

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR GRIMES GROUP
EUROPEAN COMMAND
APO 407

19 November 1947

U N I T E D S T A T E S)

v.)

Case No. 12-45

Albert HEIM, et al.)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 16-18 December 1946, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws of War.

Particulars: In that Albert HEIM, Fritz SAALMUELLER and Herbert KUNZE, German nationals, did, on or about 20 July 1944, at or near WOLLMATINGEN, Kreis KONSTANZ, Germany, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of three members of the United States Army, who were then unarmed and surrendered prisoners of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On 20 July 1944, several American flyers parachuted to earth in the vicinity of Constance and near Wollmatingen, Germany. Two of these flyers were captured and were taken into custody by German soldiers. Accused HEIM, then a major in the German Army, ordered accused SAALMUELLER, then a first lieutenant, to shoot one of the flyers. HEIM then drove away. Accused SAALMUELLER then killed this flyer with a rifle or carbine shot in the chest, while the latter was standing, unarmed, near a wall, his arms upraised. Accused KUNZE, pursuant to an order issued by accused HEIM to the effect that all captured parachuted enemy flyers be killed immediately, shot the other captured flyer two or three times in the back with a pistol, after dismissing the two German soldiers who had had custody of him. After this flyer had fallen, accused KUNZE shot him twice in the head. Accused HEIM was not present.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Albert HEIM

Nationality:	German
Age:	54
Civilian Status:	Unknown
Party Status:	Unknown
Military Status:	Major, German Army
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused, on 20 July 1944, was a major in the German Army (R 19, 93) in command of the 195th Reserve Battalion and of the Cherisy Caserne located at Constance, near Wollmatingen, Germany (R 93, 94). He also was in command at that time of a subsector, comprising the Bodan peninsula, for defense against enemy airborne landing operations (R 8, 18-23, 32, 94, 122). Accused SAALMUELLER (R 57, 58, 72) and KUNZE (R 127, 128) were first lieutenants in the German Army and under the command of the accused on 20 July 1944. From one to five weeks previously, at a meeting of noncommissioned officers, the accused addressed them and emphasized that he did not want to see any enemy flyers alive in the caserne which he commanded (R 9, 11, 45). Prior to 20 July 1944, in that month at an officers' meeting of the accused's battalion, the accused read an order that enemy paratroopers, airborne troops, agents and saboteurs were to be annihilated immediately, and also spoke to that effect, ordering that such enemy persons be immediately "shot dead" and directed strictest observance of the order (R 62, 63, 72, 98, 99, 128). Trial by court-martial was threatened by the accused for non-compliance therewith (R 128). The accused stated that the order had originated in a higher headquarters (R 128). SAALMUELLER (R 62, 63) and KUNZE (R 127, 128) were among the officers who were present in this meeting.

On 20 July 1944, several American flyers parachuted to the ground in the vicinity of Constance and Wellmatingen (R 8, 18-23, 32, 129). There was an air alert (R 100, 129). The accused took SAALMUELLER and two other officers on a drive in an automobile (R 59, 60, 102, 103). An unarmed American flyer (R 7, 28, 42, 73), accompanied by a crowd of about 50 persons which included German soldiers, was met by these officers as they were riding in the automobile (R 16, 43, 61, 103). The accused and the officers accompanying him, including accused SAALMUELLER, stepped out of the automobile in which they had been riding (R 19, 25, 61, 103). According to the accused's own admission, he said to SAALMUELLER: "Airborne troops. This man is to be annihilated" (R 105). According to SAALMUELLER, the accused first said, referring to the flyer, "These are gangsters and are all to be shot" (R 33, 61). Then he looked around and ordered SAALMUELLER: "SAALMUELLER, you shoot him immediately" (R 61). Another witness testified that the accused gave the order: "SAALMUELLER, shoot" (R 19, 20, 25). SAALMUELLER testified that the order of the accused surprised him (R 61) and that when he received it he repeated it in the form of a question, thus: "I am supposed to shoot this flyer (or "Allied flyer") I am to shoot him immediately?" and that the accused responded: "Tell him that he is a gangster; that is sufficient" (R 61). The accused, immediately after concluding his directions to SAALMUELLER concerning the disposition of the flyer gave a general order relating to security, re-entered his automobile and rode away without waiting for SAALMUELLER to execute the accused's order to kill the flyer (R 25, 62, 105). SAALMUELLER then killed the flyer by shooting him with a rifle or carbine (R 9, 12, 14-16, 24, 33, 37, 42, 62, 74).

