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CASE NO. 60

THE DACHAU CONCENTRATION CAMP TRIAL

TRIAL OF MARTIN GOTTFRIED WEISS AND THIRTY-NINE OTHERS

GENERAL MILITARY GOVERNMENT COURT OF THE UNITED STATES ZONE, DACHAU, GERMANY, 15TH NOVEMBER--13TH DECEMBER, 1945

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

Two charges alleged that the accused " acted in pursuance of a common design to commit acts hereinafter alleged and as members of the staff of the Dachau Concentration Camp, and camps subsidiary thereto, did at or in the vicinity of Dachau and Landsberg, Germany, between about 1st January, 1942, and 29th April, 1945, wilfully, deliberately and wrongfully aid, abet and participate in the subjection of civilian nations " (charge 1) and of " captured members of the armed forces " (charge 2) " of nations then at war with the German Reich, to cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities, the exact names and numbers of such victims being unknown but aggregating many thousands. . . ."

2. EVIDENCE FOR THE PROSECUTION

(i) *General conditions in the camp*

Dachau was the first concentration camp to be established in Germany, and was in existence from March, 1933, until April, 1945. The charges, however, cover only the period from January, 1942, to April, 1945. More than 90 per cent. of the prisoners were civilians, the remainder were prisoners of war. None of them had ever been tried by a court of law previous to being sent to a concentration camp. In April, 1945, about half of the total population of the camp were Slavs (mainly Russians, Poles and Czechs), the other half consisting of nationals of almost every European country, including Italy, Hungary and Germany. The main camp was equipped for approximately 8,000 inmates. In April, 1945, it contained 33,000. The entire group of concentration camps administered by Dachau and situated in a circle with Dachau in the centre, could accommodate 20,000. It contained 65,000 people in April, 1945.

The result of this overcrowding was that up to three men had to sleep in one bed, the latrines were constantly blocked, hospital blocks were

proportionately crowded and prisoners were not segregated when suffering from contagious diseases, but had to share their beds with others not suffering from such diseases. A typhus epidemic was raging at the camp from December, 1944, until the liberation of the camp by American troops in April, 1945. Approximately 15,000 prisoners died of typhus during this period. No adequate measures were taken by the camp administration to

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combat this epidemic. The food was grossly inadequate, especially in view of the long hours of work. The prisoners had to work 12 hours a day ; taking into account the cleaning of barracks and very prolonged parades and roll calls, this amounted to a 17-1 8 hour working day. When American troops entered the camp in April, 1945, a great majority of prisoners showed signs of starvation. Within the first month after the arrival of the American troops, 10,000 prisoners were treated for malnutrition and kindred diseases. In spite of this one hundred prisoners died each day during this first month from typhus, dysentry or general weakness. Clothing was insufficient to protect the prisoners from the cold. Individual clothing was not washed for periods up to 3 months. The prosecution alleged that a large warehouse full of clothing was found in the camp in April, 1945. Apart from the conditions created in the hospital blocks by overcrowding and insufficiency of medical supplies and gross lack of care, these hospitals were the scenes of numerous medical experiments, of which the prisoners were the involuntary victims. Experiments consisting of immersion of prisoners in cold water for periods of up to 36 hours, puncturing the lungs of healthy prisoners, injecting them with malaria bacteria and phlegmon matter in order to observe their reactions, were among the experiments carried out in the camp hospital. Numerous prisoners died as a result of any one of these experiments, Invalid prisoners who were considered incurably ill and those in the advanced stages of emaciation were periodically gathered into large convoys leaving Dachau for an unknown destination. It was common knowledge, according to the prisoners' testimony, that these transports of people were sent elsewhere to be killed. Prisoners were subjected to strict discipline, which was enforced by a system of severe punishments. These punishments ranged from inflicting harder work and longer hours and deprivation of food to beatings, up to 100 lashes, hanging by the wrists for long periods and confinement in the arrest blocks, to the death penalty, which was inflicted mainly for stealing.

In spring, 1942, 6,000-8,000 Russian prisoners of war were killed. Around September, 1944, 90 Russian officers were hanged in the camp. The total death roll is not known. Over 160,000 prisoners went through Dachau in the three years forming the subject of the charges. The number of recorded deaths is 25,000, but there was evidence that thousands of others perished unrecorded.

