CASE No. 29. .

TRIAL OF KARL BUCK AND TEN OTHERS

BRITISH MILITARY COURT, WUPPERTAL, GERMANY

6TH-10TH MAY, 1946

A. OUTLINE OF THE PROCEEDINGS

The accused, Hauptsturmführer Karl Buck, Untersturmführer Robert Wunsch, Oberleutnant Karl Nussberger, Wachtmeister Erwin Ostertag, Oberwachtmeister Joseph Muth, Zugwachtmeister Bernhard Josef Ulrich, Oberwachtmeister Heinrich Neuschwanger, Wachtmeister Dinkel, Wachtmeister Helmut Korb, Wachtmeister Xavier Vetter and Sturmscharführer Zimmermann, were charged with committing a war crime, in that they, at Rotenfels Security Camp, Gaggenau, Germany, on 25th November, 1944, in violation of the laws and usages of war, were concerned in the killing of six British prisoners of war, all of No. 2 Special Air Service Regiment, four American prisoners of war, and four French Nationals ; the victims were all named in the charge. The accused pleaded not guilty.

It was shown that the deceased were prisoners at Rotenfels Camp. On 25th November, 1944, they were taken in a lorry to a wood, where they were all shot to death.

Buck was in charge of the camp of Schermeck in Alsace and, by virtue of that office, was also Lager Kommandant at the Camp at Gaggenau. Wunsch was the man through whom he carried out his administrative duties at the latter place : Buck, who claimed in Court to have received orders from Dr. Isselhorst, who was in charge of the Security Police and S D. in the South West, that certain prisoners including the British and American prisoners of war should be shot, confessed that, having first had the victims transferred from Schermeck to Gaggenau and having tried to evade the command, he ordered Wunsch to have the prisoners of war and certain others shot, and to destroy all the evidence.

Wunsch claimed that he was in charge of Gaggenau only from the point of view of its general administration, and that Nussberger was in charge of the police. There was other evidence independent of that of Wunsch indicating that this accused was not responsible

for the police who were in charge of the security of the camp. Wunsch pleaded that he acted as a mere messenger in passing on to Nussberger Buck's orders for the shooting of specified prisoners ; had Nussberger been present when Buck called at the camp, the orders would have been given to him directly.

There was evidence that Nussberger was present when the prisoners were being loaded into the lorry which took them to the wood, and that he told the driver to get away as quickly as possible. This accused claimed that he was present when Buck delivered his orders to Wunsch, that his own

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part was merely to tell Neuschwanger, a guard, to report to Wunsch for orders and that it was actually Wunsch who gave the necessary instructions to Neuschwanger.

The driver gave evidence that Neuschwanger was in charge of the lorry and, together with Ostertag and Ulrich, took the prisoners into the wood to be shot. Neuschwanger claimed that he had been detailed by Ostertag but confessed to having taken part in the shooting.

Ulrich, a guard, also claimed to have been detailed by Ostertag and also confessed to a part in the shooting.

Ostertag made a similar confession. but claimed that. although his own rank in the Schutzpolizei was actually higher than that of Neuschwanger, the latter had been put in charge of the shooting by Nussberger because he knew better the place selected.

Dinkel, Korb and Vetter were shown to have guarded such victims as remained in the lorry during the period while the prisoners were taken into the wood in small groups to be shot. Korb and Vetter claimed to have demonstrated at the time their unwillingness to take part in any executions, and Dinkel to have had no knowledge of the purpose of the mission until the shooting began. Neuschwanger and Vetter, however, stated that Dinkel took some part in accompanying prisoners into the wood.

There was evidence that Zimmermann, a member of the S.S. paraded the prisoners before they left on the lorry, knowing that the latter were to be shot.

Muth's part consisted only in guarding several Russian prisoners who had been taken with the others in case they were needed to dig graves. He did not go to the scene of the shooting until after its completion.

Statements by Vetter, Korb and Ulrich indicated that some of the victims were still in uniform when shot. It was clear from the words of Wunsch and Neuschwanger that these two accused also knew that the persons shot included prisoners of war. Ostertag claimed that all the victims were civilian clothing.

