volkenrath and Ehlert planned and contrived in Belsen to bring about a course of deliberate and homicidal starvation? If the court were satisfied there was no such evidence, the accused could not be held responsible for anything other than what they had been proved to have done themselves.

It seemed that each of his four accused were entitled to a favourable verdict, but if the Court found them guilty, it was Counsel's submission that they could "only then be held collectively responsible for other acts of a similar type and nothing higher". If they were found guilty of having beaten people they could not be collectively responsible for having shot people.

Evidence of collective responsibility would only be *prima facie* evidence, and could be rebutted. In answer, the Prosecution would then have to show what the accused could have done and failed to do to prevent the use of the gas chamber or the starving of prisoners at Belsen.

4. Major Cranfield's Closing Address on Behalf of Klippel, Grese, Lobauer and Lothe

Directing the Court's attention to the parts of the Charge Sheet which alleged the killing of Allied Nationals, Major Cranfield asked why there were included in this charge the names of specific Allied Nationals, and why it was not sufficient to charge the accused with causing the death of Allied Nationals whose names were unknown. He suggested that the answer was that, unless the killing of a specifically named person was included, the charge would be a bad one on grounds of vagueness and generality. Counsel

⁽¹⁾ See p. 27. ⁽²⁾ See p. 30.

proceeded to examine the names of the persons alleged in the Belsen charge to have died in that camp, reminding the Court that his accused were charged with being together concerned in causing their deaths.

He submitted that the evidence proved that Meyer was shot by a man not before the Court. The evidence proved that Anna Kis was killed deliberately by a man not before the Court. She was a Hungarian and, in his submission, if she was a Hungarian she could not be an Allied National. It was a matter of which the Court must take judicial notice that a state of war existed between the United Kingdom and Hungary, which had not been terminated by a peace treaty. Some reference had been made to an armistice. Counsel argued however that there was an armistice with Italy, but it could not be suggested that an Italian was an Allied National. It was, he thought, agreed that the names of Kohn, Glinovjehy and Konatkevich had been wrongly included in the Belsen charge.

Referring to the death certificates relating to the remaining seven victims Counsel said that in each case the cause of death was stated to be death from natural causes. The dates of death were given, and the dates when these persons were alleged to have died were in a number of cases dates before his accused came to Belsen. One of the seven, Klee, was said by the Prosecution to be a British subject from Honduras, but Counsel for the Defence called for further proof of her nationality since the death certificate stated that she was born at Schwerin in Germany. The evidence that these seven persons were ever in Bergen-Belsen concentration camp was extremely flimsy. It seemed that he had now struck out of the Belsen charge all the specific persons whose deaths his accused were alleged to have caused, and the charge now read: "Allied Nationals unknown," which was, as he had already submitted, insufficient.

The affidavit of Anna Jakubowice said of Klippel: "I have seen him frequently beat women". She arrived at Belsen on the 1st January, and the British arrived on the 15th April. Counsel's submission was that the allegation of frequent beating must relate to the whole period from 1st January to the 15th April. Again, the alleged shootings were said to have taken place during March, 1945. A number of witnesses supported Klippel when he said that from the 1st January to the 5th April, so far from being at Bergen-Belsen, he was over one hundred miles away in Mittelbau. Counsel denied that Klippel was part of Hoessler's unit, or of Kramer's staff.

The evidence of Diamant against Grese⁽¹⁾ regarding the latter's responsibility for selecting victims for the gas chamber was vague. Regarding Lobowitz's allegation against Grese⁽²⁾, Counsel asked whether, however conscientious the accused was, it was not absolute nonsense to suggest that roll-calls went on from six to eight hours each day? He also threw doubt on the credibility of Neiger's words.⁽³⁾

Apart from the question of the truth of Trieger's evidence⁽⁴⁾ Counsel pointed out that the victim of the alleged shooting by Grese was a Hungarian and not an Allied National.

⁽¹⁾ See p. 25. ⁽²⁾ See p. 29. ⁽³⁾ See p. 31. ⁽⁴⁾ See p. 35.

As against Triszinska's allegation concerning Grese's dog,⁽¹⁾ the Court had heard the accused deny that she ever had a dog, and that has been corroborated by others of the accused and by other witnesses from Auschwitz.

Regarding Kopper's story of the punishment Kommando,⁽²⁾ Counsel referred to Grese's evidence that she was in charge of the punishment Kommando for two days only, and in charge of the Strassenbaukommando, which was a type of punishment Kommando, for two weeks. The allegation of Kopper in her affidavit was that she was in charge of the punishment Kommando in Auschwitz from 1942 to 1944, but in the box she said that the accused was in charge of the punishment company working outside the camp for seven months. In the box she failed to reconcile those two statements. Was it probable that Grese would be in charge, the only Overseer, of a Kommando 800 strong, with an S.S. man, Herschel, to assist her? If 30 prisoners were killed each day, should there not have been some corroboration of this story?

Counsel asked the Court to disbelieve Szafran's story about the shooting of the two girls,⁽³⁾ in view of Hoessler's statement that the windows of the block in question were fixed windows. The story was told neither in Szafran's affidavit nor even during her examination; she produced it on re-examination.

Commenting on the allegation of Ilona Stein,⁽⁴⁾ Counsel asked whether the Court believed, in view of the evidence, that an Overseer had any power to give an order to an S.S. guard? He pointed out that the witness, in her affidavit, said: "I did not hear the order". He doubted also whether Grese could have beaten anyone with a belt as flimsy as that worn by an Overseer at Auschwitz, one of which was produced as an exhibit.

Eleven witnesses had recognised Grese in Court. Of these eleven five made no allegation of any kind against her. This fact threw doubt on the evidence of those witnesses who said that she was notorious, a ferocious savage and the worst S.S. woman.

Regarding Jasinska's allegation that Lobauer helped in selections, Counsel asked how did she help? It was quite impossible for Lobauer to defend herself against the allegation of such a vague sort. Counsel doubted whether many of the offences alleged against this accused were sufficiently serious to be war crimes. Of the accusation made by Borenstein,⁽⁵⁾ Counsel said that cutting up a blanket was an offence against the camp regulations; Lobauer had said that if she found her doing that she very likely would have beaten her with her hands, which was all that was alleged against her.

Turning to the evidence of Gryka, Rozenwayg⁽⁶⁾ and Watinik⁽⁷⁾ against Lothe, Counsel said that the Court would remember the circumstances in which their affidavits came to be made. He had found these circumstances from Gryka and Rozenwayg in cross-examination, and the accused Lothe had also told the Court her account. Over a month after the liberation of the Belsen camp Lothe was one of the very few Germans left in Belsen. One

⁽¹⁾ See p. 35. ⁽²⁾ See p. 37. ⁽³⁾ See p. 13. ⁽⁴⁾ See p. 14. ⁽⁵⁾ See p. 24. ⁽⁶⁾ See pp. 16 and 23 for their evidence in Court. ⁽⁷⁾ See p. 36.

day she was walking through the camp when she was accosted by the three deponents, who started to shout at her, saying she was a kapo at Auschwitz, and to abuse her. They then told a British soldier that the accused was a kapo at Auschwitz, and thereupon the soldier took the entire party off to the War Crimes office. Counsel's submission was that the intention to accuse Lothe did not arise in the minds of these three deponents till they found themselves in the War Crimes office where they made up their story together.

The witnesses against Lothe were all young, and mostly uneducated. Further, the Court should consider what the mental condition of an internee at Belsen was after the liberation. The evidence given by a large number of Prosecution witnesses was embroidered and exaggerated. Counsel quoted a number of examples of evidence which had proved to be much less damning on cross-examination than it had seemed at first. For example, Dr. Bimko had talked about beatings, which later turned out to be a box on the ear.

Turning to a general discussion of the documentary evidence before the Court, Counsel said that a large amount of documentary hearsay evidence and opinion had been admitted by the operation of the Royal Warrant, and that it was for the Court to decide what weight should be afforded to that evidence. He drew attention to a passage in the Chapter on Evidence on page 70 of the *Manual of Military Law* which ran as follows: "The answer to the question why particular statements, verbal or written, should be excluded from evidence in judicial inquiries is that their exclusion has been found by practical experience useful on various grounds, and notably on the following:—

1. It assists the jury
2. It secures fair play to the accused
3. It protects absent persons
4. It prevents waste of time

"It assists the jury by concentrating their attention on the questions immediately before them, and preventing them from being distracted or bewildered by facts which either have no bearing on the questions before them, or have so remote a bearing on those questions as to be practically useless as guides to the truth, and from being misled by statements or documents, the effect of which, through the prejudice which they excite, is out of all proportion to their true weight. It secures fair play to the accused because he comes to the trial prepared to meet a specific charge, and ought not to be suddenly confronted by statements which he had no reason to expect would be made against him. It protects absent persons against statements affecting their characters. And, lastly, it prevents the infinite waste of time which would ensue if the discussion of a question of fact in a court were allowed to branch out into all the subjects with which that fact is more or less remotely connected."

In Counsel's submission the Court should be slow to consider the secondary evidence which was rendered admissible by the Royal Warrant, and should only take that into account where there were special reasons for so doing.

Beyond any doubt in a Crown prosecution the case presented against an accused carried with it a certain amount of authority, because non-military

cases were first investigated by the Director of Public Prosecution and cases before a court martial were investigated by the commanding officer. In the present trial Counsel asked the Court to proceed on the assumption that no proper preliminary investigation had been carried out.

Counsel then suggested that the accounts of incidents which had been put forward by Prosecution witnesses were very probably a confused telescoping together of experiences undergone by them during the whole of their time in concentration camps. When accusations had to be made at Belsen there were only a limited number of S.S. personnel to accuse. A large number had gone away, and when these witnesses, having suffered so much, were given the opportunity of accusing somebody, then the incident, probably telescoped, had to be pinned on to one of the people available in custody. When the photographs were shown around the camp, and evidence was asked for, there was a great temptation for these young ill-educated girls to make accusations. That seemed to Counsel a likely explanation of the quite obviously wrong identifications which had been made.

An affidavit should only be accepted by way of corroboration. An affidavit alone, providing that the accused went into the box on oath and denied it and appeared to be reliable, could not be taken as being of any weight.

Turning to the question of the gas chamber parades, Counsel suggested that general knowledge among the people paraded of the purpose of the parade was out of the question, because there would have been a stampede, however many sentries there were. It could not have been easy to discover from the procedure adopted when a gas chamber parade was intended, because when choosing working parties, as Starotska said, sometimes only Jews were called out. On other occasions when the weak or ill people were selected it was for quarantine or special blocks in another camp; sometimes the authorities took people with infectious or contagious diseases, such as scabies.

From the evidence it appeared that the usual ground for inferring that people had been gassed was that they disappeared. If they had been sent away to a factory, or to another camp, the same would have happened. Those who were chosen for the gas chamber could have had no idea what was in store for them. Otherwise it would have taken all day to get them to Block 25. Counsel suggested that, apart from being a cage for those intended for the gas chambers, it might well be that Block 25 was used as a staging block for any party that was to leave the camp after a selection. When a party had been chosen they would obviously have to be kept segregated until they were sent away. There were witnesses who spoke of people staying in Block 25 for days. (1)

Block 25 was walled in and out of bounds to the Overseers; and Erika Schopf said that she had never seen an Overseer at Block 25. Grese, Lobauer and Lothe, once a selection was over, would have nothing to do with the prisoners selected.

The ill-treatment at Auschwitz must be judged according to the general standard subsisting among the people in the camps. Account must be taken of the punishment meted out officially or semi-officially by the political party and, particularly in the case of Lobauer and Lothe, of the punishment which

(1) Regarding Block 25, see pp. 11, 13, 16, 17, 23, 35, 64 and 110-11.

they underwent themselves. Account must also be taken of the difficulties of the accused; there were few people in authority compared with the mass of prisoners. Kramer and others said that beating prisoners in any degree was against the German Regulations. A distinction should be drawn very sharply between a deliberate, wanton and cruel flogging and a quick cut with a stick delivered because the prisoner had done something wrong. Any regulation against the latter would be a dead letter, and Counsel doubted whether the latter could be regarded as a war crime.

There are four killings alleged against Grese and one against Lobauer. All allegations were made by affidavit except one made against Grese which was produced as an afterthought in re-examination. None of these shootings were corroborated.

Counsel pointed out that the three women accused whom he was defending were only at Belsen a very short time; they arrived together in the middle of March. The camp was in a chaotic condition; disease was everywhere. Owing to the chaotic conditions of the camp there were very few working parties, and his three accused were all concerned with working parties. Counsel's submission with regard to the question of their responsibility for the general conditions at Belsen was that what was going on at Belsen during March and April, 1945, was beyond anybody's control. The camp was hopelessly and increasingly overcrowded. The whole district was rapidly becoming a battle area. Transport and communications must have been in absolute chaos, and to attempt to make local purchases of foodstuffs for the extra thousands who were coming into the camp and to attempt to get extra doctors to cope with the typhus was quite beyond Kramer or anybody else on the spot. The three accused were one Overseer aged 21, and two prisoner functionaries in the camp, and he invited the Court to accept the proposition that they were in no way responsible for conditions at Belsen.

Towards April, 1945, various concentration camps were being approached by the Allied armies, from both the east and the west, and they had to be closed. The number of concentration camps grew less and less, until Belsen was almost the last. Not unnaturally, the limited number of concentration camp personnel converged on Belsen. There was no conspiracy on the part of Kramer and others to run Belsen on the same lines as Auschwitz.

Regarding "concerted action" and the Royal Warrant, Counsel claimed that the Warrant could deal only with the admission of evidence, and it could not affect in any way the amount of proof which must be put forward by the Prosecution to establish a condonation among the accused.

5. Captain Roberts's Closing Address on Behalf of Schmitz and Francioh

Captain Roberts opened his final address by examining the meaning of the term "concerted action" contained in Regulation 8 (ii) of the Royal Warrant. He pointed out that the word "concert" had been defined in Court as meaning "plan", "contrive", "pre-arrange". It seemed to him quite clear from what the Prosecutor said, when replying to the Defence's applications for separate trial, that the Prosecution were trying to maintain that common action was the same as concerted action. Counsel quoted two almost consecutive passages in which the Prosecutor had in fact used the

term "common action", then the term "concerted action" in the same connection. The words "concerted action" must imply two things, some prior planning with a view to a definite end, and full knowledge of the plan and of the end in view by those carrying it out.

At Belsen it was clear from the scenes which have been so graphically described by Mr. Le Druillenec and by Brigadier Glyn-Hughes that there was chaos and disorder on a colossal scale, quite the reverse of concerted action. In Counsel's submission, in order to prove that what occurred at Belsen was the result of concerted action, it would be necessary to show that, when each member of the staff arrived at Belsen, he was told: "Here in this camp we mean to kill many people as painfully as possible. To that end we have introduced typhus into the camp; to that end, we have, with the co-operation of the Royal Air Force, ensured that prisoners receive little food and no water, to that end we are asking all the other camps in the district to pour as many prisoners as possible into this camp; will you not become a partner with us in this joint enterprise?"

By inference, the Prosecution, claimed Counsel, had said that the mere presence of the accused during the commission of a war crime in itself made them guilty of that crime. Archbold, dealing with principals in the second degree, on page 1429, read, however, as follows: "There must also be a participation in the act; for even if a man is present whilst a felony is committed, if he takes no part in it and does not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavour to prevent the felony, or failed to apprehend the felon." (1) In Counsel's submission, this passage relating to felonies under English law must be adopted by the Court when trying war crimes. He asked the Court therefore to consider only the evidence specifically relating to each accused.

Counsel pointed out that Dujew's deposition said that "although I never myself saw him beat anyone my friends have told me that he often beat them." He did not say where or when or how he knew Schmitz, and although he mentioned his friends as saying they had often been beaten it seemed to Counsel strange that those friends never came forward themselves to give their own evidence.

The draft deposition of Vaclav Jecny (2) was no more than hearsay upon hearsay with the added confusion of interpretation. The document alleged that Schmitz was an S.S. man, whereas the evidence of C.S.M. Mallon, of Klippel and of others of the accused (3) made it clear that he was never a member of the S.S. Further, from his own past criminal record and from the fact that he was a deserter from the German Army, it was obvious that he would never have been accepted by the S.S. or any other force. None of the Prosecution witnesses had recognised Schmitz in Court. His presence there depended solely upon an alleged photographic identification.

Counsel pointed out that in two depositions made by Dr. Bimko, the victim alleged to have been shot by Francioh was a man. In Court, the witness said that the victim was a woman. Asked in cross-examination

(1) Archbold: *Pleading, Evidence and Practice in Criminal Cases*, 31st Edition, p. 1429.

(2) See p. 28. (3) See pp. 43, 49 and 51.

why she had changed the sex of the victim, she said that she had always said it was a woman. Counsel suggested that the whole episode was imaginary. In her evidence before the Court, Dr. Bimko admitted that she never knew the name of the accused and she also admitted that she never saw his photograph until after she had made her first statement. How then could she possibly know the name of the person to whom she was referring? Furthermore, her first affidavit contained a simple statement that Francioh shot a man dead; according to the second, he had been shot through the stomach; finally in Court she said that the victim had been shot in the head as well as the stomach. She had had time to think over her story and Counsel suggested that it had occurred to her that perhaps the Court might think it peculiar that a man internee should be shot dead outside the cookhouse in the women's compound and so the witness had turned the man into a woman in her story.

Counsel pointed out that Szafran's deposition and her evidence in Court⁽¹⁾ were conflicting as regards the person or persons who, along with Francioh, were alleged to have committed the shooting mentioned, the number of the victims, the time of the shooting and the direction from which the offence was carried out. Furthermore, if this incident did take place was it not remarkable that no other witnesses had been produced to corroborate it? Counsel also pointed out discrepancies between Stein's affidavit and her evidence in Court.

In Counsel's submission all three of these witnesses, who had suffered so long under the harsh hand of their oppressors, could not be otherwise than violently prejudiced against any and all of the accused. In view also of the fact that the sworn evidence given by these witnesses in their depositions differed so materially from that given by them in Court as to amount to a complete contradiction, and that they had given no satisfactory explanation of this, it was necessary to reject their evidence completely.

The affidavit of Irene Löffler⁽²⁾ was the only instance in the whole of the evidence against Francioh where the nationality of the victim was mentioned. Counsel pointed out that as Francioh came to Belsen between the 10th and 17th March, a fact which the Prosecution had not challenged, he could not have committed the offences alleged by Löffler and Sunschein.⁽³⁾ Furthermore, Sunschein had made no allegation against Francioh in the deposition and her evidence in court was the first mention of an accusation.

Maria Neuman⁽⁴⁾ was a nurse, but it was impossible to find what she was doing in the men's compound, and why she was in the vicinity of the kitchen; if she was a nurse it was unlikely that she was a member of the kitchen Kommando. Since her evidence took the form of an affidavit there was no opportunity of questioning her on these points.

Kopper's evidence⁽⁵⁾ could not be true, since, as Muller had pointed out, the distance between the cookhouse and Block No. 224 was much greater than Kopper had said, and an intervening belt of trees would have prevented the latter from seeing the alleged shooting.

⁽¹⁾ See p. 13. ⁽²⁾ See p. 30. ⁽³⁾ See pp. 17 and 30. ⁽⁴⁾ See p. 31. ⁽⁵⁾ See p. 37.

It was clear that the accused was in prison in Belsen for a period of eight to ten days, and exactly when was not material.

Counsel explained why so many people had made accusations against Francioh. Like all cookhouse personnel, he was very well known. The cookhouse was the most important part of the lives of these prisoners, and if they went short of rations or did not get any food it was Francioh whom they blamed above anybody else. Was it not strange that of over 70 internees employed in his cookhouse, only one had given any evidence against Francioh? Francioh had denied that that one was ever in his cookhouse at all.

Recalling his remarks on Löffler's evidence, Counsel said that the Prosecution had failed to produce acceptable evidence that Francioh had ever ill-treated any Allied national.

6. Major Brown's Closing Address on Behalf of Mathes, Calesson and Egersdorf

Major Brown submitted that it was unreasonable to suggest that these three men, considering the short time they were at Belsen and their minor capacities and positions, could be found guilty of having acted in a concerted manner to bring about the prevailing conditions.

In the case of Mathes and Egersdorf the only evidence produced had been in the form of affidavits, and in fact against Egersdorf there was only one paragraph in one affidavit. Neither of these two men was recognised by any witness brought before the court.

The evidence of Pichen, Hempel, Egersdorf and others showed that Mathes did not work in cookhouse No. 2; there was sufficient evidence to show that at the times of the alleged incidents he was not in the prisoners' part of the camp and was employed in the bathhouse.

Raschiner⁽¹⁾ must be mistaken in his evidence against Calesson. The accused arrived at Belsen on about the 9th or 10th April, according to Hoessler and Schmitz. He travelled by train and he was not in charge of the transport.

Zamoski⁽²⁾ had stated in evidence that he was told that his friend was dead by a sister from the hospital, but Dr. Schmidt and Dr. Kurske both stated that there were no sisters employed in the hospital for internees in Belsen. Further, Calesson was not employed in an administrative capacity in a cookhouse.

Charlotte Klein had said that Egersdorf never came to the bread store and that she could not remember any such incident as that described by the affidavit accusing Egersdorf. Further, Hungarians were not, in April, 1945, Allied nationals, and at that time a German could not commit a war crime against a Hungarian.

7. Captain Fielden's Closing Address on Behalf of Pichen, Otto and Stofel

Captain Fielden began his remarks by submitting that the three accused whom he represented had not been shown to have displayed agreement with

⁽¹⁾ See p. 32. ⁽²⁾ See p. 22.

any plan to ill-treat prisoners at Belsen. They had not, therefore, taken part in "concerted action" and could only be judged according to their own individual acts.

He went on to argue that, according to German law, Poland as a sovereign state had ceased to exist and that previous Polish nationals from that part of Poland annexed by Germany were, as a result, German nationals. With very few exceptions, about which his accused might or might not have known, the internees at Belsen came from countries annexed by Germany by conquest. These countries became German nationals. The accused were therefore not guilty, since it was a necessary ingredient of the *mens rea*, the guilty knowledge, to be proved in establishing the perpetration of a war crime, that the accused must have known, or could reasonably have been expected to know, that the nationality of the victim was that of an Ally. A German could not commit a war crime against another German. A war crime was essentially an act which the victor punished to safeguard the lives of his own nationals or of his allies. Punishment of war criminals was intended not to avenge the alleged crime but to act as a warning and a deterrent to others not to act in a similar way in the future.

Counsel pointed out that Litwinska had inspected Pichen in the dock but did not recognise him as being the man concerned in the incident which she had described.⁽¹⁾ He had enquired whether either of the S.S. men had any physical deformity while her attention was still directed towards this incident. The Court had seen the result of the war wound in Pichen's left hand, a very obvious disfigurement, yet the witness was unable to say whether or not any of the men whom she connected with the alleged incident had any physical deformity.

The incident alleged in the affidavit of Halota⁽²⁾ was supposed to have taken place at the very time when Pichen was on the S.S. men's parade. Litwinska, who worked continuously in No. 1 kitchen, never knew anything about this incident. There was no proof that the two men whom Pichen shot were dead; four hours later two bodies were found outside No. 1 kitchen. There was nothing specific in the allegation of Halota to connect Pichen directly with these two bodies.

Counsel's comment on Wajsblum's allegation⁽³⁾ was that three weeks before the arrival of the British, Pichen was not in No. 1 kitchen. From the 27th March until the 31st March he was in camp No. 2.

Dealing with the allegations made against Otto, Counsel said that Dr. Bimko had corroborated the accused's statement that he was never a Block Leader. Starotska and Kopper had both said that Block 213 was never empty. The former had testified that she would certainly have heard about the incident if a Block Senior of Block 201 had been beaten, because that functionary would have come to her and complained; Dr. Bimko said that she had never heard of such an incident.

Otto was in Auschwitz from October, 1940, until the January of 1945. Yet there was not a single allegation of ill-treatment against Otto in respect of Auschwitz.

⁽¹⁾ See p. 12. ⁽²⁾ See p. 27. ⁽³⁾ See p. 35.

Of the evidence against Stofel, Counsel confined his attention to the affidavits of Grohmann and Poppner. The affidavit of Mocks was merely corroborative of that of Poppner. Counsel pointed out the discrepancies between the first two affidavits regarding the number of prisoners in the transport, the circumstances of the alleged shooting and the number shot. These three affidavits were not read over to the deponents before they were sworn. The only evidence as to their truthfulness which the Court had was a statement by the interpreter that the affidavit was a correct translation of the evidence previously given by the deponent. The documents must therefore be suspect. Major Smallwood had said that it was sometimes necessary to make alterations to draft affidavits before swearing. A very striking fact about the allegations made by the Prosecution as regards this march was that there was no mention of any shooting of prisoners at Gross Hehlen. Here the accused, together with other witnesses, confirmed that certain prisoners were shot. The Court had heard the evidence of Brammer, who later became the Burgomaster, who was present when the bodies of three men dressed in concentration camp clothes were disinterred. He and other witnesses from the village said that this was the only party of concentration camp prisoners to go through Gross Hehlen in April of 1945. The only occasion when it was definitely established that prisoners were killed was not mentioned by any of the Prosecution witnesses. Counsel submitted that the deponents knew of this shooting at Gross Hehlen, but because they knew that it was not done by S.S. guards commanded by Stofel they took the opportunity of accounting for the losses which occurred at Gross Hehlen by inventing stories of other shootings on the line of march.

Stofel could not be held responsible for the safe keeping of the transport from the time it left the barn where the prisoners were about to be fed until the time he took command again later. Consequently the deaths of the shot prisoners could not be laid at his door. The evidence showed that the officer and the men of the Waffen S.S. unit who were in charge of the prisoners during that time were quite definitely responsible for them.

Counsel reminded the Court that Stofel was never a party to any shooting and that there was not a single shooting specifically alleged against him. In fact, Grohmann stated in his affidavit that Stofel did not take part in the shooting.

Moreover the accused should not have been included in the charge since he was never in the concentration camp proper before being captured by the Allies. To suggest that he was ever a member of the camp staff was equally erroneous. He had decided to march to Belsen only after a railway station en route had been bombed.

8. Captain Corbally's Closing Address on Behalf of Barsch, Schreirer, Dorr and Zoddell

Captain Corbally submitted that the evidence of Litwinska, Pichen and Forster showed that Barsch was never in kitchen No. 1. The identification of Barsch was carried out by photograph; there was no evidence that the deponents saw the man at all. That he was actually a medical orderly in No. 2 camp was shown by the testimony of Dr. Schmidt and Dr. Kurzke.⁽¹⁾

⁽¹⁾ See pp. 55 and 56. The accused himself did not appear in the witness box.

Schreier's case was that he was never a member of the S.S. Kurowicki's description of him as "knock-kneed" did not fit the accused. If Kopper's statement that he was an Oberscharführer in the winter of 1942-1943 was true, the story of Kurowicki and Diamant that he was a Block Leader during that time, in charge of Block 22, became far less probable. There was no evidence and it was most unlikely that the duties of a Block Leader were performed by men of the rank of Oberscharführer. Was it conceivable that a boy of 19 with one year's service could have attained the rank of Oberscharführer? It was really significant that Kopper was the only person who identified Schreier as having been at Belsen. She said that she saw him four times in all, but if she had seen him hundreds of others must also have seen him.

Passing to the defence of Dorr, Counsel said that he would like to adopt on his behalf the points made by Captain Fielden in defence of Stofel, particularly concerning the contradictions in the affidavits produced by the Prosecution.

Poppner described himself as having been imprisoned for seditious talk. Mocks was also a man who had been held for his association with some sort of illegal organisation. Grohmann was put into a concentration camp for refusing to go to work. These men obviously had prejudice against their jailers in the concentration camp in particular and against the S.S. organisation in general. Furthermore any truthful account of the journey would have mentioned the Gross Hehlen incident.

It was during the first night of this journey that Dorr was really in charge. Both Poppner and Grohmann mention killings by a stable on the first night. Counsel claimed however that there were stables later in the journey, but there was certainly no stable at Osterode. He submitted that this vagueness concerning the route was quite inexcusable.

The identity of Adolf Linz was unknown and it was impossible to say what reliance should be placed on his statement. He said that shootings were carried out in full view of the other prisoners whilst on the march. Poppner said that they took place in a wood. Counsel suggested that in this case Poppner was more to be relied upon, because it is most unlikely that shootings were carried out in full view of everybody.

Passing to the evidence against Zoddell, Counsel said that Glinowieski had not mentioned a stick in his affidavit. On the other hand, in his evidence in Court, he introduced a stick of more than a metre long and as thick as his arm. That seemed to Counsel a stupid and ridiculous exaggeration. Lozowski's account of the death of the man allegedly beaten by the accused was described by Counsel as hearsay upon hearsay. Counsel's comment on Zuckermann's evidence⁽¹⁾ was that it must have been well known throughout the camp that Zoddell was Camp Senior of Lager 1 and not Lager 2.

9. *Captain Neave's Closing Address on Behalf of Schlomowicz, Ilse Forster, Ida Forster and Klara Opitz*

Captain Neave adopted at the outset the remarks of Major Munro on concerted action and collective responsibility.

⁽¹⁾ See p. 36.

In the affidavits of Judkovitz and Basch against Schlomowicz, the dates of the alleged beatings were given as March and April, but Counsel pointed out that the accused did not arrive in Belsen until late at night on the 8th April. None of the alleged victims of these supposed beatings were named, nor were their nationalities given; the reason for that was that these victims were nothing more than figments of the deponents' over-taxed mental capabilities, due to physical and mental suffering.

The evidence for the Defence was continued in the straightforward evidence given by the accused Schlomowicz himself⁽¹⁾ which was unshaken by cross-examination, and in the affidavit of Blicblau⁽²⁾. The accused was Block Senior in all for seven days and during five of these days was under British supervision. How could a prisoner be responsible for the well-being of the internees in Block 12, at least 1,000 or 1,100 people? Apparently the Camp Kommandant himself could not improve the conditions. Block Seniors, according to Captain Singleton's description, were not members of the camp staff; they were prisoners nominated and exploited by the camp staff.

Counsel pointed out that Bialek's evidence regarding Ilse Forster⁽³⁾ provided no date; Counsel considered it a complete overstatement. His comment on Lippman's affidavit⁽⁴⁾ was the same. Regarding Litwiska's allegation in Court that Ilse Forster had murdered a young girl, Counsel pointed out that she never mentioned this offence in her affidavit; she had, however, mentioned therein a murder by Ehlert, while in Court she made no allegation against the latter accused. His submission was that neither incident had the slightest foundation in fact whatsoever.

The only evidence against Ida Forster was that of Ilona Stein,⁽⁵⁾ and Counsel considered this to be a fabrication. The accused could not have rushed out of the kitchen; at the start of the trial she was an extremely ill woman suffering from a disease which could not have developed within the space of her incarceration.

Counsel drew the attention of the Court to the fact that, in his second affidavit, Dr. Makar based his general accusation against Opitz on hearsay, whereas in his first he had based it on personal knowledge.⁽⁶⁾ Again no dates were mentioned.

10. *Captain Phillips's Closing Address on Behalf of Charlotte Klein, Bothe, Walter and Haschke*

Captain Phillips reminded the Court that Colonel Smith had submitted that the "old text" of the *Manual of Military Law* provided a truer statement of the law on the matter of superior orders than did the amended text. In case the Court did not accept that claim, he would submit that even as amended the text in the *Manual of Military Law* afforded to the accused a defence. The last sentence ran as follows:

"The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts

⁽¹⁾ See p. 56. ⁽²⁾ See p. 57. ⁽³⁾ See p. 24. ⁽⁴⁾ See p. 29. ⁽⁵⁾ See p. 14. ⁽⁶⁾ See p. 30.

which both violate unchallenged rules of warfare and outrage the general sentiment of humanity".

The acts alleged certainly outraged the general sentiment of humanity, but the Prosecution had also to prove that they violated an unchallenged rule of warfare. Even if the Prosecution could prove that the offences alleged were war crimes, they could only be shown to be breaches of one of the less well-established rules of warfare, and a rule of warfare which it would be at least difficult to call an unchallenged rule of warfare. On the Prosecutor's stating that the relevant rule of warfare was contained in paragraph 383 of chapter XIV of the *Manual of Military Law*,⁽¹⁾ Counsel replied that this was an unchallenged rule under the Convention, but in his submission, it was very much challenged as a rule of warfare, disobedience to which might bring punishment as a war criminal on an individual breaking it. As Colonel Smith had shown, it was a rule the breach of which could only be dealt with as a matter of State as opposed to individual responsibility.

It was not sufficient for the Prosecution to say that Belsen constituted a war crime, and that since these people were at Belsen they were war criminals. His four accused had not been shown personally to have had any contact with an Allied national. That fact threw the Prosecution back on to the second alternative open to it, that was to prove indirect responsibility, to satisfy the Court that these accused were at Belsen and that somehow they were responsible for the deaths and the suffering which undoubtedly took place there.

The case against three of his accused, Charlotte Klein, Bothe and Walter, rested entirely on affidavit evidence. Turning to the way in which the affidavits before the Court were prepared, he claimed that from Major Smallwood's evidence it appeared that accusations were invited from the whole number of internees at Belsen. It followed that each deponent would have considerable animus against the accused. Counsel pointed out also that the affidavits were prepared from statements taken by other people, mainly by police officers, and then turned into affidavit form by Major Smallwood, and that, "the accused were never present or really present when these accusations were being made". Their identification rested solely upon the use of photographs. Since all the photographs, during Major Smallwood's period, were of persons who had been officials in Belsen, there was no such opportunity of testing a witness's accuracy as was offered in an identification parade, where there would be other soldiers, of the same rank and dressed in the same way as a suspected person, and it would be possible for witnesses to pick the wrong person.

When Major Champion took charge, there was a certain amount of improvement so far as checking the credibility of deponents was concerned, but the same situation continued with regard to photographic identifications. Sergeant Dinsdale, one of the investigating sergeants, had said that it was quite possible for there to have been a mistake in the key on one of these photographs. If that did in fact happen it completely invalidated the whole of an affidavit, but unfortunately, no one knew which affidavit. Sergeant Higgs had said that he used to take photographs round and show them to

⁽¹⁾ See p. 8.

prospective deponents, and as soon as a deponent said: "Yes, I recognise No. 3 on photograph No. 4 as having done something or other, but I do not know her name" the witness was told by the sergeant: "Oh, that is so and so". The deponent was then able to pass on the names and key numbers to other intending deponents.

Charlotte Klein's task as distributor of bread was probably one of the most public in the whole camp. It was worthy of note that not a single Prosecution witness who had come into Court had been able to say a single word against her, and the Prosecution, so far as her own acts went, had to rely on a single paragraph in one affidavit.

Grunwald, whose evidence was used against Bothe, was only 17 at the time he made the affidavit,⁽¹⁾ and Counsel thought that that fact should be remembered when considering its worth. Charlotte Klein and Gertrude Reinhardt said that the accused Bothe never had a pistol, so far as they knew. The affidavit provided the only evidence that she ever possessed a pistol; this document also contained a most improper statement, that victims of the accused "fell down, but I cannot say whether they were dead or wounded, but as they were very weak, thin and under-nourished I have no doubt that they died".

Counsel's comment on Schiferman's evidence⁽²⁾ was that the accused did work in the wood-yard near No. 4 kitchen, but not in February, 1945, the time of the alleged offence. The accused had denied both this evidence and that of Triszinska.⁽³⁾ Hammermasch had made an allegation against Bothe in an affidavit, but had failed to recognise her in Court. Was it not likely that Schiferman and Triszinska also would have failed to recognise her, had they appeared in the witness box?

The question which arose on examining Siwidowa's evidence against Frieda Walter⁽⁴⁾ was as to the amount of force used. Counsel asked how Trieger could be correct in saying that this accused was supervisor of kitchen No. 2 at Belsen and that she used to beat women practically every day, when Walter was only in that kitchen on two days. Regarding Triszinska's allegation against Walter,⁽⁵⁾ his submission was that it was entirely a question of degree, because the accused had already admitted that she did in fact hit people now and then when it was necessary in the course of her duties; his submission was that the deponent had exaggerated out of all conscience. Frieda Walter was recognised by one witness, Zylberdukaten, who had nothing to say against her, yet she too worked in a very public place, in one of the cookhouses.

Irene Haschke was the only one of his defendants who had been accused by a live witness. Counsel submitted that it was far from clear where the cistern mentioned in Rozenwayg's evidence⁽⁶⁾ could have been situated. The accused Haschke never in fact worked in kitchen No. 1.

Examining Stein's evidence,⁽⁷⁾ Counsel suggested that Haschke actually was not attempting to beat the people involved at all, and that she was merely trying to drive them away from the cookhouse when they were thronging

⁽¹⁾ See p. 26. ⁽²⁾ See p. 33. ⁽³⁾ See p. 35. ⁽⁴⁾ See p. 34. ⁽⁵⁾ See p. 35.

⁽⁶⁾ See p. 16. ⁽⁷⁾ See p. 14.

round it in the hope of extra food. He regarded this explanation as a sufficient answer also to the evidence of Neiger and Triszinska.⁽¹⁾

Emphasising that his four accused arrived in Belsen late in February or at the beginning of March, at a time when conditions were completely chaotic, Counsel submitted that they took the only possible course if they occasionally slapped people or boxed their ears. For example, when Charlotte Klein was distributing the bread, it is quite obvious that her bread cart would have been besieged by hungry internees, and the only thing for her to do under those circumstances was to drive them away. To have acted according to the Regulations and to have reported the matter on every occasion would have been a complete waste of time.

Before the Court convicted the four accused under Regulation 8 (ii) of the Royal Warrant it was invited to look at their position against the background of conditions at Belsen as described by Brigadier Glyn-Hughes, Dr. Wiesner and Dr. Leo.⁽²⁾ At the time when his accused arrived at Belsen, there was already typhus in the camp and there were already coming into the camp people who were dead, dying or half starved and requiring special feeding. He accepted all that Captain Roberts had said about concerted action.

When interpreting the meaning of Regulation 8 (ii), it should be borne in mind that the Warrant did not and could not set out to alter the substantive law. It only set out to deal with procedural matters. Even Regulation 1 merely stated what body of law was to be applied in such trials, namely, the Laws and Usages of War; it did not set out anywhere either to add to or to alter the content of the Laws and Usages of War. Regulation 8 (ii) was purely a procedural Regulation, because the question whether or not the accused could be found responsible for the conditions at Belsen was entirely and fundamentally a question of common sense. It was impossible to hold a man responsible for any state of affairs unless he had an opportunity to control that state of affairs. Nobody could say that his accused had, or could have had, the slightest control over conditions at Belsen. Counsel reminded the Court of the passage in the *Manual of Military Law*, which stated that in every trial, "the utmost care must be taken to confine the punishment to the actual offender".⁽³⁾

11. Captain Boyd's Closing Address on Behalf of Fiest, Sauer and Lisiewitz

Dealing with Berg's evidence against Fiest,⁽⁴⁾ Captain Boyd claimed that several witnesses had said that working parties in fact were not taken from women's compound No. 2, where the accused worked. For instance, Volkenrath had said that she could not remember any working parties being taken from women's compound No. 2. In any case, what this affidavit quite clearly meant was that as the party was marched down by Fiest, when it got to the gate somebody else "came out". If it meant that Fiest did the kicking then the words "came out" were quite meaningless. Even if two meanings were possible on this affidavit, then the Court must accept that most beneficial to the defence.

⁽¹⁾ See pp. 31 and 35. ⁽²⁾ See pp. 9, 18 and 36.

⁽³⁾ Paragraph 449 (*Trial of war criminals. Punishments*) of Chapter XIV (*Laws and Usages of War on Land*) of the *Manual*. ⁽⁴⁾ See p. 24.

To people standing without watches, roll-calls such as those referred to by Neiger would seem very long; but Counsel reminded the Court that during the time roll-calls were going on the S.S. themselves had to be on parade. Furthermore, the roll-calls were quite clearly carried out on orders and, if necessary, he would rely upon the defence of superior orders.

Lobauer alone accused Fiest of beating. She however had withdrawn in the witness box much of what she had said in her affidavit, thus proving herself a thoroughly unreliable witness.

An Overseer called Ault worked in kitchen No. 3 and was very like Sauer.⁽¹⁾ Since the accusation was based on photographic identification, Counsel thought it quite clear that the incident related should in fact have been told of Overseer Ault and not of Sauer, who never worked in either kitchen No. 1 or No. 3.