(ii) *Organisation and Responsibility of the Accused in running the camp*

All concentration camps were administered by the Central Security Office in Berlin, where the Commandants and senior officers of the staff were appointed. The Dachau group of camps contained 85 branch camps which all came under the camp commandant, who held the rank of Lt.-Colonel in

the SS. In each camp there was a " Schutzhaft Lager Fuhrer " who was a kind of deputy commandant. Below this deputy commandant was a "Rapport Fuhrer," who was a kind of regimental sergeant-major, usually a senior N.C.O. of the SS. He was the most important member of the staff for disciplinary purposes. Below these were the " Block Fuhrer," who were SS men each in charge of the prisoners in one block (barrack). From the " Block " downwards, the hierarchy consisted of prisoners. There was a " block eldest " in each block, under him a " room eldest " for each room

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in the block, charged with maintaining order. These prisoner functionaries were almost always German prisoners selected by the SS, most of them habitual criminals. The commandant was aided by an adjutant and the camp administration generally, including the chief food stores, clothing stores, etc., was directly under the command of his personal staff. Other departments were headed by an officer of the camp staff such as the labour officer, the chief medical officer, and others. The labour officer was an SS N.C.0 who had to appoint working parties for various private factories in the vicinity. Each party was escorted by an SS man as a guard and a prisoner called a " Kapo " acted as foreman under this SS guard.

The medical department was in the charge of the chief medical officer with several SS doctors under him, and prisoner doctors to assist them. The political department, which was headed by a Gestapo officer, who received his orders directly from Gestapo headquarters at Munich, but came under the camp commandant for administration, dealt with all intelligence matters, including the compiling of lists for the experiments, and for the convoys of the sick for extermination.

Of the 40 accused, 9 had at one time been camp commandants or deputy camp commandants. Three had been " Rapport Fuhrers," 4 labour officers or deputy labour officers, 5 medical officers, 2 medical orderlies, 3 on the administrative staff of the camp commandant, 4 " Block Fuhrers " as well as being in charge of working parties, one was in charge of the political department, one an adjutant, one an officer in charge of the battalion of guards, one an officer in charge of supplies. Three accused had been guards. who had also been in charge of large prisoner convoys during the evacuation from Dachau to other camps in April, 1945. Three were prisoner functionaries. Thus all accused held some position in the hierarchy running Dachau camps. Most of them held important positions as the above list shows.

(iii) *Specific instances of ill-treatment and killings*

There were numerous cases of grave ill-treatment, deliberate beating and starving of prisoners and a great number of cases of killing prisoners by the SS personnel in all camps. In most cases the names of the victims were unknown but the court were asked to take into consideration only those instances where at least the nationality of the victims was known. All those cases of ill-treatment or killing of prisoners of which detailed evidence was given, were attributed to one or more of the accused. The prosecution thus

alleged against some of the accused that they held prominent positions in the hierarchy of the camps and were chiefly responsible for the conditions prevailing there, and against some of the accused acts of individual assaults or killings, against most accused, both. The case for the prosecution was that all the accused had participated in a common plan to run these camps in a manner so that the great numbers of prisoners would die or suffer severe injury and that evidence of the numerous indictments of ill-treatment and killings was only introduced to show that each individual accused took a vigorous and active part in the execution of this plan.

3. EVIDENCE FOR THE DEFENCE

There was no divergence between the prosecution and the defence with regard to the organisation of the camp and the position held by the accused

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in this organisation. The defences offered by the accused resolved themselves into two parts, those concerning the general conditions and those concerning the allegations of specific ill-treatment and killings. The defence put forward with regard to the general conditions amounted to a defence of superior orders.(Footnote1: For a discussion of the validity of this defence in general, see the references set out on p. 24, note 2.)

The defence pleaded that the camp was established and run on the orders of Himmler and the Central Security Office in Berlin, that rations, clothing, medical and other supplies were in accordance with the standards prescribed by Berlin, and that Dachau was a good camp " as concentration camps go ". Of the defences put forward with regard to specific ill-treatments and killings, some were utter denials, some were denials of the circumstances or the intensity of the ill-treatment and some were explanations, such as that the hanging of the 90 Russian officers was an execution ordered by the Central Security Office, or that it was necessary in the interest of discipline to beat prisoners who had committed thefts.