One of the Prosecution witnesses, an intelligence officer of the No. 2 Special Air Service Regiment, to which the British victims belonged, stated in the course of cross-examination that it was not among the tasks of the Special Air Service to organize and support the Maquis, but that members of the Regiment did naturally have connection with members of the Maquis, " because at this particular time the operation which was mounted in the Vosges area was mounted at a time at which the Maquis had risen against the German invaders."

The Defence called as a witness Dr. Isselhorst, Commander of the Security Police and S.D. in the South West in November, 1944. He stated that he had first had to deal with the so-called Leader Order of 18th October, 1942, when, in August, 1944, he had had his first reports of the British Special.

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Airborne Service during an operation against the Maquis. According to the witness's interpretation the Order provided that all baled-out or parachuted personnel of the Allied Forces who came down behind the German lines were to be killed without mercy. He had enquired whether the order was still valid and had been told by his superiors in Berlin that it was. He had instituted a system of investigation and had applied the order not to persons engaged in war-like operations such as the interruption of railways but only to persons who were shown to have co-operated with the Maquis.

After enquiries had been made by one, Kommandoführer Ernst, he had decided that the order must be applied to the victims of the killings charged in the present trial. Ernst had said that the group of prisoners had had sabotage equipment and instructions on demolition, some had been spies, and the activities of the group had been carried out in collaboration with the Maquis or the French civil population. The witness admitted, however, that there had been no trial of the victims by any court.

All the accused except Muth were found guilty. Subject to confirmation by superior military authority, Buck, Nussberger, Ostertag, Ulrich and Neuschwanger were sentenced to death by shooting, and Zimmermann, Dinkel, Wunsch, Korb and Vetter to imprisonment for ten, eight, four, three and two years respectively.

These sentences were confirmed by superior military authority.

B. NOTES ON THE CASE

1. THE COMPOSITION OF THE COURT .

The Court was a British Military Court convened under the Royal Warrant of 14th June, 1945, Army Order 81/1945, as amended. (Footnote: For the British law governing the trial of war criminals, see Vol. I of this series, pp. 105-110.). It consisted of a President and five members including Capitaine P. Bellet of the French Air Force. The appointment of a French officer as a member of the Court was no doubt made in view of the fact that

Frenchmen figured among the victims of the alleged crimes, and constituted an application of Regulation 5 of the Royal Warrant, which provides :

" . . . Notwithstanding anything in these Regulations 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."

2. THE STATUS OF THE VICTIMS

The Judge Advocate pointed out that the British and United States victims, if shown to be prisoners of war, were protected by the Geneva Prisoners of War Convention of 1929, in Article 2. (Footnote: See p. 49)

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The French nationals, though not prisoners of war, were also protected by the laws and usages of war, and, said the Judge Advocate : " the position under international law is that it is contrary to the rules of international law to murder a prisoner, and, if this court took the view that the shooting of these four French nationals was a murder of a prisoner held by the Germans and under the control of these accused, the court would be entitled to convict these accused of the violation of the rules of international law."

Such discussions as arose during the trial regarding the legal position of the victims centred on the status of the six members of the Special Air Service Regiment. The Defence emphasised the evidence which tended to show that members of this Regiment had had some connection with the Maquis.

Though all accused but one were found guilty on the charge, no special finding being arrived at, it is impossible to ascertain in detail what view the court took of the killing of the six British victims in particular. The Judge Advocate said that the Court might take the view that all that the evidence regarding the relations between the Special Air Service and the Maquis showed was that any two movements which took place in war at the same time must have an effect upon one another. Even if it had been proved that part of the Regiment were assisting the Maquis, it remained to be shown that the British and American prisoners were among those who took part in rendering such aid.

3. THE DEFENCE OF SUPERIOR ORDERS (Footnote: Regarding the plea of superior orders, see p. 13.)

The Defence pleaded that all of the accused acted under superior orders. Counsel drew the Court's attention to the so-called Leader Order of the 18th October, 1942.(Footnote: Regarding this, the Führerbefehl of 18th Oktober, 1942, see also the **Dostler Case**, in Vol. I of these Reports, **pp. 28-29** and **33-34**. It is interesting to note, from the point of view of historical research, that there are certain differences between the account of the contents

of the Führerbefehl put forward in the Dostler Case and that put forward in the present trial by Dr. Isselhorst, for instance as regards the Allied personnel intended to be effected by it.) This, he claimed, bound all the German armed forces, including the S.S., S.D. and police, not to treat as prisoners of war, but instead to shoot, " members of so-called Commando detachments who were parachuted from the air behind the German lines to do acts of sabotage and interference." Every leader of a Kommando and officer had been made responsible for seeing that this order was carried out and was to be punished if he failed.