Characterising Sunschein as a very honest witness, Counsel said that he regarded Lasker's evidence⁽²⁾ as "embroidered"; the former would not have said that Sauer beat people only with her hand if in fact Sauer had used a whip. The Court should accept Sauer's story that she beat people only with her hand and only for stealing.

In view of Dr. Klein's evidence regarding Hilde Lisiewitz's health,⁽³⁾ Counsel thought that the latter would not be in a fit state to carry out the feats alleged in the affidavit of Dora Almaleh.⁽⁴⁾

The deposition of Siwidowa⁽⁵⁾ did not say which cookhouse Lisiewitz was said to have supervised. Lisiewitz was for some days in cookhouse No. 1, in the peeling department, but at one time or another every Overseer in Belsen must have been in the cookhouse. Ehler, while critical of many other accused, had spoken favourably of Lisiewitz.

On the question of the general conditions at Belsen, Counsel adopted what had been said by Captain Phillips.⁽⁶⁾ The Prosecution had to prove either some positive act creating these conditions or some deliberate neglect to do something which could have been done and which would have improved conditions. It was not simply a question of carelessness or inefficiency.

Lisiewitz was only in the position of an N.C.O. in charge of fatigue parties. She could have had no power at all to improve conditions, which must have existed when she arrived there at about the beginning of March. Fiest and Sauer had no real power, as their duties were only those of policewomen; the real person responsible for the compound was the Camp Leader, a man called Klipp.

Against all three there was evidence of their hitting prisoners. In Counsel's submission it was clear that that was done for a purpose, generally because of stealing, and sometimes as Fiest stated because she lost her temper, which was very understandable. It was equally clear that it was entirely unpremeditated. It was impossible to report to the higher authorities all breaches of camp rules; conditions were chaotic, and these people had

⁽¹⁾ See pp. 46, 58 and 60. ⁽²⁾ See p. 22. ⁽³⁾ See p. 41. ⁽⁴⁾ See p. 23.

⁽⁵⁾ See p. 34. ⁽⁶⁾ See pp. 96 and 98.

to do something to keep what order they could. The alleged striking of prisoners was necessary to keep order and was not done because the accused had made a plan with anybody else to ill-treat all the prisoners.

12. *Captain Munro's Closing Address on Behalf of Johanne Roth, Anna Hempel and Hildegard Hahnel*

Captain Munro began by submitting that these three accused could have played no part at all in alleviating the conditions that existed at Belsen. They were respectively a prisoner of the Gestapo, forced to serve as a functionary, an Overseer in cookhouse No. 2 and a sort of second in command. They worked hard and were among the few people at Belsen who stayed in the camp all the time. They took the same chance of dying as any internee did.

His accused spent the whole of their days in No. 1 camp, surrounded by prisoners numbering four divisions of British infantry. Those people were hungry, and the ones who were not hungry were very sick. The beatings performed by the three accused were solely corrective beatings and not sadistic beatings. Every witness who had come before the Court had, suggested Counsel, grossly exaggerated the nature of those beatings.

Turning to the evidence against Roth, Counsel pointed out that, under cross-examination, Helene Klein had said that she did not sleep in Block 199, but with a friend in the clothing store. If she lived in another block she would not know who was the night guard.⁽¹⁾ She said first that the beating took place in the block in the night because Friedman wanted to go to the lavatory; then that it was three o'clock in the morning when they assembled for Kommandos. She further stated that she did not see Friedman die at all, but that she was only told about it the next day. The evidence of Ehlert and Ilse Lothe on the time when they last saw Ida Friedman showed that the accused could not have killed her.⁽²⁾

Counsel's comment on Rosenzweig's allegation against Roth⁽³⁾ was that obviously the latter, a farm girl and a prisoner for five years, in charge of a block of 800 people, had no idea of how to deal with them. Counsel felt sure that Roth had intentionally beaten people, but not with the savagery which the affidavit suggested. He submitted that in very difficult conditions Roth did all she could.

Charlotte Klein said that Hempel went to her for more bread, and when she could she gave Hempel more bread. Hempel was one of the people in Belsen who did positive things for the internees. She was in the position of one Overseer with 43 internee women and 18 men under her, cooking for 17,000 people every day for fourteen to sixteen hours a day. After reviewing the evidence against Hempel, Counsel reminded the Court that the accused had said, "I did beat people. I beat them because they were stealing", and that these people were stealing food which was precious to cookhouse No. 2, food which was invaluable for the feeding of the 17,000 people.

Counsel submitted that the allegation of Stempler that Hahnel had whipped girls in the bath-house in February, 1945, was disproved by the

⁽¹⁾ See p. 20. ⁽²⁾ See pp. 46 and 47-8. ⁽³⁾ See p. 33.

evidence of Pichen, Volkenrath, Ilse Forster and Sauer, as regards both the time when the accused was in Belsen and her place of work there.⁽¹⁾

13. *Lieutenant Jedrzejowicz's Closing Address on Behalf of Starotska, Polanski, Kopper, Ostrowski, Burgraf and Aurdzieg*

Lieutenant Jedrzejowicz began by pointing out that all his clients were Poles. They were alleged to have committed crimes against Poles and other nationals, and in this respect, in his submission, no war crime had been committed.

Counsel expressed the opinion that the affidavits against Starotska often contained contradictory statements; for instance Szparago Rozalja's said: "She killed and tortured 1,000 women", and then later said: "She killed thousands of women". Further, somebody who accused a person of killing 1,000 or more people should be able to name at least one specific instance and give a name, a date and description of how it happened. Mass murders were alleged against the accused in two affidavits, yet not by any of the 13 witnesses who had appeared in Court and recognised her; these witnesses would surely have known had she been guilty of such acts.

Rozalja, Synowska and Szafran had said that the accused carried out selections. The Court must realise that it was unlikely, if not impossible, for a Block Senior or a Camp Senior to make her own selections for the gas chamber. Obviously Starotska, as a Block Senior and later as a Camp Senior, was present during selections at Auschwitz No. 2. She had to be present; she could not avoid these selections. The Court had heard Dr. Klein say: "The selecting was done exclusively by doctors". Why had none of the Prosecution witnesses or deponents ever mentioned a specific selection made by Starotska as a Block Senior or as a Camp Senior, or by any Block Senior or Camp Senior of any nationality? On the other hand, the witnesses for the defence, Wojciechowska, Janicka, Komsta and Nowogrodzka, had all said that because she took part in selections she was able to do a considerable amount of good for the prisoners. The second and third of these witnesses had been in the same block, Block 7, at the same time as Synowska was, and the accused was Block Senior of the block; their evidence contradicted that of Synowska.

Counsel asked why no other witnesses could corroborate the allegations of Szparago Rozalja,⁽²⁾ if the accused had committed offences on such a great scale?

Synowska's allegation that the accused used to push girls against the electrified wire and kill them in this way was belied by the evidence of Sompolinski, Litwinska and the accused regarding the wiring of the camp.⁽³⁾

Regarding the question whether the accused favoured Christian Poles, Counsel pointed out that the Jewish witnesses made far weaker allegations against her in Court than the Polish witnesses. The witnesses against her who appeared in Court never said that they were Polish Jews or Polish nationals of the Jewish religion; they always said they were Jews from Poland. This

⁽¹⁾ See pp. 45, 53, 58 and 61. The accused Hahnel did not go into the witness box.

⁽²⁾ See p. 32. ⁽³⁾ See pp. 12, 21 and 63.

circumstance might have given the impression that the accused treated the Poles better than the Jews or other nationalities.

Turning to the case of Kopper, Counsel said that Guterman, Synger, Koppel and Furstenberg, while alleging beatings against her, never said specifically that the beatings took place while she was the Block Senior of Block 224. Counsel asked the Court to accept that these beatings took place in Block 205 only, and in this respect to believe the testimony of the accused.⁽¹⁾

Guterman in cross-examination had said that about 30 women were dying daily in the block. How then could Guterman know that Fischer died three weeks after the alleged incident ⁽²⁾ as a result of kneeling? She might well have died from typhus or from starvation or any disease. As to the allegations of Guterman and Synger ⁽³⁾ regarding the girl who fainted on parade, there was a very material discrepancy in these two statements about the same incident, on the point of what happened to the girl after her fainting.

Koppel's story, according to which Kopper beat her, and Furstenberg's seemed the same. ⁽⁴⁾ In that case the latter was alleging that the accused killed Koppel, who had, on the contrary, appeared as a witness in the trial. If Koppel's account of the woman who died immediately after a beating by the accused were correct, why was it not mentioned by Synger, Guterman and Furstenberg, who all lived in the same block as Koppel?

The defence of Kopper was that after a hard time at Ravensbruck and at Auschwitz, after a period of nearly four years, she arrived at Belsen and became a Block Senior, a position for which she was not suited. Once she was given a less responsible job, that of camp policewoman, she changed considerably. She was a very nervous person and would probably lose her temper when something went wrong, and would start hitting the girls with her belt or her hand without causing any serious injury.

The Prosecution alleged that Polanski had committed offences while an assistant Block Senior in Block 12, but Schlomowicz and Sompolinski had denied that he had held any such position. The Defence had shown that he was a good and kind man to his fellow prisoners both before he came to Belsen and after the liberation. Why should he have changed while in Belsen? There must be either a malicious invention on the part of the deponent or an error of identity.

Ostrowski's explanation that he was in bed in Block 19 the whole time between his arrival at Belsen and the British liberation, and that he had no function whatever and did not even help with the food distribution, was corroborated by Salomon and Burgraf. The various Prosecution witnesses disagreed among themselves as to the nature of the accused's function in the camp. The statements of Promsky and Kalenikow ⁽⁵⁾ were of very little value to the Court, because they were not checked, sworn or signed by the deponents, and it was quite possible that the reconstruction of the rough notes taken by the sergeant and the interpreter might have been very inaccurate.

⁽¹⁾ See p. 63. ⁽²⁾ See p. 19. ⁽³⁾ See p. 19. ⁽⁴⁾ See pp. 19 and 26. ⁽⁵⁾ See pp. 28 and 32.

Counsel expressed the opinion that the allegation made against Burgraf by Marcinkowski ⁽¹⁾ was refuted by the evidence of the accused and Trzos ⁽²⁾ as to the former's position in the camp.

The alleged murder of 50 prisoners during food distribution just before the liberation of the camp must surely have been remembered by the inmates of Block 19 if it did in fact occur. Yet not a single allegation was made against the accused Burgraf by an inmate of his own Block 19. It was made by someone who was in Block 21, Marcinkowski. According to Trzos, the deponent had only mentioned the alleged killing after describing how he himself had been struck by the accused. In Counsel's submission, if the Court were to accept that a witness was reliable, they must accept that when he related his evidence he would first relate the more serious matter. Further, it was improbable that a person would die as a result of having been hit on the arm, especially, as stated, that he would die at once.

The evidence, for instance, of Polanski had proved that Aurdzieg had never been a Block Senior of Block 12; therefore he never was, as Pinkus described him, an Overseer. With regard to the question of gold and valuables, Counsel stated that none of the witnesses had said that they saw any transaction performed in Block 12 by anybody. They never saw any gold during the time they were in Belsen. None of them had said that the accused Aurdzieg beat or ill-treated prisoners. The allegation that he together with the other functionaries of the block killed a Russian had been explained by the accused and by his witness, Andrzejewski.⁽³⁾ The Block Senior Schlomowicz had also said that never, while he was in the block, was any beating which resulted in death committed by the accused Aurdzieg.

The accused Aurdzieg had been interrogated by a French officer, Captain Pipien, through his sergeant interpreter, Le Fort. The latter had stated, in an affidavit, "I hereby certify that the deponent himself and with his own hand signed this written confession." That Aurdzieg never denied, but he denied that he signed it freely and voluntarily. The confession of the accused bore a great resemblance to the statement of Pinkus, made previously.

Of the accused whom Counsel represented, those who were functionaries in Belsen were Kopper, Burgraf and Aurdzieg. All three arrived at the end of March or in the first days of April. Could they be responsible for the conditions which existed in the camp or in the block? Could they control them and could they really help the prisoners to survive?

Polanski and Ostrowski, though alleged to be functionaries at Belsen, denied it, and witnesses also denied that they were functionaries. As regards Starotska's taking the part of Camp Senior, the accused had explained, "If I wanted to help the prisoners I had to gain the confidence of the German authorities; . . . that was the prime object of my holding the position."

While not wanting to examine at length the question of concerted action, Counsel concluded his address with two general statements. In the first place, he submitted that collective responsibility could not be so interpreted as to make subordinates responsible for the acts of their superiors. Secondly

⁽¹⁾ See p. 30. ⁽²⁾ See pp. 67 and 68. ⁽³⁾ See pp. 68 and 69.

he pointed out that it was accepted in all civilised countries that one was allowed to disobey a superior order if the carrying out of this order would entail the commission of a crime because, in all civilised countries, he expected to get protection. In a concentration camp there was no such protection, least of all for prisoners acting as functionaries.

J. THE CLOSING SPEECH FOR THE PROSECUTION

1. *Remarks on the Charge Sheet*

Colonel Backhouse expressed the opinion that it would be improper to arrive at any finding in the absence of the accused Gura, who had been away from the Court for so long. He asked the Court to report to the Convening Officer that they were unable to arrive at a finding in his case because he was ill and away from Court, and that it was not practicable to adjourn the case. That would leave the Convening Officer free to take any course he might consider proper.⁽¹⁾

He suggested that the Court should make a special finding regarding four of the alleged victims' names appearing on the Charge Sheet. Anna Kis and Sara Kohn were both mentioned in the affidavits of a certain Jenner, and as Jenner was not in the dock his affidavits were not put in. He continued: "They were general affidavits, and by that time we were trying to cut out as many of the affidavits as we could to save time, unless they raised something particular." It was obvious from the evidence that Glinovjechy was at Auschwitz and not Belsen, and that his name had been put into the wrong charge by mistake. Maria Konatkevich had not been mentioned because the relevant affidavit dealt with events after the period set out in the charges. The Court could not find the accused guilty in respect of the fate of those four victims because the evidence was not put before the Court for one reason or another.

2. *The Law Involved*

Colonel Backhouse next made a general examination of the law involved in the case. He devoted himself largely to the task of answering the points raised by Colonel Smith.

He submitted that Allied nationals could only come into German hands, in an internment or concentration camp, in one of three ways. They could be prisoners of war, and the evidence showed that a number of the internees, particularly Russians, were prisoners of war; or they could be Allied nationals who were living in Germany and were interned, or inhabitants of occupied countries overrun during the war by Germany.

If they were prisoners of war, it was quite sufficient to quote the following passage from Article 46 of the Geneva Convention of 1929, relative to the Treatment of Prisoners of War: "All forms of corporal punishment, confinement in premises not lighted by daylight and, in general, all forms of cruelty whatsoever, are prohibited."

A civilian who was interned was entitled to precisely the same treatment as a prisoner of war. That was not a new doctrine; there existed a ruling

⁽¹⁾ See p. 146.

of the Judge Advocate General in January, 1918, on the subject, and far from being an arbitrary ruling made with a view to oppressing the Germans, it was a ruling which operated against the British Government in respect of Germans interned in England, making it clear that they had precisely the same rights and were to be treated in precisely the same way as prisoners of war. This ruling was based upon the case of *Ex parte Liebmann* (1916 1 K.B., page 268) where it was laid down that: "An enemy alien subject resident in the United Kingdom who is in the opinion of the executive government a person hostile to the welfare of that country and on that account interned may properly be described as a prisoner of war, although not a combatant or a spy." The Judge Advocate General's comment on the case was that although the annex to the Hague Convention did not expressly deal with or provide for such persons, as their position did not appear to have been contemplated in 1907, they were, nevertheless, entitled to be treated as prisoners of war.

The inhabitants of occupied territories were protected by Article 46 of the Hague Convention which stated: "Family honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected." The *Manual of Military Law*, in chapter XIV, paragraph 383, stated: "It is the duty of the occupant to see that the lives of inhabitants are respected, that their domestic peace and honour are not disturbed, that their religious convictions are not interfered with, and generally that duress, unlawful and criminal attacks on their persons, and felonious actions as regards their property, are just as punishable as in times of peace."

The Prosecutor denied making any mistake when quoting paragraph 442 of the *Manual*.⁽¹⁾ He left out the words "members of the armed forces", because they were quite immaterial. No one surely could suggest that if a member of the armed forces were put in charge of prisoners and ill-treated them he was guilty of a war crime, and that if, because of the man-power situation, a civilian was put in charge of them instead, and ill-treated them, he was not guilty of a war crime. The whole difficulty arose from the fact that when the Hague Convention was written a military body like the S.S. was not thought of, and it was taken for granted that only a member of the armed forces would guard prisoners of war and would, further, be in a position to ill-treat the inhabitants of occupied countries. The point was, however, completely academic, because Kramer had said: "We were members of the Wehrmacht; as soon as war broke out we became members of the Wehrmacht and I am a member of the armed forces of Germany". The S.S. in the dock were on their own evidence members of the armed forces of Germany.

He agreed that a crime would not be a war crime if it was not connected with war. Where he and Colonel Smith were in complete disagreement was on the question of what was meant by "connected with war". The latter Counsel had argued on the basis that the object of the ill-treatment must be connected with the war effort, whereas, he had argued, this ill-treatment of Jews was going on before the war and would have continued afterwards. The Prosecutor pointed out, however, that what was being complained of in the present trial was ill-treatment of Allied nationals during time of war.

⁽¹⁾ See pp. 8 and 72.

Such ill-treatment was not happening before the war and that would not have gone on after the war. Allied nationals were entitled to protection by their Government. The Court was not, of course, concerned with what Germans did to Germans during the war, but it was concerned with the protection of Allied subjects from German ill-treatment during the war. The mere fact that those people came into the hands of the Germans and were interned or imprisoned by them, and that their countries were occupied by the Germans as a result of operations of war, was quite sufficient to turn that ill-treatment into a war crime; it was precisely the type of war crime that was provided against by the Convention. On any other interpretation the Conventions and Regulations themselves would become nonsense. When a prisoner of war was ill-treated by one of his guards that, of course, did not help the war effort, yet if that person was an Allied subject who had come into his guard's hands by operations of war, then if the latter ill-treated him it was a war crime of precisely the type against which the Convention provided.

In any case, was it not quite obvious that the actual internment in Auschwitz or Belsen was done with a view to further a war effort? There were two reasons for interning those people who were so treated. One was the deliberate destruction of the Jewish race. The avowed object of that was to strengthen the home front and to prevent what happened in the previous war. The destruction of Poland was another reason, and that again was an avowed war aim. The gathering into Germany of persons from every country that Germany overran was done with the deliberate intention of weakening that particular country in its effort to resist Germany.

Colonel Smith had suggested that the crime involved was the moving of the prisoner of war from the prisoner-of-war camp into the concentration camp and that anything which happened to him thereafter was thereby excused. The Prosecutor found it difficult to accept the suggestion that if a man were ill-treated in a prisoner-of-war camp that was a war crime, but if the ill-treatment took place outside in the street or in a concentration camp it was not.

Colonel Smith's next point was that the only purpose of the punishment of war crimes was to secure legitimate means of warfare. No extension of the application of a principle was involved in the charges, however, since the offences were, as Counsel had shown, provided against under existing International Law.

Colonel Smith had claimed that the State and not the individual was responsible in International Law, but he admitted that a war crime was one of the exception to that rule. Colonel Backhouse stated that under the Versailles Treaty, which was still in force, it was laid down that: "The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the law and customs of war". The Leipzig trials also recognised that if an individual broke one of the laws and customs of war he could properly be tried and in fact he was in some cases convicted by the Germans for breaches of international agreements.

Colonel Smith's argument on the question of whether the victims were Allied nationals applied, of course, to Poles and certain Czechs only. It had

no application, even if accepted, to persons of Russian, French, Dutch, Belgian, Greek, and other nationalities; the Germans made no pretence of annexing their countries. Again, before it was possible to annex a country the war must be ended. Whilst the war was still going on the citizens of the country occupied were entitled to protection under the Convention. The gassing of a Hungarian transport started at about the same time as D-Day. Surely Germany did not think the war was already over on D-Day, in 1944? If it were sufficient for a belligerent to say merely "We have annexed this country", then the Convention could never apply at all. In actual fact the Germans never did such an absurd thing. The only part of Poland which the Germans ever declared annexed was a small piece of Silesia which was taken from them in the previous war by the Poles, and which they said was German. That was the only part they did intend to incorporate into the Reich; the rest of Poland was merely occupied territory. Even if the accused did not know that the victims were Allied nationals, he would still not agree with Colonel Smith's argument. By analogy, if a man assaulted a policeman he could not afterwards say that he did not know the victim was a policeman.

The Prosecutor pointed out that a charge did not become bad if it did not contain the names of the victims. In the *Peleus Trial* ⁽¹⁾ and in the *Llandovery Castle Case*, ⁽²⁾ for instance, the victims had not been specifically mentioned in the charges against the accused involved. The charge was required by the Regulations to fall within the Field General Court Martial procedure, and the Field General Court Martial rules stated the charge could be drawn in any ordinary language. ⁽³⁾ It was quite obvious that the accused were not prejudiced in the present case.

Various Defending Officers had set up the plea of superior orders but, with the exception of the gas chamber, the accused had all said that ill-treatment of prisoners was forbidden and said: "We did it against orders". So far as the gas chamber was concerned the accused said they were acting on superior orders; but in order to succeed, Counsel submitted, the accused must satisfy the Court that they did not know that what they were doing was wrong. Not one of them had dared to go into the witness box and say that. Could the Court believe that the persons involved did not know that what they were doing was wrong and contrary to every law and custom of war?

It had been suggested that their acts were legal under German law. Colonel Smith had put the proposition to the Court that a Decree gave absolute power to the competent authority, so that any order that Himmler gave automatically became law. An examination of the Decree showed that it did nothing of the kind. What the Decree in fact did was simply to say that cases against certain privileged bodies would be tried not in the ordinary Courts but in the Courts of those privileged bodies. It gave the S.S., amongst other people, immunity from trial in an ordinary Court for matters which they considered to be matters of politics. Therefore, if the crime against German Law which they committed was one which Himmler himself was condoning, in all probability they would be absolved from

⁽¹⁾ No. 1 of Vol. I of this series.

⁽²⁾ *Annual Digest of Public International Law Cases*, 1923-1924, Case No. 235; Cmd. (1921) 1422, p. 45.

⁽³⁾ Rule of Procedure 108: "... No formal charge-sheet shall be necessary ..."

responsibility. That was the most that could be said. Could these acts be said to be done under cover of authority when they were kept secret even in Germany, and when any records that were kept were covered by the words "Special Treatment"? In his submission, there was no pretence of legality about this procedure. Everyone in the camps knew that the daily murders were wrong.

Colonel Smith had queried the provision in the *Manual* regarding superior orders and had tried to set up that the original text is the right one. That amendment in the *Manual* was made, however, to bring it in line with almost every writer on the subject, including Professor Lauterpacht and Professor Brierly. It was in fact made in consultation with the American Judge Advocate General, and it was in line with American law as set forth in America, as opposed to the American Manual, which had not yet been amended.⁽¹⁾

On the question of collective responsibility which was raised by Captain Phillips, the Prosecutor claimed that all the accused were parties to a general conspiracy (alternative expressions were "concerted action", "joint action", or "unit") to ill-treat the persons who were under their care. Of course, he did not suggest, for instance, that the girl Hahnel was in the dock because she once hit a girl in a bath with a whip. If the Prosecution's case was right she was there because she was one of a body of people who were habitually ill-treating the persons under their care, and the fact that she hit somebody in a bathroom was merely brought in to show that she was taking an active part, however small, in the conspiracy.

It would undoubtedly be open to the Court to convict her in respect of specific actions even if they do not feel that she was a party to a more general ill-treatment. The extent of the punishment she should suffer would be an entirely different matter. If they thought she was guilty of an isolated incident of ill-treatment, or was merely a party to a very limited ill-treatment, naturally they would not want to visit any great wrath upon her; whereas if, on the other hand, they thought she was a party to the extent of wholeheartedly joining in the conspiracy then the Court would probably take a different view.

A number of accused had been asked whether they had ever planned with others to commit ill-treatment. Proof of a conspiracy was nearly always, however, a matter of inference, to be deduced from the criminal actions of the parties to the deed, and a conspiracy might very well arise between

⁽¹⁾ That is to say, the United States text was still unamended at the time of the British Amendment, April, 1944. Paragraph 347 of the United States Basic Field Manual FM. 27-10 (*Rules of Land Warfare*) used to provide that individuals of the Armed Forces would not be punished for war crimes if they were committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they were committed by their troops, might be punished by the belligerent into whose hands they fell. By Change No. 1 to the *Rules of Land Warfare*, dated 15th November, 1944, the sentences quoted above from paragraph 347 have been omitted and the following provisions have been added to paragraph 345:

"Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."

persons who had never seen each other and had never corresponded together. "It is not necessary for the persons to have concocted the scheme the subject of the charge nor that they should have originated it. If a conspiracy is formed and a person joins in afterwards he is equally guilty as the original conspirators," it was stated in the case of *Rex v. Murphy*; ⁽¹⁾ and it had also been held that these principles applied even though the indictment did not specifically allege a conspiracy, if the acts amounted to a conspiracy. What was suggested was that, finding themselves in the S.S., and finding a conspiracy to ill-treat the persons who were interned, some of the minor figures in the dock joined in, assisted in, and were parties to that conspiracy.

It had been suggested by the Defence that it was not permissible to convict unless the person concerned was "in control of the situation". That was a very facile argument because it was quite easy to say that if one of the accused had not marched victims on the road to the gas chamber somebody else would have marched them. If all the girls had refused to march them on the parade they would never have been taken to the gas chamber. It was by that collective disclaimer of responsibility that the crime was committed. In a similar way, the actions of any one man in a mob lynching might be said to have no effect on the lynching, but if the whole mob did not do the lynching the victim would not die. On the question of the gas chamber selections, Klein had said: "My only part in the matter was to say this man is fit, this man is unfit, so I am not responsible." An S.S. man had said: "I know I was there, but I was not responsible because the man who did the selecting was Klein." Counsel claimed that if a number of people took a part, however small in an offence, they were parties to the whole. The question of the degree of their responsibility was relevant only in assessing punishment.

Regarding the question of the Polish prisoners in the dock, Counsel said that on the face of it, it might be a little absurd to suggest that it is a war crime for Poles to beat other Poles in concentration camps, but surely, if these people, whether to save themselves from being beaten or from whatever motive, accepted positions of responsibility in the camp under the S.S. and beat and ill-treated prisoners, acting on behalf of the S.S., they had identified themselves with the Germans, and were as guilty as the S.S. themselves. The same applied to Schlomowicz, who is not a Pole but an Austrian.

The following paragraphs of an article by Professor Brierly summed up the position on the question of what was a war crime:

"For there is one clear and absolutely fundamental principle running through the laws of war which enables us if not to define war crimes or to make an exhaustive list of them at any rate to recognise one when we see one.

"This is the principle that the only kind of injury to the person or the property of an enemy that the existence of war legally justifies is one which serves some military purpose. All wanton injury, injury which does not appreciably advance the military object of war, which is victory, is forbidden by the laws of war, and he who commits such injury commits a war crime.

⁽¹⁾ 8 C. and P., p. 311.

"Clearly that leaves open a lot of border-line cases but most of this difficulty disappears if we imagine the sort of question which a Court will have to answer: can this killing which would normally be murder, this injury which would normally be unlawful wounding, this taking of property which would normally be theft, be justified as an act of war? If not, it will be a war crime."

3. *The Facts Regarding Conditions in Auschwitz and Belsen*

The Prosecution suggested that the Court should first come to a conclusion as to the general picture of what was happening at these two camps, Auschwitz and Belsen, and then consider how the individual persons fitted into that general picture.

Could the Court have the slightest doubt about the gas chamber or the selections which were made for the gas chamber? It was freely admitted that there were, in the camp Birkenau, five gas chambers attached to the crematoria, and that there was attached to each of these gas chambers a crematorium.

The persons who were being put into those gas chambers were not people who had committed an offence of any sort, and they were not people who had been submitted to any trial; they were simply persons who were no longer fit to work for the Reich or persons of the Jewish race. There was no doubt whatsoever that, whatever other places may also have been used in the course of this destruction, in Auschwitz alone literally millions of people were gassed for no other reason than they were Jews. The people who were gassed were the old, the weak, pregnant women and children under 14.

Many of the people gassed were Allied nationals who came into the hands of the Germans because they were scattered around the various countries. The Hungarians were brought in at a later period; it had been rightly argued that the Hungarians were not Allied nationals, but the Court must take the picture as a whole to see what was happening in this camp.

Those selections were made on a variety of occasions. Some victims never entered the camp but went straight to the gas chamber. The second class of selections were selections in the hospital. The third type took place in the camp, when the Jews, and according to some witnesses Aryans as well, were paraded and victims chosen out.

It was common ground that a doctor attended the parades, and it was clear that the Lagerführer (Camp Leader), as a rule, was there, and that some Block Leaders were present, whichever happened to be on duty.

It was the submission of the Prosecution that all people who took part in these selections, knowing what they were, were equally guilty, whether the doctor who said: "This one to live, this one to die", or the man who pushed the victims into one particular compartment or the other, or the man who led them, or the man who gassed them.

Although a lot of people had tried to pretend that they did not know what these parades were for, was it not obvious from the body of the evidence that everyone knew their purpose? As Schopf said, everybody knew that Block 25 was kept specially for people who were going to the crematorium. Many

witnesses and Irma Grese herself had borne witness to the brutality used on these occasions.

The last type of selection was the general selection. It had been the custom for some people at the camp gate to be selected. As they came back in the working party they were made to run at the double and those who fell out were selected. Naturally, persons who knew they were in a weak state of health, or had reasons to suspect that they would not be able to pass the selection at the gate, began to hide in the camp. Then the S.S. developed a new plan. When the working parties had gone out, they held a parade of everybody left in the camp. These were marched and lined up outside Block 25, and only those who could give a proper account of themselves escaped the gas chamber.

What were the duties of the various officials? Everyone seemed to be agreed that it was the doctor's duty to make the selection. According to Hoessler it was the duty of the Overseer at the selection parade to maintain order, and the kapos were under the orders of the Overseer, doing what she told them to do. The Camp Senior had herself said that she took down the numbers of the persons on the selection and that all the Overseers who happened to have camp duty that day, together with the Block Leader, had to attend these selections.

Every person who took part in those parades, knowing what they were for, took part in deliberately organised murder, and an attempt to murder the whole Jewish race, to destroy the strength of Poland and to destroy by fear many other people.

The Prosecutor then asked what was the position in Auschwitz apart from the gas chamber? Counsel referred to the lack of sanitation, lighting and water, of which Starotska had spoken. Many witnesses had spoken of the beatings there and of the practice of setting dogs on prisoners. To prove that the whole camp was ruled by force and ill-treatment, the Prosecutor referred to the evidence of Defence witnesses, namely Lothe, Grese, Lobauer, Gura, and Dr. Klein himself.⁽¹⁾ He again quoted Starotska, who had said: "Some of the Overseers had sticks; some had whips, and some had dogs. Prisoners in Auschwitz were beaten on every occasion. They had to work very hard. Accommodation was very bad, and they had lice and other diseases, and dogs were set on them". That was a reasonably fair picture of life at Auschwitz.

Colonel Backhouse explained that he was dwelling on Auschwitz because it was the obvious line of defence to say that Belsen was exceptional.

The evidence made it clear that Belsen was intended to be a new Auschwitz removed from the threat of the Russian advance. Dr. Klein said there was some talk of the camp being some kind of exchange camp for prisoners, but that later he realised that it was not a camp for sick people, but a death camp, a torture camp. Counsel claimed that there was never the slightest attempt to improve conditions there, to bring medical supplies, beds or anything else that one would naturally require to build up a convalescent camp, to provide any diet, or to make any provision for the sick people when they arrived. The prevailing attitude was summed up in Kramer's words: "Let

⁽¹⁾ See pp. 41, 46, 47, 48 and 51.

them die". Was not that a continuation of the general situation in Auschwitz?

It was quite obvious that the internees were being starved; and if they were not being deliberately starved, at least there was not the slightest care as to whether they starved or not. No attempt was made to organise the feeding of the unfortunate ones who were weak, and the food actually went to the strong.

Counsel referred the Court to the evidence of Brigadier Glyn Hughes, Colonel Johnston and Captain Sington⁽¹⁾ for descriptions of the emaciated victims living alongside piles of dead. He submitted that the facts before the Court showed that conditions in Belsen arose, not out of a breakdown in organisation, but out of the complete neglect of the authorities.

Counsel submitted that there existed in Germany during the period covered by the charges an organisation which deliberately murdered and ill-treated a great number of Allied nationals. If the Court were satisfied that any of the accused did in fact join in this conspiracy to ill-treat and murder Allied nationals at Auschwitz or Belsen, however late he or she joined and however small the part played, that accused was responsible before the law.

4. The Responsibility of Each Accused

(i) *Kramer*. The Prosecutor pointed out that this accused had worked in concentration camps since 1934, and from 1942 onwards had been the Kommandant of a concentration camp. He served his apprenticeship in the gassing of innocent people, as he had explained himself, at Natzweiler, where he constructed the gas chamber, took the people in and gassed them himself. The Prosecution asked the Court to accept that he came to Auschwitz to manage the gassings of new transports in May, 1944. It had been said that he had written orders saying that the gas chamber was not his concern. He was the only person to say so. There were a number of witnesses who said that he took an active part in the selection parades, in that for instance he loaded people into the trucks and beat them when they would not get into the trucks. He admitted that he saw the selections but claimed to have taken no part in them.

So far as his general conduct in Belsen and Birkenau was concerned, everything depended on the general picture which the Court formed of these camps. Kramer had himself said that he was regularly in the camp and that he was always in the camp until the roll-call was finished.

Could there be any doubt that Kramer was implicated absolutely in the events in Belsen, in view of the evidence, for instance, of Brigadier Glyn Hughes, Colonel Johnstone, Sunschein and Sompolski?⁽²⁾

(ii) *Dr. Fritz Klein*. This accused had made no secret whatsoever of the fact that he attended selections and selected people, and that he knew that it was wrong and that it was murder. He agreed that those who were not fit to work were simply destroyed. The only time when he ever did anything to improve conditions in Belsen was when he knew that the British were

⁽¹⁾ See pp. 9-10. ⁽²⁾ See pp. 9, 10, 16 and 21.

coming. The evidence plainly showed that he was content to neglect the camp completely.

(iii) *Peter Weingartner*. The principal witness against Weingartner was Glinowieski, whose brother was said to have been beaten to death by the accused. Sunschein's evidence was also referred to by Counsel.⁽¹⁾ Weingartner had agreed that there were dogs with his party when they came to the hill on the way to work. Had the Court any doubt that the women in the "Vistula" Kommando were chased up the hill with dogs behind them?

No witness had suggested that Weingartner ever attended or took part in a selection. Nevertheless, he was Block Leader at the gate of Lager A where the transports arrived. Was it credible that he never even saw a selection and knew nothing about them? There was evidence that he had beaten Sunschein with a rubber hose at Belsen. Counsel asked the Court to regard the accused as being obviously involved in the state of affairs existing in both camps.

(iv) *Kraft*. Counsel referred to the evidence of Sompolski,⁽²⁾ who had recognised this accused in person. Kraft denied ever being in the actual concentration camp. Counsel submitted that the explanation of his being in the concentration camp was that soldiers would be sent in from the Wehrmacht camp to clean up the concentration camp before the British arrived.

(v) *Hoessler*. This accused like Kramer, was "one of the old guard". In view of his own admissions and of the evidence of Dr. Bimko and various other witnesses,⁽³⁾ Counsel was confident that Hoessler would be found guilty.

(vi) *Borman*. There were a number of allegations that Borman set her dog on people. She was also seen several times on selection parades. Jonas had said she was not content merely to stand there when she was the Overseer on duty but pointed out to the doctors: "This one looks quite weakly, she can be taken away as well". There was also evidence of her beating people.

(vii) *Elizabeth Volkenrath*. Josephine Singer had said that this accused beat many people in the tailoring shop and threw a Czech woman down some steps. Later at Auschwitz she became supervisor in the parcel store, issuing bread, and that was where Sunschein saw her frequently beating people. Kaufmann had said that during selections she saw Volkenrath throw women to the ground or against a wall, trample on them and beat them with a stick or rubber truncheon. Singer, Trieger, Siwidowa and others had said that hers were not merely beatings with the hand but beatings with rubber sticks, beatings producing unconsciousness and sometimes death, and kicking.

At Belsen she continued her beating. Counsel referred to the evidence of Neiger, Löffler⁽⁴⁾ and others in this connection.

(viii) *Ehlert*. From the point of view of the Prosecution, there was no evidence with regard to Ehlert's conduct at Auschwitz. Concerning her acts at Belsen, the evidence against her came from Sunschein, Hammer-

⁽¹⁾ See p. 16. ⁽²⁾ See p. 21. ⁽³⁾ See pp. 11, 12, 13, 14, 16, 17, 20, 21, 22 and 27.

⁽⁴⁾ See pp. 30 and 31.

masch, Helene Klein, Neiger, Korkovitz, Löffler, Kopper and Weiss, and alleged the beating of people at the gate and the beating of people for unimportant reasons, for instance, for wearing a scarf.

(ix) *Grese*. Grese was quite frank about almost everything which was suggested against her. Kopper had made an allegation regarding Grese's behaviour in the sand pit Kommando.⁽¹⁾ Concerning her actions at Auschwitz, the Prosecutor drew attention also to the stories of Rozenwayg, Watinik and Triszinska, according to which she was in charge of a Kommando, with Lothe as the kapo, and alleging that she set a dog on them. On her own admission alone there seemed ample evidence to show that she was ill-treating, beating, and prolonging roll-calls at Auschwitz. At Belsen she was made Arbeitsdienstführerin and again there were stories from the prisoners as to how she beat people and forced them to "make sport".

(x) *Lothe*. Lothe was herself an imprisoned German. When she eventually became a kapo, however, she worked with the S.S. and against the prisoners. Against her there were many allegations, for instance of beatings.

(xi) *Lobauer*. Lobauer was another kapo. There were many allegations of beating against this woman. She had said frankly: "I admit carrying a stick at Auschwitz and I admit using it".

(xii) *Klippel*. Against Klippel there was very little evidence. One deponent had said that he was employed in the kitchen at Belsen, that he frequently beat women in this kitchen and that he twice shot Jewish women who approached the kitchen in search of food.⁽²⁾ On the other hand there was considerable evidence to show that the accused did not belong to Belsen at all.

(xiii) *Schmitz*. The evidence against Schmitz was contained in the statement of Jecny, who disappeared without signing it.⁽³⁾ Could the Court believe, if the accused were really a prisoner, a Camp Senior over 28 prisoners, that he should suddenly be put in charge of 15,000 people and tell Hoessler how to run the camp?⁽⁴⁾ What was much more likely was that he came as an S.S. man and helped to guard and to supervise the clearing up of the concentration camp during the last few days.

(xiv) *Francioh*. This accused tried to show that he was in jail during the relevant period in April, but actually his jail period was earlier. The evidence of the people from his own kitchen showed that he was not stating the truth. There were a number of different shootings alleged against him.

(xv) *Mathes*. All the allegations against this accused were to be found in three affidavits, and concerned the shooting of people trying to steal from the kitchen.

(xvi) *Caleson*. The Court would remember the allegations against this accused with regard to the transport, of which he was quite obviously the senior N.C.O. He was accused of shooting prisoners on the way, and it was also said that there was no food or water on the journey for the Jews and very

⁽¹⁾ See p. 37. ⁽²⁾ See the affidavit of Jakubowice on p. 27. ⁽³⁾ See p. 28.
⁽⁴⁾ See p. 50.

little for the Christians. He was also faced with allegations of beating prisoners at Belsen and of shooting prisoners at Belsen station.

(xvii) *Burgraf*. The evidence against Burgraf was that he behaved badly at Drütte and that when he came to Belsen he continued to do so. He became a functionary in Block 19, where he armed himself with a table leg, with which he beat prisoners.

(xviii) *Egersdorf*. The evidence against Egersdorf was that of Almaleh, from which Counsel quoted the account of the shooting of the girl.⁽¹⁾ To the Judge Advocate's question asking what Counsel's attitude was to the Defence argument, that the evidence showed that the ill-treatment was not of an Allied national but of a Hungarian girl, and that this was not an incident which would support a charge in which ill-treatment of Allied nationals was alleged, the Prosecutor replied that the only reason for quoting these particular incidents in connection with any of the accused was to show that they, having joined the camp staff, co-operated in the ill-treatment of persons in the camp. The fact that the individual person whom an accused was seen ill-treating was Hungarian would not be relevant if the Court believed that the accused was taking a part in the systematic ill-treatment which was going on.