4. FINDINGS AND SENTENCES

All 40 accused were found guilty and the finding was confirmed in each case. Thirty-six accused were sentenced to death, one to hard labour for life, 3 to hard labour for 10 years. The Reviewing authority commuted 3 of the 36 death sentences, one to hard labour for life, and 2 to 20 and 10 years' hard labour respectively. The sentence of one further accused was reduced by the Reviewing authority from 10 to 5 years' hard labour. The Confirming authority commuted of the remaining 33 death sentences, two of them to 20 years' hard labour and 3 to 10 years' hard labour.

B. NOTES ON THE CASE (Footnote 2: For the United States law and practices concerning war crimes, see Vol. III, pp. 103-20.)

1. QUESTIONS OF JURISDICTION AND PROCEDURE

(i) *Jurisdiction*

The defence, in a motion before the beginning of the hearing of the evidence, which amounted to a plea to the jurisdiction,(Footnote 3: For the United States law and practice concerning war crimes, see Vol. III, pp. 103-20.) put forward the following three arguments :

(a) that the accused were not described as enemy nationals in the charge and as the court had a limited jurisdiction as to the person and a war crime was defined in paragraph 3 of the Circular No. 132 of Hq. USFET dated 2nd October, 1945, as " . . . including those violations of enemy nationals or persons acting with them of the laws and usages of war, of general application and acceptance . . ." the charges disclosed no offence which the court was competent to try ;

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(b) that the names and nationalities of the victims were not disclosed in the charge and were mainly unknown and that it therefore could not be seen from the charges whether or not the victims were nationals of nations who were at war with Germany at the material time. If they were not, the court had no jurisdiction to try the accused for any assaults or murders of such nationals ;

(c) that the accused were prisoners of war and that Article 63 of the Geneva Convention provides : "A sentence may be pronounced against a prisoner of war only by the same court and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."

The motion was denied by the court. The first argument is erroneous ; though it is usual to describe accused in the charge against them as " enemy nationals " this is not necessary. All accused in this case stated in their direct examination that they were enemy nationals, but even if that had not been the case, the court would have had jurisdiction. The definition quoted by the defence does not purport to be exhaustive, as is shown by the word " including " and the words " or persons acting with them " leaving room for the argument that any neutral or allied nationals who by their conduct had identified themselves with the German staff and their way of running the camp could be tried with them. A British Military Court found 5 Poles guilty of war crimes against Allied nationals in the Belsen trial, (Footnote 1: See Volume II, page 150, of this series.)-thus upholding the principle that as a war crime is an offence against international law the nationality of the offender is irrelevant in this connection. Professor Lauterpacht advocates that a victorious belligerent should even " try before his tribunals such members of his own forces as are accused of war crimes ".(Footnote 3: Oppenheim-Lauterpacht, 6th Edition, revised, Volume II, page 458))

With regard to the second argument the defence pointed out that in many cases the victims were Hungarians or Roumanians who were enemy nationals or Italians who were enemy nationals until 1943, and that none of them was an American citizen. The prosecutor argued that the gravamen of

the charges was the common design to ill-treat and kill the inmates of the camp. Such common design may be proved by giving evidence of any ill-treatment whether the victims in the particular case had been Allied nationals or not. The court permitted evidence of cases of ill-treatment of enemy nationals to be given but it seems that the findings of the court and the sentences could be based on the allegations of ill-treatment and murder of allied nationals alone. (Footnote 3: Cf. *Belsen Trial*, Volume II of this series, pp.150 and 155)

The third argument was dealt with by the Supreme Court of the United States in re Yamashita. (Footnote 4: 66, Supreme Court Reporter 340, p. 350, and *see* Volume IV of this series, p. 46.) The relevant passage from Chief Justice Stone's judgment reads : " . . . but we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence ' pronounced against the prisoner of war ' for an offence committed while a prisoner of war and not for a violation of the laws of war committed while a combatant."

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The jurisdiction of the court in this case-as indeed in all concentration camp cases held before such courts as this-can be based on Article 2 of the Ordinance No. 2 of the United States Military Government in Germany which gives military government courts jurisdiction over " all offences against the laws and usages of war." The offences against the laws and usages of war in the Dachau case are, with regard to the first charge, offences against Article 2 of the Geneva Convention (Prisoner of War Convention of 1929), which says that prisoners of war shall " at all times be humanely treated and protected particularly against acts of violence or insults and from public curiosity," as well as against Articles 9-14 (Accommodation, food, clothing and hygiene in prisoner of war camps) and Articles 31 and 33 of the same Convention (conditions of work for prisoners of war). The offences with regard to the second charge are offences against Article 46 of the Annex to the 6th Hague Convention of 1907 which, dealing with inhabitants of occupied territories, says : " family honour and rights, individual life and private property as well as religious convictions and worship must be respected ".