Counsel claimed that there was evidence that the victims of the shooting had established such contact with Terrorists and the Maquis as would bring them within the scope of these orders, and that a " security police case " preceded the executions. The accused would themselves have been punished " by the S.S. and S.D. Courts " had they not carried out their orders regarding the prisoners. Counsel for various individual accused claimed that the punishment meted out would undoubtedly have been death.

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The Judge Advocate stated that in principle superior orders provided no defence to a criminal charge, and made reference to that passage from Oppenheim-Lauterpacht's *International Law*, 6th Edition revised, pp. 452-453, on which reliance has been placed so frequently in war crime trials :

" The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or 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 latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received ; that rules of warfare are often controversial ; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a 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 lawful 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 Judge Advocate expressed the view that an accused would be guilty if he committed a war crime in pursuance of an order, first if the order was *obviously unlawful*, secondly if the accused *knew that the order was unlawful*, or thirdly if he *ought to have known it to be unlawful had he considered the circumstances in which it was given.* (Footnote: See p. 16.)

4. THE DEFENCE OF MISTAKE OF FACT

Counsel acting for the accused in general pointed out that in Germany there had been not only courts-martial but also " so-called S.S. and police courts for German persons and members of the S.S." He claimed that the interrogations of the victims by Kommandoführer Ernst, on whose reports Dr. Isselhorst acted, constituted a trial by the Security Police. The accused he claimed, had had no other information on the matter than that the prisoners had been tried and condemened, and had acted on that assumption. They had ".neither the sense for technicalities nor the mental abilities to look deeper into this case." The Prosecutor, on the other hand, submitted that the obliteration of all traces of the crime and the steps taken by the accused to suppress all knowledge of the crime belied any contention that they thought that they were performing a legal execution. Lawful executions did not take place in woods, nor were those shot buried in bomb craters with their valuables, clothing and identity markings removed.

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The Judge Advocate pointed out that under the Hague Convention even spies were entitled to a trial. (Footnote: Article 30 of the Hague Convention No. IV of 1907 : " A spy taken in the act shall not be punished without previous trial.") There seemed to him to be no evidence that the victims were ever tried before a Court. Dr. Isselhorst had said that they were sentenced by decision of Ernst and " not through a court." If his evidence was believed, they were condemned as a result of an administrative decision and not after a trial.

Assuming that co-operation between certain of the victims and the Maquis was not contrary to the laws and usages of war and assuming that the original Führerbefehl was contrary to international law, the question whether or not the deceased had ever been subjected to trial to find whether they came within the scope of the latter would hardly seem relevant to the question of the legality of the executions. On the other hand, could it have been shown that a *bona fide* impression had existed in the minds of the accused that the execution was the consequence of a trial in which the victims had been legally condemned to death, the plea of mistake of fact, which the Defence raised, might well have been effective. In the circumstances of the case, however, the Court did not see fit to give effect to it.

5. IGNORANCE OF THE PROVISIONS OF INTERNATIONAL LAW AND ITS POSSIBLE EFFECTS

It is a rule of English law that ignorance of the law is no excuse : Ignorantia juris neminem excusat. There are some indications that this principle when applied to the provisions of international law is not regarded universally as being in all cases strictly enforceable. Thus Oppenheim-Lauterpacht, International Law, 6th Edition revised, pp. 452-453, states that " 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 [a member

of the armed forces] cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received." In the present trial, the Judge Advocate, in his summing up, said that the Court must ask itself : " What did each of these accused know about the rights of a prisoner of war ? That is a matter of fact upon which the Court has to make up its mind. The Court may well think that these men are not lawyers : they may not have heard either of the Hague Convention or the Geneva Convention ; they may not have seen any book of military law upon the subject ; but the Court has to consider whether men who are serving either as soldiers or in proximity to soldiers know as a matter of the general facts of military life whether a prisoner of war has certain rights and whether one of those rights is not, when captured, to security for his person. *It is a question of fact for you.*" (Footnote: Italics inserted.)