(xix) *Pichen*. Against Pichen there was a great deal of evidence as to what went on in his kitchen in particular. There was the account of the shooting on the day of the S.S. parade.⁽²⁾

(xx) *Otto*. The question was whether to believe this accused or not. The allegation made against him was that he caught Stojowska taking a bed from outside Block 213 and that a day or so later he came into Block 201, where she lived, found that the other Block Senior had also got a bed and beat them both. There was only the one affidavit against him, but this man undoubtedly frequented that part of the camp, and, asked Counsel, was it not the practice of an S.S. man, if he saw something irregular as he was going round the camp, to take action there and then?

(xxi-xxii) *Stofel and Dorr*. Counsel suggested that the finding of the corpses⁽³⁾ was entirely consistent with the story that Dorr shot each straggler along the route of the transport, and asked was it surprising, realising how cheap life was held in the concentration camps, to find one of the guards who had been in a concentration camp for a long time shooting people as they went, with the full approval of the man in charge, Stofel?

(xxiii) *Schreier*. Counsel did not examine the evidence regarding this accused except as regards his identification. Could the Court have any real doubt at all that he was in fact a member of the S.S., that the uniform he was wearing was his and that he was stationed in Belsen when he spent the evening with the girl in Soltau?⁽⁴⁾

(xxiv) *Barsch*. In view of the evidence, Counsel did not ask the Court to say that this accused was ever in Belsen at all.

⁽¹⁾ See p. 23. ⁽²⁾ See pp. 12, 27 and 52. ⁽³⁾ See p. 55.

⁽⁴⁾ See p. 54. The Prosecutor later agreed with the Judge Advocate that nothing had been proved against Schreier as regards Belsen.

(xxv) *Zoddel*. This man accepted the position and responsibility of a Camp Senior, becoming a senior prisoner in the camp, abused that position as the S.S. did, and identified himself completely with the S.S.

(xxvi) *Schlomowicz*. It was said that this accused regularly beat people at Belsen with a rubber cable and a stick.

(xxvii) *Ostrowski*. The Court might think there was no doubt at all that this accused had a function in the block in question and that in fact he was engaged, as various witnesses said, in beating and ill-treating people.

(xxviii) *Aurdzieg*. He was the man who made a full confession to Capt. Pipien of the French War Crimes Investigation team, then told the story of how that was obtained from him and he was made to sign at the pistol point; yet if the Court would examine the original it would find that below his signature he went on to give an account and description of the persons who were working with him.

(xxix-xxxix) *Ilse Forster, Ida Forster, Opitz, Charlotte Klein, Bothe, Walter, Haschke, Fiest, Sauer, Lisewitz and Hempel*. Against every one of these women there was evidence of beating. These beatings were not alleged merely to be slaps on the face or the boxing of ears. On the question of the rubber sticks of which the Court had heard so much, Counsel asked whether there existed a kitchen with running water, or with large boilers, and portable boilers which were brought in and filled, which did not have these short lengths of hose?

(xl) *Roth*. In connection with this accused, Counsel made reference to the allegations of Sofia Rosenzweig, Rorman and Helene Klein.⁽¹⁾ Helene Klein had not been certain that the victim's name was Friedman; Counsel suggested that whether Friedman was alive or not was of no great importance.

(xli) *Hahnel*. The only evidence against Hahnel was that of Stempler, who recognised her from a photograph and said that the accused beat a girl in the bath.

(xlii) *Kopper*. Was it not plain that Kopper preserved herself at Auschwitz as an informer? She admitted she was two years in a Strafkommando without being beaten when everybody else was. She claimed that she had this good fortune because she knew her rights. The Court might think it was because, as other prisoners alleged, she was a known informer and was kept as such.

When she came to Belsen she was made Block Senior, and then a camp policewoman, and it was only, the Court might think, because she "got too big for her boots" that on the 1st March she was molested, as it was alleged. She was obviously a woman who was not liked by the other prisoners and they were only too pleased to beat her when given the opportunity. There were many allegations made against her regarding her acts while she was Block Senior.

(xlili) *Polanski*. Witnesses said that he was an assistant Block Senior in Block No. 12, that he behaved extremely badly and that he was one of the

⁽¹⁾ See pp. 20, 32 and 33.

gang of people who were forcing people out to bury the dead early in the morning, beating them on the head as they went.

(xliv) *Starotska*. This accused had admitted to a number of offences, but claimed that she was actually acting as a sort of Scarlet Pimpernel on behalf of the prisoners. Did the evidence support her? Rozalja said: "She created an atmosphere of fear in the whole block, Block No. 26"; this was quite apart from the evidence of her denouncing people to the S.S., and regularly beating people in the block. The evidence of Anna Wojeiechowska⁽¹⁾ did not support the accused's story in the way the latter had intended; the witness had not actually been selected for the gas chamber. Janicka and Komsta, two further Defence witnesses, had testified to her kindness, but they were both Aryan Poles, and therefore favourites. Nowogrodzka had made it quite clear that Starotska did no kindness whatsoever for anybody but Aryan Poles, and that she put Aryan Poles in a favourable position and paid no attention to the other prisoners.

Counsel submitted that she made herself indispensable to the S.S. in Auschwitz, and accepted any post which was given to her. When she came to Belsen the same was true.

K. THE SUMMING UP OF THE JUDGE ADVOCATE

The Judge Advocate began his summing up by pointing out that the Prosecution did not ask the Court to consider whether the taking of Allied nationals to Auschwitz was right or wrong. What they did say was that, when they were there, they should not have been ill-treated or maltreated to an extent that they died or suffered physical hardship. If the Court were satisfied that Allied nationals were taken in the way which had been described, and that they were put in a gas chamber because they were of no use to the German Reich, it seemed to him that a violation of the customs and usages of war had been committed.

In regard to the more general question of ill-treatment or maltreatment, the same difficulties did not arise, because it was not claimed that such treatment was in any way authorised by the German Reich, as it had been suggested might be the case in regard to the gas chambers.

Regarding the plea of superior orders, he advised the Court to follow the law as laid down in Volume II of Oppenheim's *International Law*, 6th Edition, p. 452; the passages quoted run as follows:

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. . . . Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the law cannot, in conditions of war discipline, be expected to weigh scrupulously the legal

⁽¹⁾ See p. 64.

merits of the order received; that rules of warfare are often controversial; and an act otherwise amounting to a war crime may have been executed in obedience to orders received as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of a stigma of war crime. . . . However, subject to these qualifications, the question is governed by the major principle that members of the armed forces are bound to obey legal orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."

The Court would probably find that the reason why that attitude was adopted by the writer was contained in the next sentence: "To limit liability to the persons responsible for the order may frequently amount, in practice, to concentrating responsibility on the head of the State whose accountability, from the point of view of both international and constitutional law, is controversial."

The Judge Advocate went on to say that the two broad issues which had to be established beyond all reasonable doubt were, first, whether the crime set out in the charge sheet had been established, and secondly, if it had been established, whether the accused or any of them had been proved to have committed it.

Dealing with the first issue, the Judge Advocate expressed the view that there was a tremendous body of evidence to establish that at Auschwitz the staff responsible for the well-being of internees were taking part in gassings, in improper unlawful beating, in roll-calls and in the use of savage dogs; and that they were overworking and underfeeding the internees. It might even be that there were experiments performed upon people, allegedly in the interests of science, against their will. He was not suggesting for the moment that the prisoners in the dock necessarily committed what he called that general crime, but he stated that in his opinion there was evidence upon which the Court could find that the war crime set out in the first charge had been committed.

In respect of Belsen there was a general allegation of ill-treatment or maltreatment, of a state of wilful or culpable neglect whereby thousands of innocent people lost their lives. Here again it seemed to him, rightly or wrongly, that there was a tremendous volume of evidence upon which the Court could properly find that the offence alleged was committed by the staff employed at Belsen who were responsible for the well-being of the internees.

The difficult issue was whether each or any of the accused had been proved beyond all reasonable doubt to have committed the offence with which they are charged.

The Judge Advocate then summarised the evidence against the accused, beginning with those alleged to have committed crimes at Auschwitz. He prefaced this survey by stating in general that the case for the Prosecution was that at Auschwitz members of the staff agreed together, either tacitly or expressly, that they would ill-treat the internees, and that they would take part in the gassings.

In dealing with the evidence against Weingartner, the Judge Advocate said that through some error the events which were alleged to have taken place at Auschwitz appeared in the Belsen charge.⁽¹⁾ Weingartner could not, therefore, be punished for these matters but evidence regarding them had been allowed to be introduced, as showing the way in which he was conducting himself, from which the Court were invited by the Prosecution to infer that he must have been party to a system of ill-treating internees.

Regarding the allegations of beating, the Judge Advocate felt that, if discipline and order could not be maintained without a reasonable use of force, and whether there was specific authority to use that force or not, the Court would not hold that reasonable use of force against any of the accused as a war crime or as a breach of the customs and usages of war. What the Prosecution were alleging, and what they had to prove, was the use of force of such kind that it was savage and brutal, without justification, existing merely because the person causing it was a party to a system of cruelty which was in force in concentration camps.

There was a vast difference between hitting people with the hand and hitting them with a stick or kicking them, and the Court would no doubt have a very keen eye to discriminate between the various kinds of alleged ill-treatment. Great damage could be done even with the hand if people struck in anger or got into the habit of striking every day so that gradually more force was put behind their blows.

The Judge Advocate said that usually affidavits did not come before courts of criminal jurisdiction, but that under war conditions it had become necessary to introduce these affidavits in an endeavour, not to convict innocent people, but to convict guilty people. However much one would prefer to have a deponent in person before the Court the affidavits were properly admitted, and it was for the Court to say whether they would act upon them. There was nothing to compel the Court to accept them.

The affidavits were dangerous material. He had the greatest faith in cross-examination as a means of finding the truth. He invited the Court to consider the way in which the affidavits were taken, especially on the question of identity. He was sure that the Court would find it difficult to act upon the evidence of a mere one or two unless supported in some material particular.

It had been pointed out that sometimes a witness differed in his evidence in Court materially from his affidavit, or that he introduced matters which were not in the affidavit. Some affidavits used indiscriminate and very wide language such as "She threw people to the ground and cruelly beat them and many died". A great number of the affidavits ended with allegations that people died as a result of what was alleged to have happened. He was sure that the Court would want more proof that people were killed in this manner before they accepted the allegation and that if there was any doubt they would not accept it.

The Judge Advocate was of the opinion that the charges did not say that every person who was on the staff of Auschwitz or Belsen concentration

(1) A reference to the alleged killing of Hejmech Glinowiewski. See pp. 4 and 15.

camps was guilty of a war crime. The Court would have to be satisfied that a person was deliberately committing a war crime, identifying themselves with the system in force at the camp; their mere presence on the staff was not of itself enough to justify a conviction.

At the end of his summing up of the evidence relating to the offences alleged to have been committed at Auschwitz, the Judge Advocate said that the main allegations related to Allied nationals unknown. It was not necessary to prove everything in a charge. It was the substance which must be proved, and if the Court were satisfied that there was substantial ill-treatment, causing death or physical suffering to people whose names the Prosecution were not able to put forward, that would allow the Court to convict the accused, even though they were not satisfied of the death of any named person.

The case for the Prosecution was that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened. The Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused according to the positions they held.

Turning to the allegations regarding Kramer's actions at Belsen, the Judge Advocate said that he did not think it mattered very much whether he acted wilfully or merely with culpable neglect; the question was whether the Prosecution had proved that Kramer did not carry out his duties as far as he was able to do and that he had caused at any rate physical suffering upon Allied nationals by reason of his actions? Further, there was no charge against Dr. Klein of any deliberate acts of cruelty, and it was for the Court to consider whether Klein had a fair opportunity to do anything with regard to the conditions in Belsen and whether he so failed to act that the Court would have to find him guilty of the charge. What had to be decided was whether, in the time when he was really responsible and could improve matters, he failed either deliberately or in a culpable way deserving of punishment to do what he should have done.

The Judge Advocate later commented that it was acknowledged that at Belsen there were a large number of very sick and feeble people; a resort to violence by smacking or striking people who were weak and not in a fit condition might become a very improper thing, and quite different from the same action adopted towards fit and strong persons.

Regarding offences committed outside Belsen, the Judge Advocate said that the charge alleged certain crimes committed at Bergen-Belsen between certain dates by members of the staff responsible for the well-being of the persons interned therein. A man could not be convicted upon a charge

which was not before the Court, but if the Court were satisfied that the substance of the charge was proved they might find a person guilty though of an offence differing from the particulars set out in the charge. He did not think that it mattered very much, looking at the substance of the charge and not the shadow, whether the people in a convoy on its way to Belsen had already reached and become internees in Belsen.

In the course of his treatment of the case against Burgraf the Judge Advocate said that it did not seem to be the aim of the Prosecution to bring accusations against anyone, however terrible, if they were only ordinary prisoners in the camps at Auschwitz or Belsen. The essence of the charge was that the accused should have been in some position of authority, with the power to look after the inmates and make their life satisfactory. It would be for the Court to decide whether Burgraf could be treated as being on the staff at Bergen-Belsen.

After surveying the evidence before the Court, the Judge Advocate said that on a broad basis it was suggested by the Prosecution that in Germany in the war years there was a system of concentration camps of which Auschwitz and Belsen were two; that in these camps it was the practice to treat people, especially the unfortunate Jews, as if they were of no account and had no rights whatsoever; that the staff of these concentration camps were deliberately taking part in a procedure which took no account of these wretched people's lives; that there was a calculated mass murder such as at Auschwitz; that there was a calculated disregard of the ordinary duties which fell upon a staff to look after the well-being and health of people at Belsen; that throughout these camps the staff were made quite clearly to understand that the brutalities, ill-treatment, and matters of that kind would not be punished if they took place at the expense of the Jews; and that there was a common concerted design of the staff to do these terrible things.

As already indicated, apart from his comments on points of law, to which reference has been made in the preceding paragraphs, the Judge Advocate also provided the Court with a full summing up of the evidence which had been placed before it. This part of the Judge Advocate's address is not here reproduced in full since it would duplicate the summaries of evidence already set out on pp. 9-37 and 39-69.

L. THE VERDICT

The Court found the following guilty on both charges: Kramer, Fritz Klein, Weingartner, Volkenrath, Grese and Lobauer.

The following were found guilty on the Auschwitz charge only: Hoessler, Borman, Schreier and Starotska.

The following were found guilty on the Belsen charge only: Ehlert, Francioh, Calesson, Burgraf, Pichen, Stofel, Dorr, Zoddell, Ostrowski, Aurdzieg, Ilse Forster, Bothe, Walter, Haschke, Fiest, Sauer, Lisiewicz, Roth, Hempel and Kopper.

Kraft, Lothe, Klippel, Schmitz, Mathes, Egersdorf, Otto, Barsch, Schlomowitz, Ida Forster, Opitz, Charlotte Klein, Hahnel and Polanski were found not guilty.

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The Court ruled that in the case of findings of guilty on the Belsen charge the words: "Anna Kis, Sara Kohn (both Hungarian nationals), Hejmech Glinovjehy and Maria Konatkevicz (both Polish nationals)" would be omitted, as well as the words: "A female internee named Korperova."

In the case of findings of guilty on the Auschwitz charge, the words: "And particularly to Ewa Gryka and Hanka Rosenwayg (both Polish nationals)" would be omitted.

M. SPEECHES BY DEFENCE COUNSEL IN MITIGATION OF PUNISHMENT

Without calling any further witnesses, Counsel for the Defence made speeches in mitigation of punishment on behalf of the accused who were found guilty.

Major Winwood said that Weingartner was forced to do service in the S.S. at Auschwitz and Belsen. He felt sure that the Court must have formed the opinion that his mentality and temperament were, to say the least, not quite normal. Though unsuitable for the task, he was put in charge of a large number of women, and his nerves and temper sometimes overrode his reason. Deliberate ill-treatment was not part of his make-up. He was one of those unfortunate people caught up against his will in the Nazi machine of which he became an unwilling but very easily moulded tool. Dr. Klein received from his superior officer distinct and direct orders what to do. From the purely practical and human point of view, Dr. Klein had little option in disobeying the orders he received, since his superior was on the spot seeing that he carried out the order. Counsel asked that the Court bear this in mind in assessing punishment. Further, it had been said that he sent thousands to their death in the gas chamber, but every man or woman whom Dr. Klein chose as fit for work was saved from the gas chamber, and he or she was granted a lease of life. Kramer had represented himself as a true German who carried out an order because it was an order. Counsel suggested that a British officer of the same rank and equivalent position would bear a greater degree of responsibility if convicted of such a crime for he had been brought up to consider the principles of tolerance, kindness, and the rule of fair justice. The mind of the German, especially that of a National Socialist and member of the S.S., was drilled into one particular channel and the broad view of humanity was lost sight of. He could have fled from Belsen like others, yet he did not do so, although he must have known that his superiors had washed their hands of him. In conclusion, Major Winwood quoted from the *Manual of Military Law* on page 61: "The instigator of an offence should receive a more severe sentence than the person who was instigated to commit it." The men in the dock were instigated to commit this war crime and they had been found guilty. The instigators of the crime were about to stand their trial in Nuremberg. Were the Court to mete out to these minor characters a punishment which could not be exceeded at Nuremberg?

Major Munro wished to associate himself with what Major Winwood had said about the State system and also as to the effect on sentence of the plea of superior orders. Against Hoessler, apart from one general affidavit, there were no allegations of personal brutality. There was also a certain

amount of evidence in his favour. Borman had said that she joined the S.S. to make more money, but her life up to that time had been one of rather bitter and friendless loneliness. Volkenrath did not volunteer into the S.S. and the job she had latterly at Belsen of Oberaufseherin was not so important as it sounded. She had no administrative control in the camp, and the job mainly consisted in detailing other Overseers to particular jobs. Whatever might have happened later, it was clear that at the beginning Ehlert was a good and decent woman who looked after the interests of the prisoners, and who, it appeared, was punished for it. The Court was invited to take into account what the conditions in concentration camps could do to weak human nature.

Major Cranfield reminded the Court that Grese's mother died when she was 14 years of age, that she herself left her home at the age of 16, and that at the age of 18 she was conscripted into the concentration camp service; Grese was a girl of only nineteen when she came to the appalling atmosphere of Auschwitz. Grese was only a poorly educated girl. Her father was an agricultural labourer and she was a subject of the Nazi propaganda machine. At the time of the liberation at Belsen Lobauer had undergone five years of the most rigorous kind of imprisonment. She received that for refusing to make munitions which would, of course, have been used against the Allies. Further; while she was undergoing that imprisonment she received a savage beating as a punishment for what the Court would consider a trivial offence. Prison functionaries such as she were ordered to take up their appointments and they had no opportunity of refusing.

Captain Roberts pointed out that on the day the British arrived at Belsen, Francioh went out of the camp to help his wife pack in order to return home, and had he chosen at that moment to go with her he could have gone quite easily. Instead he chose to return to the camp and to continue his duties there in accordance with the truce.

Major Brown stressed that less than a year before the liberation of Belsen, Calesson, then 52, was living at home with his wife and three children. In May, 1944, he was conscripted into the German army. He was only in Bergen-Belsen for five days. He was one of those men who could have left Belsen under the terms of the truce, but he remained there, because he had nothing to fear.

Captain Fielden observed that Pichen, far from being a full-blooded S.S. man, was conscripted into the Wehrmacht in 1940, and became an ordinary front line infantry soldier. He had suffered the horrors and perils of the Eastern Front, where he was wounded and was, as a result, a cripple. He did not come to Belsen until the middle of March. In trying to guard against continual thefts from the cookhouse, he was making an attempt to safeguard food for the benefit of the others. There was no accusation of actual killing against Stofel.

Captain Corbally, speaking on behalf of Schreirer, said that at the time when he was alleged to have been at Auschwitz he was 19 years of age. There was no evidence that he killed anybody at Auschwitz, and there was evidence that the most serious atrocity alleged against him was done in obedience to an order. Dorr, at the time of trial a young man of 24, did not

want to be a concentration camp guard. He wanted to be a front line soldier, and it was because of his illness that he was unable to pass the medical examination required. With reference to the crimes which he committed on the march Counsel claimed that every plan which had been made to get the prisoners to Belsen went wrong. Instead of going by train they had to walk. Dorr had never had to do anything like that before. He had considerable worry and responsibility to get these people to Belsen. The road they took might at any time have been cut by the British or American troops. Zoddell had been an internee for a long time and his internment had left him a sick man. Counsel invited the Court to say that there was no evidence which satisfied them that he really killed anybody.

Captain Neave reminded the Court that there was evidence that Ilse Forster, a girl of 23, did do something in her small way to alleviate the suffering and the hardships of those who worked directly under her in the kitchen.

Captain Phillips stated that, at the beginning of the trial, Bothe was 24, Walter 23 and Haschke 24. They all arrived at Belsen towards the end of February, 1945, at a time when the conditions in the camp had already begun to become bad and difficult. Counsel invited the Court to let their punishment be in proportion to their share in the responsibility. They were not in Belsen a very long time and did not hold any greatly responsible position. They were all educated and brought up under the Nazi system, with the result seen at Belsen.

Captain Boyd said that Fiest, Sauer and Lisiewitz were conscripted and only arrived at Belsen in late February and March, 1945. They were all small people with very little responsibility. As Mr Le Druillenec said, although he was speaking more particularly of prisoners, conditions at Belsen were such that anyone coming to the camp was almost inevitably brutalised.

Captain Munro said that Roth had been a prisoner of the Germans without any position at all for four years and two months before being given a position which, suggested Counsel, was only that of a hut orderly. She remained behind in Belsen until 16th June, a considerable time after the liberation by British troops, because she had a clear conscience. Like Pichen, Hempel worked in a cookhouse and Counsel claimed that whatever she did, she did it for the betterment of the prisoners.

Lieutenant Jedrzejowicz said that Aurdzieg, Burgraf, Ostrowski, Kopper and Starotska were all victims of war. They were dragged away from their homes and put for an indefinite period of time in a concentration camp. They were sent there to do hard work and eventually to die. Aurdzieg was taken away from home at the age of 16 years, and grew to be a man in a concentration camp. Burgraf also was in a concentration camp as a young man. He and Ostrowski were only seven days in Belsen. Kopper was an internee for a period of just under five years and held a position at Belsen for not longer than two months. As Starotska said, Kopper was unsuited to the job of Block Senior because she was in a state of complete exhaustion and on the verge of a nervous breakdown. The last accused, Starotska, had been in concentration camps since 1942, but before that she was sentenced to death and kept in prison by the Gestapo for a period of two years. This

sentence and her stay in prison until the sentence was commuted must have been a great mental and physical strain for a girl of 23 years of age. Dr. Bimko said that a number of prisoners at Belsen hoped that the accused would be appointed Camp Senior. Lieutenant Jedrzejowicz too referred to the brutalising atmosphere of the concentration camp.

N. THE SENTENCES

Subject to confirmation by superior military authority, the following sentences were pronounced:

Kramer, Fritz Klein, Weingartner, Hoessler, Francioh, Pichen, Stofel, Dorr, Borman, Volkenrath and Grese were sentenced to death by hanging.

Zoddell was sentenced to imprisonment for life.

Caleson, Schreirer, Ostrowski, Ehlert and Kopper were sentenced to imprisonment for 15 years.

Aurdzieg, Lobauer, Ilse Forster, Bothe, Haschke, Sauer, Roth, Hempel and Starotska were sentenced to imprisonment for 10 years.

Burgraf and Fiest were sentenced to imprisonment for 5 years.

Walter was sentenced to imprisonment for 3 years.

Lisiewitz was sentenced to imprisonment for 1 year.

These sentences were confirmed by superior military authority and were carried into effect.

PART II.—NOTES ON THE CASE

A. INTRODUCTION: THE ROYAL WARRANT OF JUNE 14TH, 1945

1. *Jurisdiction of the British Military Courts*

The jurisdiction of British Military Courts for the trial of war criminals is based on the Royal Warrant dated 14th June, 1945, Army Order 81/45, with amendments. The Royal Warrant states that His Majesty "deems it expedient to make provision for the trial and punishment of violations of the laws and usages of war" committed during any war "in which he has been or may be engaged at any time after the 2nd September 1939." It is His Majesty's "will and pleasure" that "the custody, trial and punishment of persons charged with such violation of the laws and usages of war" shall be governed by the Regulations attached to the Warrant.

The Royal Warrant is based on the Royal Prerogative which, in English law, is "nothing else than the residue of arbitrary authority which at any given time is legally left in the hands of the Crown" (Dicey's definition).

The constitutionality and legality of the Royal Warrant and of its individual provisions have so far not been challenged in any British Superior Court as have its American counterparts, the orders of the American executive authorities appointing Military Commissions for the trial of war criminals under the law of the United States. The latter have been reviewed by the Supreme Court of the United States in the so-called Saboteur Case, *Ex parte Quirin and others* (1942) and in the cases *In re Yamashita* (1946) and *In re Homma* (1946).⁽¹⁾

Provisions similar to those contained in the Royal Warrant have been made in the Commonwealth of Australia by an Act of Parliament (War Crimes Act, 1945, No. 48/1945), and in the Dominion of Canada by an Order in Council, made under the authority of the War Measures Act of Canada, and entitled *The War Crimes Regulations (Canada)* (P.C. 5831 of 30th August, 1945; Vol. III, No. 10, Canadian War Orders and Regulations). The Canadian Regulations were given statutory form by an Act respecting War Crimes, of 31st August, 1946.

2. *Definition of "War Crime" in the Royal Warrant*

Regulation 1 of the Royal Warrant provides that "war crime" means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939. The jurisdiction of the British Military Courts, as far as the scope of the crimes subject to their jurisdiction is concerned, is narrower than the jurisdiction of, e.g., the International Military Tribunal established by the Four Power Agreement of 8th August, 1945, which, according to Article 6 of its Charter, had jurisdiction not only over violations of the laws and customs of war [Art. 6 (b)] but also over what the Charter called "crimes against peace" and "crimes against humanity" [Art. 6 (a) and (c)].

⁽¹⁾ See pp. 30-31, 77, 78, 79, 105, 110, 111, 113, 120 and 121 of Volume I of this series.

3. *Convening of a Military Court*

Regulation 2 of the Royal Warrant gives to certain Senior Officers power to convene Military Courts for the trial of persons charged with having committed war crimes. The accused is not entitled to object to the President or any member of the Court or the Judge Advocate, or to offer any special plea to the jurisdiction of the Court. (Regulation 6).

During the discussion of the question of securing an additional Defence Counsel to plead in the Belsen Trial on behalf of all the accused, the Judge Advocate quoted the marginal note to Rule of Procedure 32 (*Objection by Accused to charge*) and added that to Rule of Procedure 34, which provided for another type of objection, there was the marginal note *Special Plea to the Jurisdiction*. These last five words were also used in Regulation 6 of the Royal Warrant.

There seemed then to be some force in the argument put forward by the Defence and adopted by the Prosecution, that the Defence could attack the charge, but not the jurisdiction of the Court to try war crimes.

4. *Composition of the Military Court*

Regulation 5 of the Royal Warrant provides that a Military Court shall consist of not less than two officers in addition to the President. If the accused is an officer of an enemy or ex-enemy Power, the Convening Officer should, so far as practicable, appoint or detail as many officers as possible of equal or superior relative rank to the accused. He is, however, under no obligation so to do. If the accused belongs to the naval or air force of an enemy or ex-enemy Power, the Convening Officer should appoint or detail, if available, at least one naval officer or one air force officer as a member of the Court, as the case may be.

It was under this last provision that naval officers were appointed to sit on the bench, *inter alia*, in the *Peleus* and the *Scuttled U-Boats Cases*.⁽¹⁾

5. *Mixed Inter-Allied Military Courts*

Further, under Regulation 5, the Convening Officer may, in a case where he considers it desirable so to do, appoint as a member of the Court, but not as President, one or more officers of an Allied Force serving under his command or placed at his disposal for the purpose, provided that the number of such officers so appointed shall not comprise more than half the members of the Court, excluding the President. It is left to the discretion of the Convening Officer to appoint or not to appoint Allied officers as members of the Court.

In law, a mixed Court constituted under Regulation 5, remains, of course, a British municipal court.

In the *Peleus* case and in the *Almelo* case,⁽²⁾ Greek and Dutch officers respectively were appointed to serve on the Military Court; in the first case because a Greek ship and 18 Greek nationals were involved as the victims of the crime; in the second case because the crime had been committed on Dutch territory and one of the victims was a Netherlands national. In other cases, where the number of Allied nations involved was obviously

⁽¹⁾ See pp. 1-21 and 55-70 of Volume I of this series. ⁽²⁾ *Ibid*, pp. 35-45.

too large, as e.g., in the concentration camp cases, including the Belsen Trial, no allied officers were appointed. In many cases, official observers from all nations interested were invited to attend. Thus the following nations sent representatives to attend the Belsen Trial: Czechoslovakia, Denmark, France, Luxembourg, Greece, Poland, Russia, Yugoslavia and Holland. The Jewish World Congress was also represented. That the appointment of Allied members of the Military Courts is not compulsory is strikingly demonstrated by the trial by a British Military Court at Singapore of W/O Tomono Shimio of the Japanese Army. In that case the accused was charged, found guilty and sentenced to death by hanging, by a Court consisting of British officers only, for having unlawfully killed American prisoners of war at Saigon, French Indo-China. The *locus delicti commissi* was French territory, the victims were United States nationals.

6. The Judge Advocate

A Judge Advocate may be deputed to assist a British Military Court by the Judge Advocate General of the Forces or in default of such deputation may be appointed by the officer convening the court. The duties of the Judge Advocate, according to Rule 103 of the Rules of Procedure, an Order in Council (S.R. & O. 989/1926 as amended) promulgated under the authority of Section 70 of the Army Act,⁽¹⁾ consist mainly in advising the Court on matters of substantive and procedural law. He must also, unless both he and the Court think it unnecessary, sum up the evidence before the Court deliberates on its findings. Paragraph (h) of Rule 103 lays down that "In fulfilling his duties the Judge Advocate will be careful to maintain an entirely impartial position". The Judge Advocate has no voting powers. The members of the court are judges of law and fact and consequently the Judge Advocate's advice need not be accepted by them.

If no Judge Advocate is appointed the Convening Officer must appoint at least one officer having legal qualifications as President or as member of the Court, unless, in his opinion, no such officer is necessary (Rule of Procedure 103 and Regulation 5 of the Royal Warrant, as amended). Since the Legal Member, unlike the Judge Advocate, is a member of the Court, he has the right to vote.

7. Representation by Counsel

Regulation 7 provides that Counsel may appear on behalf of the Prosecutor and accused in like manner as if the Military Court were a General Court Martial. The appropriate provisions of the Rules of Procedure, 1926, apply accordingly.

Rule 88 provides that Counsel shall be allowed to appear on behalf of the Prosecutor and accused at General and District Courts Martial,

- (1) when held in the United Kingdom; and
- (2) when held elsewhere than in the United Kingdom, if the Army Council or the Convening Officer declares that it is expedient to allow the appearance of Counsel.

⁽¹⁾ As to the relevance of the Rules of Procedure, see p. 130. Rule 103 is among those made applicable to Field General Courts Martial, "so far as practicable," by Rule 121.

The Rules of Procedure, 1926, provide that English and Northern Irish barristers-at-law and Solicitors, Scottish Advocates or Law Agents, and the corresponding members of the legal profession in other British territories, are qualified to appear before a Court Martial.

Regulation 7 of the Royal Warrant provides that, in addition to these persons qualified in British law, any person qualified to appear before the Courts of the country of the accused, and any person approved by the Convening Officer of the Court, shall be deemed to be properly qualified as Counsel for the Defence.

In practice accused persons tried as war criminals are defended either by advocates of their own nationality or by British serving officers appointed by the Convening Officer, who may or may not be lawyers. In the Belsen Trial all the Defence Counsel were British or Polish serving officers.

8. Appeal and Confirmation

No right of appeal in the ordinary sense of that word exists against the decision of a Military Court. The accused may, however, within 48 hours give notice of his intention to submit a petition to the Confirming Officer against the finding or the sentence or both. The petition must be submitted within 14 days. If it is against the finding it shall be referred by the Confirming Officer to the Judge Advocate General or to his deputy. The finding and any sentence which the Court had jurisdiction to pass, if confirmed, are valid, notwithstanding any deviation from the Regulations or the Rules of Procedure or any defect or objection, technical or other. An exception exists only in the case where it appears that a substantial miscarriage of justice has actually occurred.

No action has yet been taken before British civil courts similar to that taken in the United States in the *Quirin*, *Yamashita* and *Homma* cases, where the proceedings of United States Military Commissions were made the subject of judicial review. (See paragraph 1 *supra*).

9. The Authority of Decisions of Military Courts

The Military Courts are not superior courts and their decisions are therefore not endowed with that special binding authority which Anglo-American law attaches to judicial decisions as precedents. Their relevance for the development of International Law may rather be compared with the relevance of judicial decisions in countries whose legal systems are not based on the Anglo-American doctrine of the binding character of precedents. Although the findings and sentences of British Military Courts trying war criminals do not lay down rules of law in an authoritative way, they are declaratory of the state of the law and illustrative of actual state practice.

B. RULES OF EVIDENCE AND PROCEDURE

The Royal Warrant provides in Regulation 3 that, except in so far as there is otherwise provided, the Rules of Procedure applicable in a Field General Court Martial of the British Army shall be applied so far as applicable to the Military Courts for the trial of war criminals. These rules are contained

in the British Army Act and the Rules of Procedure made under the Act by an Order in Council, the latter being a piece of delegated legislation enacted by the Executive in 1926 (S.R. & O. 989/1926).

According to Section 128 of the Army Act, the rules of evidence of a British Court Martial are the rules applicable in English civil courts. By "civil courts" is meant courts of ordinary criminal jurisdiction in England, including courts of summary jurisdiction. This provision is made applicable, "so far as practicable", to Field General Courts Martial by Rules of Procedure 73 and 121. Rule of Procedure 122(A) states that "practicable", as used in the Rules, signifies "practicable having due regard to the public service".

The rules of civil courts in England and, under the provisions quoted above, also of British Military Courts, differ in certain respects from the rules of procedure under which courts of continental countries exercise jurisdiction. One of the main differences is that in English courts the accused is allowed, if he so chooses, to give evidence on his own behalf as a witness under oath. The reported cases provide numerous instances of this and the *Dreierwalde* trial⁽¹⁾ may be taken as an example. There, the Judge Advocate, following the usual practice, told Amberger that, should he decide to give evidence on oath, he would be sworn and would no doubt be questioned to find whether his words were true. Should he decide not to do so, it would be permissible instead for him simply to make a statement, and in such a case his words could not be questioned as to their truth. In either event, his Counsel would be able to address the Court and call any witnesses, but, the Judge Advocate pointed out, if Amberger decided to take the latter course, so that his story could not be tested by questioning, it would not carry the same weight as would the former. The accused decided to give evidence on oath. Both the Defending Counsel and the Judge Advocate subsequently pointed out to the Court that the evidence on oath which he gave must be treated in the same way as that of any of the other witnesses.

There are, of course, also differences in the way in which witnesses are examined, on the one hand in the law of most Continental countries, where it is the President of the Court who primarily directs the examination, and on the other hand in English law, where it is mainly the responsibility of Counsel for the Prosecution and for the Defence to examine the witnesses "in chief", to cross-examine and to re-examine them.

In the interest of the reliability of the fact-finding of the Court, English procedure, very similar to most continental codes of procedure, excludes certain types of evidence, e.g. written statements in circumstances where the person can be examined *viva voce*.

In view of the special character of the war crimes trials and the many technical difficulties involved, the Royal Warrant has introduced a certain relaxation of the rules of evidence otherwise applied in English Courts. Thus Regulation 8 (i) runs as follows:

"At any hearing before a Military Court convened under these Regulations the Court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided

⁽¹⁾ See pp. 81-87 of Volume I of this series.

the statement or document appears to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court Martial, and without prejudice to the generality of the foregoing in particular:—

- (a) If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the Court, unable so to attend without undue delay, the Court may receive secondary evidence of statements made by or attributable to such witness;
- (b) any document purporting to have been signed or issued officially by any member of any Allied or enemy force or by any official or agency of any Allied, neutral or enemy government, shall be admissible as evidence without proof of the issue or signature thereof;
- (c) the Court may receive as evidence of the facts therein stated any report of the "Comité International de la Croix Rouge" or by any representative thereof, by any member of the medical profession or of any medical service, by any person acting as a "man of confidence" (*homme de confiance*), or by any other person whom the Court may consider was acting in the course of his duty when making the report;
- (d) the Court may receive as evidence of the facts therein stated any depositions or any record of any military Court of Inquiry or (any Summary) of any examination made by any officer detailed for the purpose by any military authority;
- (e) the Court may receive as evidence of the facts therein stated any diary, letter or other document appearing to contain information relating to the charge;
- (f) if any original document cannot be produced or, in the opinion of the Court, cannot be produced without undue delay, a copy of such document or other secondary evidence of its contents may be received in evidence.

It shall be the duty of the Court to judge of the weight to be attached to any evidence given in pursuance of this Regulation which would not otherwise be admissible."

C. QUESTIONS OF EVIDENCE ARISING IN THE TRIAL

During the course of the trial, a number of disputes arose as to the scope of Regulation 8 (i). These discussions are summarised in the following paragraphs. Comment is also made on some other applications of Regulation 8 (i), and on two further topics: Group Criminality and the Scope of Regulation 8 (ii), and the admissibility of evidence of offences committed outside Auschwitz and Belsen.

1. The Admissibility of Affidavit Evidence

In his opening Speech, the Prosecutor pointed out that although the trial was held under British law, the Regulations had made certain alterations in the laws of evidence for the obvious reason that otherwise many people

would be bound to escape justice because of movements of witnesses. A number of affidavits had been taken from ex-prisoners from Belsen, but many of the deponents had since disappeared. Therefore the Prosecution would call all the witnesses available and would then put the affidavits before the Court and ask for the evidence contained therein to be accepted.

On 3rd October, 1945, the Judge Advocate asked the Prosecutor what he relied on in putting in the affidavits. The Prosecutor replied that he relied on Regulation 8 (i).

The Judge Advocate asked whether Regulation 8 (i) (a) was not intended to be read, at any rate so far as an affidavit was concerned, to the effect that the Court had first to be satisfied that the witness was dead, or was unable to attend or to give evidence or was, in the opinion of the Court, unable to attend without undue delay.

The Prosecutor replied that the general introductory provision of Regulation 8 (i) made paragraph (a) academic by stating that Regulation 8 (i) (a) was "without prejudice to the generality of the foregoing." To the question whether the Prosecutor took the view that, even if there was a witness in the flesh who could be obtained, the Prosecutor would still be inclined to rely on the affidavits, the Prosecutor replied that technically he should take that view. It would, of course, be a matter for the Court to decide whether they considered that the statement or document appeared to be of assistance.

The Judge Advocate advised the Court that the regulation was so wide that the Prosecution's view of it was a correct one.

Captain Phillips then objected to the use of affidavit evidence, which would generally not be admissible before a Court. It was, he said, only admissible, if at all, as a result of Regulation 8 (i), and that Regulation, in his submission, was merely permissive. It said that the Court might take into consideration certain types of evidence. The objection of the Defence was that this was not a case in which the Court should receive such evidence. The Defence did not say that the Court could not do so, but they said that the Court had a discretion and that it should exercise its discretion here in favour of the Defence by refusing to accept the evidence. The whole of the evidence contained in these affidavits was, in the submission of the Defence, completely unreliable, thoroughly slipshod and incompetent.

The Judge Advocate said that it was entirely a matter for the Court's discretion whether they accepted this evidence or not. It was for the Court to consider what weight should be attached to any affidavit. In his view, all these exhibits would be admissible in evidence, but what was left for the Court to decide was how much weight they would attach to any particular document, having heard the whole of the circumstances and having considered it in the light of other evidence.

The Court decided that they would receive in evidence the affidavits tendered by the Prosecution. They added, however, that when they came to decide what weight should be attached to any particular affidavit, they would bear in mind any observation which the Defence might address to them.