The fact that none of the victims were nationals of the nations trying the case is of no moment. Persons accused of war crimes may be tried by the belligerent power into whose hands they fall, whether that power is the one whose subjects were the victims of the alleged crimes or an allied power. For illustrations of this principle see the trial of the Commandant and staff of the Belsen Concentration Camp by a British Military Court (only a few of the tens of thousands of victims were known to be British subjects) (Footnote 1:See Volume II) and the Hadamar trial by an American Military Government Court (none of the victims in that case was a citizen of the United States.) (Footnote 2: See Volume I of this series, pp. 46 *et seq.*)

The Judgment " In re Yamashita " can also be quoted as an authority for the above proposition. The charge against General Yamashita was that he " while a commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his

duty as a commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States *and its allies* and dependencies . . . and he . . . thereby violated the laws of war ".(Footnote 3: Italics inserted.) [See also the Trial of Tomoyuki Yamashita in this series-editor] In this charge and in the court's decision there may be said to be an implicit recognition of the right of one allied power to try war criminals for offences against the subjects of another allied power.

(ii) *Definiteness of the charges.*

In a motion for an order directing the Convention to make the charges and particulars more definite the defence criticized the charges mainly on two grounds :

> (a) that the description of the period of time as " between 1st January, 1942 and 29th April, 1945 " in the charges was so vague that they failed to inform the accused with sufficient certainty of the case they would have to answer ;

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> (b) that the charges were bad for duplicity as each of them disclosed plurality of offences whereas in accordance with paragraph 6, sub-para. 2 of the U.S. Military Government's Manual " each charge should disclose one offence only and should be particularised sufficiently to identify the place, the time and the subject matter of the alleged offence and shall specify the provision under which the offence is charged."

In reply to the first argument the prosecution pointed out that the offences with which the accused were charged were all of a continuing nature and that it was alleged that the common design forming the subject of the charges was in operation from January, 1942, till April, 1945. Being a continuous offence the participation of the individual accused was sufficiently clearly alleged to apprize them of what they were called upon to defend. The argument that only very few of the accused were at Dachau during the whole period from January, 1942, until April, 1945, whereas most of them either arrived later or left earlier than the dates given in the charges, was not used by the defence.

With regard to the second argument, the prosecution said that each charge set forth only one offence, i.e. subjection of prisoners to cruelties and ill-treatment. Only the forms which this subjection took varied, and therefore only a partial description of those forms of subjection was expressed in the charges, but the charges quite definitely alleged participation in the running of the camp, pursuant to a common design which included the subjection of described persons to stated wrongful acts at stated times and places.

The motion was denied.

(iii) *Motion for severance of the charges*

S I T E M A P

The defence based this motion on paragraph 7 (b) of the United States Manual of Courts Martial, 1928.(Footnote 1: For a similar motion in a trial before a British Military Court, see the Belsen Trial, Vol. 11, p. 143 of this series.) The main arguments were that there were 40 defendants and that many of them intended to call some of their co-defendants as witnesses and also that antagonistic defences would be offered by various accused which would prejudice all of them. The prosecution, in reply, argued that the defendants were not prejudiced by a joint trial. The essence of the case was a trial of the staff of Dachau Concentration Camp and the nature of offences each being committed in pursuance to a common design was such as to suggest that the defences of the accused were not antagonistic. The court denied the motion for severance of the charges. Winthrop in his " Military Law and Precedents," page 253, says with regard to Military Commissions : " The granting of a severance at all events is largely a matter of discretion and unless the abuse of it is obviously flagrant, it should not be questioned ".