On 19th September, 1945, the affidavit of Colonel Johnston was tendered by the Prosecutor. One of the Defending Officers objected to three paragraphs of the affidavit on the ground that they contained merely comment on points which it was the Court's duty to decide. A difficulty arose from the fact that the Court must know what was in a paragraph in order to decide whether to admit it or not. The Prosecutor pointed out that this was inevitably so in a system of Courts Martial, under which the Court was judge both of law and of fact. The Court must, in fact read themselves, or have read to them, the paragraphs in order that they might consider the legal point; then they must do the impossible and say "we refuse to allow this to be put before us and, in our capacity of judges of fact, we will ignore them, although in our capacity of judges of law we must consider them first."

One of the paragraphs objected to was left out on the advice of the Judge Advocate, who remarked that the deponent was going rather outside his province. As to the two remaining paragraphs, the Court decided that the words "In short such orders and the carrying out of such orders was mass murder" and a reference to "accomplices in mass murder" should not be put in.

During the hearing of the evidence for the defence, the question arose whether, at that stage of the trial, affidavits made by witnesses who had been heard by the Court in person could be put in, in order to show the unreliability not of the witnesses involved but of the affidavits as a whole, all of them having been produced by the same War Crimes Investigation Unit.

The Defence argued that it was essential, in the present case, where the evidence for the Prosecution was largely documentary, for the Defence to be able to challenge the whole system whereby that documentary evidence was produced by pointing out discrepancies between what witnesses had said in Court and what they had said in written statements not yet entered as evidence.

This was opposed by the Prosecution on the ground that the examination and the cross-examination of the respective witnesses was the proper time to point out discrepancies between the affidavits and the oral evidence of witnesses and that if the defending officers had missed this opportunity, they could not submit the affidavit at a time when the witnesses had no opportunity of explaining the alleged discrepancy in the course of their cross-examination.

The Court ruled that, if there were any witnesses who gave evidence in Court personally and were cross-examined in regard to affidavits that they had made, and if those affidavits were not put in as evidence, the Court would allow any Defending Officer to put in such affidavits during the course of his defence, for the purpose of establishing the manner in which these affidavits had been taken.

On the other hand the Court felt that, in the case of witnesses who gave evidence in person and were not cross-examined in regard to their affidavits, the Court should not admit such affidavits, because they would carry no weight with them unless accompanied by a cross-examination of the witnesses so that the Court could appreciate exactly what their evidence would be in regard to the taking of the affidavits.

2. *The Use of Films as Evidence*

On 20th September, 1945, a film of the scenes which were found at Belsen was shown to the Court. Technically the film was an exhibit attached to an affidavit, made by members of the Army Film and Photographic Unit, stating that they photographed scenes at the camp, that they had seen the cinematographic film made from the negatives of the photographs taken by them, and that the film negatives were copies of the film taken by them.

On the 13th October, the Prosecutor applied for permission to show an official documentary film, made by the Soviet official photographers, of the concentration camp at Auschwitz, as part of the Prosecution's case. Alternatively he suggested that the Court might call for it themselves, the Prosecution's case having been closed. The film, which had only just been brought to his attention, was an official document of the Soviet Union and therefore admissible under Regulation 8.⁽¹⁾ In any case he could produce a certificate from the photographer. In law, a film had been held to be a document and capable of being a means of committing, not slander but libel. The Defence objected, alleging it to be a propaganda film that was not related in any way to any of the accused in the dock. It might not have been taken until long after they had all left the camp.

The Judge Advocate advised the Court that, provided they were satisfied as to the circumstances and the time of the taking of the film, then it was within the Court's competence to receive it in evidence and to attach such weight to it as they might think fit.

The Court decided to see the film as a silent film with an official translator indicating in English to the Court relevant points which would help them to follow the position and the layout of the camp. The Court would treat this as evidence called by the Court.

On the 15th October, an affidavit of one of the producers of the film was read, certifying that the film was an official documentary film prepared for the Union of Soviet Socialist Republics and published by them, that the filming took place at Auschwitz in Poland and that it was a true representation of the conditions there found. The filming began on the first day after liberation and was completed by the end of the investigation carried out by the Soviet War Crimes Commission. As the film was shown an interpreter made a commentary in English.

3. *A Map of Belsen Used as Evidence*

A second affidavit by Brigadier Glyn Hughes was tendered by the Prosecution during the hearing of the evidence for the Defence. In this he formally identified a plan of Belsen camp delivered to him by the army survey section; this to the best of his knowledge and belief was a true representation of the camp before it was burnt down. Counsel on both sides considered the plan substantially accurate.

4. *Admissibility of Affidavits Made by one of the Accused*

On the 5th October, objection was raised by Major Cranfield to the admission of an affidavit made by the accused Kopper. It was submitted

⁽¹⁾ Counsel was presumably relying on Regulation 8 (i) (b). (See p. 131).

that the affidavit was objectionable as evidence against any of the other accused.

Major Cranfield pointed out that while this affidavit was admissible under Regulation 8 of the Royal Warrant,⁽¹⁾ that provision was merely permissive. He called on the Court to reject the evidence as being completely worthless. The Prosecution's own witnesses had called Kopper an informer and one who lied. In support of his argument he quoted a passage from page 94 of the *Manual of Military Law* governing the procedure followed in Courts Martial: "If the Prosecution find it necessary to call one suspected participant in a crime as a witness against the others the proper course is not to arraign him or, if he has been so arraigned, to offer no evidence and to take a verdict of acquittal." The reason was clear. The spectacle of one criminal turning on his fellow criminals to save his own skin was not one which was attractive to British justice.

The Prosecutor submitted that the meaning of the Regulation was that the Court could admit evidence that would not otherwise be admitted, but that if they found that they might accept it then they must accept it, subject to such weight as they might attach to it afterwards. The Court had not a discretion to say: "All this evidence is legal and we will accept this part and reject that part." The case came within a specific category mentioned under Regulation 8 (i). Any deposition, any summary, or any examination made by any officer detailed for the purpose by any military authority was included, and the Court had heard that Major Champion and Major Smallwood were in fact both detailed. Regulation 8 (ii)⁽²⁾ rendered it permissible to enter evidence by one accused against another.

Replying, Major Cranfield said that in his view the object of Regulation 8 (ii) was to introduce into the law of procedure governing the Court the proposition that, if one of the accused were proved a member of a unit, then evidence against another member of that unit would be evidence against the accused, merely because he was a member of the unit. Regulation 8 (ii) did not render the affidavit admissible.

After quoting Regulation 8 (i) the Judge Advocate said that he saw no reason in law why the Court should reject this affidavit. They would have to read the document and then say whether they were satisfied that it appeared to be an authentic document on the face of it. They must then say whether it was a document which would help in proving or disproving the charges.

The Court decided that the document would be admitted, while reserving the right to judge what weight to place on it.

5. *Admissibility of Affidavits Made by an Accused While in Custody*

On the 5th October, Major Cranfield also objected to certain affidavits made by the accused Irma Grese because at the time the statements were taken the deponent was in custody. The Defence referred to paragraph 78 (3) of Chapter VI of the *Manual of Military Law*, which said that persons in custody should not be questioned without the usual caution being first administered.

⁽¹⁾ See pp. 130-1. ⁽²⁾ See p. 138.

The Defence made the point that the Prosecution could not put in those affidavits under Regulation 8. The Royal Warrant should, in case of doubt, be construed strictly against the Crown. It should be construed according to its meaning as appeared from its terms. No generality of words, however wide, should operate to embrace something which did not appear to be intended.

Counsel distinguished this question from that involving Kopper. The statement made by Kopper was a statement of evidence against other persons. The statements made by Grese were a confession and admission of the deponent herself. Counsel made a distinction between confessions and evidence. In his submission it was significant that nowhere in the Regulations was there any mention of a confession or an admission by an accused person. The intention of Regulation 8 was to enable the Court to hear secondary evidence in lieu of primary evidence. The Defending Officer referred to Regulation 3 of the Royal Warrant, detailing those sections of the Army Act and those Rules of Procedure which were not to apply to Military Courts. Rule of Procedure 4, stipulating that the usual caution shall be administered, was not so excluded by the Royal Warrant. Unless the evidence stated that Rule of Procedure 4 had been complied with, the Court could not hold that the documents appeared "on the face of it to be authentic" within the meaning of Regulation 8.⁽¹⁾

The Prosecutor replied that the provisions regarding the cautioning of accused had no application in Military Courts. It was not necessary for the Prosecution to satisfy the Court that Grese's were voluntary statements. The Royal Warrant was drawn up with the deliberate intention of avoiding legal arguments as to whether evidence was admissible or not. They were drawn widely to admit any evidence whatsoever and to leave the Court to attach what weight they thought fit to it when they had heard it. By "authentic" was signified "genuine".

The Judge Advocate said that the affidavits were not, in his view, analogous in any way to the statements or documents which came under Rule of Procedure 4 in the case of a Field General Court Martial.

He advised the Court to accept the Grese affidavits as documents within the meaning of Regulation 8 (i). Even if they were taken in such a way that they would not be accepted as a confession or document at a Field General Court-Martial, that circumstance would not help the Defence, because in Regulation 8 (i) there were the words "notwithstanding that such documents would not be admissible as evidence in proceedings before a Field General Court Martial". This would not prevent the Defence from attacking the weight of the documents as evidence.

The Court overruled the submission of the Defence and admitted the documents. It would be open to the Defence to attack their weight.

Paragraph (E) of Rule of Procedure 4, to which reference was made, states that, during the preliminary investigation of a charge, "After all the evidence against the accused has been given, the accused will be asked: 'Do you wish to make any statement or to give evidence upon oath? You

⁽¹⁾ Rule 4 is among those made applicable to Field General Courts Martial, "so far as practicable," by Rule 121.

are not obliged to say anything or give evidence unless you wish to do so, but whatever you say or any evidence you give will be taken down in writing, and may be given in evidence'. Any statement or evidence of the accused will be taken down, but he will not be cross-examined upon it".

"If the accused is remanded for trial by court martial, no evidence will be admitted at his trial of any statement which he may have made, or evidence which he may have given, at the taking of the summary of evidence before such caution was addressed to him."

In the course of the trial of Eberhard Schoengrath and six others the Defence objected to the admission of statements made by five of the accused, on the grounds that, according to the affidavit of their interrogator, no caution had been administered to the accused, and that the statements were therefore made inadmissible by Rule 4(E).

The Legal Member, however, advised the Court that it was empowered to receive a statement even though a caution was not administered, provided the Court was satisfied that the statement was made voluntarily. It had been established by long precedent during war crime trials that the regulation which said that the Court might receive oral statements and documents appearing on the face of them to be authentic and would attach such weight to them as it thought fit was to be accepted as relating to affidavits and statements made by an accused. An abstract of evidence was quite different from a summary of evidence. When a summary was taken the accused must be present and must have the opportunity of cross-examining any of the witnesses. He continued: "That is all ruled out by the Royal Warrant. An abstract of evidence is merely supplying you with anything in the nature of evidence which the Prosecution propose to produce."

The rights of one accused before a Court Martial to which the Legal Member made reference are those contained in paragraphs (C) and (D) of Rule 4, which deal with the procedure to be followed where a case is adjourned by the commanding officer "for the purpose of having the evidence reduced to writing", a process referred to in Rule 4 and in the marginal note to the Rule as adjournment for taking down the summary of evidence. These paragraphs read as follows:

"(c) Where the case is so adjourned, at the adjourned hearing the evidence of the witnesses who were present and gave evidence before the commanding officer, whether against or for the accused, and of any other person whose evidence appears to be relevant, shall be taken down in writing in the presence of the accused before the commanding officer or such officer as he directs.

"(D) The accused may put questions in cross-examination to any witness, and the questions with the answers shall be added in writing to the evidence taken down."

Regulation 4 of the Royal Warrant, however, provides that:

"The commanding officer of the unit having charge of the accused shall be deemed to be the commanding officer of the accused for the purposes of all matters preliminary and relating to trial and punishments. . . . He shall without any such preliminary hearing as is

referred to in Rule of Procedure 3 either cause a Summary of Evidence to be taken in accordance with Rule of Procedure 4 or an abstract of evidence to be prepared as the Convening Officer may direct. The accused shall not have the right of having a Summary taken or of demanding that the evidence at the Summary shall be taken on oath or that any witness shall attend for cross-examination at the taking of the Summary."

For the trial of Eberhard Schoengrath and six others, as for the Belsen trial, an abstract of evidence had been prepared, and not a Summary of Evidence. In both cases, the submission of the Defence was over ruled.

The result seems to be that, while in practice the Court will always ascertain whether or not a statement is made voluntarily in order to assess its evidential value, the Defence cannot prevent its being put in as evidence by denying its voluntary nature, but may attack its weight.

6. Hearsay Evidence

Hearsay, or secondhand, evidence was admitted throughout the trial, both in the witness box and in the affidavits entered. In English Civil Courts, subject to exceptions, a statement, whether oral or written, made by a person who is not called as a witness, is not admissible to prove the truth of any matter contained in that statement.⁽¹⁾ Such evidence is rendered permissible by Regulation 8 (i) provided that it satisfies the conditions laid down therein.⁽²⁾

7. Group Criminality and the Scope of Regulation 8 (ii)

Much discussion during the trial turned on the scope of Regulation 8 (ii) which was claimed by the Prosecution to be in point and which, as amended, provides:

"Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as *prima facie* evidence of the responsibility of each member of that unit or group for that crime. In any such case all or any members of any such unit or group may be tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court."

One of the striking features of the type of warfare waged by the Axis Powers in general and by the Nazi Regime in particular was the phenomenon of mass criminality for which certain organisations were responsible. In a great number of official and non-official statements, programmes and recommendations, attention was drawn to this fact, which was bound to confront the authorities charged with the meting out of just retribution with a formidable task and with great difficulties of a procedural and perhaps also of a substantive legal nature. For instance, the United Nations War Crimes Commission adopted on 16th May, 1945, a recommendation to its Member

⁽¹⁾ See Harris and Wilshire's *Criminal Law*, Seventeenth Edition, p. 482.

⁽²⁾ See also the Report on the *Dreierwalde Trial*, on p. 85 of Volume I of this series.

Governments in which it was said that the Commission had "ascertained that countless crimes have been committed during the war by organised gangs, Gestapo groups, S.S. or Military Units, sometimes entire formations." In order to secure the punishment of the guilty, the Commission recommended, *inter alia*, the committing for trial, either jointly or individually, of all those who, as members of these criminal gangs, had taken part in any way in the carrying out of crimes committed collectively by groups, formations and units.

The British authorities, by enacting Regulation 8 (ii), would seem to have acted along the lines recommended as far as the burden of proof was concerned. Later, the Four Great Powers, in agreeing upon the Charter of the International Military Tribunal annexed to the Four Power Agreement of 8th August, 1945, went still farther by enacting the provisions of Articles 9 and 10 of the Charter concerning criminal groups and organisations. It is to be noted, however, that the judgment of the International Military Tribunal placed a restrictive interpretation on these provisions and made important recommendations with regard to them.⁽¹⁾

In the Belsen Trial, each defendant was charged not only with taking part in the concerted action but also with offences personally committed and the Prosecutor stated in his opening speech (see Part I, p. 9) that, lest there should be the slightest shadow of doubt, no person had been brought before the court against whom the Prosecution would not produce some evidence of personal acts of deliberate cruelty and in many cases of murder. It is impossible to state whether and how far the court acted on Regulation 8 (ii) in convicting various accused. Reference may profitably be made, however, to the interpretations placed on this provision by Counsel.

Certain Defence Counsel claimed that the Prosecution were arguing that Regulation 8 (ii) made everyone who worked on the staff of Belsen or Auschwitz guilty of a war crime, *ipso facto*.

Both Defence and Prosecution were, however, agreed in fact that, before this provision could operate against any individual accused, it must have been proved that he knowingly took part in a common plan to ill-treat the prisoners in the two camps. The Prosecution claimed that, if such participation were proved, the insignificance of the accused's part, or the lateness of his arrival, would not serve to excuse him. For example, anyone taking part in the selection parades, knowing their purpose, took part in deliberately organised murder. The Prosecutor admitted that, if participation in only a limited ill-treatment were proved, then the responsibility would be less. On the other hand he claimed that proof of a conspiracy could be deduced from the acts of the accused and could well arise between persons who had never seen each other and had never corresponded together. Furthermore, the accused were as guilty if they joined in conspiracy already formed as they would have been had they originated it.

Major Cranfield and Captain Phillips pointed out that it could not be said that some of the accused had any power at all to control conditions at Belsen. Major Munro suggested that, if Regulation 8 (ii) were applied, the

⁽¹⁾ *The Judgment of the International Military Tribunal*, British Command Paper Cmd. 6964, p. 67.

accused would only be held collectively responsible for acts of a type similar to their own offences. Proof that an accused beat prisoners would not make him responsible for another's murder. Captain Roberts pointed out that common action was not the same as concerted action; the latter involved prior planning with a definite end in view and full knowledge of the plan and of the end by the accused.

The Judge Advocate reminded the Court that, when they considered the question of guilt and responsibility under Regulation 8 (ii), the strongest case must be against Kramer, and then down the list of accused according to the positions they held.

At one point in the trial evidence was admitted by a witness as to acts of a person not identified by him. This incident illustrates both the application of Regulation 8 (ii), and the possible operation against Kramer of the principle of vicarious liability.

During the interrogation of the witness Abraham Glinowieski, the Prosecutor put to him a question concerning a person named Erich whom the witness had mentioned in his affidavit but whom he had not identified among the accused. Captain Corbally submitted that the Court ought not to hear this evidence. This witness had failed to identify Erich; therefore this evidence was worthless, and not only against Erich himself. As it was a joint trial, Counsel considered himself entitled to object to it on behalf of the other prisoners whom he represented, and he thought that the other Defending Officers too would be entitled to object to it on those grounds. If the witness could not identify the man to whom he referred, the evidence was clearly worthless and it could only prejudice the whole mass of the prisoners before the Court.

The Prosecutor maintained that he was entitled to ask the question. He had a right to call evidence of cruelty and ill-treatment which went on at both camps, whether by the accused or not, so long as Kramer was the Kommandant of the camp and responsible for their behaviour. The accused were some of a group of people who set out to ill-treat and kill persons under their charge and evidence against other members of the group became evidence against them. That was the Prosecution's case, and on that ground alone, the Prosecutor would submit that, even if it were quite impossible to say who Erich was, or even if he did not know his name, the fact that he was one of the guards under Kramer and was permitted to behave in a way which the witness might say he behaved, made evidence of his acts admissible.

Addressing Captain Corbally, the Judge Advocate said: "I would be prepared to advise the Court that if this witness does not identify the accused whom you represent, then I shall tell the Court in my summing up exactly what you are saying now, but I am bound to tell the Court that in my view it is allowed to hear this evidence on the grounds that the Prosecutor has put forward. So far as you are concerned unless he is identified I agree, you are entitled to say there is no evidence against the man you represent".

Unless the accused was identified, the Judge Advocate agreed that Captain Corbally was entitled to say that there was no evidence against the man whom he represented.⁽¹⁾ The Prosecutor said that he had made, up to then,

⁽¹⁾ In point of fact, Zoddell. See pp. 15 and 18.

no attempt to connect offences with any particular person because the witness had not recognised anybody.

Captain Phillips pointed out that ordinarily this evidence would be inadmissible as irrelevant and that it was only admitted by the special provision of Regulation 8, on the grounds that any one accused was to be held responsible for all the atrocities alleged to have been committed at Belsen. Before the Prosecutor could justify the inclusion of this evidence, however, he must satisfy the Court that, in the case of every one of the accused, there was at the moment sufficient evidence of concerted action to justify the admission of the evidence. Certain of the accused were only in Belsen for a very short period. Therefore, Counsel submitted that unless this evidence related or was shown to relate to specific accused, it was inadmissible on the grounds of irrelevance.

The Judge Advocate said he did not imagine for a moment that the Court would convict any of the accused merely because they happened to be at Belsen during the period charged. What the Judge Advocate thought the Prosecutor was going to say was: "If I establish that this camp was, in effect, itself a war crime in the way it was run, and I then show that one of the accused had an official position and was taking an active part in what was going on, then the Court will consider that". The Judge Advocate did not quite see the relevancy of the Defending Officer's remarks on this particular point because the Prosecutor was offering a picture of the camp and at any rate the evidence would be relevant as regards Kramer, the Kommandant.

The Court decided to overrule the objection made by the Defence and invited the Prosecutor to continue with his examination.

The inclusion of this discussion on the effect of Regulation 8 (ii) in a section dealing with questions of evidence, and not in the later section on questions of substantive law, seems justified, despite the references made by the Prosecutor to the English law of conspiracy.⁽¹⁾ Such arguments were intended simply to elucidate the meaning of the term "concerted action", and Regulation 8 (ii) as a whole appears to be relevant only for purposes of assessing evidence. What is to be proved or disproved remains "the responsibility of each member of that unit or group for that crime".⁽²⁾ Evidence rendered admissible by the Regulation is not more than *prima facie* evidence.

The Regulation, on the face of it, bears a resemblance to the rule of English criminal law that, after proof of a conspiracy between a number of persons, any act or statement by any one of them *in furtherance of the common design* may be given in evidence against them all.⁽³⁾ But the reason for this rule is that each of the parties to a conspiracy has, by entering into it, adopted all his confederates as agents to assist him in carrying it out. Consequently, it would not be safe to assume without further enquiry that this rule of English criminal law is an exact model for Regulation 8 (ii).

⁽¹⁾ See pp. 108-9. ⁽²⁾ Italics inserted.

⁽³⁾ See Archbold, *Pleading, Evidence and Practice in Criminal Cases*, p. 1419; Kenny, *Outlines of Criminal Law*, 15th Edition, pp. 99, 161 and 341; Harris and Wilshire, *Criminal Law*, 17th Edition, p. 47.

8. *Admissibility of Evidence of Offences Committed outside Auschwitz and Belsen*

On 3rd October, 1945, Captain Corbally, in agreement with Captain Fielden, objected to a part of the affidavit of Bohumil Gromann because it alleged crimes committed by Dorr and Stofel on the march from the camp Klein-Bodungen to Belsen. No part of the evidence given in the affidavit was, in the submission of the Defence, connected with Belsen camp itself, and therefore it must be irrelevant on a charge which alleged that war crimes were committed by the accused whilst members of the staff of the Belsen camp. The accused were not at that time on the staff of Belsen.

The Judge Advocate, in summing up the ensuing argument, advised the Court that if they were satisfied that these men were on the staff of Belsen Concentration Camp at the time stated in the charge (between 1st October, 1942, and 30th April, 1945), and that they were responsible for the well-being of persons interned there, it would be within the Court's province to say that they did not find the charge bad because the crime occurred on the way to Belsen and not in Belsen itself.

The Judge Advocate reminded the Court that according to the Prosecution, although physically the accused were not at Belsen, they were going there. They had to deliver their convoy there and, claimed the Prosecution, it was reasonable for the Court to say that in substance the charge had been made out and that the two accused were on the staff of Belsen concentration camp. If they were not on that staff, on whose staff were they? It was a matter for the Court to decide. As regards the victims, the Judge Advocate said that it was for the Court to decide whether it was proper to hold that they were persons interned in Belsen. They were undoubtedly going there and that is where they would have arrived if they had continued to the end of their journey. He advised the Court to examine the evidence in order to determine these questions.

The Court decided to admit the evidence. It was still open to the Defence to attack the weight thereof.

In his summing up, the Judge Advocate said, in this connection, that a man could not be convicted upon a charge which was not before the Court, but that if the Court were satisfied that the substance of the charge was proved they might find a person guilty though of an offence differing from the particulars set out in the charge. He did not think that it mattered very much, looking at the substance of the charge and not the shadow, whether the people in a convoy on its way to Belsen had already reached and become internees in Belsen. Both Stofel and Dorr were found guilty.

On the 4th October, 1945, Major Munro, on behalf of Ehlert, objected to part of an affidavit by Irene Löffler which did not refer either to Auschwitz or Belsen but to an incident which happened at Plaschau. Colonel Backhouse said that he was seeking to show that the accused were ill-treating prisoners before reaching Belsen, since it seemed from the cross-examination that the Defence intended to prove that conditions at Belsen were beyond their control. The Judge Advocate said that Ehlert appeared in both charges as an accused person, the suggestion being that the two concentration camps were in themselves a war crime and that this woman

was, along with others, a perpetrator of that war crime. This evidence was introduced to show she was systematically carrying out a course of conduct of this kind.

The Judge Advocate advised the Court that the law did admit evidence of that kind, and that if the Court decided to admit it it was legally in order. On the other hand, the Judge Advocate tended to the view of the Defence that it was not necessary to accept this evidence. The Court decided to omit the paragraph in question.

Nevertheless, at subsequent dates, evidence was admitted concerning the actions of various accused at camps other than Belsen and Auschwitz. For instance, Jutta and Inga Madlung bore witness to the good behaviour of Ehlert at Ravensbruck,⁽¹⁾ and evidence of Burgraf's misconduct at Drütte Camp contained in Kobriner's affidavit was admitted. In connection with the second instance, the Prosecutor again explained that the course of the cross-examination had shown that the Defence intended to claim that conditions at Belsen compelled the accused to behave roughly. This evidence of an accused's actions previously was intended to show that he was in fact acting in precisely the same way in a camp where those conditions had not arisen.⁽²⁾ Again, Kramer admitted under cross-examination that he gassed persons at Natzweiler.⁽³⁾

D. OTHER PROCEDURAL QUESTIONS

1. *The Application by the Defence for the Severing of the Two Charges*⁽⁴⁾

The Defence applied for the trial of the two charges separately, quoting in their favour Rules of Procedure 16 and 108, and pointing out that their request was not the same as an application for a separate trial of individual accused such as was forbidden by Regulation 8 (ii) of the Royal Warrant.

Rule of Procedure 16, intended for proceedings by District Courts Martial is made to some degree applicable to Field General Courts Martial by Rule 109 which provides as follows:

"The court may be sworn at one time to try any number of accused persons then present before it, but except so far as the convening officer has directed otherwise the trial of each accused person will be separate. The convening officer should only direct persons to be tried together in cases where the circumstances are similar to those mentioned in Rule 16, and the provisions of that rule will be complied with as far as practicable."

Rule 16, which was quoted in part by the Defence, runs in full as follows:

"Any number of accused persons may be charged jointly and tried together for an offence alleged to have been committed by them collectively. Where so charged any one or more of such persons may at the same time be charged and tried for any other offence alleged to have been committed by him or them individually or collectively, provided that all the said offences are founded on the same facts, or form or are

⁽¹⁾ See p. 46. ⁽²⁾ See pp. 29 and 115. ⁽³⁾ See pp. 40 and 112. ⁽⁴⁾ See pp. 5-6.

part of a series of offences of the same or similar character. In any such case notice of intention to try the accused persons together should be given to each of the accused at the time of his being informed of the charge, and any accused person may claim, either by notice to the authority convening the court, or, when arraigned before the court, by notice to the court, to be tried separately, on the ground that the evidence of one or more of the other accused persons proposed to be tried together with him will be material to his defence; the convening authority or court, if satisfied that the evidence will be material, and if the nature of the charge admits of it, shall allow the claim, and the person making the claim shall be tried separately."

On behalf of those accused who appeared on both charges, reference was made by the Defence to Rule of Procedure 108, which in full reads as follows:

"The statement of an offence may be made briefly in any language sufficient to describe or disclose an offence under the Army Act. No formal charge-sheet shall be necessary, but the convening officer may nevertheless direct the separate trial of two or more charges preferred against an accused; or the accused, before pleading, may apply to be tried separately on any one or more of such charges on the ground that he will be embarrassed in his defence if not so tried separately, and the court shall accede to his application unless they think it to be unreasonable. If such charges are separately tried, the provisions of Rule 62 shall apply as if the Field General Court Martial were a District Court Martial."

Rule 62 lays down certain rules which are applicable when the charges against an accused before a District Court Martial are inserted in different charge-sheets and which would presumably have been followed had the application for the severing of the two charges been granted. Rule 62 (A) states that the accused shall be "arraigned, and until after the finding tried, upon each charge-sheet separately, and accordingly the procedure in Rules 31 to 44, both inclusive, shall, until after the finding, be followed in respect of each charge-sheet, as if it contained the whole of the charges against the accused." (Rules 31 to 44 make provisions governing the course of trial from the arraignment of the accused to the finding of guilty or not guilty). *Inter alia*, Rule 62 also provides, in clause (B), that the "trials upon the several charge-sheets shall be in such order as the convening officer directs." The Convening Officer may, according to clause (D), direct that "in the event of the conviction of an accused person upon a charge in any charge-sheet, he need not be tried upon the subsequent charge-sheets." In an explanatory footnote, the *Manual of Military Law* states that "Most of the ordinary cases which come before courts-martial are so simple in their facts that an accused person is not likely to be embarrassed by being tried upon several charges at the same time. But if the charges are complicated, or if the alleged offences were committed at different times, or if different sets of witnesses are required to prove the different charges, embarrassment is likely to arise." The *Manual* points out further that "after the finding of the court upon all the charge-sheets has been arrived at, the procedure will be the same as if all the charges had been inserted in one charge-sheet. Unless, therefore, the convening officer directs that the accused need not be

tried upon any subsequent charge-sheet, the court will not proceed to sentence until they have arrived at a finding on all the charge-sheets, and will then award one sentence in respect of them all. A finding of "not guilty" on any one or more charges in a charge-sheet (whether alternative or not) will be announced in open court."

It will be noted that even such a separation of the charges would not have entitled the trial of the two charges by different courts, which was also requested, though less strongly, by the Defence.

Footnote 1A to Rule of Procedure 16 states that "Where the offence of murder is charged, no other offence should be included in the same charge sheet." Rule 109, however, lays down only that Rule 16 shall apply to trials by Field General Courts Martial in the given circumstances "as far as practicable," and a footnote to the Rules could in any case have no legal authority. In claiming that the accused whom he represented could only be held "collectively responsible for other acts of a similar type" as those proved against them, "and nothing higher," Major Munro made no reference to this footnote.⁽¹⁾

2. Right of Accused to Have Evidence Translated⁽²⁾

Immediately before Dr. Ada Bimko gave evidence, Lieutenant Jedrzejowicz said that, if the witness gave evidence in German, he would not require it to be translated into Polish.

The Judge Advocate felt bound to advise the Court that in his view, in this particular kind of Court, the accused must hear the evidence in the language which they could understand. Counsel could not possibly know how to cross-examine except on instructions from the accused whom he represented and his instructions must necessarily be determined by the evidence. The Judge Advocate advised the Court that he did not think that anybody should waive the rights of a person who did not understand a language when serious accusations of fact were being made. The Defending Officers were no doubt endeavouring to shorten the proceedings but he thought that the suggestion would be wrong in law.

The Court decided that the evidence must be translated into Polish so that the Polish accused would understand it, except in any case where a particular witness was called to make a specific accusation against one or two of the German accused and there was no question of that witness raising any point against the Polish accused. In cases where the Polish accused might be implicated by the witness, however, the evidence must be translated into Polish.

3. Presence of Witnesses in the Court Room

On 26th September, one of the Defending Officers mentioned that it had been brought to his notice that, while a witness was giving evidence, four other Prosecution witnesses, who had already been called, were in the public

⁽¹⁾ See p. 83.

⁽²⁾ For a discussion on the same point see the Report on the *Scuttled U-Boats Case*, on pp. 65-66 of Volume I of this series.

gallery taking notes. Though admitting that it was not against the regulations for the witnesses to be there, the Defending Officer applied for the Prosecution witnesses to be excluded from the Court until the case for the Prosecution was closed.

The Prosecutor said he did not really object to this course, but added that, once the Prosecution witnesses had given evidence, normally they did remain in court. What the Defending Officers were afraid of was that the witnesses were acting as spies, taking notes of the accused's numbers and so on; but it would be just as easy for somebody who was not a witness to do so on their behalf. The real answer would be to exclude the whole of the general public.

The Judge Advocate referred to the Rule of Procedure 81 which said:

"During the trial a witness other than the prosecutor or accused ought not, except by special leave of the court, to be in court while not under examination and if while he is under examination a discussion arises as to the allowance of a question or the sufficiency of his answers, or otherwise as to his evidence, he may be directed to withdraw."

The Judge Advocate added that the Rule of Procedure was one which affected General Courts Martial and it did not seem to apply to Field General Courts Martial and therefore not to a Military Court; but the spirit remained and it was, in the Judge Advocate's opinion, entirely a matter for the Court to decide.⁽¹⁾

The Court decided to uphold the Defending Officers' application and not to allow the Prosecution witnesses in Court after they had given evidence.

4. *Illness of an Accused and its Influence on the Proceedings*

On the 23rd October, the accused Gura fell ill and the question arose whether the trial could be continued in his absence or whether the charge against him would have to be dropped and the accused tried at some later stage.

After a consideration of the legal position the Judge Advocate, in his summing up, stated that Rule of Procedure 119(C) made it imperative for an accused to be present throughout his trial. Even if Gura had been able to come back after a short absence the trial would still not have been in order if it had continued in his case. The Judge Advocate said that the position was that Gura would not be found either guilty or innocent of this charge, but that the Court would regard the matter as "Not proceeded with to a conclusion". Then it would be left to the appropriate military authorities to decide whether or not to bring him to trial again, starting afresh upon any charges they might consider appropriate.

Rule of Procedure 119(C) states: "The proceedings shall be held in open court, in the presence of the accused, except on any deliberation among the members, and the Judge Advocate (if any), when the court may be closed". Rule 67 provides: "In case of the death of the accused or of such illness of

⁽¹⁾ It may be mentioned that Regulation 13 and Rule of Procedure 132 both lay down that a Court shall, in cases not foreseen by the legal provisions contained in the Regulations and Rules, do what "appears best calculated to do justice."

the accused as renders it impossible to continue the trial, the court will ascertain the fact of the death or illness by evidence, and record the same, and adjourn, and transmit the proceedings to the convening authority". This Rule, however, even if it could have been held applicable in the case of Gura, is not one of those provisions, applicable to a District Court Martial, which are made applicable to a Field General Court Martial by other Rules of Procedure, mainly 121, and so to a Military Court.

Probably as a result of the difficulties which arose out of the absence of Gura, an amendment to the Regulations for the Trial of War Criminals was made by Army Order 8/46, whereby the following words were added at the end of Regulation 3:

"Notwithstanding the provisions of Rule of Procedure 119(C) a Court may, after his arraignment, proceed with the trial of an accused in his absence, if satisfied that so doing involves no injustice to such accused".

5. *The Recording of Special Finding*

Rule of Procedure 121 makes Rule 44 among others applicable, "so far as practicable", to a Field General Court Martial. Clauses (D) and (E) of the latter provision run as follows:

"(D) Where the court are of opinion as regards any charge that the facts which they find to be proved in evidence differ materially from the facts alleged in the statement of particulars in the charge, but are nevertheless sufficient to prove the offence stated in the charge, and that the difference is not so material as to have prejudiced the accused in his defence, they may instead of a finding of 'Not guilty', record a special finding.

"(E) The special finding may find the accused guilty on a charge, subject to the statement of exceptions or variations specified therein".

During the examination of the accused Kopper, the Judge Advocate announced that the Court recognised that the person named "Korperova" in the Belsen charge must be the accused. At the beginning of his Closing Address,⁽¹⁾ the Prosecutor also made some remarks on the contents of the charges.

At the end of his summing up of the evidence relating to the offences alleged to have been committed at Auschwitz, the Judge Advocate said that the main allegations related to Allied nationals unknown. It was not necessary to prove everything in a charge. It was the substance which must be proved and if the Court were satisfied that there was substantial ill-treatment, causing death or physical suffering, to people whose names the Prosecution were not able to put forward that would allow the Court to convict the accused, even though they were not satisfied of the death of any named person.

As a result of the statements referred to in the last two paragraphs, the

⁽¹⁾ See p. 104.

Court recorded a special finding in that it stated that certain details would be deleted from the charges.⁽¹⁾

E. QUESTIONS OF SUBSTANTIVE LAW

1. *The Sources of Substantive Law Regarding War Crimes*

Colonel Smith claimed that the Military Court trying the accused applied International Law and did not take its substantive law, as distinct from its procedure, either from the Crown or from Parliament. The Court was given its rules of procedure by the Royal Warrant but in deciding cases before it the former was not bound by, for instance, the British *Manual of Military Law*.

It is true that Regulation 1 of the Royal Warrant states: " ' War Crime ' means a violation of the laws and usages of war committed during any war in which His Majesty had been or may be engaged at any time since the 2nd September, 1939 ", and that Regulation 8 (iii) provides that: " The Court shall take judicial notice of the laws and usages of war ". It is also true that much substantive law on the matter of war crimes has been created or codified by international agreements such as the Hague Convention No. IV of 1907 (on the rules of land warfare) and the Geneva Prisoners of War Convention of 1929. On the other hand Regulation 9 of the Royal Warrant provides that the punishment of a war crime consists in any one or more of the following:—

- (1) Death (either by hanging or shooting) ;
- (2) Imprisonment for life or for any less term ;
- (3) Confiscation ;
- (4) A fine.

The Court may also order the restitution of money or property taken or destroyed by the accused. It would not be easy to maintain the proposition that provisions regarding punishment were mere matters of procedure. Further, there are spheres in which International Law is vague, and state practice is a very important source of law. The defence of superior orders is a case in point.

Chapter XIV (*The Laws and Usages of War on Land*) of the British *Manual of Military Law* is intended as a guide for the use of the military forces. It has not therefore the authority as a statement of International Law which attaches to an international treaty.

⁽¹⁾ See p. 122. In this connection it is interesting to refer to the trial of a Japanese alleged war criminal, Sgt. Aoki Toshio, by a British Military Court at Singapore on 11th February, 1946. Toshio was charged with " committing a war crime in that he at Sonkurai Camp in the month of November 1943 in violation of the laws and usages of war by forcing some three hundred British prisoners of war at that time in his custody the majority of whom were sick and injured to enter a train containing no sufficient or suitable accommodation and by allowing Korean soldiers under his command to beat, kick and otherwise maltreat the said prisoners, causing the death of seven of the said prisoners and further injured the health of the remainder." The Court recorded a special finding of guilty, omitting the words " causing the death of seven of the said prisoners." The sentence of three years imprisonment was confirmed by higher military authority. The Court thus removed the most serious details from the charge, and so made a more sweeping application of Rule of Procedure 44 than did the Court in the Belsen Trial.

Such publications, prepared for the benefit of the armed forces of various nations, are frequently used in argument in the same way as other interpretations of International Law, and, *in so far as their provisions are acted upon*, they mould state practice, which is itself a source of International Law.

At another point in his speech Colonel Smith set out to prove that the individual's first allegiance was to his national laws. Counsel's position would seem to be that, whereas the accusing state is bound by International Law on questions of substance, the accused must look first to his own laws. It could be argued, however, that the very fact that a Military Court did administer International Law would preclude an alleged war criminal from pleading on his behalf Municipal Law precedents such as *Mortensen v. Peters* and *Fong Yare Ting v. United States*.⁽¹⁾

2. *Responsibility of State and Individual for Breaches of International Law*

Colonel Smith stressed that in International Law the general principle was that the State and not the individual was responsible for breaches of that law. There has not been universal agreement on the extent to which an individual can be held personally liable for breaches of such international agreements as the Hague Convention No. IV (Rules of Land Warfare) and the Geneva Prisoners of War Convention of 1929, according to the strict letter of which the responsibility for breach thereof lies on the State authority to which the perpetrator owes allegiance. The trend of opinion⁽²⁾ and the practice followed by the Courts, however, has been to make the individual responsible for his acts in breach of international conventions, and this trend was illustrated on a high level by the decision pronounced by the International Military Tribunal at Nuremberg, that certain accused had made themselves criminals by waging war in breach of the terms of an inter-governmental agreement renouncing war undertaken as an instrument of national policy, the Briand-Kellogg Pact.⁽³⁾ Indeed, the International Military Tribunal made use of the fact that the Hague Convention No. IV of 1907 had been enforced personally against its violators. The judgment on this point runs:

" But it is argued that the Pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war. These included the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters. Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offences against the laws of war; yet the Hague Convention nowhere designates such

⁽¹⁾ See pp. 74-5.

⁽²⁾ See for instance Professor H. Lauterpacht, in the *British Year Book of International Law*, 1944, p. 64; Lord Wright in the *Law Quarterly Review*, January, 1946, p. 42; and Professor A. L. Goodhart in *The Juridical Review*, April, 1946, pp. 14-15.

⁽³⁾ " Treaty Series, No. 29 (1929) " British Command Paper Cmd. 3410.

practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention".⁽¹⁾

3. *The Nationality of the Accused*

The Court held five Poles guilty of war crimes against Allied nationals, thus approving the argument of the Prosecution that by identifying themselves with the S.S. the Polish accused had made themselves as guilty as they. The Court thus acted on the principle that its jurisdiction extended to the trial of Allied nationals alleged to have committed war crimes, their nationality being irrelevant in this connection.

4. *The Nationality of the Victims*

On the 3rd October, Captain Brown objected to part of Dora Almaleh's affidavit and submitted that the facts set out were completely irrelevant. The charge referred to a war crime and to the ill-treatment and death of Allied nationals. Paragraph 3 of the affidavit in question referred to a Hungarian girl and Counsel thought that it was within the knowledge of the Court that a war crime could not be committed by a German against a Hungarian. The Prosecutor made two points in replying. Hungary, he said, left the Axis before April, 1945, and had come on to the Allied side; at that time, therefore, the Hungarians were at least some form of Allies, though Counsel did not know to what extent.⁽²⁾ A more general point made by the Prosecutor was that what he was trying to prove was the treatment of the Allied inmates of the camp. He thought that he was perfectly entitled to put before the Court evidence of the treatment of other persons in the camp. If there were 10 people and he wanted to prove that one of them was badly treated, in the Prosecutor's submission, he was perfectly entitled to prove that the 10 were badly treated. The treatment of all the inmates in the camp was relevant to show the treatment of any individual inmate.

The Court decided that the paragraph be included in the evidence before the Court.

Colonel Smith claimed that only offences against Allied nationals could be regarded by the Court as war crimes, and that "Allied nationals" meant nations of the United Nations. The term therefore excluded Hungarians and Italians. As has been seen, the Prosecutor himself in effect disclaimed any intention of charging the accused of crimes against persons other than Allied nationals. Both Prosecution and Defence therefore recognised that, under the Royal Warrant, the jurisdiction of British Military Courts is limited to the trial of war crimes proper and excludes crimes against humanity as defined by Article 6(c) of the Charter of the International Military

⁽¹⁾ British Command Paper Cmd. 6964, p. 40.

⁽²⁾ The paragraph alleged that Egersdorf shot a Hungarian girl in April, 1945.

Tribunal.⁽¹⁾ British Military Courts deal with such crimes only if they are also violations of the laws and usages of war.

A second question relating to the nationality of the victims of atrocities committed in the two camps arose out of Colonel Smith's claim that numbers of them had ceased to be Allied nationals, and had become German subjects, as a result of the annexation of their homelands by Germany. The Prosecutor replied that before it was possible for a country to be annexed the war must be ended. While the war was still in progress the citizens were entitled to the protection of the Hague Convention.

Oppenheim-Lauterpacht, *International Law*, Vol I, fifth edition, p. 450, states that the act of forcibly taking possession of a part of an enemy's territory during the continuance of war, "although the conqueror may intend to keep the conquered territory and therefore to annex it, does not confer a title so long as the war has not terminated either through simple cessation of hostilities or by a treaty of peace. Therefore, the practice, which sometimes prevails, of annexing during a war a conquered part of enemy territory cannot be approved. For annexation of conquered enemy territory, whether of the whole or of part, confers a title only after a *firmly established* conquest, and so long as war continues, conquest is not firmly established. For this reason the annexation of the Orange Free State in May 1900, and of the South African Republic in September 1900, by Great Britain during the Boer War, was premature."

This doctrine was underlined in the judgment of the International Military Tribunal at Nuremberg where it was stated:

"A further submission was made that Germany was no longer bound by the rules of land warfare in many of the territories occupied during the war because Germany had completely subjugated those countries and incorporated them into the German Reich, a fact which gave Germany authority to deal with the occupied countries as though they were part of Germany. In the view of the Tribunal it is unnecessary in this case to decide whether this doctrine of subjugation, dependent as it is upon military conquest, has any application where the subjugation is the result of the crime of aggressive war. The doctrine was never considered to be applicable so long as there was an army in the field attempting to restore the occupied countries to their true owners, and in this case, therefore, the doctrine could not apply to any territories occupied after the 1st September, 1939. As to the war crimes committed in Bohemia and Moravia, it is a sufficient answer that these territories were never added to the Reich, but a mere protectorate was established over them."⁽²⁾

⁽¹⁾ Article 6 (c) of the Charter enumerates among the crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

"Art. 6 (c). *Crimes against humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." For some provisions which govern United States Military Commissions set up for the trial of war criminals and which do reflect the influence of Article 6 (c), see Volume I, pp. 113-115.

⁽²⁾ British Command Paper Cmd. 6964, p. 65.

5. *Civilians as War Criminals*

Colonel Smith assumed that the accused could not be regarded as members of the armed forces. The Prosecutor claimed that the S.S. were members of the German armed forces.

It would be harder to prove that the camp prisoners who were given minor official positions by the authorities were anything more than civilians. In meeting the argument that no war crime could be committed by Poles against other Allied nationals, the Prosecutor said that by identifying themselves with the authorities the Polish accused had made themselves as much responsible as the S.S. themselves. Perhaps it could be claimed that by the same process they could be regarded as having approximated to membership of the armed forces of Germany.

In any case subsequent court decisions have made it quite clear that civilians can commit war crimes. For example, in the *Zyklon B Case*⁽¹⁾ two German industrialists, undoubtedly civilians, were sentenced to death as war criminals for having been instrumental in the supply of poison gas to Auschwitz, knowing of its use there in murdering Allied nationals. Another instance among many is provided by the *Essen Lynching Case*⁽²⁾ where civilians appeared among persons found guilty of being concerned in the killing of three British prisoners of war. *The Hadamar Trial*⁽³⁾ provides an example from among the trials held before United States Military Commissions; here the civilian personnel of a medical institution were found guilty of unlawfully putting to death Russian and Polish nationals.

6. *The Defence of Superior Orders*

There was some argument during the trial as to the extent to which the accused could plead the defence of superior orders.⁽⁴⁾ It is not proposed here to set out at length the law and practice relating to superior orders in trials of war criminals since this task has already been performed in Volume I of this series, at pages 18-20 and 31-33. It will suffice to quote one legal text and one judicial utterance which are relevant to the issue and which have not appeared in the volume already published.

The Charter of the International Military Tribunal, in Article 8, provides that: "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires"; and on this the Tribunal made the following comment: "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."⁽⁵⁾

⁽¹⁾ See pp. 93-103 of Volume I of this series. ⁽²⁾ *Ibid*, pp. 88-92. ⁽³⁾ *Ibid*, pp. 46-54. ⁽⁴⁾ See pp. 75-6, 79, 95-6 108 and 117-8. ⁽⁵⁾ British Command Paper Cmd. 6964, p. 42

ANNEX
TABLE OF ACCUSED

Name of Accused	Charge on which Accused's Name appeared	Position in the Camps	Verdict	Sentence
Antoni Aurdzieg	Belsen	Prisoner appointed a minor functionary	Guilty	Imprisonment for 10 years
Eric Barsch	Belsen	Camp official	Not Guilty	Death by Hanging
Juana Borman	Belsen and Auschwitz	Camp official	Guilty on the charge only	Imprisonment for 10 years
Herta Bothe	Belsen	Prisoner appointed a minor functionary	Guilty	Imprisonment for 5 years
Medislaw Burgraf	Belsen	S.S. guard	Guilty	Imprisonment for 15 years
Otto Calesson	Belsen	S.S. guard	Guilty	Death by Hanging
Wilhelm Dorr	Belsen	S.S. guard	Not Guilty	Imprisonment for 15 years
Karl Egersdorf	Belsen and Auschwitz	Camp official	Guilty on the charge only	Imprisonment for 15 years
Herta Ehlert	Belsen	Camp official	Guilty	Imprisonment for 5 years
Gertrud Fiest	Belsen	Camp official	Not Guilty	Imprisonment for 10 years
Ida Forster	Belsen	Camp official	Guilty	Death by Hanging
Ilse Forster	Belsen	S.S. guard	Guilty	Death by Hanging
Karl Francioh	Belsen and Auschwitz	Camp official	Guilty on both charges	Death by Hanging
Irma Grese	Belsen and Auschwitz	Camp official	Guilty on both charges	Death by Hanging
Ladislav Gura	Belsen and Auschwitz	Camp official	Trial against him not proceeded with (see p. 146)	—
Hildegard Hahnel	Belsen	Camp official	Not Guilty	Imprisonment for 10 years
Irene Haschke	Belsen	Camp official	Guilty	Imprisonment for 10 years
Anna Hempel	Belsen and Auschwitz	Camp official	Guilty on the charge only	Death by Hanging
Franz Hoessler	Belsen and Auschwitz	Camp official	Guilty on the charge only	Death by Hanging
Charlotte Klein	Belsen	S.S. Doctor	Not Guilty	—
Dr. Fritz Klein	Belsen and Auschwitz	Prisoner appointed Senior	Guilty on both charges	Death by Hanging
Josef Klippel	Belsen	Prisoner appointed Senior	Not Guilty	Imprisonment for 15 years
Helena Kopper	Belsen	Prisoner appointed Senior	Guilty	Imprisonment for 15 years

Name of Accused	Charge on which Accused's Name appeared	Position in the Camps	Verdict	Sentence
Georg Kraft	Belsen and Auschwitz	Kommandant of Birkenau (Auschwitz No. 2) and later of Belsen	Not Guilty	Death by Hanging
Josef Kramer	Belsen and Auschwitz	Camp official	Guilty on both charges	Imprisonment for 1 year Imprisonment for 10 years
Hilda Lisiewicz	Belsen and Auschwitz	Prisoner appointed minor functionary	Not Guilty	—
Hilde Lobauer	Belsen and Auschwitz	Prisoner appointed minor functionary	Not Guilty	—
Ilse Lothe	Belsen and Auschwitz	Prisoner appointed minor functionary	Not Guilty	Imprisonment for 15 years
Fritz Mathes	Belsen	Prisoner appointed minor functionary	Not Guilty	—
Klara Opitz	Belsen	S.S. guard	Not Guilty	Death by Hanging
Vladislav Ostrowski	Belsen	Prisoner appointed minor functionary	Not Guilty	Imprisonment for 10 years
Walter Otto	Belsen	Prisoner appointed minor functionary	Not Guilty	Imprisonment for 10 years
Anchor Pichen	Belsen	Camp official	Not Guilty	Imprisonment for 15 years
Antoni Polanski	Belsen and Auschwitz	S.S. guard at Auschwitz	Guilty on the charge only	Imprisonment for 10 years
Johanne Roth	Belsen	Prisoner appointed Block Senior	Guilty	Imprisonment for 10 years
Gertrud Sauer	Belsen	S.S. guard	Guilty	Death by Hanging
Ignatz Schlomowicz	Belsen	Camp official	Guilty on both charges	Death by Hanging
Oscar Schmitz	Belsen	Camp official	Guilty	Imprisonment for 3 years
Heinrich Schreier	Belsen and Auschwitz	S.S. guard	Guilty on both charges	Death by Hanging
Stanislawa Starotska	Belsen	Prisoner appointed Camp Senior	Guilty	Imprisonment for life
Franz Stofel	Belsen and Auschwitz	S.S. guard	Guilty	—
Elizabeth Volkenrath	Belsen and Auschwitz	Camp official	Guilty	—
Frieda Walter	Belsen and Auschwitz	Camp official	Guilty	—
Peter Weingartner	Belsen and Auschwitz	S.S. guard	Guilty	—
Erich Zoddell	Belsen	Prisoner appointed Camp Senior	Guilty	—

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FOREWORD

This third volume includes reports of ten cases. They are drawn from widely distant parts of the globe ; the trial courts are diverse in character, consisting of National Courts and Military Courts acting under different warrants or commissions. The charges were diversified in character.

Perhaps the most important case from the standpoint of international law is that which stands first in the volume. The prisoner was a German named Klinge. He was indicted before a Norwegian Court for torturing Norwegian civilians, and in one case so as to cause the victim's death. The trial court sentenced him to death under Articles of the Civil Criminal Code as modified by a Provisional Decree of 1945, which gave new and special powers to the Court in the case of war crimes, including the power to impose the death sentence where under the relevant articles of the Civil Criminal Code imprisonment was the severest penalty. On appeal, the sentence was upheld by the Supreme Court ; nine of the thirteen judges affirmed the decision of the trial judges, four dissented. The question was whether the Decree of 1945, which was passed after the crime was committed and which first gave the Court power to sentence to death for the offence, had retrospective effect, notwithstanding Article 97 of the Constitution of Norway, which is in the following terms : " No law may be given retroactive effect " and Article 96 which vetoed any trial except according to Norwegian law, as follows : " No one may be convicted except according to law, or be punished except according to judicial sentence. Examination by torture must not take place." As the actual crime was covered by the specific penal prohibitions of the Norwegian Civil Criminal Code, no question of retroactive operation arose as to the conviction, but it did arise as to the sentence. The Law of 1945 was clearly, it was held, intended to have a retroactive effect in permitting the death sentence. The majority of the Court held that the particular classes of offences against the laws and customs of war depended on rules of international law and lay outside the intended scope of Article 97 of the Constitution. These were directly binding on the prisoner as from the outbreak of war and by international law his crimes could be punished by the death sentence. The majority fully accepted that Sections 96 and 97 were constitutional limitations binding on both the Norwegian legislature and Courts, but were of the opinion that the laws and customs of war were incorporated into Norwegian Law and punishable by the penalty described by International Law for the offence, namely death. The minority were of opinion that Section 96 was obligatory and meant by " law " law in the sense of formal laws or regulations passed by the

Norwegian legislature and that Section 97 excluded the retroactive effect of the law of 1945 which, in their opinion, first legalised the death penalty for the crime.

I may, perhaps, be pardoned for giving a reference to an article which I contributed to the Fall Issue of the Toronto Students' Journal, "Obiter Dicta." At p. 20 I have referred to the rule against retroactive law as a principle of justice, not jurisdiction, quoting the judgment of the International Military Court at Nuremberg, and also quoting a valuable statement of principle by Willes J. in the English case of *Phillip v. Eyre*, that there may be cases which the existing law for want of prevision fails to meet, so that to refuse the intended retroactive effect of the remedial law may involve such injustice that the maxim *summum jus summa injuria* would apply. But beyond that, the objection had also to be considered under Article 96 that the law being applied was not the ordinary penal law only of the nation such as is contemplated by Article 96, but a special law, namely, international law, and that the international law and customs of war had been incorporated into Norwegian law. This latter involves the meaning of law in Section 96. If I may refer again to my article, on p. 19, I contemplated the possible jurisdiction of a national Court to administer not only the ordinary national law, but also the international law, such as that of Prize and of the laws and customs of war. The Norwegian Court has thus, in treating the Court as a Court of international law as well as of national law, decided a question which did not arise for direct decision by the Nuremberg Tribunal.

The next case recorded in the volume is also from the Norwegian Supreme Court. It is the case of Richard Wilhelm Hermann Bruns and two others. Charges of murder there failed. As to the charges of torturing, the Supreme Court held that the inflicting of torture was a serious war crime, and though it did not result in death or permanent disability, might justify the death sentence. This decision followed the decision of the Supreme Court on these questions of retroactive operation which I have just referred to. The Court did not find it necessary to consider the defence advanced that the torturing was justified by way of reprisal. No doubt the true import of the theory of reprisals forms one of the most important and difficult questions which now face the student of the law of war. But it is difficult to regard with anything but distaste the suggestion that torture can be justified as a reprisal against inhabitants of an occupied country for their acts in working with the underground movement. It is, however, technically inadmissible on many grounds.

The case next reported comes from the Permanent Military Tribunal at Strasbourg and the French Court of Appeal. The chief defendant was the ex-Gauleiter of Alsace; the main question was whether the Germans had conquered the province or were merely in occupation until the time came when it was freed by the Allies. Once that was decided against the defendants, the numerous consequential questions were not difficult to decide, though the decisions are important. They are too complicated to be set out in this Foreword. They are examined in the Report as fully and precisely as is possible. But the clear decision that recruiting Alsations to serve in the German army was contrary to the laws of war, having regard to the status of Alsace, will be a leading case on the point.

The other cases reported in this volume are from Allied Military Courts, five from Military Commissions set up by the United States in Germany, one from a British Military Court in Germany, and one from a British Military Court sitting at Kuala Lumpur in the Malay Peninsula. They were all concerned with the murder or maltreatment of prisoners of war or civilians and with breaches of the Geneva Convention, and also the Hague Convention No. IV of 1907. They all involve subsidiary points of interest. It is curious to find in war crimes cases such defences as that the killing was done on the spur of the moment, or was done by the prisoner when insane or under the influence of drink, or in self-defence, or under provocation. These defences, after being carefully considered, failed. There were also some interesting defences of a technical character which the reader of the Reports should consider in detail.

This volume has been prepared by Mr. George Brand, LL.B., of the Commission's legal staff, under the supervision of the Legal Publications Committee, composed of Mr. Kintner (United States), Chairman, Dr. Schram Nielsen (Denmark), and Mr. Aars-Rynning (Norway). The outlining of the Norwegian cases is based on reports submitted to the Commission by Mr. Aars-Rynning, who has also assisted in drafting the Annex on Norwegian Law.

WRIGHT,

Chairman,

United Nations War Crimes Commission.

London, January, 1948.

**Trial of Kriminalassistent
KARL-HANS HERMANN KLINGE**

EIDSIVATING LAGMANNSRETT AND SUPREME COURT OF NORWAY, 8TH DECEMBER,
1945, AND 27TH FEBRUARY, 1946

*Torturing and Ill-treatment of Civilians as a War Crime.
The Validity under Article 97 of the Norwegian Constitution
of the Retroactive Application of the Provisional Decree
of 4th May, 1945, on the Punishment of Foreign War
Criminals.*

A. OUTLINE OF THE PROCEEDINGS

I. THE HISTORY OF THE CASE

The case against Karl-Hans Hermann Klinge was in the first instance tried by the Eidsivating Lagmannsrett (one of the five Norwegian courts of appeal). On 15th October, 1945, Klinge was charged by the Director of Public Prosecutions with having committed war crimes which violated:

- (i) Art. 228 of the Civil Criminal Code, with which should be read Art. 3 of the Provisional Decree of 4th May, 1945,⁽¹⁾ by having ill-treated at the end of February or the beginning of March, 1945, a named Norwegian citizen during interrogations at the Gestapo H.Q. in Oslo.
- (ii) Art. 229 of the Civil Criminal Code, with which should be read Art. 232 thereof and the Provisional Decree of 4th May, 1945, by having ill-treated and tortured 17 Norwegian citizens whom he interrogated at the Gestapo H.Q. in Oslo during the period from November, 1944, to the end of April, 1945.

It was proved that the victim named in the first charge was forced to bend his knees for a very long time, was then beaten with a truncheon across his back and his seat, and was finally stripped and, with his hands and feet bound, was thrown into a bath filled with ice-cold water, where he was repeatedly ducked under. As a result of this ill-treatment he collapsed and died on the same day.

The evidence also showed that the 17 victims referred to in the second charge were tortured by being beaten with a special heavy truncheon, and being hit in the face, and were given cold baths. During the interrogation "Wadenklemmen" and handcuffs were used.

The Lagmannsrett was satisfied with the evidence as to the defendant's guilt, and, on the 8th December, 1945, sentenced Klinge to death for having committed crimes against Arts. 228 and 229 of the Civil Criminal Code, and Art. 3 (a), (b) and (c) and Art. 1 of the Provisional Decree of 4th May, 1945. The case then went on appeal to the Supreme Court of Norway.

⁽¹⁾ Regarding the Norwegian Law concerning trials of war criminals, see Annex I on pp. 81-92.

2. COMPOSITION OF THE SUPREME COURT

As the case against Karl-Hans Hermann Klinge was regarded as a leading case, all the 13 judges of the Supreme Court took part in the hearing, as laid down by Art. 2 of Law No. 2 of 25th June, 1926. The judges were : Skau, Holmboe, Bonnevie, Schjelderup, Larssen, Alten, Grette, Evensen, Stang, Fougner, Berger, Bahr and Berg.

The Public Prosecutor was Statsadvokat Harald Sund. Counsel for the Defence was Høyesterettsadvokat Adam Hjorth.

3. THE CASE FOR THE DEFENCE ⁽¹⁾

Counsel for the Defence argued that the Lagmannsrett had unjustly applied the Provisional Decree of 4th May, 1945 ; as the crimes for which the defendant had been convicted had been committed before the passing of that Decree, the punishment should have been restricted to the limits set by Arts. 228, 229 and 62 of the Civil Criminal Code. Norwegian law did not provide for a more severe punishment than those laid down in these provisions. The Provisional Decree of 4th May, 1945, which provided for severer penalties, could not be applied, as such a course would be at variance with Art. 97 of the Constitution, which stated that : " No law may be given retroactive effect." International law recognised the death sentence, but international law could not give authority for the application of a more severe degree of punishment without having first been formally incorporated into Norwegian national law. The defending counsel pointed out that it had been commonly accepted in Norwegian legal theory and legal practice that the veto imposed by Art. 97 was absolute as far as criminal law was concerned.

It could not be said that the situation had been confused, because the King and his Government in London had had every opportunity of keeping the criminal law legislation up to date ; Counsel here made reference to the Provisional Decree of 22nd January, 1942, which had amended Chapters 19, 21 and 22 of the Civil Criminal Code.

Another point raised by the defending counsel was that the same Provisional Decree of 1942 did not introduce the death sentence for crimes against Arts. 228 and 229, and that it was only the Provisional Decree of 4th May, 1945, that made possible the infliction of a death sentence for crimes against the above-mentioned paragraphs. Thus the defendant's crimes had been judged more severely than would have been the case if the Provisional Decree of 1942 had been applied.

A subsidiary appeal was lodged against the extent of punishment ; according to the defending counsel, the sentence was too severe even if the Provisional Decree of 4th May, 1945, could be applied.

4. THE JUDGMENT OF THE COURT

The decision of the Lagmannsrett was upheld by nine of the judges of the High Court, with four judges dissenting. The judgments are summarised below.

⁽¹⁾ As no records are kept of the proceedings of such trials as the present, this statement of the case for the defence has been made up of passages from the judgments delivered.

(i) Judge Skau

Judge Skau was the first judge to give reasons in favour of upholding the sentence passed by the Lagmannsrett. He said that the crucial question for the court to decide was whether the provisions of Art. 97 of the Constitution had to be regarded as precluding the retroactive application of the Provisional Decree of 4th May, 1945. It appeared from the Decree itself and its explanatory memorandum that it was intended that the former be given retroactive effect.

Judge Skau fully realised the force of the argument of defence counsel in favour of keeping to a strict interpretation of Art. 97, and he agreed that an extraordinary situation did not in itself justify or authorise any modification of that provision ; on the contrary, it was in extraordinary situations that the provision had its most important purpose to fulfill. In his opinion, nevertheless, there was no question of a conflict with Art. 97 in the case in hand, which must be regarded as lying outside the intended scope of Art. 97. Before setting forth his reasons, however, Judge Skau made some preliminary observations.

The defendant had been convicted for a series of grave acts of torture. Torture, said Judge Skau, was not only criminal according to Norwegian law ; it was also a violation of the laws and customs of war. According to the same laws and customs of war, war crimes could be punished by the most severe penalties, including the death sentence. In other words the criminal character of the acts dealt with in the case in hand as well as the degree of punishment were already laid down in these provisions of international law relating to the laws and customs of war. Those provisions were valid for Norway as a belligerent country.

Judge Skau did not consider it necessary to deal with the question whether Norwegian courts were precluded by Art. 96 of the Constitution (" No one may be convicted except according to law. . . ") from trying war criminals in accordance, directly and solely, with the above-mentioned provisions of international law. It had to be regarded as conclusive that such a legal bar had been removed by the passing of the Provisional Decree of 4th May, 1945. That Decree had incorporated the provisions of international law regarding war crimes into Norwegian law as an integral part of the national legislation as far as it was considered necessary by the Norwegian legislature.

Even if it were granted that Norwegian courts could not have inflicted a more severe punishment than was provided for by Norwegian law had the Provisional Decree of 1945 not been passed, foreign war criminals tried in Norway would not have been sentenced for acts which were not criminal at the time when they were committed, nor would they have been given a more severe sentence than was provided for by international law in force at the time. It was beyond doubt that the acts in question were not only crimes according to Norwegian law but also war crimes, crimes against the " laws of humanity " and the " laws and customs of war." He particularly wanted to stress the international character of the trial and punishment of war criminals as distinct from the trial of the quislings of the various nations.

The late President Roosevelt and Mr. Churchill had declared, on 25th October, 1941, that the disposal of war criminals was one of the main

war aims of the Allies. A solemn statement on the punishment of war criminals had been made on 31st January, 1942, in the St. James's Declaration by the governments of those Allied countries whose territories had been occupied by the Axis Powers, and the Moscow Declaration of 1st November, 1943, voiced the same views. Judge Skau then recalled the preparatory work carried out by the United Nations War Crimes Commission for the trial of war criminals, and the conventions which had been adopted by the Allied nations setting out how the various nations should take part in the prosecution of war criminals.

In view of all these declarations, he agreed with the ruling of the Lagmannsrett that in the present case there could be no question of an unconstitutional retroactive application of the Provisional Decree of 4th May, 1945. The passing of that Decree was a link in or a result of Norway's adherence to the agreements between the Allied nations mentioned earlier. The claim of the Allied belligerent nations, including Norway, to exercise the right to punish war criminals became effective the moment their crimes were committed, this right being based on and circumscribed by the provisions of international law regarding the laws and customs of war.

The real effect of the Decree was merely to authorise the Norwegian courts to make effective the already existing demand for punishment in conformity with the conventions concluded.

Art. 97 of the Constitution was one of the means of safeguarding citizens against an unjustified infringement by the state of their constitutional rights. Judge Skau agreed with the defending counsel that these protective provisions had been made not only in the interest of the individual citizen but also and primarily in the interest of the community. The arbitrariness and uncertainty which would be caused by an unlimited right to give new laws a retroactive effect would prejudice the most vital interests of the community.

It seemed unreasonable, however, to maintain that provisions made for the protection of the community could be pleaded by foreign intruders, citizens of a state which had attacked that same community in order to subdue it, who had used the most reckless and brutal means to achieve this end. Such a situation could not possibly have been foreseen by those who drafted the Constitution. To allow such a plea by foreign war criminals would be a violation of the high principles which were the foundation of Art. 97 and the claim for justice which it supported.

Judge Skau dismissed as irrelevant the argument that, since the King and his Government in London had had every opportunity of keeping the criminal law legislation up to date, it could not be claimed that the situation had been confused.

Turning to the point raised by the defending counsel, that the Provisional Decree of 1942 did not introduce the death sentence for crimes against Arts. 228 and 229, Judge Skau said that no explanation had been submitted as to why the provisions laid down by the Provisional Decree of 1945 had not been passed into law at an earlier date. He drew the court's attention, however, to the fact that the Provisional Decree of 1945, besides introducing more severe degrees of punishment than that of 1942, had set out the very

characteristics of crimes of the kind dealt with in the case in hand, defining them as war crimes and as crimes which were punishable according to Norwegian laws if they were provided against by Norwegian penal clauses. In Judge Skau's opinion it would have been formally more correct to charge and sentence the defendant for crimes against the Provisional Decree of 1945, reference also being made to Arts. 228 and 229 of the Civil Criminal Code, instead of for crimes against Arts. 228 and 229, reference also being made to the Provisional Decree of 1945. As he had pointed out earlier, the Provisional Decree of 1945 had incorporated into Norwegian national law the provisions on war crimes and their punishment laid down by international law. It was to be assumed that the date of the passing of the Decree had depended on the negotiations which had taken place between the Allied nations regarding the disposal of war criminals. It was not merely an expression of an altered and more severe attitude towards the war crimes dealt with.

Further, he wanted to point out that most probably very few outside the circle of victims who had been directly exposed to the atrocities had a complete idea or knowledge of the character and extent of the Gestapo's criminal methods before these were finally revealed. He was sure that if the Norwegian people could have foreseen at the beginning of the war that the Gestapo would act as they had done, the general and unanimous sense of justice would already then have demanded the same severe judgment of those war crimes as did the Provisional Decree of 1945. He did not agree with what had been said in the explanatory notes to the Traitors' Decree, referred to by the defending counsel, to the effect that in the circumstances prevailing during the war, the country being occupied, and the King and his Government abroad, and the Storting and the Supreme Court out of function, "it has not been possible to keep the national criminal legislation in step with the demands of justice developed in the nation in the war years." It was wrong in his opinion to interpret the quotation as meaning that the Norwegian people's sense of justice had changed during the years of war. It would be more correct to say that the people's sense of justice had not been given an opportunity to express itself before the atrocious character of those crimes was revealed.

In his opinion there was no contradiction between the conclusion which he had reached in the present case and the rulings given by the Supreme Court in cases against traitors when the question of the retroactivity of the various Provisional Decrees had been discussed and decided upon. In this connection he drew the court's attention to the interpretation, given in a recent case against a traitor, by the first judge, who had said: "In my opinion Art. 97 of the Constitution vetos a new law introducing punishment for acts which before its promulgation were regarded as lawful. In principle it also vetos the introduction of more severe punishment for such acts." In making the reservation constituted by the expression "in principle," the judge had apparently not wanted to commit himself as to the question whether an increase in punishment introduced by a new Decree would, in all instances, be at variance with Art. 97 of the Constitution. And when it had been stressed in theory that Art. 97 had imposed an absolute veto as regards criminal law, it was, no doubt, because circumstances like those with which they were being faced could not have been foreseen.

Having come to the conclusion that the application of the Provisional Decree of 1945 was not, in the present case, at variance with the Constitution, he then proceeded to consider the appeal as far as the degree of punishment was concerned.

Judge Skau agreed with the Lagmannsrett that the death sentence was the only possible punishment in the case in hand. There was no justification for a mitigation of punishment even if Art. 5 of the Provisional Decree of 1945 (regarding superior orders) were pleaded, as the Lagmannsrett had been satisfied that the defendant had acted on his own accord though with the connivance of his superiors. The defending counsel had stressed the exorbitant pressure exercised by the Nazi system on the German people and the fact that subordinates were intentionally misled as to the lawfulness of the Nazi methods. In that connection Judge Skau pointed out that the acts of ill-treatment of which the defendant had been found guilty were such severe violations of the "laws of humanity" that he, the defendant, regardless of all German propaganda, could not have been in doubt that his acts, irrespective of their purpose, not only were to be condemned morally but were also unlawful.

(ii) Judge Holmboe

Judge Holmboe was the first judge to give his reasons for dissenting. He said that in his opinion there was no justification for the application of the more severe punishment introduced by Art. 3, para. 2, of the Provisional Decree of 1945, as all the crimes proved against Klinge had been committed before the promulgation of that Decree. He agreed with Judge Skau that the Decree had been intended to have retroactive effect, though the intention had not been expressly laid down in the Decree itself. The explanation for that omission could most probably be found in the following quotation from its explanatory notes:

"International law asserts that violations of the laws and customs of war are crimes and are punishable as such. In other words, the authority to prosecute has been sanctioned by international law and comes into effect as soon as a state of war exists. As a result there is no question of retroactivity in this respect, even though the regulations of the national penal code applicable to war crimes may have been promulgated after the crime was committed."

Judge Holmboe said that he could not accept that argument, which had also been put forward by the Lagmannsrett and given further consideration by Judge Skau. In his opinion, Art. 96 of the Constitution vetoed any trial except according to Norwegian law, i.e., according to formal laws or regulations passed by the legislature. It made no difference if there existed corresponding provisions sanctioned by international law which could be applied by international bodies or, as mentioned in the explanatory notes, by the national courts of those countries whose laws admitted the infliction of punishment without special reference to law. The Judge referred to the following passage in the explanatory notes:

"Such an interpretation is alien to the Norwegian conception of law. Norwegian courts can only inflict punishment according to provisions of Norwegian civil or military law. The principle laid down in Art. 96 of the Constitution must be interpreted in this connection so as to make

an arbitrary application of an undefined provision of international law inadmissible. In Norway, international law is not incorporated into national law as an integral part, as is the case in various foreign legal systems. Before a rule of substantial character of international law can be applied by Norwegian courts, it must be incorporated into Norwegian national law by a special act."

Judge Holmboe fully agreed with that point of view and only wanted to add that the laws regarding criminal procedure in cases of crimes against the civil criminal code, as well as for crimes against the military criminal code, expressly laid down that the indictment, in describing the criminal acts alleged, should emphasise the characteristics contained in the relevant provisions and make reference to the paragraphs applicable to the case. The only exception was made in charges dealt with by courts-martial, but it appeared from Art. 6 and Art. 1 of the law of procedure regarding crimes against the military criminal code that, even in courts-martial, punishment could not be inflicted except according to Norwegian law. In his opinion those provisions alone constituted a sufficient objection to arriving at a conviction on the basis only of the international law applicable to the crimes in question at the time of their perpetration.

If that was the case it would follow that Norwegian national law, when incorporating the provisions laid down by international law, would be given retroactive effect if applied to acts committed before its promulgation.

Consequently the main question in the case was whether such retroactivity would be at variance with Art. 97 of the Constitution. As had already been mentioned by Judge Skau, it had always been maintained that in Norwegian legal theory it was beyond doubt that Art. 97 had to be regarded as an absolute veto on the retroactive application of criminal law to the detriment of a defendant. That meant that Art. 97 not only vetoed the introduction of retroactive punishment for acts which were not punishable by the laws in force at the time of their perpetration—a question of no interest in the case—but also the retroactive increase in the degree of punishment. That interpretation of Art. 97 had always formed the basis of Norwegian criminal law and that was without doubt the reason why the question had not been dealt with previously by the courts. The same interpretation had also formed the basis for the Provisional Decrees passed in London during the war. The Provisional Decree of 22nd January, 1942, concerning punishment for membership in the Quisling Party, had not been given retroactive effect. The same applied to the Provisional Decrees of 3rd December, 1942, and 22nd January, 1942, which, *inter alia*, introduced capital punishment for various crimes against the Civil Criminal Code.

In Judge Holmboe's opinion, in normal circumstances the retroactive application of a law introducing capital punishment for crimes which could only be punished by imprisonment at the time of their perpetration, as in the case in hand, would have been at variance with Art. 97 of the Constitution.

The question arose whether the extraordinary conditions which followed the war and the occupation justified a more elastic interpretation of Art. 97 or, as Judge Holmboe preferred to put it, whether those extraordinary conditions could, fully or to some extent, justify the disregarding of that provision altogether. The explanatory notes to the Provisional Decree of 1945,

did not deal with that point, apparently considering that the question of retroactivity in the strict sense of the word did not arise as the provisions already existed in international law; to that point of view Judge Holmboe strongly dissented.

Summing up the arguments set out above, Judge Holmboe pointed out that there had been no constitutional obstacles preventing the criminal legislation from being kept up to date during the occupation. The Cabinet in London had all the time taken it for granted that, as long as the Storting was out of function, the King could pass the necessary laws in the form of Provisional Decrees. The Supreme Court had adopted that point of view and had accordingly enforced all Provisional Decrees regarding criminal law. He particularly wanted to stress that the very same crimes which were dealt with in the Provisional Decree of 1945 regarding the punishment of foreign war criminals had also been dealt with by the Provisional Decree of 1942, which amended Chapters 19, 21 and 22 of the civil penal code. According to its explanatory notes, the Provisional Decree of 1942 expressly aimed at covering serious crimes, such as murder, torture and grave bodily injury, committed by "the Germans and their collaborators," and it laid down that the death sentence could be applied for crimes which, according to the provisions of the Civil Criminal Code in the chapters referred to, could be punished by a life sentence. Consequently there had seemed to be no need at that time to introduce the death sentence for other crimes mentioned in the same chapters of the criminal code, including crimes for which the defendant had been convicted. After three years, a few days before the capitulation, the authorities responsible for the legislation had decided that the Provisional Decree of 1942 did not suffice and that the application of the death sentence should be extended to cover less serious crimes like the ones dealt with in the present case.

Judge Holmboe said that he realised that there might have been various difficulties in keeping the legislation up to date, as for instance trying working conditions and insufficient contact with public opinion at home. The discussions between the Allies regarding the disposal of war criminals might also have been a reason for the delay in the passing of new Decrees, but surely those difficulties could not justify the retroactive application, contrary to the Constitution, of Provisional Decrees.

One predominant intention of Art. 97 was that the criminal should be aware beforehand of the punishment which his crime involves. That, though a very important point, was not the only decisive one. It was impossible to accept the argument that German war criminals could not, according to the provisions of international law only, expect any other punishment than a death sentence in the event of Germany's losing the war. Another not less important result of Art. 97 was that the state powers, be it the legislature, the administration or the judiciary, should not be given the opportunity of arbitrarily and retroactively introducing or increasing a punishment for an act already committed. In other words, Art. 97 had to be regarded as a complement to the fundamental principle expressed in Art. 96: "No one may be convicted except according to law." He did not agree that the case in hand had to be regarded as lying outside the field which Art. 97 was intended to cover. The Constitution and its historical models came to life during a period of wars and revolutions, at a time when terror

was not unknown, though it must be admitted that those who drafted the Constitution could not possibly have foreseen such a form of warfare as that waged by Germany during the Second World War. Art. 97 had been intended not to cover certain specified situations but to be an expression of a principle of law which according to its authors should form the basis of the legislation of a free community. One had to be wary of limiting the scope of that provision to suit an extraordinary situation. In normal times that provision was of lesser importance, in any case as far as criminal law was concerned, as it voiced only a principle which would concur with the people's sense of justice. It was in turbulent times that the provision was significant. It could be maintained that the situation with which they were faced was exactly like the one which Art. 97 was intended to cover. The sense of justice which had matured in the Norwegian people during the occupation had grown under the influence of the terror and indignation caused by the atrocities committed as well as by anxiety and grief. He did not want to make any conjectures as to whether the demand for justice, as had been maintained by Judge Skau, would have been the same before the occupation. However strongly he felt that the crimes committed against the Norwegian people should be severely punished, experience had shown that an atmosphere born of cruelty and hatred was calculated to upset a carefully considered and fair judgment.

It could be argued that the fact that international law had sanctioned the application of the death sentence for crimes of the kind dealt with in this case justified the view that the Provisional Decree of 1945 was not in itself unfair. That argument, however, could not justify its retroactive and unconstitutional application. Neither did he agree with the view put forward by Judge Skau that it would be unreasonable to accept a war criminal's plea which was based on the Norwegian Constitution. It was of decisive importance that the provision in Art. 97 contained a veto which was addressed in the first place to the legislature but at the same time also to the judges. It was a binding provision as to the way in which the administration of justice should be carried out in Norway. In effect, it constituted, of course, a safeguard for the criminal as well, regardless of the character and seriousness of the crime. The crimes they were dealing with in the case in hand were very serious indeed, but that should not prevent the defendant from being tried according to Norwegian law as laid down by the Constitution.

Judge Holmboe had consequently come to the conclusion that the application of Art. 3 of the Provisional Decree of 1945 to the present case would be at variance with the Constitution. As a result, the punishment should not have exceeded a maximum of 13 years and six months of imprisonment. He admitted that the result was not satisfactory. If it had been possible according to his conception of the law to propose a more severe form of punishment, he would have done so. He was not blind to the fact that it would hurt the people's sense of justice that foreign war criminals were to be punished by a restricted term of imprisonment only, whereas Norwegian torturers could be given death sentences. In that connection, however, it had to be remembered that the traitors were sentenced not only for torture but for treason as well. Taking the long view, however, it was no disaster if a criminal or a group of criminals were sentenced to a

more lenient punishment than the judge himself would wish to apply. On the other hand, it was of the greatest importance that the courts, when trying war criminals, should without reservation stick to the unshakeable safeguard against despotism as far as criminal law was concerned, namely the provision contained in the Constitution against the retroactivity of a new law, which represented a principle which had prevailed for generations.

He contended that the crimes should be brought directly within the Civil Criminal Code which, according to Arts. 228, 229, 232 and 62 thereof, was applicable to the case.

(iii) *Judge Bonnevie*

Judge Bonnevie also argued that the application of the Provisional Decree of 4th May, 1945, was at variance with Arts. 96 and 97 of the Constitution. In his opinion the sentence of the Lagmannsrett should consequently be annulled and the case retried by the Lagmannsrett, particularly as other provisions of the Civil Criminal Code might be considered applicable. According to those provisions, in conjunction with the Provisional Decree of 3rd October, 1941, the death sentence could in his opinion, be applied without violating Arts. 96 and 97 of the Constitution. He recalled, however, that the Director of Public Prosecutions had maintained that the crimes dealt with in the case could not be brought under the above-mentioned provisions, which was apparently the reason why the Lagmannsrett had not considered the question whether those provisions could be applied.