(iv) *Witnesses' immunity from testifying in war crimes trials*

One witness refused to answer a question because the matter on which he was required to give evidence was a matter which he had sworn not to divulge. The oath referred to was the oath as an official of the government of the

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German Reich. It is a generally recognised rule that the burden of proving that a matter is excluded on ground of privilege is on the person asserting it. It was thus incumbent on the witness in this case to prove that he would be divulging an official secret by answering the question. The chief reason for the protection given to witnesses with regard to official secrets is that the disclosure of them would injure the relationship between the official and the government or injure the State. In this case the oath was an oath of allegiance to the German Reich which no longer exists and there was, therefore, no interest to be preserved or injured. The court did not recognise the immunity of the witness and he was ordered to answer the question.

(v) *The right of cross examination if the accused makes an unsworn statement*

The defence objected to a question, otherwise proper, put by the prosecution to an accused who had taken the stand to make a voluntary unsworn statement. The defence argued that the accused could not be asked incriminating questions in cross examination on such an unsworn statement. The regulations governing the trials before Military Government Courts do not say whether an accused can refuse to answer incriminating questions in cross examination during the course of his unsworn statement, though they provide, contrary to the procedure in Courts Martial that an accused can be cross examined on such an unsworn statement. The accused's objection was overruled by the Court and it seems, thus, that the court held that the accused's right not to incriminate himself is waived as soon as he takes the stand, even if he does so only to make an unsworn

statement. The rights of the other side to cross examine seem to be the same as if the witness was giving evidence on oath.

(2) *Questions of Substantive Law*

(i) *Common Design*

(a) *The evidence necessary to establish common design*

The charge alleged that the accused " acted in pursuance of a common design to commit the acts hereinafter alleged as members of the staff of Dachau Concentration Camp . . did participate in the subjection of. . . (the inmates) . . . . to cruelties and mistreatment ". The charges thus alleged the participation of all accused in a common design to ill-treat the prisoners.

The prosecution rested their whole case squarely on the common design. In his closing address the chief prosecutor said : " If there is no such common design then every man in this dock should walk free because that is the essential allegation in the particulars that the court is trying. As to examination of the specific conduct of each one of the accused, the test to be applied is not did he kill or beat or torture or starve but did he by his conduct, aid or abet the execution of this common design and participate in it ? " To prove this common design, the prosecution adduced evidence that Dachau Concentration Camp was run according to a system which inevitably produced the conditions described by all witnesses, and that the system was put into effect by the members of the camp staff and that every accused was at one time, though not all at the same time, a member of this staff.

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To establish a case against each accused the prosecution had to show (1) that there was in force at Dachau a system to ill-treat the prisoners and commit the crimes listed in the charges, (2) that each accused was aware of the system, (3) that each accused, by his conduct " encouraged, aided and abetted or participated " in enforcing this system.

The defence never seriously contested the existence of the system and it can be said to be common sense that it was quite impossible to belong to the staff for a substantial time, as all the accused did, without being aware of this system. The main point at issue was, therefore, the third, the connection of the individual accused with the common design. It emerges from the evidence adduced by the prosecution, from the speeches of counsel and from the findings of the court that the prosecution established the guilt of each of the accused in one of two ways :

(a) if his duties were such as to constitute in themselves an execution or administration of the system that would suffice to make him guilty of participation in the common design, or,

(b) if his duties were not in themselves illegal or interwoven with illegality he would be guilty if he performed these duties

in an illegal manner.

An example may best illustrate this. If an accused held the position of a Lagerfuhrer (deputy camp commandant) or a Rapportfuhrer (Regimental Sergeant Major) or of an SS Doctor, this could in itself be said to be sufficient proof of his guilt. If, on the other hand, an accused was in charge of the bath and laundry or merely a guard or a prisoner functionary, then it became necessary for the prosecution to prove that he used this position, not illegal in itself, to ill-treat the prisoners.

The guards and prisoner functionaries (block eldest, room eldest and capos) formed the lowest grade of the hierarchy. The defence denied that members of either category could be called members of the staff.

With regard to the SS guards, the prosecution pointed out that they were the men who stood in readiness to prevent any prisoner from extricating himself from this camp. They were thus aiding and abetting in the execution of the common design. The prosecution quoted from Wharton, " Criminal Law", 12th Edition, Vol. I, page 341. If any perpetrator be " outside of an enclosure watching to prevent surprise or for the purpose of keeping guard while his confederates inside are committing a felony, such constructive presence is sufficient to make him a principal in the second degree. No matter how wide may be the separation of the confederates, if they are all engaged in a common plan for the execution of the felony and all take their part in the furtherance of the common design, all are liable as principals ".