(iv) *Judge Schjelderup*

Judge Schjelderup agreed with Judge Skau but added that in his opinion it was sufficient and decisive that the crimes for which the defendant had been sentenced were not only a violation of Norwegian criminal law in the narrower sense but a violation of the generally accepted provisions of the laws and customs of war. Those provisions came into force as between Norway and Germany on 9th April, 1940, on the outbreak of the hostilities, and would remain in force until the final peace treaties were signed. The Provisional Decree of 1945, and particularly the already existing criminal provisions referred to in Art. 1 thereof, must not, according to his opinion, be regarded as anything but an interpretation of law already in force at the time of the promulgation of the Decree. According to the generally accepted laws and customs of war, which in his opinion were directly binding on the defendant, his acts were, at the time of their committing, crimes which could be punished by the death sentence. There was no question of applying a more severe punishment than could be inflicted at the time of the perpetration of the crimes. The laws of war with their severe maximum punishment were clear enough.

(v) *Judge Larssen*

Judge Larssen agreed with what had been said by Judge Skau and pointed out that it had been laid down by the provisions of international law that acts like those dealt with in the case in hand were war crimes and could be punished as such by the death sentence. The defendant was bound by those rules at the time of the perpetration of his crimes. That would have been quite clear if international criminal law could have been made directly applicable by the national court as was the case in some other countries.

He recalled that Judge Schjelderup had said that in his opinion such direct application of the provisions of international law could be made by Norwegian courts. So far it had, however, been commonly accepted that Art. 96 of the Constitution vetoed trials by Norwegian courts except according to Norwegian law. Judge Larssen fully endorsed that view but added that it was quite possible that the provisions of international law would have to be applied directly by the national courts. As the Provisional Decree of 1945 had incorporated the provisions of international law into Norwegian law, however, it was not necessary to discuss that question any further.

As to the question of whether the application of the Provisional Decree of 1945 to the case in hand would be at variance with Art. 97 of the Constitution, it would not be correct to discuss what the defendant's position would have been if the Civil Criminal Code only were to be applied. His guilt was determined by the fact that his acts were, at the time of their perpetration, subject to international law (i.e., they were war crimes which were punishable even by the death sentence). It would not alter his legal position even if those provisions of international law could not at that time be directly applied by Norwegian courts because of Art. 96 of the Constitution. The consequence would only have been that the trial would have had to be carried out by a special court established according to international law, as had been the case with the major war criminals. In view of the fact that the Provisional Decree of 1945 had merely incorporated the relevant provisions of international law into Norwegian law, he agreed with Judge Skau that the new terms of punishment did not place the defendant in a less favourable legal position than he was already in before the passing of that Decree. That implied that the retroactive application of that Decree was not at variance with Art. 97.

Judge Larssen then said that the consequence of the minority vote would be that the defendant would not be charged as a war criminal but would instead be charged with having violated the provisions of the Civil Criminal Code regarding bodily injury, which would mean his being charged for crimes of a quite different and far less serious character than he had actually committed. Art. 97 had in its general terms expressed a principle of justice. There would need to exist strong and decisive reasons before it would be possible to accept the minority interpretation referred to above, which would lead to a conclusion which, as Judge Holmboe also maintained, would offend the natural sense of justice. Such reasons were not present as far as he could discern.

(vi) *Judge Alten*

Judge Alten substantially agreed with Judge Skau's arguments and conclusions. He further endorsed Judge Larssen's views which, according to his opinion, were in agreement with what had been said by Judge Skau.

(vii) *Remaining Judgments*

Of the remaining seven judges, five (Grette, Evensen, Stang, Bahr and Berg) supported the majority vote, whereas two (Founger and Berger) supported the minority.

B. NOTES ON THE CASE

1. THE OFFENCE ALLEGED

Arts. 228, 229 and 232 of the Norwegian Civil Criminal Code, for breach of which Klinge was charged, provide as follows:

Art. 228. He who commits an act of violence against another person or in any other way inflicts bodily harm on him, or is an accomplice to such an act, will be fined or sentenced to imprisonment for a period of up to six months. If the act has resulted in some injury to body or health or considerable pain, a term of up to three years imprisonment can be inflicted and up to five years if the act resulted in death or grave injury. . . .

Art. 229. He who causes harm to another person's body or health, or puts another person into a state of helplessness, unconsciousness or any similar state, or who is an accomplice to such an act, will be punished by a term of up to three years and up to six years if the act has resulted in sickness or disability to work lasting more than two weeks, or permanent injury, and up to eight years if the act has resulted in death or considerable injury to body or health. . . .

Art. 232. If an act mentioned in Arts. 228-231 was premeditated and carried out in a particularly painful way or by means of poison or other similar substances which are highly dangerous to the health, or with a knife or other particularly dangerous instrument, a term of imprisonment must always be inflicted. Life imprisonment may be inflicted for crimes against Art. 231 carried out under the same conditions. For crimes against Arts. 228-229 the term of imprisonment fixed by those paragraphs can be increased by a term of up to three years.

There can be no doubt that Klinge's acts were also offences against the laws and usages of war, in so far as they constituted gross breaches of the duties of an occupant during wartime in territory under his control. Torture, said Judge Skau in the course of his judgment, was not only criminal according to Norwegian law; it was also a violation of the "laws of humanity" and of the "dictates of the public conscience" which were referred to in the introductory paragraphs to the Hague Regulation IV concerning land warfare,⁽¹⁾ and of Arts. 46 and 61 of the Geneva Convention concerning prisoners of war.⁽²⁾ In the list of war crimes worked out for the Versailles Peace Conference of 1919, he added, torture was listed as crime No. III.

⁽¹⁾ Judge Skau was making reference to the following passage: "Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience."

⁽²⁾ "Article 46. Prisoners of war shall not be subjected by the military authorities or the tribunals of the detaining Power to penalties other than those which are prescribed for similar acts by members of the national forces."

Officers, non-commissioned officers or private soldiers, prisoners of war, undergoing disciplinary punishment shall not be subjected to treatment less favourable than that prescribed, as regards the same punishment, for similar ranks in the armed forces of the detaining Power.

All forms of corporal punishment, confinement in premises not lighted by daylight and, in general, all forms of cruelty whatsoever, are prohibited.

Collective penalties for individual acts are also prohibited."

"Article 61. No prisoner of war shall be sentenced without being given the opportunity to defend himself.

No prisoner shall be compelled to admit that he is guilty of the offence of which he is accused."

2. THE QUESTION OF THE RETROACTIVE APPLICATION OF THE DECREE OF 4TH MAY, 1945

Assuming that the Ministry was speaking purely of the situation as seen from the point of view of International Law, the legal position regarding the prosecution of war criminals is stated very clearly in the following passage from the Ministry's memorandum: "International law asserts that violations of the laws and customs of war are crimes and are punishable as such. In other words, the authority to prosecute has been sanctioned by international law and comes into effect as soon as a state of war exists. As a result there is no question of punishment with retroactive effect in this respect, even though the provisions of the national criminal code applicable to war criminals may have to be promulgated after the crime was committed."

Nor is there any doubt that the sentence of death passed on Klinge was permissible under International Law. Judge Skau quoted authorities to show also that all war crimes could legally be punished with death under the laws and customs of war.

It may be added that no shadow of an objection could be raised to the sentence on the ground that it constituted an unjust use of the discretion thus permitted by International Law, since it was shown that a death had resulted from the ill-treatment meted out by the accused.

The questions argued during the trial therefore turned upon the interpretation of certain provisions of Norwegian law. It was not denied that Klinge had infringed Arts. 228, 229 and 232 of the Civil Criminal Code, but the Defence claimed that the punishment meted out should not have exceeded the provisions of Arts. 228, 229 and 62; of which the last runs as follows:

Art. 62. If several kinds of crime, each punishable by different terms of imprisonment, have been committed by the same person by one or several acts, the terms of imprisonment passed must exceed the minimum term of the gravest crime but must in no case exceed its maximum term by more than half. . . ."

This plea was not upheld by the Court.

The examination of Klinge's appeal involved the judges in an interpretation of one of the most fundamental provisions of the Norwegian constitution. It was perhaps in the circumstances inevitable therefore that interesting arguments based on principles of justice and public policy should have been raised. Thus, Judge Skau pointed out that circumstances like those facing the Court could not have been foreseen when the constitution was drafted, and expressed the opinion that it seemed unreasonable that provisions made for the protection of the community could be relied upon by an enemy of the same community. To allow such a plea to be put forward by foreign war criminals would be a violation of the high principles which were the foundation of Art. 97 and the claim for justice which it supported. Judge Holmboe, on the other hand, clearly regarded Art. 97 of the Constitution as a safeguard against despotism, whose full effect was worth preserving even if complete justice would, in consequence, not be done in the present case in so far as Klinge would be punished too leniently. Judge Larssen said that the acceptance of the view of the minority among the judges would offend the natural sense of justice.

Judge Schjelderup and Judge Larssen seem to have considered it correct to interpret the word "law" in Art. 97 as including the laws and customs of war as well as Norwegian law, in cases like the one before the Court.

3. THE DEFENCE THAT THE DEATH SENTENCE WAS NOT JUSTIFIED EVEN ACCORDING TO THE PROVISIONAL DECREE

The Defence entered a second plea, based on Art. 5 of the Provisional Decree,⁽¹⁾ that the sentence was too severe even if the Provisional Decree could be applied. The defending counsel stressed the exorbitant pressure exercised by the Nazi system on the German people and the fact that subordinates were intentionally misled as to the lawfulness of the Nazi methods.

In making reference to "exorbitant pressure" the Defence was raising the defence of necessity, while the suggestion that Klinge was deliberately led to believe that Nazi methods were legal seems to indicate that the Defence were relying also on the argument that in some circumstances superior orders may lead to such a mistake of fact as may itself be put forward as a defence. In this connection it is of interest to quote certain comments made later on Art. 5 of the proposed Law on the Punishment of Foreign War Criminals, by the Ministry of Justice and Police.⁽²⁾

"It cannot possibly be admitted as a defence that a German soldier or policeman has ill-treated Norwegian civilians, devastated and burned Norwegian property, etc., in order to save himself from criminal or disciplinary punishment. There may, however, be important reasons for the mitigation of, or even complete exemption from, punishment. . . .

"The paragraph should naturally not be taken to mean that circumstances resulting from superior orders cannot be exculpatory. If the superior order has given the subordinate justifiable reason to believe that the actual circumstances of the act were other than they were, exculpation may be the consequence."

The Supreme Court rejected this plea put forward by the Defence.

⁽¹⁾ See p. 85.

⁽²⁾ See p. 81.

CASE No. 12

**Trial of Kriminalsekretär
RICHARD WILHELM HERMANN BRUNS
and two others**

BY THE EIDSIVATING LAGMANNSRETT AND THE SUPREME COURT OF NORWAY,
20TH MARCH AND 3RD JULY, 1946

Torturing as a War Crime. The Legal Status of the Norwegian Underground Military Organisation. The Defences of Legitimate Reprisals, Superior Orders and Duress.

A. OUTLINE OF THE PROCEEDINGS

1. THE INDICTMENT

The accused were Kriminalsekretär Richard Wilhelm Hermann Bruns, Kriminalassistent Rudolf Theodor Adolf Schubert and Kriminaloberassistent Emil Clemens. All three were accused of the murder and torturing of Norwegian citizens.

Bruns was charged by the Director of Public Prosecutions with having committed war crimes which were in violation of:

1. Art. 233 of the Civil Criminal Code, and Art. 3 of the Provisional Decree of 4th May, 1945,
2. Art. 231 of the Civil Criminal Code, with which should be read Art. 232; the Provisional Decree of 4th May, 1945; and the Law of 6th July, 1945,
3. Arts. 228 and 229 of the Civil Criminal Code, the Provisional Decree of 4th May, 1945, and the Law of 6th July, 1945.

Schubert was charged with having committed war crimes which were in violation of:

1. Art. 229 of the Civil Criminal Code, with which should be read Art. 232; and Art. 3 of the Provisional Decree of 4th May, 1945,
2. Arts. 228 and 229 of the Civil Criminal Code, and the Provisional Decree of 4th May, 1945.

Clemens was charged by the Director of Public Prosecutions with having committed war crimes which violated:

1. Art. 233 of the Civil Criminal Code, and Art. 3 of the Provisional Decree of 4th May, 1945,
2. Arts. 228 and 229 of the Civil Criminal Code, with which should be read Art. 232; and the Provisional Decree of 4th May, 1945.

The Public Prosecutor acting in this trial was Statsadvokat Harald Sund. Counsel for the Defence was Høyesterettsadvokat Adam Hjorth.

2. THE EVIDENCE PROVED BEFORE THE LAGMANNSRETT

The case against Bruns, Schubert and Clemens was in the first instance tried by the Eidsivating Lagmannsrett. During the trial several witnesses were called for both the prosecution and the defence. The following facts were established.

On 17th April, 1945, Bruns and Schubert went to arrest a certain Norwegian who was in charge of the arms of the illegal Military Organisation. They rang the bell at his flat and the door was opened by his brother, who slammed it as soon as he saw the Germans. When the brother refused to open in spite of orders, Schubert fired several shots with his automatic through the door. When the door finally gave in, Bruns fired some shots at random through the opening. The brother was mortally wounded and died later in hospital.

In March or April, 1943, Bruns fired from a distance of 25-30 metres at a Norwegian prisoner who was trying to escape. The shot was aimed at the prisoner's legs but, as he was stooping at that moment, he was hit in the head and killed.

On 19th December, 1942, Bruns was present at the interrogation of a sick Norwegian. Leg screws were fastened to his legs and he was beaten with various implements. Later he was thrown unconscious into a cellar, where he remained for four days before receiving medical attention. Between 1942 and 1945, Bruns used the method of "verschärfte Vernehmung" on 11 Norwegian citizens. This method involved the use of various implements of torture, cold baths and blows and kicks in the face and all over the body. Most of the prisoners suffered for a considerable time from the injuries received during those interrogations.

Between 1942 and 1945, Schubert gave 14 Norwegian prisoners "verschärfte Vernehmung," using various instruments of torture and hitting them in the face and over the body. Many of the prisoners suffered for a considerable time from the effects of injuries they received.

On 1st February, 1945, Clemens shot a second Norwegian prisoner from a distance of 1.5 metres while he was trying to escape. Between 1943 and 1945, Clemens employed the method of "verschärfte Vernehmung" on 23 Norwegian prisoners. He used various instruments of torture and cold baths. Some of the prisoners continued for a considerable time to suffer from injuries received at his hands.

3. THE DECISION OF THE LAGMANNSRETT

The Court established that both Bruns and Schubert were aware that, when firing through the door and later at random into the room, they might hit the brother. The Court also established that the wounds from which the latter died had been inflicted by Bruns' pistol and Schubert's automatic. The Court found, however, that the defendants could not be held guilty of murder as they were trying to arrest a man who was in charge of the arms of the illegal Military Organisation and they had expected armed resistance.

It appeared later that the person in charge of the arms was not at home that night and that arms were never kept in the flat, but the defendants may not have known that and may have thought that they were encountering armed resistance.

The Court felt satisfied that Bruns, when trying to stop the prisoner from escaping, had aimed at his legs but that, as the victim stooped at that very moment, the shot hit him in the head. The Court came to the conclusion that, as the prisoner had not stopped when ordered to do so, the defendant had acted within his rights in shooting at him. The fugitive had been an important official in the illegal intelligence service whose capture was of great importance to the German authorities, and the only way to stop him from getting away was to shoot at him. The Court, therefore, did not consider the defendant guilty of his murder.

The Court felt it established beyond doubt that the sick Norwegian had been most brutally ill-treated, but, as it had not been possible to ascertain Bruns' part in the torture, the Court gave him the benefit of the doubt and acquitted him on that count of the indictment.

The Court found that the prisoner shot by Clemens had been trying to escape and that the defendant had not exceeded his rights in trying to prevent him from escaping by shooting at him. The Court, therefore, held the defendant not guilty of his murder.

The Court then turned to a consideration of the torture allegations. In this connection Counsel for the Defence, Høyesterettsadvokat Adam Hjorth, had claimed that the Military Organisation and its activities were at variance with International Law and that the Germans in fighting the organisation were, therefore, justified in using methods contrary to International Law. The German methods of carrying out interrogations had to be regarded as constituting reprisals.

The Court could not accept this point of view. The Military Organisation had been established in 1941, and soon had members all over the country, with its centre in Oslo. In 1945, it had more than 40,000 members. The organisation received its orders from the Norwegian High Command in England and its task was to take part in the fight for freedom and to organise acts of sabotage.

The members of the organisation, continued the Court, were instructed in the use of small arms and had courses in explosives and other means of sabotage with a view to carrying on partisan warfare. Such warfare did not take place, however, and the skirmishes which occurred between the men of the home forces and German groups were of a casual nature. It was not till the German capitulation that the Military Organisation mobilised. During the occupation its activities consisted mainly of organising, training, military intelligence and some sabotage. The members were not in uniform and bore no special marks of distinction on such occasions; nor did they carry their weapons openly. They had, therefore, no rights as soldiers according to Article 1 of the Regulations on Land Warfare (Hague Regulations). On the other hand they had no unlawful weapons, they did not attack objectives contrary to the Hague Regulations nor did they commit any other acts at variance with the laws and customs of war. Thus their activities were permissible according to international law, but they had no rights as soldiers as long as they did not appear in uniform, did not bear marks of distinction and did not carry their arms openly. They could, therefore, be shot when caught.

In the opinion of the Court, this underground military movement did not constitute a breach of International Law and therefore the Germans were not justified in using torture against its members as a means of reprisal.

Further, the defendants has pleaded superior orders in connection with all the torture charges. In the beginning, said the Court in its judgment, only the Chief of the Sipo, Fehlis, had any right to give such orders. Later that right was extended to those under him, first to Stumbannführer Reinhardt, Chief of Abteilung IV, and then to Fehmer who was in charge of counter-espionage and matters concerning the Military Organisation. Bruns, who was directly responsible to Fehmer, and other Sachbearbeiter often employed torture of their own accord, though as a rule with the connivance of their superiors. The Court took it for granted that the defendants, when employing torture during interrogations in order to extort confessions or information, acted to the best of their belief in the interest of their country.

The Court could not accept the defendants' plea that they would have been in serious danger from their superiors had they refused to perform such acts of alleged duty. The Court could not believe that a state, even Nazi Germany, could force its subjects, if they were unwilling, to perform such brutal and atrocious acts as those of which the defendants were guilty. There was no doubt that the German methods were effective. Their investigations were solely based on betrayal and torture. But for these methods they would never have succeeded in interfering with the underground movement to the extent they did.

On the other hand, the Germans had omitted to try a considerable number of prisoners whom they could have sentenced to death, without infringing the laws and customs of war, for sabotage or participation in the activities of illegal organisations.

In deciding the degree of punishment, the Court found it decisive that the defendants had inflicted serious physical and mental suffering on their victims, and did not find sufficient reason for a mitigation of the punishment in accordance with the provisions laid down in Art. 5 of the Provisional Decree of 4th May, 1945.⁽¹⁾ The Court came to the conclusion that such acts, even though they were committed with the connivance of superiors in rank or even on their orders, must be regarded and punished as serious war crimes. If a nation, which without warning has attacked another, finds it necessary to use such methods to fight opposition, then those guilty must be punished, whether they gave the orders or carried them out.

As extenuating circumstances, Bruns had pleaded various incidents in which he had helped Norwegians, Schubert had pleaded difficulties at home, and Clemens had pointed to several hundred interrogations during which he had treated prisoners humanely.

The Court did not regard any of the above-mentioned circumstances as a sufficient reason for mitigating the punishment and found it necessary to act with the utmost severity. Each of the defendants was responsible for a series of incidents of torture, every one of which could, according to Art. 3 (a), (c) and (d) of the Provisional Decree of 4th May, 1945, be punished by the death sentence.

⁽¹⁾ See p. 85.

The defendants were found not guilty of the murder charges, but guilty of the torture allegations with the exception of one or two minor instances.

All three defendants were sentenced to death by shooting.

4. THE APPEAL TO THE SUPREME COURT

All three defendants appealed to the Supreme Court. Their appeal was based on the following arguments:

- (a) That the acts of torture which the defendants had committed were permitted under International Law as reprisals against the illegal Military Organisation whose activities were at variance with International Law.
- (b) That the acts were carried out on superior orders and that the defendants acted under duress.
- (c) That the acts of torture in no case resulted in death. Most of the injuries inflicted were slight and did not result in permanent disablement.

5. THE DECISION OF THE SUPREME COURT

The Supreme Court upheld the sentence of the Lagmannsrett and rejected the appeal. Judge Larssen delivered the opinion of the Court.

Dealing with the defendants' appeal point by point, Judge Larssen said that it could not be established that the acts of torture had been carried out as reprisals. Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. During the whole of the occupation there was no indication from the German side to the effect that their acts of torture were to be regarded as reprisals against the Military Organisation. They appeared to be German police measures designed to extort during interrogations information which could be used to punish people or could eventually have led to real reprisals to stop activities about which information was gained. The method of "verschärfte Vernehmung" was nothing but a German routine police method and could, therefore, not be regarded as a reprisal.

In Judge Larssen's opinion it was not, therefore, necessary to deal with the question whether the various acts of the Military Organisation were contrary to International Law and whether as such they justified reprisals.

As to the second point of the appeal, the argument that the acts of torture were performed on superior orders and under duress, Judge Larssen said that he supported what had been said by the Lagmannsrett in that connection. There was no definite proof that such orders had been given. The Lagmannsrett had established that on many occasions the defendants had used torture on their own accord though frequently with the connivance of their superiors. The Lagmannsrett had also established that the defendants would have been in no serious danger had they refused to perform such acts of alleged duty. New evidence had come forth in support of the latter contention. The Supreme Court was in possession of two documents, a report from Hans Latza, President of the S.S. Polizeigericht Nord, dated 4th December, 1945, and another from Dr. Helmut Schmidt of the same

Polizeigericht, dated March, 1945. The latter wrote in his report: "I regret that the Sipo did not report cases of torture. Those involved would certainly have been punished." It is evident that at least that particular Polizeigericht would not have punished any leniency towards prisoners in cases where the method of "verschärfte Vernehmung" was employed.

Judge Larssen concluded that the pleas of superior orders and duress put forward by the three defendants must therefore fail.

Considering the third point of the appeal, in which the defendants pleaded that their acts of torture had in no case resulted in death or permanent disablement, Judge Larssen found that the acts that had been committed were not casual violations of various paragraphs of Norwegian law but constituted a methodically carried out ill-treatment of Norwegian patriots, conducted throughout several years. He found no extenuating circumstances and therefore voted for the rejection of the Appeal.

The four other judges concurred.

B. NOTES ON THE CASE

1. THE OFFENCES ALLEGED

It was alleged that the accused had violated provisions made by Arts. 228, 229, 231, 232 and 233 of the Norwegian Civil Criminal Code. Of these, Arts. 228, 229 and 232 have already been quoted in these pages.⁽¹⁾ The remaining paragraphs read as follows:

"Art. 231. He who inflicts considerable injury to another person's body or health, or is an accomplice to such an act, will be punished with a term of imprisonment not under two years if the act was premeditated; and life imprisonment may be applied if the act resulted in death.

Art. 233. He who without premeditation causes another person's death or is an accomplice to such an act, is punishable with imprisonment for up to six years. If the act was premeditated or if it was committed in order to facilitate or conceal another crime or in order to avoid punishment for such other crime, life imprisonment may be inflicted. The same applies in cases of repeated violation and when other particularly aggravating circumstances are present.

The defendants were found not guilty of murder but guilty of the torture allegations, and in sentencing them to death the Court was acting under Art. 3 of the Decree of May 4th, 1945.⁽²⁾ The question of the retroactive character of this provision and its position in relation to Art. 97 of the Norwegian Constitution had already been settled by the Supreme Court in its judgment on the appeal of Karl-Hans Hermann Klinge.⁽³⁾ In considering the plea of the appellants in the present trial to the effect that their acts of torture had in no case resulted in death or permanent disablement, Judge

⁽¹⁾ See p. 12.

⁽²⁾ See p. 89. It is to be noted that the sections of the Civil Criminal Code which the accused in this and the Klinge Case were found to have violated are contained in Chapter 22 of the Code (Offences against Life, Body and Health). In sentencing these accused to death, therefore, the Court may have acted under subsection (c) of Art. 3, as well as under (a) and possibly (d).

⁽³⁾ See p. 1.

Larssen stated that the acts that had been committed were not casual violations of various paragraphs of Norwegian law but constituted a methodically carried out ill-treatment of Norwegian patriots, conducted throughout several years.

2. THE LEGAL STATUS OF THE NORWEGIAN UNDERGROUND MILITARY ORGANISATION AND THE QUESTION OF REPRISALS

The attitude taken by the Lagmannsrett to the question of the legal status of the Norwegian Underground Military Organisation is interesting, and the conclusion reached seems in effect to have been that, while the acts of the Organisation did not constitute a breach of International Law on the part either of the men involved, or of the Norwegian Government, they did amount to breaches committed by the Organisation of the laws enforced in Norway by the German occupation authorities.

In Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), p. 446, it is said that, "... reprisals in time of war occur when one belligerent retaliates upon another, by means of otherwise illegitimate acts of warfare, in order to compel him and his subjects and members of his forces to abandon illegitimate acts of warfare." It is to be noted that "one belligerent retaliates upon another"; and, by holding that the Norwegian Government had committed no breach of International Law, the Court ruled out the defence of reprisal. (Similarly the use of spies in wartime is not considered an illegitimate act of warfare justifying reprisals.)

Article 1 of the Hague Convention No. IV of 1907 provides that:

"The laws, rights, and duties of war apply not only to the army, but also to militia and volunteer corps fulfilling all the following conditions:

- (1) They must be commanded by a person responsible for his subordinates;
- (2) They must have a fixed distinctive sign recognisable at a distance;
- (3) They must carry arms openly; and
- (4) They must conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army'."

The Lagmannsrett decided that, since the men of the Military Organisation did not come within the scope of this Article, they had no rights as soldiers and could therefore be shot when caught. Since they were held not to have infringed the laws and usages of war, however, it is assumed in these notes that the Court regarded them as having been guilty of breaches of the municipal laws then enforced by the German occupation authorities. This assumption seems to be supported by the fact that the Court held that a killing carried out by Bruns and Schubert when trying to arrest a man who was in charge of the arms of the Military Organisation did not make them guilty of a war crime. The accused could, it seems, claim that they were merely carrying out a legal duty.

Judge Larssen, delivering judgment upholding the decision of the Lagmannsrett, restricted himself to stating that the acts of torture could not be regarded as reprisals. Reprisals were generally understood to aim at

changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. It may be added that had the men of the Military Organisation fallen within the scope of Article 1, they would have become prisoners of war on capture and reprisals taken against them would in all circumstances have been illegal, since Article 2 of the Geneva Prisoners of War Convention of 1929, in setting out in general the rights of such prisoners, provides that "... Measures of reprisals against them are forbidden."

3. THE LEGALITY OF SHOOTING A PRISONER WHILE TRYING TO ESCAPE

The Court held that Bruns and Clemens did not become guilty of a war crime by shooting at a prisoner who was trying to escape. This decision is reminiscent of the advice offered to the Court by the Judge Advocate in the *Dreierwalde Case*, in his statement that, if the accused Amberger "did see that his prisoners were trying to escape or had reasonable grounds for thinking that they were attempting to escape," to shoot at them to prevent their escape would not be a breach of the laws and customs of war.⁽¹⁾

4. SUPERIOR ORDERS AND DURESS

The comments of both Courts on these two pleas were restricted to questions of probability, and legal problems were not touched upon in the judgments. Nor were they dealt with in those delivered by the Judges of the Supreme Court in the trial of Klinge. Judge Skau did not go beyond expressing the opinion that the acts of ill-treatment of which the defendant had been found guilty were such severe violations of the "laws of humanity" that he, the defendant, regardless of all German propaganda, could not have been in doubt that his acts, irrespective of their purpose, not only were to be condemned morally but were also unlawful.⁽²⁾

⁽¹⁾ See Volume 1 of these *War Crime Trial Law Reports*, pp. 81-87, especially the notes on pp. 86-87.

⁽²⁾ See p. 6.

Trial of ROBERT WAGNER, Gauleiter and Head of the Civil Government of Alsace during the Occupation, and six others

PERMANENT MILITARY TRIBUNAL AT STRASBOURG, 23RD APRIL TO 3RD MAY,
1946, AND COURT OF APPEAL, 24TH JULY, 1946

Administration of occupied territory. Recruitment of volunteers by the occupant. Introduction of compulsory military service by the occupant. Interference of head of the Administration of occupied territory in the proceedings of occupation courts. The Status of Alsace during the occupation. Jurisdiction of French Military Tribunals. The Legality of the French Ordinance of 28th August, 1944. The Plea of Superior Orders.

The chief accused, Wagner, was Gauleiter and head of the civil government of Alsace, when the province was under German occupation. The others were high administrative, Nazi Party and judicial officers. The accusations brought against them arose mainly out of the systematic recruitment of French citizens from Alsace to serve against France, abuse of legal process resulting in judicial murder, the killing of Allied prisoners of war and the mass expulsion and deportation from Alsace of Jews and other French nationals. Pleas to the jurisdiction of the Tribunal and against the retro-active application of the French Ordinance of 28th August, 1944, Concerning the Suppression of War Crimes, were unsuccessfully entered. All the accused, except one, were found guilty, and were sentenced to death.

Wagner, Röhn, Schuppel, Gädeke and Gruner appealed to the *Cour de Cassation* (Court of Appeal) on various grounds. Gruner was successful in a challenge to the jurisdiction of the Military Tribunal but the pleas of the other appellants failed.

A. OUTLINE OF THE PROCEEDINGS

1. THE COURT

The Court was the Permanent Military Tribunal at Strasbourg. Its members were:

President: Colonel Begue, Commander of the 8th Artillery Regiment.

Judges : Simoneau, chef de Bataillon, of the 23rd Infantry Regiment, former member of a resistance group ; Hardiviller, Captain of the General Staff at Strasbourg, former member of the F.F.I. ; Grunder, Lieutenant, of the P.O.W. depot, No. 103, former member of the F.F.I. ; Bucher, N.C.O. (Adjutant-chef) of the 23rd Infantry Regiment, former member of the F.F.I.

The Public Prosecutor was Colonel Daubisse of the Military Judicial Service.

The Greffier (Clerk of the Court), was Captain Baile.

2. THE ACCUSED

The following were defendants in the trial :

Robert Heinrich Wagner, ex-Gauleiter and Reich Governor of Alsace.

Hermann Gustav Philipp Röhn, ex-deputy Gauleiter of Alsace.

Adolf Schuppel, former Chief of Section (*chef de bureau*) in the Civil Administration of Alsace.

Walter Martin Gädeke, former Chief of the Personnel Section of the Civil Administration in Alsace.

Hugo Grüner, ex-Kreisleiter of Thann.

Ludwig Luger, Public Prosecutor at the Special Court at Strasbourg.

Ludwig Semar, former first Deputy Prosecutor at the Special Court at Strasbourg.

Richard Huber, former President of the Special Court at Strasbourg.

They were accused of war crimes within the meaning of the Ordinance of 28th August, 1944, concerning the Prosecution of War Criminals.

3. THE INDICTMENT

The Indictment (*Acte d'Accusation*), drawn up by the Public Prosecutor (*Commissaire du Gouvernement*) set out the charges against each of the accused.

Wagner, Röhn and Schuppel were charged with having incited Frenchmen to bear arms against France.

Wagner, Röhn, Schuppel and Gädeke were charged with having carried out recruitment for the benefit of a foreign power at war with France.

Wagner was charged with having made attempts against individual liberty.

Hugo Grüner was charged with having committed premeditated murder.

Wagner, Röhn, Schuppel, Gädeke, Luger, Semar and Huber were charged with having been accomplices in premeditated murder.

The Indictment analysed in great detail the positions which the accused had held, the powers they had exercised, and the nature of the alleged offences.

(i) Position and Powers of the Accused

Wagner

Wagner, who had been Gauleiter and Reichsstatthalter of Baden, was appointed Gauleiter and Chief of the Civil Administration of Alsace in the

summer, 1940, and was ordered by Hitler to carry out the Germanisation and Nazification of the Province. He claimed to have received Hitler's (oral) orders for his activity in Alsace on the occasion of an interview at Hitler's headquarters near Grendenstadt on 20th June, 1940, i.e., two days before the signing of the Franco-German Armistice. According to Wagner, Hitler had declared that as a result of the victories of the German armies, the Treaty of Versailles was null and void, the "territorial problem of Alsace had ceased to exist" and the province had again become part of the Reich.

The Indictment summed up the position held by Wagner in his double capacity as head of the Nazi Party and of the Executive by saying that he, Wagner, wielded the same powers in respect of Alsace as Hitler did in respect of the Reich.

The entire administrative personnel, including the ordinary police and the Gestapo, were under his direct orders. Though several departments, such as finance, the postal services, transport, war economy, the Four Years Plan and national education, were controlled by the central authorities in Berlin, and though Wagner claimed that other departments would, on occasion, also receive direct orders from the Berlin Ministries, it was Wagner, the Prosecution pointed out, who had taken all major decisions which resulted in the *de facto* incorporation of Alsace into the German Reich, and who had ordered the measures affecting the life and liberty of the population of Alsace.

Thus he was held responsible for the systematic Germanisation of Alsace, for the introduction of Nazi law, the administrative and economic incorporation of the province into the Reich, for the introduction of compulsory labour and military service, for the deportations and the confiscation practice, for the setting-up of concentration camps and the infamous practices in which they indulged.

Wagner had arrogated to himself the power of final decision in the administration of justice, notably in the trials held by the Special Court, which had been established at Strasbourg by his initiative. The Indictment pointed out that no decision could be taken by that tribunal without Wagner's approval and that the hearings were adjourned whenever Wagner happened to be absent from Strasbourg.

It was his normal routine to examine the Indictment before the trial was held, and to communicate to the Prosecutor of the Special Court his orders concerning the penalty which the latter was to demand. Wagner issued these instructions in writing, under the seal of his Civil Cabinet, and the Prosecutor communicated them to the President of the Court. The instructions remained with the Prosecutor's dossier and were not filed with the records of the case.

Wagner's official powers included the privilege of mercy, but it was alleged that he consistently rejected every recommendation for mercy.

Röhn

Röhn held the function of Deputy Gauleiter of Alsace. He claimed that this was merely a Party, not an executive office and that he had no influence on the administration and government of Alsace. Even as a Party official

he claimed to have acted throughout by Wagner's orders, passing on the latter's instructions and directives by circulars to the lower levels of the Party organisation, without in any way altering them; he had merely been "Wagner's postman."

Against this, the Indictment described Röhn as Wagner's confidant and ascribed to him considerable powers in the administration of Alsace. The Indictment referred to the account of Röhn's functions and activities given by Wagner, who described Röhn as the virtual Party leader both in Alsace and Baden, and maintained that he had issued in his own name orders and instructions, which were neither submitted to, nor countersigned by the Gauleiter. Besides, Wagner stated, Röhn had addressed such orders and instructions not only to the Kreisleiters, but also to the heads of the 22 administrative departments.

The Indictment further referred to a circular issued by Röhn in June, 1944, in which he said: "It is essential that the Party should be informed of all measures that are being prepared with a view to suppressing disorders and to fighting parachutists, so that it (the Party) can give the necessary support to the Police."

Schuppel

Schuppel, whose rank as civil servant was that of "Chief of Section," was in charge of the Department of the Interior of the Civil Administration of Alsace. His Party function was that of Gaustabsamtsleiter (head of the Chief of Staff for the Gau).

Schuppel's activities covered a wide field. He maintained the liaison between the Alsatian administrative and Party authorities on the one hand, and Party Headquarters at Munich and the central authorities on the other. He was under Wagner's and Röhn's orders, but the Indictment alleged that he held powers of decision in many departments, ranging from the organisation of rabbit-breeding in Alsace to the confiscation of Church property, from the census and "total mobilisation" of the Alsatian population for war work to the persecution of French nationals suspected by the Germans, and the deportation of resisters and their families. Besides, it was alleged, special tasks had been repeatedly allotted to him, in the execution of which he also held full powers of decision.

Gädeke

Gädeke had been Chief of the Personnel Department of the Civil Administration and head of Wagner's "Civil Cabinet." It appears that he held no responsible Party function, but was Wagner's right-hand man in the latter's capacity as Governor of Alsace. It was Gädeke who handed on to the various administrative department Wagner's orders and instructions, which were sometimes oral, sometimes in writing; in the latter case, Gädeke would sign them, adding to his signature the note "by Wagner's orders." Gädeke attended most meetings and conferences held under Wagner's chairmanship and was present at the Governor's interviews with the Prosecutor of the Special Court. It was not alleged, however, that he attended Wagner's conferences with Gestapo officials and with the Minister of the Interior of Baden. According to the Indictment, Gädeke was fully informed of Wagner's consultations which eventually led to the

setting-up of the Special Court at Strasbourg; he knew of Wagner's interference with the procedure of that Court and abetted him in it. He took an active part in the preparation of military conscription in Alsace and in the drafting of the Order introducing conscription.

Grüner

Grüner, Kreisleiter of Thann and Lörrach, was not a member of any of the policy-making bodies in occupied Alsace; he was charged with having personally murdered four Allied airmen who had made forced landings in Alsatian territory in October, 1944.

Luger

He was Public Prosecutor at the Special Court in Strasbourg and accused of complicity in the judicial murders committed by that Court. In his capacity as Prosecutor he kept Wagner informed of all proceedings which he proposed in his *réquisitions* (formal motion concerning sentence to be awarded).

Semar

Semar, "First Deputy Prosecutor" of the Special Court, was charged with complicity in murder. Proceedings against this accused were, however, separated from those against the five others, because, having fled to the American zone of occupation, where he was subsequently arrested, he was transferred to the military prison at Strasbourg at a time when the *information* (preliminary enquiry) in the case was already closed.

Huber

Huber had been President of the Special Court at Strasbourg and, as such, had pronounced the objectionable death sentences. Through the Prosecutor, Luger, he was informed of Wagner's orders concerning the trials and submitted to these orders. Huber was tried *in contumacia* (in his absence).

(ii) *Nature of the Offences Charged*

I. RECRUITMENT OF FRENCH NATIONALS FOR THE GERMAN ARMY

(a) *The Recruitment of Volunteers*

During the early years of the German occupation attempts were made to induce Alsatians to volunteer for the German Army. A large-scale propaganda campaign was launched for this purpose and young Alsatians were invited to join the Wehrmacht and the Waffen SS. Volunteers were promised considerable advantages and privileges, and special efforts were made to obtain the voluntary service with the German Armed Forces of French reserve officers.

Wagner was held responsible by the Prosecution for the organisation and direction of all measures intended to gain volunteers. In one of his circular letters addressed to the lower Party organisations Röhn spoke of the "propaganda campaign for volunteers, which has been ordered by the Gauleiter." The Indictment, quoted, *inter alia*, passages from an appeal for volunteers signed by a group of Alsatian traitors, which expressly referred to Wagner as having inspired the campaign.

Röhn was alleged to have been the author of a number of instructions addressed to Party offices, concerning the recruitment of volunteers. In the above-mentioned circular he spoke of the necessity "of stepping-up the propaganda campaign, which must be given even more effective support than hitherto by the Party and its formations." An example must be set, he said, by young Alsatians employed on salaried jobs in the Party, and he summed up the instruction in the words: "I enjoin upon you to avail yourselves of every opportunity to emphasize the historic importance of the participation of German Alsace in the struggle for liberation and against Bolshevism, in which the great German Reich is engaged." It was Röhn who directed the Kreisleiters by circular to arrange personal interviews with French volunteers.

Schuppel was accused of having taken part in these activities.

(b) *Military Conscription*

The appeals for volunteers proved a failure. On Wagner's own account, only about 2,300 persons responded, and it was alleged that even this negligible contingent included a number of German nationals resident in Alsace.

As a preliminary step towards the introduction of compulsory military service, labour service was introduced in 1941, and military conscription followed in 1942.

The Indictment pointed out that the Germans had given repeated assurances that they had no intention of enlisting Alsatians for the German army.