As to the prisoner functionaries, the prosecution contended that the expression " staff " was wide enough to include all persons who were engaged in any administrative or supervisory capacity. The test was whether they were appointed by and took their orders from the SS. The evidence showed that both was the case. The court by finding the three guards and the three capos (prison functionaries) amongst the accused all guilty, seems to have upheld the prosecution's contention.

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(b) *Nature and definition of " Common Design "*

The defence argued that the charges were bad in law (1) because the accused were charged with performing various acts in pursuance of a common design and " common design was not a crime ", and (2) that the phrase " common design " was too vague and did not inform the accused of whether or not they had to answer a conspiracy charge. The fallacy of the first argument is that the accused were not charged with common design, but with violations of the laws and usages of war and the manner in which these violations were alleged to have been committed was by participation in a common design to ill-treat and kill the prisoners.

As to the second objection, it appears from the evidence on which the court found the accused guilty and from the arguments put forward by the prosecution that the burden of proof which such a charge placed on the

prosecution, though heavier than in a merely joint charge, is less heavy than in a conspiracy charge. The definition of common design referred to in the trial was " a community of intention between two or more persons to do an unlawful act." (Black, Law Dictionary, 3rd Edition, page 367, citing State against Hill, 273, MO 329, 201 SW 5860.)

This definition does not differ materially from the definition of conspiracy given by Kenny (Outline of Criminal Law, 15th Edition, page 335). " Conspiracy is the agreement of two or more persons to effect any unlawful purpose whether as their ultimate aim or only as a means to it." It seems that the court did not find it necessary specifically to distinguish one offence from the other, though there must be a distinction as common design is inherent in the concept of many joint offences, all of which are not included in the general category of criminal conspiracies.

The evidence adduced by the prosecution seems to fall short of showing a conspiracy among the accused in the strictly technical sense of the term. There is no evidence that any two or more of them ever got together and agreed on a long-term policy of ill-treating and killing a great number of the inmates, and then put this agreement into operation. The accused did not all know each other, nor were they all at Dachau at the same time, but as they came and went the system remained and as each of them took over his position, he adhered to the system.

It seems, therefore, that what runs throughout the whole of this case, like a thread, is this : that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute " acting in pursuance of a common design to violate the laws and usages of war ". Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary. The degree of the participation of each accused found its expression in the sentences which ranged from 5 years' hard labour to death.

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In the Mauthausen Concentration Camp case, (Footnote 1: General Military Government Court of the U.S. Zone, Dachau, Germany, 29th March-13th May, 1946.) where the facts were basically the same-though the casualty figures were much higher as mass extermination by means of a gas chamber was practised-a United States General Military Government Court announced the following special findings after finding all 61 accused guilty of the charges :

" **The court** finds that the circumstances, conditions and the very nature of the Concentration Camp Mauthausen, combined with any and all of its by-camps, was of such a criminal nature as to cause every official, governmental, military and civil, and every employee thereof, whether he be a member of the Waffen SS, Allgemeine SS, a guard, or civilian, to be culpably and criminally responsible."

" The Court further finds that it was impossible for a governmental, military or civil official, a guard or a civilian employee, of the Concentration Camp Mauthausen, combined with any or all of its by-camps, to have been in control of, been employed in, or present in, or residing in, the aforesaid Concentration Camp Mauthausen, combined with any or all of its by-camps, at any time during its existence, without having acquired a definite knowledge of the criminal practices and activities therein existing."

" The Court further finds that the irrefutable record of deaths by shooting, gassing, hanging, regulated starvation, and other heinous methods of killing, brought about through the deliberate conspiracy and planning of Reich officials, either of the Mauthausen Concentration Camp and its attached by-camps, or of the higher Nazi hierarchy, was known to all of the above parties, together with prisoners, whether they be political, criminal, or military."

" The Court therefore declares : ' That any official, governmental, military or civil, whether he be a member of the Waffen SS, Allgemeine SS, or any guard, or civil employee, in any way in control of or stationed at or engaged in the operation of the Concentration Camp Mauthausen, or any or all of its by-camps in any manner whatsoever, is guilty of a crime against the recognised laws, customs and practices of civilised nations and the letter and spirit of the laws and usages of war, and by reason thereof is to be punished."