Early in 1942, a number of Alsatians who had fled to Switzerland were obliged to return home, and in an agreement concluded on that occasion between the German Reich and Switzerland, Germany gave the undertaking that the young people would not be called up in the course of the war.

Military conscription was introduced in Alsace by Wagner's *Ordinance of 25th August, 1942*, which had the following wording:

"By virtue of the powers conferred upon me by the Führer, I order as follows:

Section 1. Compulsory military service with the German armed forces is herewith introduced in Alsace for all Alsatians of German race who belong to any of the age groups to be designated by special order.

Section 2. The persons liable to military service, who have been called up shall be subject to the provisions applicable to German soldiers and shall have the rights that belong to German soldiers."

Section 3 of the Ordinance analogously defined the status of persons liable to, but not actually on, active military service.

The cited Ordinance was promulgated simultaneously with an Ordinance concerning the acquisition of German nationality by Alsatians. This second ordinance merely gave effect in Alsace to the Decree of the Reich Minister of the Interior of 23rd August, 1942, concerning the acquisition of German nationality by Alsatians, Lorrainers and Luxemburgers, which had been issued under a provision of the Order of the Council of Ministers for the Defence of the Reich, of 20th January, 1942, enabling the Minister

of the Interior to grant collective naturalisation to certain groups of aliens. The Decree of the Reich Minister of the Interior of 23rd August, 1942, given effect to in Alsace by Wagner's Ordinance of 25th August, 1942, provided, *inter alia*, that "Alsatians, Lorrainers, and Luxemburgers of German race who have been called up or will be called up for service with the Wehrmacht or with the Waffen SS., or who have proved themselves as reliable Germans and are recognised as such" could be granted naturalization. The acquisition of German nationality would take effect as from the day of joining the Wehrmacht or the Waffen SS. (or from the recognition as a reliable German).

The Ordinance introducing compulsory military service was supplemented by the following carrying-out orders:

Order of 27.8.42, by which the 1920-24 classes were called up.

Order of 5.11.42, by which military service was made compulsory with retroactive effect as from 25.8.42, for all persons acquiring German nationality.

Order of 1.1.43, calling up the 1914-1919 classes.

Order of 1.10.43, concerning sanctions against deserters, persons failing to comply with call-up orders for military or labour service, and against their relatives.

Order of 9.9.44, extending compulsory military and labour service to the 1928 class.

Order of 25.10.44, extending to Alsace the operation of the Order of the Führer concerning the Volkssturm, and involving all able-bodied men from 16-60 years of age.

The Indictment gave the following summary, based mainly on Wagner's and Gädeke's accounts, of the events which preceded the introduction of compulsory military service in Alsace.

At an unspecified date in 1942, Gädeke was ordered by Wagner to consult the responsible officials of the administrative section of the Civil Administration and of the Police, as well as representatives of the "Territorial (Wehrmacht) Command," on the advisability of conscripting Alsatians for the German army. The replies were all in the negative, even in the case of the military authorities, though the latter would obviously have welcomed an increase of available man-power. According to Gädeke all persons consulted had expressed doubts as to the legality of the proposed measure, in view of the "unsettled status of Alsace."

In spite of this, Wagner contacted Bürckel, Gauleiter of Lorraine, and Simon, Gauleiter of Luxembourg, suggesting to them a joint *démarche* in the matter. Hitler, having been informed by the three Party officials of their intentions, convened a conference at Vinnitza in the Ukraine, which was attended, in addition to Hitler and the three Gauleiters, by Keitel, Ribbentrop, Himmler and Bormann. It was Wagner who, after having made a detailed report on the situation in Alsace, proposed the introduction of compulsory military service in the province. The other Gauleiters endorsed the proposal. Hitler then gave orders for conscription to be introduced in the three territories, leaving it to the Chiefs of the respective Civil Administrations to settle all matters of detail. As usual, Hitler's order

was oral. Keitel had strongly recommended the measure during the debate.

The Indictment emphasised the fact that Wagner had been the motive power in preparing and introducing compulsory military service and in support of this allegation referred to a speech made by Wagner at Strasbourg a few months after the introduction of the measure, in which he declared that, seeing that the majority of Alsatians were not aware of their duties towards their new fatherland, one man had to act on behalf of all and that that man could only be he, Wagner, himself. "I therefore solicited the Führer's permission," he said, "to introduce compulsory military service in Alsace, and I have now been given that permission."

After his return from Vinnitza, Wagner, through Gädeke, ordered the Ordinance introducing conscription to be drafted by the administrative section of the Civil Government. With the Ordinance, orders concerning repressive measures to be taken in the case of disobedience were drafted by Gädeke and further transmitted to all Party organisations by a circular issued by Röhn. These instructions provided that every Alsatian liable to military service who failed to report to the Medical Boards or otherwise to comply with his duties under the Ordinance was to be arrested and immediately deported to the Reich. Any attempt at rioting was to be suppressed with the utmost ruthlessness by the police, who were to make use of their weapons on the slightest provocation.

It was alleged that conscription was enforced with the utmost brutality; numerous deserters and persons who had disobeyed call-up orders were shot, and their families dispossessed and deported to Germany.

Röhn was charged with having circulated the above instructions received from the administrative section, and of having himself drafted and circulated instructions to the Kreisleiters concerning the recruitment of A.R.P. personnel the call-up of the 1908-1913 classes, and the call-up of French reserve officers.

Schuppel was likewise held responsible for having circulated Wagner's orders and instructions concerning compulsory military service. Besides he had issued circulars concerning the deportations of the families of deserters, etc., in which he criticized the delays in the deportation procedure. He was also the author of a circular concerning the employment of Alsatian girls with German military units.

Gädeke was not indicated on the charge of participation in the voluntary recruitment of French nationals; he was, however, accused of having participated in compulsory recruitment. His part in the events appears from the above account.

II. MURDER AND COMPLICITY IN MURDER

These charges were based on three types of facts: (a) Judicial murder, (b) the shooting of captured allied airmen, (c) the killing of persons detained in concentration camps and prisons.

(a) Judicial Murders

The Case of Théodore Witz

This young Alsatian had been involved in proceedings in the Special Court at Strasbourg. The offence for which he was tried was the illegal

possession of a gun, though this was in fact a very old model. Shortly before the trial his Counsel, Maître Merckel, discussed the case with the Prosecutor, who told him that he did not consider Witz as a dangerous criminal, but rather as an excitable youth, and that in his motion concerning the penalty to be inflicted (*réquisition*) he had not proposed the death penalty, but confinement (*réclusion*) for a term of four to five years. When, according to the established practice, the file was submitted to Wagner, however, the latter is alleged to have dictated to Gädeke the following remark: "Yes, to be executed. Urgent," which Gädeke took down in his own hand.

Witz was actually sentenced to death by the Special Court (with Huber as the Presiding Judge), and the sentence was executed. The recommendation for mercy, which was supported by the German Prosecution, was rejected by Wagner.

The "Ballersdorf Case"

In the night of 13th February, 1943, a group of Alsatians, attempting to pass over into Switzerland, had been intercepted by frontier guards, and in the ensuing clash one guard and three of the fugitives were killed.

In the afternoon of 16th February, 1943, the trial was held of 14 survivors of the group, before the Special Court at Strasbourg. The following facts were alleged by the Prosecution in support of the contention that the most elementary principles and rules even of the German law of procedure were disregarded in the "Ballersdorf trial."

Thus, the Indictment referred to a note written in Huber's own hand to the effect that he, the President of the Court, did not receive the Indictment against the 14 men until 12.30 p.m. on the day of the trial. Two hours later, the accused were allowed to see the Indictment and to communicate with their counsel, who had all been appointed *ex officio*. This, the Prosecution pointed out, was in flagrant violation of the German law in that the accused had not been notified of their right to demand a supplementary enquiry, to name witnesses and to choose their own counsel. Moreover, two of the accused, Brungard and Müller, who were under age, had not been examined by a psychiatrist before the trial.

A medical expert was, however, heard at the trial itself on the responsibility of these two accused. This expert declared Brungard fully responsible, but considered Müller mentally deficient and proposed that the latter should be taken to a mental institution for further examination. Upon this motion, the Court passed a decision under Art. 81 of the German Code of Criminal Procedure for the separation of the trial against Müller and ordered his removal to a mental hospital.

Before this incident, evidence had been produced of the fact that the frontier guard had been killed by one of the three men who had themselves met with their death in the encounter, and that the accused Gentzmittel had not been present when the clash occurred.

Immediately after the decision for the separation of the proceedings against Müller was passed, the hearing was adjourned. The President of the Court, Huber, the Public Prosecutor, Luger, and the Gestapo and S.D. officials left the Court building and were absent "for a considerable time." It was hinted that during this interval they were received by Wagner.

The hearing was resumed for the final speeches only. In summing up for the Prosecution, the Prosecutor is alleged to have admitted that there was no evidence of the guard having been killed by any of the accused. In spite of this admission, he demanded sentence of death for all of them, and the 13 death sentences were pronounced.

The trial, which had begun late in the afternoon and had been adjourned for some time, was closed at 7.0 p.m.

The 13 condemned men, as well as Müller, were packed on a Gestapo lorry and taken to the Struthof camp. On the following morning they were killed in the most brutal manner by an S.S. detachment in a sand quarry near the camp.

About the fate of Müller, whose case had been separated from that of the other accused, the following facts have come to light: several weeks after the trial, the Prosecutor General of the Court of Appeal at Karlsruhe enquired about the state of the proceedings against Müller. In his reply, Luger reported that Müller had been taken to a concentration camp, where "he had meanwhile died." It appears, however, that he was killed together with the other 13 men; for, on the morning of the executions, Wagner had rejected an appeal for mercy which had been made on their behalf, and in the list of names contained in his decision the name of Müller was included, while that of Brungard had been omitted. A "corrected" list was sent to Luger by Gädeke, when, weeks after the execution, the mistake was pointed out to him. The question whether the inclusion of Müller's name in the list was, in the Prosecutor's words, a deliberate "piece of machiavellianism," or a genuine error, was left open in the Indictment.

Throughout the Preliminary Enquiry, Wagner denied having had any knowledge of the irregularities of procedure, of the adjournment of the hearing and, in particular, having received the members of the Court during the interval and given them any instructions concerning the sentence. Luger's correspondence with the Prosecutor General, however, made it clear that the Gestapo had already received Wagner's orders for the shooting of the 14 men even before Luger was received by Wagner and before the trial was opened. This account was borne out by Gädeke's depositions; according to him, Wagner's original intention had been to have the men shot without any trial, and he only accepted the idea of a trial in the Special Court after a long discussion with a German official and on condition that the trial would be held within 24 hours.

(b) The murder of four Allied airmen

On 7th October, 1944, four unknown British airmen made a forced landing at Rheinweiller in Alsace. They were arrested by German pioneers and taken to the town hall. The gendarmerie station at Schlinggen was informed of the incident and a detachment of gendarmes led by the *maître gendarme* Reiner went to Rheinweiller to take charge of the prisoners. On their arrival, they found the captured men outside the town hall, surrounded by a crowd which was said to have been "curious rather than hostile" and were faced with the fact that Grüner, Kreisleiter of Thann and Lörrach, had taken control of the situation. Reiner's plan was to take the prisoners to the gendarmerie barracks and to arrange for them to be taken over by the military authorities. Grüner, however, prevented him from doing so. The

account given in the Indictment of the events that followed, was based mainly on depositions made by Grüner himself in the course of the Preliminary Enquiry.

Grüner had told the gendarmes that he was under orders from Wagner to shoot every Allied airman that was captured. He had then ordered the prisoners to be marched off one by one each escorted by a German, and the groups to keep a distance of 50 m. from one another. He had then followed the procession in his car, had taken each prisoner separately to the banks of the Rhine and had shot them with his own *mitraillette*, which he declared to have always carried with him. The bodies of the murdered men were thrown into the river. Grüner withdrew part of his admission during his interrogation saying that the actual shots had been fired by another person; but even then he admitted that he had given the order for execution. The Indictment maintained that the second version given by Grüner was untrue.

Grüner reported the incident to Schuppel, Wagner not being at his office on that particular day. On the following day he attempted to induce the *maître gendarme* to make a false report to the "Landrat," i.e. to say that the four prisoners, while under escort, had been attacked and "carried off" by men hidden by the roadside.

During the Preliminary Enquiry, Grüner, Wagner, Röhn and Schuppel had mutually incriminated one another. Grüner maintained that the execution of "terror flyers" had been discussed at numerous meetings which were under Wagner's chairmanship, held early in 1944 and at which Röhn had always, Schuppel sometimes, been present, and that Wagner had expressly ordered the Kreisleiters to shoot captured airmen themselves, whenever they had an opportunity of doing so. According to Röhn and Schuppel, Wagner's instructions to the Kreisleiters were to hand captured airmen over "to the vengeance of the population," or, in Schuppel's version, to incite the mob to lynch them. Wagner claimed that these or similar orders had emanated from Goebbels and Himmler and had been communicated to the Kreisleiters not by him, but by Röhn. Among the witnesses for the Prosecution heard in the Preliminary Enquiry, was the former mayor of Mulhouse, who had heard Wagner "explain" the murders of prisoners as reprisal action taken by the population, which was in a state of frenzy as a result of allied air attacks.

(c) Murders committed in prisons and concentration camps

Several hundred members of the resistance movement (*Réseau alliance*), accused of having assisted prisoners of war, deserters, etc., to escape, had been interned in the Schirmeck concentration camp and a number of prisons. After the invasion of the Continent by the Allies, 102 of the 104 detainees at the Schirmeck camp, 87 men and 15 women, were transferred to the extermination camp Struthof, where they were shot during the night of 1st September, 1944.

Towards the end of November, 1944, 63 inmates of prisons were shot by a certain Gehrum, who made a tour of the prisons for the purpose of exterminating Alsatian patriots. A further contingent was executed after trial in the Special Court at Karlsruhe.

As the crimes committed at the Struthof camp were to be dealt with in a special trial, the Indictment referred only briefly to the daily executions by

hanging or shooting, which took place for years at that camp, and to the gas-chamber "experiments" that were undertaken there by a certain Professor Hirt. Specific mention was made of 80 women and some 50 men who were killed in the Struthof gas chambers in August, 1943.

The Prosecution alleged that Wagner, who had ordered the setting-up of the Schirmeck camp, who had inspected the installations at the Struthof and who was on intimate terms with the said Professor Hirt, must have been aware of the criminal activities carried on by persons who were under his direct orders. Wagner denied any such knowledge.

III. OFFENCES COMMITTED AGAINST THE LIBERTY OF THE INDIVIDUAL

The facts adduced by the Indictment under this head are these:

(i) *Compulsory labour service* was introduced in 1941. When, in August, 1941, the first contingents received orders to appear before the Medical Boards, the parents of the young people were promised that they would not be sent to Germany. As a matter of fact, the first transports bound for German labour camps left in October, 1941.

(ii) *Expulsion from Alsace* into unoccupied France was the method used by the Germans before 1942 to get rid of persons regarded by them as undesirable.

Many Jews, foreseeing events, had left in haste, before the arrival of the Germans, taking with them their most treasured belongings. But for most the persecutions commenced immediately. At Mulhouse for instance they had to meet daily and clean the streets of the town, and on 16th July 1940, all of the Jews of Colmar were called together at the Police Station, and, each furnished with a suit-case and 2,000 francs, they were crowded together in trucks and carried to the lines of demarcation where the French received them. Wagner himself stated that 22,000 Jews had been affected by these first expulsions. Before the declaration of war there were in Alsace around 50,000 Jews, including German refugees.

After the Jews, the French had to suffer. Some French officials of whom the Germans had had need for the transmission of powers were able to leave and take even their furniture, personal property, but these were rare exceptions. The great majority were expelled in August 1940, under the same conditions as the Jews, each with a suitcase and 2,000 francs. Then came the turn of the various groups of Francophile Alsations. Some particular expulsions were put into effect in the September, October and November of 1940, but the great "cleaning up" took place in the month of December. It was the SS which carried these out with their usual brutality. Everywhere, in all the towns and villages, they took away persons whom they suspected, all the social classes being affected by this stroke.

After these mass expulsions there took place certain individual expulsions, of which the greater part of the victims stayed for a greater or lesser time in the camp of Schirmeck.

(iii) *Deportation to Germany* became the practice from the summer of 1942 onwards. Special camps were created for deported Alsations at Ulm and Breslau. Deportation was the normal sanction taken against families if one of their members had not complied with call-up orders for military or labour service, or even for the failure of a child to join the Hitler Youth.

The lot of all these unfortunate people was terrible. They lived under strict supervision in camps without comfort, children often being separated from their parents.

(The indictment then went on to describe in some detail the eventual fate of the property of those deported. The belongings of all the exiles were confiscated and sold for the benefit of the Reich; for more than three years these belongings were sent twice a month to public auction in the big towns. The most valuable movables disappeared as if by magic. The Germans took on hire furnished apartments, then went away again taking away the furniture. Again, the farms of more than 500 peasants who had been deported because their children had refused to present themselves for medical inspection for labour services or military services were immediately given to German peasants.)

Wagner was the only accused who was indicted on a charge of "illegally depriving individuals of their liberty." In his defence he claimed to have been ignorant of many of the alleged facts and in particular to have disregarded Hitler's orders in favour of the population of Alsace. He had received definite orders from Hitler to expel several hundred thousand Alsations; in fact only about 25,000 had been forced to leave.

(4) THE EVIDENCE BEFORE THE COURT

Complete records of the trial not being available, such evidence as was produced during the hearing of the case cannot be dealt with in this report. Some indications of the evidence relied upon both by the Prosecution and the Defence, can, however, be gathered from references in the Indictment to depositions made in the course of the Preliminary Enquiry, and from the Judgment.

Apart from the mutually incriminating evidence of the accused themselves, the Court heard, *inter alia*, the accounts given of the case of Théodore Witz and the Ballersdorf case by the lawyer who had acted as counsel for the defence in these cases, and of one of the Prosecutors of the Special Court. In the case of the four murdered airmen, the depositions of the *maître gendarme* who had been summoned to take charge of the prisoners, were available. As will be seen, the charges of illegal recruitment were brought against the accused in two forms; on the one hand they were indicted on the general charge of having recruited French nationals for a Power at war with France, on the other hand they were charged with having caused the incorporation into the German Army of six individual Alsations, who had been called up at various dates between January 1943 and 1944. One of these six men was heard during the trial; he made his depositions not as a sworn witness, but as a person called upon to give information without taking an oath. Among the evidence considered by the Court were also depositions made by Keitel, Ribbentrop and Lammers, obtained through a *commission rogatoire* of the *juge d'instruction*.

The Indictment dealt at length with the general line of defence taken by the accused during the Preliminary Enquiry.

In most cases they had denied any knowledge of the criminal acts with which they were charged. Apart from this, they relied mainly on two defences: (a) the denial of the illegality of the acts or measures which formed the substance of the charges, (b) the plea of superior orders.

In regard to the charge of illegal recruitment Wagner maintained on the one hand that, according to reports which he had received from the Police

and the Party formations, the majority of Alsatians were anxious to join the German Army, but were deterred from enlisting as volunteers by fear of the disapproval of their compatriots; conscription enabled them to gratify their wish without any anxiety. On the other hand he claimed that in his opinion the recruitments had not been illegal, Alsace having been incorporated in the Reich. (See below).

5. PLEAS OF THE DEFENCE

(i) *Plea to the Jurisdiction of the Court*

Counsel for the accused Grüner offered a Plea to the Jurisdiction of the Court. (Under Art. 81 of the Military Code, pleas to the jurisdiction of the Court must be raised before the hearing of witnesses.)

The Plea was rejected by the Tribunal on the following grounds:

- (a) The Tribunal had been seized with Grüner's case by an Order for Trial (*ordonnance de renvoi*) issued on 6th April, 1946, by the *juge d'instruction* under Art. 177 of the Military Code. All accused and their counsel had been duly notified of the Order and no objection had been raised.
- (b) Under Art. 177 of the Military Code¹ the provisions of Art. 68 of that code (concerning the exclusive authority of the Indictments Division of the Court of Appeal, *Chambre des mises en accusation de la Cour d'appel*, to commit cases for trial to a Military Tribunal) was inapplicable in times of war. Under Art. 177, the decision on the question whether an offence comes within the jurisdiction of a Military Tribunal and the authority to commit the trial to such Tribunal rests with the *juge d'instruction*; the Orders for Trial issued by the *juge d'instruction* (*ordonnance de renvoi*) have the same effect as Orders for Trial issued by the Indictments Division of the Court of Appeal (*arrêts de renvoi*).
- (c) It is an established principle that the *arrêt de renvoi* issued by the Court of Appeal is constitutive of the jurisdiction of the Court to which it commits the case for trial. The same principle applied to the Order for Trial issued by the *juge d'instruction* where such Order replaces the decision of the Court of Appeal. No appeal lying against the Order of the *juge d'instruction* of 6th April, 1946, it had become final.
- (d) Three of Grüner's co-defendants, Wagner, Röhn and Schuppel, were being tried on the one hand for complicity in the murders with the commission of which Grüner was charged, on the other for offences which were undeniably within military jurisdiction. The proceedings against Wagner, Röhn and Schuppel being inseparable from those against Grüner, it was essential in the interest of the effective administration of justice and the establishment of truth, that the accused should all be tried by the Strasbourg Military Tribunal.

(ii) *Plea relating to the status of Alsace*

As has been seen, Wagner claimed that his recruitment had not been illegal, Alsace having been incorporated in the Reich. In this connection,

⁽¹⁾ See the notes on the case, p. 49.

Wagner referred to his interview with Hitler, shortly before his appointment as Gauleiter and Governor of Alsace, to the terms of the Armistice denouncing the Treaty of Versailles, and to certain "tacit or secret agreements" concerning the status of Alsace.¹

The Prosecution denied that Wagner could have held in good faith his view that his recruitments were legal, and in support of this contention adduced the following facts:

- (a) In a letter dated 9th July, 1942, and addressed to Bormann, one of the Departments of the Civil Administration expressed the view that nobody except Hitler himself was in a position to say whether "the introduction of German nationality in Alsace" was, or was not, compatible with the terms of the Armistice.
- (b) Wagner could not have been ignorant of the vehement protests raised by the French (Vichy) Government against the compulsory recruitment of Alsatians for the German Army.
- (c) Wagner must have had knowledge of the protests raised by the French Government against his demand for the resignation of the Deputies Haut-Rhin and Bas-Rhin; the French Government's note, dated 28th July, 1941, expressly stated that France did not recognize the legality of the German Civil Administration in Alsace. Wagner must also have known of the note of the French Government of 17th September, 1941, protesting against the introduction of compulsory labour service in Alsace and declaring that Germany was not entitled under the Armistice to introduce this measure.
- (d) The Prosecution referred to the following incident which took place in 1942, and of which Wagner must have had knowledge: Abetz, German Ambassador with the Vichy Government, was asked by Ministerialrat Kraft, an official of the Civil Administration of Alsace, to support the demand for the restitution to Strasbourg University of the equipment of its Science Institutes. To this request, Abetz replied to the effect that, in contrast with what had happened in 1918, the status of Alsace had not been settled by the Armistice of 1940. This, he said, was true in spite of the *de facto* situation created after 1940 by unilateral administrative measures taken by the Germans and based on rules and regulations introduced by them. The French Government could not be expected to give recognition, by the gesture of relinquishing possession of the material in question, to a *de facto* state of affairs, before they had even been asked by the German Government to recognize this state *de jure*.

Besides, Wagner's attention had been drawn to the illegality of introducing compulsory military service in Alsace by high officials of his own Civil Administration and by responsible military circles in Alsace.

Other accused merely repeated Wagner's contention that Alsace was part of the Reich by virtue of the Armistice of 1940, which had declared the Treaty of Versailles null and void.

⁽¹⁾ See pp. 25 and 36.

(iii) *The Plea of Superior Orders*

Wagner occasionally referred to orders he had received from Hitler. All other accused claimed to have acted on orders from Wagner, either in the latter's capacity as Head of the Civil Administration or as Gauleiter.¹

(iv) *The Challenge of Wagner's Counsel to the legality of applying the Ordinance of 28th August, 1944*

The Tribunal rejected the contention of Wagner's counsel that the retro-active application of the Ordinance was not legal, on the following grounds:

The Ordinance in question provides in its Art. 1 that French Military Tribunals shall be competent to try under the French law in force and in accordance with the provisions of the Ordinance, such *enemy nationals* and non-French agents who are or were in the service of the enemy administration or interests, as are guilty of *crimes or offences committed since the beginning of hostilities* either in France or in any territory under French authority.

Wagner, the decision went on to say, was a German national. He was tried for crimes punishable under the Penal Code and committed between 1940 and 1944, i.e., after the beginning of hostilities. These crimes had been committed in Alsace, i.e., in French territory.

The Ordinance in question establishes the jurisdiction of Military Tribunals to try enemy nationals for such offences as are not justified by the laws and customs of war, even if they were committed under the pretext of or during state of war.

The Tribunal, whose jurisdiction had been duly established by the Order for Trial of 6th April, 1946, which order had become final, was not competent to decide on the correctness of applying the Ordinance.

The decision further referred to directives issued by the Ministry of War, Direction of Military Justice, and to its own decision rejecting the plea to its jurisdiction, which had been offered by counsel for the accused Grüner.

6. PROGRESS OF THE TRIAL

The trial having been opened on 23rd April, 1946, the Presiding Judge ruled that in view of the fact that the accused Huber had not presented himself within five days of the issuing of the order to appear, made by the Judge under Art. 119 of the Military Code, judgment would be passed in default.

After the interrogation of the accused for purposes of identification, the *Commissaire du Gouvernement* (Prosecutor) made a motion for the disjunction or severance of the trial against the accused Semar. The application was granted by the Court and the disjunction of the trial ordered on the grounds that Semar had been handed over to the Strasbourg Military Tribunal after the closure of the Preliminary Enquiry and had therefore not been interrogated by the *juge d'instruction*; that the effective administration of justice required that the trial and judgment against Semar's co-accused should not be postponed; and finally that the disjunction was not prejudicial to the interests of the other accused. The Tribunal based its decision on Art. 474 of the Code of Criminal Procedure, which provides that the absence

(¹) See p. 54.

(*contumace*) of any accused must on no account lead to an adjournment or delay in the proceedings against the co-defendants who are present. At the same time the Tribunal ordered a supplementary *information* to be instituted and conducted by one of the Judges of the Tribunal.

The President, in accordance with Art. 79 of the Military Code, then ordered the reading of the Order convening the Tribunal, of the decision committing the case to the Tribunal, of the Indictment and of a number of other documents; he gave a summary of the crimes for which the accused were prosecuted and instructed them and their counsel of their rights and duties under the Military Code and the Code of Criminal Procedure.

After hearing the plea of Grüner's Counsel to the Jurisdiction of the Tribunal, the latter proceeded to the interrogation of the defendants Schuppel, Gädeke and Röhn. Before the interrogation of Wagner, application was made by his counsel for a number of new witnesses, among them Keitel, Ribbentrop and Lammers, to be heard. The Tribunal rejected the application for the time being, ordering the "junction of the incident to the substance of the case" and reserved its final decision on the matter until the hearing of the other witnesses had been completed. The decision was based on the consideration that the trial was not sufficiently advanced to enable the judges to decide whether the hearing of the proposed new witnesses was essential to establish the truth.

The following days of the trial were devoted to the interrogation of Wagner, and the hearing of witnesses and a number of persons called to give information.

On the seventh day of the trial, the Presiding Judge, by virtue of his discretionary power under Art. 82 of the Military Code, ordered a number of documents, received by the Court after the closure of the Preliminary Enquiry, to be filed with the records of the case. Among these documents were the depositions of Keitel, Ribbentrop and Lammers, obtained through a *commission rogatoire* of the *juge d'instruction*.

The hearings were closed on the eighth day of the trial. In his final address the Prosecutor required that the accused be convicted and sentenced in accordance with the Indictment.

Then followed the final addresses by counsel for the defence. In his *plaidoyer*, counsel for Wagner requested a decision by the Court on the legality of applying the Ordinance of 28th August, 1944, retroactively.¹

Finally the Tribunal passed a decision on the application for the hearing of new witnesses made earlier in the trial by counsel for Wagner.

The application was rejected on the following grounds:

Counsel for Wagner had been free during the Preliminary Enquiry to communicate with his client. He had been notified of the date of the trial on 7th April, 1946, and had access to the documents relating to the case. Both Wagner and his counsel had received the instructions concerning the naming of witnesses in accordance with Art. 179 of the Military Code. Wagner had thus been given sufficient time to prepare his defence. The addresses by counsel for the Prosecution and for the Defence had supplied sufficient material on which the judges could base their decision. The

(¹) See p. 38.

hearing of further witnesses was therefore not essential to establish the truth.

At every stage of the trial as set out above, the Prosecution, the defendants and their counsel were invited to make their observations, the defence "having the last word."

All decisions mentioned above were announced as having been arrived at by a majority vote, in accordance with Art. 91 of the Military Code, which, provides that "the Judgment shall merely state the fact of the majority of votes without indicating the number of pro and contra votes, non-compliance with this provision involving the nullity of the Judgment."

7. THE QUESTIONS EXAMINED BY THE TRIBUNAL AND THE VERDICT

Under Art. 88 of the Military Code, which provides that the :

"Presiding Judge shall announce the questions arising from the Indictment and the hearings which will be put to the Judges,"

the Tribunal was called upon to examine a total of 207 questions for their findings. These questions fall into the following groups :

(a) A group of questions relating to the incriminated *facts* and their classification. The Tribunal was asked whether the deaths of Théodore Witz and the 14 accused of the Ballersdorf case were due to wilful homicide and whether such homicide had been committed with premeditation ; whether in the case of the four airmen wilful homicide had been committed and in each case whether such homicide was preceded, accompanied or followed by some other crime ; whether six individual Alsations had at definite dates in 1943 and 1944 been enrolled in the German army.

The findings of the Tribunal on each of these 44 questions was in the affirmative.

(b) Questions relating to *Wagner*

In regard to the murders of Théodore Witz and 13 of the accused in the Ballersdorf case the Tribunal considered the question whether Wagner, in abusing his power or authority, had been an accomplice in the crime by dictating or ordering the sentence to be awarded by the Special Court. Wagner was found *guilty* on the charge of complicity in these murders.

He was found *not guilty* of having ordered the 14th accused, Müller, to be executed without sentence.

His complicity in the murder of the airmen was examined by reference to the question whether, in abusing his power or authority he had given orders for allied airmen to be killed on the spot. He was found *not guilty* on this charge.

He was found *guilty* of having during the years 1940 to 1942 incited French nationals to bear arms against France, by addressing to them appeals to join the Wehrmacht at a time when France was at war with Germany. He was further found *guilty* of having recruited French nationals for the German armed forces, and of having caused the recruitment of the six Alsations by signing the Ordinance of 25th August, 1942.

Wagner was the only accused in regard to whom the question was asked whether he was guilty of having, during the years 1940 to 1944, arbitrarily

deprived French nationals of their liberty. The Tribunal found him *guilty* on this charge, and answered in the affirmative the further question whether he had during the material period held the *de facto* executive power in Alsace.

(c) Questions relating to *Röhn*

The Tribunal considered the question whether Röhn was guilty of having incited French nationals to join the Wehrmacht, of participation in illegal recruitment in general and in the recruitment of the six Alsations, the first by circulating Wagner's orders and instructions, concerning compulsory military service, the latter by passing on the circular letter concerning persons disobeying call-up orders. He was found *guilty* on all these charges.

He was found *not guilty* of having given instructions for the killing of allied airmen, and thus of complicity in the four murders.

In regard to each of the charges the Tribunal considered the question whether Röhn had acted on superior orders. This question was answered in the negative throughout.

(d) Questions relating to *Schuppel*

Schuppel was found *guilty* on the charges (a) of having incited French nationals to bear arms against France, (b) of participation in illegal recruitment in general on the ground that he had circulated Wagner's orders and instructions, in particular the order concerning sanctions against Alsatian deserters and persons not complying with their military duties ; (c) of participation in the illegal recruitment of one of the six Alsations, this latter crime having been committed by him by issuing the circular letter of 13.12.43 concerning sanctions against the families of deserters.

He was found *not guilty* of having been an accomplice in the murder of the four airmen by approving Wagner's relative orders.

The Tribunal denied that he had been acting on superior orders.

(e) Questions relating to *Gädeke*

Gädeke was found *guilty* on the charge of illegal recruitment in general and of participation in the recruitment of the six Alsations, the first on the ground that he had circulated Wagner's orders and instructions concerning compulsory military service, the latter because of his authorship of the circular threatening sanctions against resisters and their families.

He was found *guilty* of complicity in the murder of Théodore Witz on the ground that he had taken down Wagner's order to the Court to pass sentence of death, and in the murder of the 13 Ballersdorf men on the ground that he had passed on to the Prosecutor Wagner's order to demand sentence of death.

He was not found to have acted on superior orders.

(f) Questions relating to *Grüner*

Grüner was found *guilty* of the premeditated murder of the four airmen, each offence being preceded, followed or accompanied by another crime. The Tribunal found that he had not acted on the orders of his superiors.

(g) Questions relating to *Luger*

The Tribunal examined the questions whether Luger, by demanding sentence of death against the accused in the Ballersdorf trial under pressure from Wagner was an accomplice in the murder of the 13 men. He was found *guilty* on this charge.

The Tribunal, however, came to the conclusion that he had acted on superior orders.

(h) Questions relating to *Huber*

Huber was found *guilty* of complicity in the murder of Théodore Witz and the 13 Ballersdorf men on the ground that under pressure from Wagner he had pronounced death sentences against them.

The Tribunal found that he had not acted on superior orders.

8. THE SENTENCES

Wagner, Röhn, Schuppel and Gädeke were sentenced to death and confiscation of their entire property for the benefit of the nation.

Grüner and Huber were sentenced to death. The sentence on Huber was pronounced in his absence.

Luger was acquitted.

All accused, including Luger, were declared to be jointly and severally liable for the costs of the proceedings.

9. RECOURSE TO AND DECISIONS OF THE COURT OF APPEAL (*Cour de Cassation*)¹

Wagner, Röhn, Schuppel, Gädeke and Grüner lodged appeals on a number of different grounds relating both to procedural and substantive law. Their arguments are set out below, together with the decision of the Court as to each plea. The order in which the Court dealt with the pleas put forward has not been disturbed in this report, but headings have been added for the convenience of the reader. It will be noted that, of the five appellants, only Grüner was successful. The Court delivered judgment on 24th July, 1946.

(i) *The Composition of the Military Tribunal* ⁽²⁾

The Court of Appeal first decided on a plea put forward by Wagner, Röhn and Schuppel, and based upon the alleged violation of Art. 156 of the *Code de Justice Militaire*, claiming that the Military Tribunal was irregularly composed because Wagner had the rank of a General commanding an Army Corps and the Tribunal could not, therefore, properly be presided over by a Colonel.

The judgment of the Court of Appeal pointed out that, according to Art. 5 of the Ordinance of 28th August, 1944, "For adjudicating on war crimes the Military Tribunal shall be constituted in the way laid down in the *Code de Justice Militaire*."

The provisions of Arts. 10 *et seq.* and 156 of the *Code de Justice Militaire*, which varied the composition of Military Tribunals according to the rank of the accused, applied only to French military personnel and to persons treated as such.

⁽¹⁾ See p. 100.

⁽²⁾ See p. 94.

Paragraph 13 of Art. 10, according to which Military Tribunals called upon to try prisoners of war are composed in the same way as for the trial of French military personnel, that is according to rank, would not be applied to Wagner, who was not sent before a Military Court as a prisoner of war. It was therefore right that the appellants were brought before a Military Tribunal composed in accordance with Arts. 156 and 186 of the *Code de Justice Militaire*.

(ii) *Four Pleas Based upon Alleged Infringements of the Procedural Rights of the Accused* ⁽¹⁾

(a) The Court of Appeal had next to decide on a plea put forward by Wagner, Röhn, Schuppel and Gädeke, alleging a violation of Art. 65 of the *Code de Justice Militaire* in that the Order for Trial had been issued on the 6th April, 1946, before the return of a Commission of Enquiry sent by the *juge d'instruction* on 14th March, 1946, to hear Ribbentrop, Keitel and Lamers, and that Counsel for the accused had not been furnished with the evidence of these witnesses before the close of the preliminary hearing.

The Court of Appeal rejected this plea.

According to the terms of Art. 81 of the *Code de Justice Militaire*, which were applicable to the proceedings of Military Tribunals established in territorial districts in a state of war in virtue of the provisions of paragraph 3 of Art. 179, the accused should have formulated their complaint before the Military Tribunal.

In the absence of such steps the plea could not be brought up for the first time before the Court of Appeal.

(b) The Court of Appeal also rejected a plea put forward in two parts, the first by Wagner, Röhn, Schuppel and Gädeke and the second by all the appellants, the plea as a whole being based on an alleged violation of Art. 71, paragraph 1, and Arts. 172 and 179 of the *Code de Justice Militaire*, and Art. 1 of the Ordinance of the 28th August, 1944, relating to the rights of the defence. The first part of the plea claimed that the indictment had not been delivered to the appellants three days at least before the meeting of the Tribunal, along with the text of the law applicable and the Christian names and surnames, professions and residences of the witnesses. The second part of the plea alleged that the order to appear which was delivered to the accused did not contain among the texts of the law applicable that of the Ordinance of 28th August, 1944, despite the fact that such notification was expressly required by the above-mentioned texts and the fact that the Ordinance, which bestowed upon the alleged acts the character of war crimes and furnished the basis for the proceedings and alone provided legal jurisdiction to the French Military Tribunal to try belligerent persons belonging to an enemy nation, was pre-eminently a legal text applicable to the proceedings and which ought therefore to have been notified to the accused.

In its decision on this plea the Court of Appeal laid down that the combined effect of Arts. 172 and 179 of the *Code de Justice Militaire* was that the provisions of Art. 71, paragraph 1, of the same code were not applicable to proceedings held by Military Tribunals established in territorial districts in a state of war. According to Art. 179, an accused ordered to appear

⁽¹⁾ See pp. 97-9.

before such a tribunal must, 24 hours at least before the meeting thereof, receive notification of the summons containing the order of convocation of the Court as well as the indication of the crime or delict alleged, the text of the law applicable and the names of the witnesses which the prosecution proposed to produced. The summons was duly notified to the accused on the 6th April, 1946.

It was true that it was maintained that the summons did not make mention of the Ordinance of 28th August, 1944, which gave to the alleged acts the character of war crimes and provided a basis for the jurisdiction of the Military Tribunal, and therefore did not satisfy the requirements of Art. 179 of the *Code de Justice Militaire*. Nevertheless, since the provisions of this article, which were relied upon in the second part of the plea, envisaged only the texts of the law which laid down the penalties applicable to the crimes committed, and since this category did not include the Ordinance of 28th August, 1944, the complaints contained in both parts of this plea were not substantiated.

(c) The Court of Appeal had next to decide upon a plea put forward by Wagner, based upon alleged violations of the rights of the defence, and claiming that the Military Tribunal had rejected the arguments of the appellant in favour of hearing further witnesses.

The Court of Appeal recalled that the Military Tribunal had decided on 3rd May, 1946, to reject the arguments of the appellant in favour of hearing several witnesses because it was for the accused to arrange for the appearance of all witnesses whom they judged necessary for their defence. In deciding thus, the Military Tribunal had made an exact application of the provisions of paragraph 3 of Art. 179 of the *Code de Justice Militaire* the language of which was as follows:

"... The accused has the right, without formality or previous notification, to arrange for the hearing on his behalf of all witnesses of whom he has notified the Prosecutor before the opening of the proceedings, provided they are present at the hearing."

Therefore the plea was rejected.

(d) The court rejected the plea of Röhn, based upon an alleged violation of the rights of the defence, and claiming that the Memoranda of the appellant dated 28th January, 1st June and 14th September, 1943, which had not been submitted as evidence at the preliminary hearing, were made the subject of argument at the main hearing and were used as a basis for the verdict.

The documents referred to in the plea, said the Court of Appeal, appeared in the dossier of the preliminary enquiry and were made the subject of interrogations of the accused Röhn on the 18th June and 5th October, 1945. Furthermore, they had been made the subject of discussion between the parties in the course of the main hearing without the appellant having raised any objection. It followed that the plea must fail.