These special findings contain two findings of fact : (1) that the running of the camp was a criminal enterprise, and (2) that every official who was employed or merely present in the camp at any time must have been aware of the common design, i.e. of the criminality of the enterprise ; and a conclusion of law, that every official who was engaged in the operation of this criminal enterprise " in any manner whatsoever "; is guilty of a violation of the laws and usages of war. By this conclusion in the special findings, together with the findings of guilty of all 61 accused in the Mauthausen Concentration Camp trial and of all 40 accused in the Dachau Concentration Camp trial, the United States Military Government Courts seem to have established a rule that membership of the staff of a concentration camp raises a presumption that the accused has committed a war crime. This presumption may

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inter alia-be rebutted by showing that the accused's membership was of such short duration or his position of such insignificance that he could not be said to have participated in the common design.

(ii) *Special Findings on Group Criminality and Subsequent Proceedings against members of the group*

The directive issued by Hq, USFET, dated 26th June, 1946, provides for the trial of additional participants in mass atrocities when the principal participants have already been convicted. (Footnote 1: See Volume III, pp.

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114 and 117-18 of this series.)

Paragraph 11 (b) (2) of this directive reads : " In such trials of additional participants in the mass atrocity the prosecuting officer will furnish the court with certified copies of the charge and particulars, the findings and the sentence pronounced in the parent case. Thereupon such intermediary military government courts will take judicial notice of the decision rendered in the parent case including the finding of the court that the mass atrocity operation was criminal in nature and that the participants therein acting in pursuance to a common design did subject persons to killings, beatings, atrocities, etc., and no examination of the record of such parent case need be made for this purpose. In such trials of additional participants in the mass atrocity, the court will presume, subject to being rebutted by appropriate evidence, that those shown by competent evidence to have participated in the mass atrocity knew of the criminal nature thereof."

The defence counsel in their petitions against the findings in the Mauthausen main trial raised two questions: (a) whether a Military court has power to announce any findings beyond the findings of guilty or not guilty of the charge, and (b) whether an accused in any subsequent proceedings would be prejudiced by the fact that such findings in the main trial were judicially noticed by the court in the subsequent trials. With regard to the first question, counsel argued that the findings exceeded the allegations of the particulars in the charge and were therefore improper. Winthrop, in his compendious work Military Law and Precedents (2nd Edition, Reprint 1920, page 385) says : " It is a peculiarity of the military procedure that a court martial in its judgment is not confined to a bare acquittal or conviction but may characterise or expand the findings or sentence or accompany it with animadversions, recommendations or other remarks . . ."

With regard to the second question, counsel maintained that the special findings were illegal as they constituted a trial *in absentia* of all those members of the camp staff who were not tried in the main trial. This is not the case. In accordance with the special findings any accused in a subsequent trial is-*inter alia*-entitled to an acquittal if he can prove that he was not aware of the criminal nature of the operation or that the nature and the extent of his participation was such that he could not be said to have furthered the common design to any substantial degree. In view of these defences it cannot be said that he had been found guilty *in absentia*.

Paragraph 11 of the directive is a provision somewhat similar to Article 10 of the Charter, defining the constitution, jurisdiction and functions of the

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International Military Tribunal at Nuremberg. (Footnote 1: Cmd. 6903) Article 10 says : " In cases where the group or organisation is declared criminal by the tribunal, a competent national authority of any signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be

questioned." Thus the declaration of the criminality of the Gestapo, SS, SD, etc., in one case and of the criminality of the camp staffs in the other, are binding on courts in subsequent proceedings and cannot be challenged by the accused in such proceedings. But whereas, according to the judgment of the International Military Tribunal (Footnote 2: Cmd.6964, p. 67), the prosecution in subsequent proceedings against members of criminal organisations have to prove that the accused had " knowledge of the criminal purposes or acts of the organisation ", such knowledge is to be presumed against members of the staff of a concentration camp. In the subsequent trials of such members the burden of proof with regard to *mens rea* is placed on the defendant, who has to show that he did not know of the criminal nature of the enterprise.

The paragraph quoted above from the directive of 26th June, 1946, received application in a series of trials held at Dachau in which ex-members of the concentration camp staff were accused of acting in pursuance of a common design to commit atrocities against camp inmates, the finding in the original Dachau Trial that the mass atrocity operation was criminal being accepted by the tribunals conducting these later trials.

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