(iii) *The Alleged Retroactive Application of the Ordinance of 28th August, 1944*

The Court of Appeal had next to decide on a plea put forward by Wagner, based upon the alleged violation of Art. 4 of the *Code Penal*⁽¹⁾ and of the

(1) "No misdemeanour, delict or crime can be punished except by penalties laid down by law before the perpetration thereof."

principle of the non-retroactivity of the criminal law, claiming that the Ordinance of the 28th August, 1944, had been applied against the appellant despite the fact that the Ordinance, which was aimed at punishing acts committed before its promulgation, did not respect Art. 4 and the principle just mentioned.

The judgment of the Court of Appeal recalled that the Ordinance laid down that the crimes and delicts set out in its Art. 1, "which have been committed since the beginning of hostilities," shall be prosecuted before French Military Tribunals and tried in accordance with the French laws in force and with its own provisions. This legal text, duly promulgated, became binding on the Tribunals and could not be questioned before them on grounds of its unconstitutional nature. The plea could not, therefore, be upheld.

(iv) *The Status of Alsace*

Wagner put forward a plea based upon an alleged violation by false application of the Ordinance of 28th August, 1944, claiming that the acts alleged were committed in Alsace, which was annexed by Germany, and on territory over which French sovereignty had ceased to operate.

The purported declaration of annexation of Alsace by Germany on which reliance was placed in the plea was deemed by the Court of Appeal to be nothing more than a unilateral act which could not legally modify the clauses of the treaty signed at Versailles on 28th June, 1919, by the representatives of Germany. Therefore the acts alleged to have been committed by Wagner were committed in Alsace, French territory, and constituted war crimes in the sense of Art. 1 of the Ordinance of 28th August, 1944.

(v) *A Plea based on the Fact that the Judges were not asked whether the Acts charged were Justified by the Laws and Customs of War.*⁽¹⁾

The Court of Appeal had next to decide on a plea put forward by all appellants and based upon an alleged violation of Arts. 88, 90 and 172 of the *Code de Justice Militaire*, Art. 1 of the Ordinance of 28th August, 1944, and Art. 7 of the Law of 20th April, 1810, and upon an alleged lack of legal basis.

The appellants claimed that, since the prosecution arose out of crimes and delicts committed by persons belonging to an enemy nation and whose acts were of a belligerent nature, the questions put to the military judges should have aimed at making it clear that the alleged crimes were within their competence and should be punished with the penalties laid down in the Ordinance of 28th August, 1944, because they were not justified by the laws and customs of war.

In fact, however, none of the questions put to the military judges had asked whether the acts charged were or were not justified by the laws and customs of war. The silence of the questions on this point resulted in the judges not taking a decision on an essential element of the war crimes alleged against the appellants.

The Court of Appeal pointed out that the war crimes set out in Art. 1 of the Ordinance must, in the language of that Article, be punished by

(1) And see pp. 53-4.

French Military Tribunals, in accordance with French law, "when such offences even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."

The effect of these provisions was that justification by the laws and customs of war of the alleged acts would, if established, take away their criminality. Distinct questions regarding the existence of this justifying element were not, therefore, necessary, since they were implicitly included in the questions regarding guilt. It followed that the plea must be rejected.

(vi) *Five Pleas relating to the Application of Provisions of French Law regarding Enrolments on Behalf of an Enemy Power, and relating to Superior Orders.*⁽¹⁾

The Court then had to decide on pleas put forward by Wagner, Röhn, Schuppel and Gädeke alleging violation of Arts. 75 and 77 of the *Code Pénal* and of Art. 24 of the Law of 29th July, 1881,⁽²⁾ and failure by the Tribunal to answer Counsel's arguments.

It was pleaded:

- (a) that the appellants had not been guilty of an infraction of these articles since the first text envisaged only Frenchmen and the second, foreigners, and were not applicable to the appellants who belonged to a country at war with France;
- (b) that the Ordinance of 28th August, 1944, did not refer to the articles of the *Code Pénal* set out above;
- (c) that the question whether or not the provocation of Frenchmen to bear arms against France had been effective, had not been asked;
- (d) that Schuppel and Gädeke, who were simply inferior officials, had only obeyed orders received from their superiors;
- (e) and finally that the Tribunal had omitted to answer arguments of Gädeke's Counsel in which he pleaded this justifying circumstance.

Dealing with the first part of the plea, the Court of Appeal pointed out that the first paragraph of Art. 77 of the *Code Pénal* declaring guilty of espionage "any foreigner who commits one of the acts set out in Art. 75, paragraph 4," and which is aimed especially against enrolment for a foreign power at war with France, made no distinction between foreigners coming from an enemy nation and those who do not. Moreover, paragraph 2 of Art. 77, according to the language of which "provocation to permit or proposal to commit one of the crimes set out in Arts. 75 and 76 and by the present article shall be punished in the same way as the crime itself," makes no exception in favour of persons coming from an enemy country.

Therefore, in declaring Wagner, Röhn, Schuppel and Gädeke guilty of having carried out enrolment for a power at war with France and the first three of having encouraged Frenchmen to bear arms against France, the Military Tribunal, far from violating Arts. 75 and 77 of the Criminal Code, on the contrary, made an exact application thereof.

On the second part of the plea, the Court of Appeal laid down that it was of no importance that the infractions mentioned in the plea did not

⁽¹⁾ And see pp. 51-4.

⁽²⁾ See p. 53.

appear in the enumeration, contained in paragraph 2 of Art. 1. of the Ordinance, of offences which must in particular be punished as war crimes, since this enumeration had not an exhaustive character.

On the third part of the plea, the Court of Appeal recalled that Wagner, Röhn and Schuppel had been accused of offences against Arts. 75 and 77 of the *Code Pénal* for having incited Frenchmen to bear arms against France. In view of the affirmative answers to the questions regarding guilt in this connection, it was in order for the Military Tribunal to pronounce the penalty laid down by the above-mentioned articles.

It was for the defence to request that subsidiary questions should be asked as to whether the provocations alleged had been committed in one of the ways set out in Art. 23 of the Law of 29th July, 1881, and had not had any effect; but no use had been made of this right and consequently Art. 24, paragraph 1, of the said law of 29th July, 1881, had no application in this connection.

On the 4th and 5th items of the plea, the Court of Appeal pointed out that, in connection with each of the infractions of Arts. 75 and 77 of the *Code Pénal*, set out in the charge against Schuppel and Gädeke, the Military Tribunal had been asked whether the accused "had acted under order of his superiors for purposes within the jurisdiction of the latter and on which he owed them obedience due to rank."

The putting of these questions gave satisfaction to the request formulated in the arguments put forward by Gädeke and set out in his plea. Further, the Tribunal had answered in the negative to each of these questions. The answers duly given to these questions were irrevocable. Therefore the plea must fail.

(vii) *The Jurisdiction of the Military Tribunal*⁽¹⁾

The Court of Appeal had then to decide on the joint pleas put forward on the one hand by Grüner and on the other hand by Röhn and Schuppel, founded upon the alleged violation of Art. 81 of the *Code de Justice Militaire* and of Art. 1 of the Ordinance of 28th August, 1944. They pointed out that the Military Tribunal, in its decision of the 23rd April, 1946, had rejected the arguments based on lack of jurisdiction put forward by Grüner, on the ground that the competence of the Military Tribunal, being based on the Order for Trial, could not be questioned. The appellants pleaded that, according to the terms of Art. 81 of the *Code de Justice Militaire*, the question of lack of jurisdiction could be brought up at any time before the hearing of witnesses, and that the voluntary homicides alleged in the charge against Grüner had been committed on German territory against an English prisoner of war. The terms of the Ordinance of the 28th August, 1944, could not, therefore, be applied in this instance.

In its decision on this plea, the Court of Appeal recalled that the terms of Art. 81 of the *Code de Justice Militaire* stated that "if the accused or the Prosecutor has pleas based on lack of jurisdiction to put forward, such a plea must be put forward before the hearing of witnesses and the submission must be decided upon immediately." The provisions of this article were applicable in proceedings before a Military Tribunal established in territorial districts in a state of war, in virtue of Art. 179, paragraph 3 of the same

⁽¹⁾ And see p. 49.

Code. Counsel for Grüner, before the hearing of witnesses, had claimed that the Military Tribunal lacked jurisdiction in view of the fact that the acts had not been committed either in France or in territory under the authority of France or against or to the prejudice of any of the persons mentioned in paragraph 1 of Art. 1, of the Ordinance of 28th August, 1944.

The Military Tribunal in its decision of 23rd April, 1946, had rejected his arguments on the ground that the formal act of sending the case to trial had bestowed jurisdiction on the Tribunal, the Order of Trial had become final in the absence of any opposition and the competence of the Tribunal could not, therefore, be put into question.

The Court of Appeal ruled that in deciding thus, the Military Tribunal had violated the provisions of Art. 81 of the *Code de Justice Militaire*. Moreover the Court of Appeal pointed out that paragraph 1 of Art. 1 of the Ordinance of 28th August, 1944, laid down that:

"Enemy nationals or agents of other than French nationality who are serving enemy administration or interests and who are guilty of crimes or delicts committed since the beginning of hostilities, either in France or in territories under the authority of France, or against a French national, or a person under French protection, or a stateless person resident in French territory before 17th June, 1940, or a refugee residing in French territory, or against the property of any natural persons enumerated above, and against any French corporate bodies, shall be prosecuted by French military tribunals and shall be tried in accordance with the French laws in force, and according to the provisions set out in the present Ordinance, where such offences, even if committed at the time or under the pretext of an existing state of war, are not justified by the laws and customs of war."

The Tribunal's decision of the 3rd May, 1946, stated that Grüner was, by the answers made to the questions Nos. 146 to 153, declared guilty of four acts of voluntary homicide, each specified by questions Nos. 31—38 in the following terms: "Is it proved that on the 7th October, 1944, at Reinweiler (Baden), a homicide was voluntarily committed against the person of an English prisoner of war of unknown address?" "Did this murder immediately precede, accompany or follow the murder set out in the —th question?"⁽¹⁾

The crimes set out in the charge against Grüner were shown by the answers made to the above-mentioned questions to have been committed in Germany against the persons of soldiers of an Allied army and were not among those which, according to the terms of the Ordinance of 28th August, 1944, could be prosecuted before French Military Tribunals and tried according to French laws.

It followed that, in applying to Grüner provisions of the said Ordinance, the decision which was challenged violated these provisions and had no legal basis.

Finally, since the Military Tribunal had answered in the negative the question whether Röhn and Schuppel were accomplices to the crime of voluntary homicide committed by Grüner, the accused were without interest in making a complaint based on the violation of the law on which reliance

⁽¹⁾ See pp. 97 and 99.

was placed in the plea. Accordingly, the plea in so far as they were concerned could not be received.

There was, according to the Court of Appeal, no need to decide on the plea put forward by Gädeke based on an alleged violation of Art. 60 of the *Code Pénal*, concerning complicity in the acts of premeditated murder specified in questions 1—28 of which he had been declared guilty by the answers to questions 118-144, since the penalty inflicted upon him was legally justified having regard to the dispositions of Arts. 75 and 77 of the *Code Pénal*, which was aimed at punishing the crime of recruiting for the benefit of a foreign power, and the provisions of Art. 411 of the *Code d'Instruction Criminelle*.

(viii) The General Outcome of the Appeal

For the reasons set out above the Court of Appeal rejected the appeals lodged by Wagner, Röhn, Schuppel and Gädeke and condemned them collectively to pay costs.

The Court quashed the ruling of 23rd April, 1946, which rejected the arguments of Grüner based on lack of competence, together with the judgment of 3rd May, 1946, as far as it related to Grüner.

Since the acts contained in the charge against Grüner did not fall within the jurisdiction of the existing French Courts, the Court stated that a reference back for re-trial was not possible and that Grüner was to be freed if he was not detained for another reason or required by an Allied authority.⁽¹⁾

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE TRIBUNAL AND ITS JURISDICTION

The Tribunal was convened by virtue of the French Ordinance of 28th August, 1944, Concerning the Prosecution of War Criminals.⁽²⁾

Art. 177 of the *Code de Justice Militaire*, on which the Tribunal relied when rejecting the arguments of Grüner's Counsel in making his plea to the jurisdiction of the former, includes the following passage:

"If the *juge d'instruction* . . . is of the opinion that the act charged constitutes an offence within the military jurisdiction he shall refer the accused for trial to a Military Tribunal, Article 68 not being applicable. . . ."

Article 68 lays down the exclusive authority of the Indictments Division (*Chambre des mises en accusation*) of the Court of Appeal to commit cases to a Military Tribunal for trial.⁽³⁾

The Court of Appeal, however, ruled that an accused was, despite the provisions of Art. 177, still entitled, under Art. 81⁽⁴⁾, to question the jurisdiction of the Tribunal at any time before the hearing of witnesses. The

⁽¹⁾ Grüner was subsequently handed over to the British Authorities for trial by British Military Court (which has jurisdiction to try all war crimes committed against Allied victims). Grüner succeeded in escaping on the eve of his trial and at the date of going to press of this Volume he had not been recaptured.

⁽²⁾ See p. 93.

⁽³⁾ See p. 97.

⁽⁴⁾ See p. 47.

Court of Appeal went on to state that the Tribunal had in fact been without jurisdiction to try Grüner, whose crimes were committed in Germany against Allied prisoners and were therefore outside the scope of Art. 1 of the Ordinance of 28th August, 1944.⁽¹⁾

As will be seen, Grüner could properly have been tried by a Military Government Tribunal in the French Zone of Germany.⁽²⁾

One word may be added regarding the reliance placed by the Tribunal on the fact that Art. 68 of the *Code de Justice Militaire* was inapplicable in war time.

At the time of the trial (April, 1946), fighting between France and the ex-enemy countries had ceased. The question whether, under International Law, in view of the fact that no treaty of peace had been signed with Germany, the war against Germany must still be regarded as being in progress, is, however, of no relevance to provisions of municipal law such as Art. 68 of the *Code de Justice Militaire*. Each country is free to appoint, for its own internal legal purposes, an official date at which the war is to be deemed to have ended. For the French legal system, the date so appointed was 1st June, 1946, for that of the United States, 31st December, 1946.⁽³⁾ On the other hand, the British Government has taken the view that, no treaty of peace or declaration of the Allied Powers terminating the state of war with Germany having been made, the United Kingdom is still in a state of war with Germany, although, as provided in the Declaration of Surrender of 5th June, 1945, all active hostilities have ceased. (*R. v. Bottril, ex parte Küchenmeister* [1946] 1 All England Reports, p. 635).

2. PRISONERS OF WAR RIGHTS NOT GRANTED TO PERSONS ACCUSED OF WAR CRIMES

It is a recognised rule that a person accused of having committed war crimes is not entitled to the rights in connection with his trial laid down for the benefit of prisoners of war by the Geneva Prisoners of War Convention of 1929.⁽⁴⁾ An interesting corollary is provided by the decision of the French Court of Appeal that Wagner was not entitled to the rights provided for a prisoner of war under French Law.⁽⁵⁾

3. THE CHARGES AGAINST THE ACCUSED

Article 1 of the Ordinance makes certain persons punishable for breaches of French law in respect of specified persons and property, provided that their acts are not justified by the laws and customs of war.⁽⁶⁾

⁽¹⁾ See p. 48.

⁽²⁾ See p. 101.

⁽³⁾ President Truman, in a proclamation on 31st December, 1946, announced with immediate effect the official termination of hostilities of the Second World War. At a news conference he pointed out that his proclamation did not officially end the state of emergency proclaimed by President Roosevelt in 1939 and 1941 nor formally end the state of war itself, and that such action could only be taken by the U.S. Congress. The termination of hostilities meant the immediate ending of 20 war-time statutes, and the cessation of 33 others within six months.

⁽⁴⁾ See *War Crime Trial Law Reports*, Vol. I, pp. 29-31 and also a Report on the trial of General Yamashita by a United States Military Commission, to be contained in Volume IV of this series.

⁽⁵⁾ See pp. 2-3.

⁽⁶⁾ See p. 94.

In the Wagner trial the legal provisions describing the offences which the accused were alleged by the Prosecution to have committed, were those contained in Arts. 75, 77, 295, 296 and 297 of the *Code Pénal* and in the Ordinance of 28th August, 1944. It is interesting to examine these in turn.

(a) Art. 77 of the Code provides that any foreigner who commits any of the acts referred to in Art. 75 (2), (3), (4) and (5) and in Art. 76 thereof shall be guilty of espionage and punished by death.

Provocation to commit, or proposal to commit, one of the crimes set out in these paragraphs of Art. 75, or in Arts. 76 or 77 itself, shall also be punished as espionage.

The only provision referred to in Art. 77 which is relevant to the present discussion is the following paragraph from Art. 75:

"75. The following shall be guilty of treason and punished with death:

"(4) Any Frenchman who, in time of war, incites soldiers or sailors to pass into the service of a foreign power, facilitates such an act, or carries out enrolments for the benefit of a power at war with France."

These provisions were the basis of the charges of inciting Frenchmen to bear arms against France which were made against Wagner, Röhn and Schuppel.

(b) Article 114 of the *Code Pénal* provides that:

"Whenever a public official, an agent or an officer of the Government, orders or commits an arbitrary act against, or attempt against, individual liberty, the civic rights of one or more citizens, or the Constitution, he shall be sentenced to civic degradation.

"If, however, he pleads that he acted under orders of his superiors for objects which were within their province, and concerning which he owed them obedience due to rank, he shall be exempt from punishment, which shall be applied only to the superiors who gave the order."

It will be recalled that Wagner was charged with attempts against individual liberty. It should be noted that under Art. 35 of the *Code Pénal* the penalty of "civic degradation" must, in the case of an alien, be accompanied by a sentence of imprisonment for a term not exceeding five years.

(c) The remaining three Articles of the *Code Pénal* which were referred to in the *Act d'Accusation* and in the judgment of the Tribunal, as describing the alleged offences, were as follows:

"295. Homicide committed voluntarily is called murder.⁽¹⁾

"296. Murder committed with premeditation or by foul play⁽²⁾ is called premeditated murder.⁽³⁾

⁽¹⁾ In the French, "meutre."

⁽²⁾ In the French, "guet-apens."

⁽³⁾ In the French, "assassinat." The term "murder" and "premeditated murder" are used throughout these pages as signifying "meutre" and "assassinat." No closer equivalents are available; for instance, if "assassinat" were translated as "murder," then "meutre" would have to be rendered as perhaps "manslaughter," whereas such a translation would be inexact.

" 297. Premeditation consists of forming a plan, before the act, to make an attempt against the person of a specific individual, or of anyone who may be found or encountered, even if the plan should depend on the existence of some circumstances or the fulfilment of some condition."

It will be recalled that Hugo Grüner was charged with having committed premeditated murder, and Wagner, Röhn, Schuppel, Gädeke, Luger, Semar and Huber with having been accomplices thereto. (As to complicity, see p. 17.)

(d) Reference was also made to the Ordinance of 28th August, 1944.

Article 2(1) thereof states that illegal recruitment of armed forces, as specified in Art. 92 of the *Code Pénal*, shall include all recruitment by the enemy or his agents. The provisions of Art. 92 are as follows:

" Whoever raises armed forces or causes them to be raised, or engages or recruits soldiers, or causes them to be engaged or recruited, or furnishes them with or procures for them arms or munitions, without the orders or permission of a lawful authority, shall suffer death."

These provisions would provide a basis for the charges against Wagner, Röhn, Schuppel and Gädeke, alleging recruitment for the benefit of a foreign power at war with France.

Art. 2(4) of the Ordinance provides that:

" Premeditated murder, as specified in Art. 296 of the *Code Pénal* shall be interpreted to include killing as a form of reprisal."

Art. 2 (5) of the Ordinance states that: " Illegal restraint, as specified in Arts. 341, 342 and 343 of the *Code Pénal* shall include forced labour of civilians and deportation for any reason whatever of any detained or interned person against whom no sentence which is in accordance with the laws and customs of war has been pronounced."

The wording of Art. 341 is as follows:

" With the exception of cases in which the law orders the seizing of accused persons, whoever arrests, detains or sequesters any person without the order of the constituted authority, shall be punished with a term of penal servitude."

" Whoever affords a place for carrying out the imprisonment or sequestration shall undergo the same penalty."

Arts. 342 and 343 set out the circumstances in which sentences of penal servitude for life, or imprisonment for from two to five years may be delivered for the commission of this offence.

These provisions would provide the basis for the charge of attempts against individual liberty, brought against Wagner.

Art. 23 and the first paragraph of Art. 24 of the Law of 29th July, 1881, on the liberty of the Press, on which a plea was based by Wagner, Röhn, Schuppel and Gädeke, run as follows:

" Art. 23. Anyone who by speech, shouts or threats uttered in public places or meetings, either by writing or printed matter sold or distributed, placed on sale or displayed in public places or meetings, or by placards or posters displayed to the public eye, has directly provoked the author

or authors to commit an act defined as a crime or a delict, if the provocation has been effective, shall be punished as an accomplice in that act. This provision shall apply also when the provocation has only resulted in an attempted crime, as defined in Art. 2 of the *Code Pénal*.

Art. 24. Anyone who by any of the means set out in the preceding Article has directly provoked anyone to theft, murder, pillage, arson or one of the crimes or delicts made punishable by Arts. 309 and 313 of the *Code Pénal*, or one of the crimes made punishable by Art. 435 of the *Code Pénal*, or one of the crimes or delicts provided against by Arts. 75 to 85 inclusive of the same code, shall be punished, where this provocation has not been put into effect, by from one year to five years' imprisonment and a fine of from 1,000 to 1,000,000 francs. . . ."

As has been seen,⁽¹⁾ the Court of Appeal ruled that Counsel for Wagner, Röhn and Schuppel should have requested that a subsidiary question be put to the judges of the Military Tribunal asking whether the accused came within the terms of Article 24, but, since they had failed to do so, that Article had no application to the case.

Art. 88 and 90 of the *Code de Justice Militaire*, to which reference was made by the Defence in connection with their plea based on the fact that the judges were not asked whether the acts charged were justified by the laws and customs of war,⁽²⁾ make the following provisions, regarding the questions which the President of a Military Tribunal must or may put to the judges thereof; they elucidate also the plea of the Defence, based on Arts. 23 and 24 of the Law on the Freedom of the Press, referred to in the last paragraph:

" Art. 88. The President shall ask the questions arising out of the Indictment and the proceedings in Court which must be put to the Judges.

" He may also, acting *ex officio*, put to them subsidiary questions, if the proceedings have shown that the principal act can be considered either as an offence punishable by a different penalty or as a crime or delict under the general law; but in this case he must declare his intentions in public sitting before the closing of the proceedings, in order to put the public prosecutor, the accused and his Counsel, in a position to give their observations in due course.

" Art. 90. The questions shall be put by the President in the following order for each accused:

" (1) is the accused guilty of the act of which he is charged?

" (2) was this act committed in such and such aggravating circumstances?

" (3) was this act committed in such and such circumstances which make it excusable according to the law?"

The investigation attempted in the previous paragraphs of the specific offences which the accused were alleged to have committed and of various provisions of French law relied upon by both Counsel and the Tribunal is of value, since it illustrates French state practice in the matter of war crimes,

⁽¹⁾ See p. 47.

⁽²⁾ See p. 45.

as do also, for instance, the provisions relating to the defence of superior orders, to be discussed later. The emphasis placed on breach of provisions of French law and defences based upon the same law does not signify, however, that the accused were not tried also for offences against the laws and customs of war. The French practice is merely an example of the prevailing continental approach to war crimes and their punishment, according to which the accused must be shown to have committed some breach of municipal law which was at the same time *not justified by the laws and customs of war*. In many trials of alleged war criminals by French Military Tribunals, the judges are specifically asked whether the acts proved against the accused were justified by the laws and customs of war. The Court of Appeal had to decide upon a plea based upon the fact that this step had not been taken in the Wagner Trial, and ruled that it was not necessary that the Judges should be asked this specific question, because Art. 1 of the Ordinance of 28th August 1944, made it clear that the legality of an accused's acts under the laws and customs of war would render him not guilty of an offence. It was not, therefore, necessary to ask the judges whether this element of justification existed.

4. THE DEFENCE OF SUPERIOR ORDERS

Wagner occasionally referred to orders he had received from Hitler. All other accused claimed to have acted on orders from Wagner, either in the latter's capacity as Head of the Civil Administration or as Gauleiter. Only in Luger's case, however, was the plea of superior orders successful in securing an acquittal.

The Judgment of the Tribunal states that Luger was acquitted in virtue of Art. 3 of the Ordinance, which lays down broadly that superior orders, while they "cannot be pleaded as justification within the meaning of Art. 327 of the *Code Pénal*," may, in suitable cases, be pleaded as an extenuating or exculpating circumstance.

Art. 327 of the *Code Pénal* provides:

"No crime or delict is committed when the homicide, wounding or striking was ordered by the law or by legal authority."

The Judges answered in the affirmative the question whether, in committing the acts proved against him, Luger had "acted under the orders of his superiors, for objects which were within their province, and concerning which he owed them obedience due to rank." On the other hand, whenever the Judges were asked whether any of the other accused had acted under similar circumstances, their answers were in the negative.

The Prosecution, and the Tribunal, made reference, in the *Acte d'Accusation* and in the judgment respectively, to Art. 114 of the *Code Pénal*, and, in view of the wording of Art. 3 of the Ordinance, it is interesting to examine the former provision.⁽¹⁾

The first paragraph thereof states that any public official who has ordered or committed an arbitrary act against, or an attempt against, individual liberty, the civic rights of one or more citizens, or the Constitution, shall suffer civic degradation. The second paragraph, however, states that if he

⁽¹⁾ See also earlier in these notes, p. 51.

pleads that he acted under the orders of his superiors, for objects which were within their province, and concerning which he owed them obedience due to rank, he shall not suffer this punishment, which shall be applied only to the superiors who gave the order.

The similarity between the wording of this second paragraph and that of the question put to the Judges whether Luger acted under superior orders (*see above*) is evident. The position seems to be that the defence of superior orders, when pleaded in war crime trials before French Military Tribunals, does not constitute an absolute defence such as is envisaged in Art. 327, but that circumstances similar to those described in the second paragraph of Art. 114 may constitute an extenuating or exculpating circumstance. It is left to the Tribunal to decide in each case, whether and to what extent the plea is to be heeded.⁽¹⁾

⁽¹⁾ See Michel de Juglart, *Répertoire Méthodique de la Jurisprudence Militaire*. (Paris, 1946), pp. 242-5.

Trial of GUNTHER THIELE and GEORG STEINERT

UNITED STATES MILITARY COMMISSION, AUGSBERG, GERMANY, 13TH JUNE,
1945.⁽¹⁾

A. OUTLINE OF THE PROCEEDINGS

The accused, a German army lieutenant and grenadier respectively, were charged with a violation of the Laws of War. The specification against Thiele alleged that he "did, at or near Billingsbach, Germany, on or about 17th April, 1945, wrongfully and unlawfully order that, an American prisoner of war, be killed, which order was then and there executed by a member of his command." It was alleged that Steinert "did, at or near Billingsbach, Germany, on or about 17th April, 1945, wrongfully and unlawfully kill" the same named prisoner of war. Both pleaded not guilty.

It was shown that a United States officer was wounded and taken prisoner by members of the command of Lieutenant Thiele. Captain Schwaben, the battalion commander and superior officer of Lieutenant Thiele, sent an order to Lieutenant Thiele to kill the prisoner. Lieutenant Thiele then ordered Grenadier Steinert to do the killing, and Grenadier Steinert carried out this order. The accused were, at the time of the offence, part of a German unit which was closely surrounded by United States troops, from whom the Germans were hiding.

The accused were sentenced to death by hanging. On the recommendation of his Staff Judge Advocate, however, the appointing authority commuted the sentences to terms of imprisonment for life.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSION

This trial, like the following two annotated in the present document, was held before the promulgation by order of General Eisenhower of the directive regarding Military Commissions in the European Theatre of Operations of 25th August, 1945.⁽²⁾ In respect of the present trial, the authority to appoint the Military Commission was delegated by the Commanding General, European Theatre of Operations, to the Commanding General, 12th Army Group, by letter dated 19th November, 1944, with power of redelegation. This power was delegated by the Commanding General, 12th Army Group, to the Commanding General, Seventh United States Army, by letter dated 21st May, 1945. In the first letter authority was given to the Commanding Generals, Sixth and Twelfth Army Groups, to

⁽¹⁾ This report and the following three contained in this Volume are based not on complete transcripts of the trials, which were not available to the Secretariat of the United Nations War Crimes Commission, but on trial summaries furnished by the United States authorities.

⁽²⁾ See Annex III, p. 105.

appoint Military Commission for the trial of persons subject to the jurisdiction of such commissions who were "charged with espionage or with such violation of the laws of war as threaten or impair the security of their forces, or the effectiveness and ability of such forces or members thereof." By a radio message from the Commanding General, Seventh Army, to the Commanding General, 12th Army Group, dated 4th June, 1945, the facts of this case were stated and the opinion was expressed that they came under the provisions set out above in that they were acts that threatened or impaired the security of United States forces, or the effectiveness and ability of those forces or members thereof. Advice was given in the same way of the intention to try this case and concurrence was requested to this and similar trials. Authority to hold the trial was then given.

2. CONFIRMATION OF SENTENCES

Paragraph 12 (Review) of the European directive of 25th August, 1945, provides that:

- "(a) Every record of trial by military commission will be referred by the appointing authority to his staff judge advocate for review before he acts thereon.
- "(b) Every record of trial in which a death sentence is adjudged, if such sentence is approved and not commuted by the appointing authority, will be forwarded to the Deputy Theatre Judge Advocate, War Crimes Branch, this headquarters, APO 757, for review by the Theatre Judge Advocate or his deputy and presentation with appropriate recommendations to the confirming authority for action."

The first three United States trials dealt with in the present volume⁽¹⁾ all took place before the promulgation of the directive of August 25th, 1945, but in each case a review of the proceedings was submitted to the appointing authority by his Staff Judge Advocate and before a death sentence was carried out a further review was prepared by the Deputy Theatre Judge Advocate for the Commanding General, European Theatre of Operations.

3. THE LEGAL NATURE OF THE OFFENCE

The acts of the accused were in violation of Art. 2 of the 1929 Geneva Prisoners of War Convention and of Art. 23 (c) of the Hague Convention No. IV of 1907. These run as follows:

"Art. 2. Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.

"They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity."

"Measures of reprisal against them are forbidden."

"Art. 23. In addition to the prohibitions provided by special Conventions, it is particularly forbidden:

- (c) To kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion."

⁽¹⁾ See pp. 56-64.

4. THE DEFENCE OF SUPERIOR ORDERS

The Defence, in putting forward the plea of superior orders on behalf of both accused, quoted Section IV, paragraph 47, of the *Deutsches Militärstrafgesetzbuch* (German Military Penal Code):

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

“(2) If the guilt of the subordinate is minor, his punishment may be suspended.”

The law relating to the plea of superior orders has already been discussed in Volumes I and II of this series.⁽¹⁾ It will suffice here to point out that the plea was rejected by the Commission, but that, on the recommendation of his Staff Judge Advocate, the Commanding General, 7th United States Army, commuted the sentences to imprisonment for life.

5. THE DEFENCE OF MILITARY NECESSITY

The accused raised the defence that their acts were legal because based on military necessity. The Court, however, rejected this plea.

On this point, Oppenheim-Lauterpacht, *International Law*, Vol. II, 6th Edition (Revised), pages 183-4, states:

“As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or his other subjects. In accordance with the German proverb, *Kriegsraison geht vor Kriegsmanier* (necessity in war overrules the manner of warfare), many German authors before the World War were already maintaining that the laws of war lose their binding force in case of extreme necessity. Such a case was said to arise when violation of the laws of war alone offers, either a means of escape from extreme danger, or the realization of the purpose of war—namely, the overpowering of the opponent. This alleged exception to the binding force of the law of war was, however, not at all generally accepted by German writers. . . . The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war, i.e., generally binding customs and international treaties, but only by usages (*Manier*, i.e., *Brauch*). . . . In our days, however, warfare is no longer regulated by usages only, but to a greater extent by laws—firm rules recognized either by international treaties or by general custom. These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self preservation. . . . Art. 22 of the Hague

(1) Volume I, pp. 16-20 and 31-33; and Volume II, p. 152.

Regulations stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in a case of necessity. What may be ignored in the case of military necessity are not the laws of war, but only the usages of war.”

The accused in this case had violated the laws of war as expressed in solemn treaty obligations and, therefore, the doctrine of military necessity was no defence.

Trial of PETER BACK

UNITED STATES MILITARY COMMISSION, AHRWEILER, GERMANY. 16TH JUNE, 1945

A. OUTLINE OF THE PROCEEDINGS

It was charged that Peter Back, a German civilian, "did, at or near Preist, Germany, on or about 15th August, 1944, violate the laws and usages of war by wilfully, deliberately and feloniously killing an American airman, name and rank unknown, a member of the Allied Forces, who had parachuted to earth at said time and place in hostile territory and was then without any means of defence." He pleaded not guilty.

It was shown that the accused had shot an unarmed airman who had been forced to descend by parachute on to German territory. The Commission passed a sentence of death. The Army Judge Advocate recommended that the sentence be approved, but execution stayed pending further orders.

B. NOTES ON THE CASE

1. LEGAL BASIS OF THE COMMISSION

Like the last trial, the present proceedings were held by virtue of powers redelegated by the Commanding General, 12th Army Group, in this instance to the Commanding General, 15th United States Army.

2. THE NATURE OF THE OFFENCE

The accused was charged with "wilfully, deliberately and feloniously killing" an American airman; this phraseology is in part reminiscent of that used in the charge in the *Jaluit Atoll Case*,⁽¹⁾ and approximates to the definition of murder in United States Law as "the unlawful killing of a human being with malice aforethought."

The accused admitted the killing, but pleaded that he committed it on the "spur of the moment," and that he had no intention of killing. Nevertheless, the Commission found him guilty of a deliberate killing. In this connection, it must be remembered that in United States Law (as in English Law) it is not necessary that the intention to kill "should have been conceived for any particular period of time. It is as much premeditation if it entered into the mind of the guilty agent a moment before the act as if it entered ten years before."⁽²⁾ In the words of another authority, "a man who wantonly, intentionally and violently kills another shows by that act, not indeed the existence of hatred of long standing, but the existence of deadly hatred, instantly conceived and executed; which is at least as bad, if not worse. This, in the strict sense of the words, is malice aforethought," though "not long aforethought."⁽³⁾ In this case, the rapidity with which the execution followed the forming of the intent did not reduce the degree of the crime, which was treated as murder.

⁽¹⁾ See Volume I of this series, pp. 71-80.

⁽²⁾ Wharton, *Criminal Law*, 12th Edition, Volume I, Sec. 507.

⁽³⁾ Stephen, *Digest of Criminal Law*, 5th Edition, Art. 244 (a).

A subsequent assault by two others, hastening the death of the victim, did not relieve Back of guilt. "Liability for homicide does not depend upon the fact that death is the immediate consequence of the injury inflicted by the accused. One who inflicts an injury is deemed by the law to be guilty of homicide if the injury contributes to the death. If two persons inflict wounds at different times . . . (and) if at the moment of death it can be said that both injuries are contributing thereto, the responsibility rests on both actors. In such cases the law does not measure the effects of the several injuries in order to determine which contributed in greater degree to bring about the death."⁽¹⁾

The accused was a civilian, and his conviction is further proof that civilians as well as combatants are liable to be brought before war crimes tribunals accused of breach of the laws and usages of war.⁽²⁾

3. MADNESS AS A DEFENCE

There was some evidence that the accused was known at times to act without thinking, but the report of a neuro-psychiatrist, who examined him a few days before the trial, stated that he was sane. The entry of this latter evidence is an interesting indication that the defence that madness deprived the accused of the requisite *mens rea* might have been considered admissible in a war crime trial had it been put forward.

⁽¹⁾ *American Jurisprudence*, Homicide, Sec. 48.

⁽²⁾ See also Volume I of this series, pp. 53-4 and 103.

Trial of ALBERT BURY and WILHELM HAFNER

UNITED STATES MILITARY COMMISSION, FREISING, GERMANY, 15TH JULY, 1945

A. OUTLINE OF THE PROCEEDINGS

Bury, ex-police chief of Langenselbod, Kreis Hanau, Germany, and Hafner, ex-policeman in the same place, were accused of unlawfully killing a United States prisoner of war. It was alleged that the former accused delivered the prisoner to the latter, with instructions to kill him, and that Hafner carried out these orders. The airman was taken to a secluded spot and shot. Bury stated that he had orders that "terror flyers" were no longer to be granted the protection of prisoners of war and were to be killed by lynching or beating and that the police were not to protect "terror flyers" if the populace lynched them. Both accused were sentenced to death by hanging and the sentences were confirmed.

B. NOTES ON THE CASE

1. THE LEGAL BASIS OF THE COMMISSION

The proceedings again were based upon a delegation by the Commanding General, 12th Army Group, of the power to hold war crime trials, delegated to him by the Commanding General, European Theatre of Operations.

2. RULES OF PROCEDURE

The trial was held before the promulgation of the European directive,⁽¹⁾ but basic provisions regarding procedure similar to those set out therein were made for these proceedings. In the Special Order appointing the Commission, power was granted to it to make such rules for the conduct of the proceedings, consistent with the powers of a Military Commission, as were deemed necessary for a full and fair trial. The Order further provided that the Commission was not bound by the rules of procedure and evidence prescribed for General Courts Martial, but such evidence was to be admitted as had probative value to a reasonable man. In paragraphs 2 and 3 of the European directive it was subsequently provided:

"Military commissions shall have power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such commissions, and with the rules of procedure herein set forth, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for general courts martial. . . . Such evidence shall be admitted before a military commission as, in the opinion of the President of the commission, has probative value to a reasonable man."

⁽¹⁾ See p. 56.

In the present trial, the Commission announced at the outset that its proceedings were to "be governed generally by the rules of procedure and evidence as laid down in the Manual for Courts Martial with the following changes. Statements made by the accused in the course of investigations which appear to be regularly and properly authenticated will be admitted in evidence, subject to such attack as the accused may desire to make. The statements made by the accused that are admitted in evidence will be received generally against all of the accused subject to such rebuttal as the accused or any of them may elect to make. The accused will be accorded the same privileges with regard to testifying as are accorded accused persons in trials before American Courts Martial, but if the accused or any of them elect to take the stand as an unsworn witness, he will be subject to cross-examination. If the accused elects to remain silent, the fact may be the subject of all reasonable inferences and comments."

It will be noted that the rule giving effect to the extra-judicial statements of one accused against another was different from that prevailing in Courts Martial. In paragraph 76, the *Manual for Courts Martial, U.S. Army*, provides: "The accused, whether he has testified or not, may make an unsworn statement to the court in denial, explanation, or extenuation of the offences charged, but this right does not permit the filing of the accused's own affidavit. This statement is not evidence, and the accused cannot be cross-examined upon it, but the prosecution may rebut statements of fact therein by evidence. Such consideration will be given the statement as the court deems warranted. The statement may be oral or in writing, or both. . . . If the statement made by an accused himself includes admissions or confessions, they may be considered as evidence in the case, but in a joint trial the statement by one accused is not evidence against his co-accused. . . ." Paragraph 114 (c) states: ". . . The fact that a confession or admission of one conspirator is inadmissible against the others does not prevent the use of such confession or admission against the one who made it, but any such confession or admission cannot be considered as evidence against the others. The effect of an unsworn statement made by one of several joint offenders at the trial is likewise to be confined to the one who made it. . . ." ⁽¹⁾

The remaining provisions of the *Manual* which were rendered inapplicable to the present proceedings are those contained in paragraphs 77 and 121 (b). Paragraph 77, *inter alia*, states: "The failure of an accused to take the stand must not be commented upon; . . ." In so far as an accused became liable to cross-examination *even if unsworn*, a departure was made also from paragraph 121 (b), which provides that: ". . . An accused person taking the stand *as a witness* becomes subject to cross-examination like any other witness. . . ." ⁽²⁾

3. THE NATURE OF THE OFFENCE

The offence was said to be a breach of the Hague Convention No. IV, Arts. 4 and 23, and of the Geneva Prisoners of War Convention, Arts. 2 and 3.

⁽¹⁾ Regarding the question of the admissibility of evidence by one accused against another in the Belsen trial, held by a British Military Court, see Volume II, pp. 134-5.

⁽²⁾ Italics inserted. In British war crime trials, by contrast, where an accused chooses not to appear as a witness on oath, he may make an unsworn statement, on which he is not subject to cross-examination. (Rules of Procedure 40 and 41.)