After ^{the} air alert on 20 July 1944 (R 129), accused KUNZE took his bicycle and rode out from the caserno and after he had travelled about 500 to 600 meters an automobile came along in which the accused was standing (R 132). KUNZE speeded up so as to keep

as close behind the accused as possible (R 132). The automobile was stopped and KUNZE saw a flyer standing in a crowd of persons, some of whom were in uniform (R 132, 133). KUNZE rode toward the crowd and saw the accused get out of the automobile and heard him shout in a loud voice: "All of them will be shot immediately" (R 133). Shortly afterward, the accused rode away in the automobile and KUNZE followed it on his bicycle (R 133). In Wollmatingen, KUNZE encountered a troop of soldiers who were marching toward the caserne (R 133). He changed direction and rode toward the caserne (R 134). After arriving in the vicinity of the caserne, KUNZE saw two German air force soldiers approaching leading an unarmed American flyer between them (R 33, 34, 42, 136). Because of the order which he had heard repeatedly to the effect that enemy flyers were to be killed immediately, KUNZE decided to shoot the flyer (R 137) and forthwith killed him by shooting him with a pistol (R 33, 34, 39, 41, 137). The accused stated he felt very remorseful because of the above-related incident of 20 July 1944 (R 113, 114).

Evidence for Defense: When the accused took command of the 195th Reserve Battalion and of the Cherisy Caserne about May 1943 (R 94), his predecessor passed on to him an order (R 94, 98), the contents of which were that units of paratroopers, units employed in airborne attacks and commandos were to be annihilated immediately and that every officer who captured enemy prisoners of these types would be tried by court-martial (R 98). The accused considered it his duty to have the American flyers killed, who were killed on 20 July 1944 (R 123).

Late in May 1944, an editorial by Reichminister Goebbels, entitled "A Word on the Enemy Air Terror", dealing with the treatment of enemy flyers, was published in a weekly newspaper and this was broadcast weekly (R 96-98; D-Ex 2). This editorial said in part:

"Even the arbitrary methods of warfare of the Anglo-Americans must end somewhere. The pilots cannot say that they as soldiers acted upon orders. It is not provided in any military law that a soldier is (sic) the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare. Our century (sic) has obliterated to a great extent the boundaries between warfare and crime on the part of the enemy. It would be demanded (sic) too much of us to expect that we should silently accommodate ourselves as victims to this unlimited barbarity."

Sufficiency of Evidence: The evidence that the accused ordered his subordinates, SAALMUELLER and KUNZE, to kill immediately any enemy flyers captured, and that he personally ordered SAALMUELLER to kill a captured American flyer was substantial and not contradicted. On behalf of the accused, the defense was presented that he had, himself, thus ordered these subordinates to kill captured enemy flyers in obedience to orders to that effect issued to him by his military superiors. However, there is substantial evidence that despite the issuance of such superior orders, the accused acted independently of them and on his own deliberate volition in giving the orders to his subordinates to kill captured enemy flyers. This was revealed in his statement to SAALMUELLER accompanying his order to the latter, viz: "These are gangsters and are all to be shot"; "Tell him that he is a gangster; that is sufficient". Having thus acted independently and of his own volition, as these statements show, the defense of superior orders in mitigation was not applicable on his behalf. Furthermore, the accused was under no immediate compulsion. No military or other superior of his was present when he gave the orders to his own subordinates. Thus, the accused failed to sustain the burden of proof required of him in international law by pertinent authorities discussed in Section V, post, in respect of mitigation of punishment.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: Petitions for Review were filed by Mr. Frank L.

Walters, Chief Defense Counsel, 11 February 1947 and 22 September 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

2. Fritz SAALMUELLER

Nationality:	German
Age:	42
Civilian Status:	Mayor
Party Status:	Unknown
Military Status:	First Lieutenant, German Army
Plea:	NG
Findings:	G
Sentence:	Life imprisonment

Evidence for Prosecution: On 20 July 1944, the accused was a first lieutenant in the German Army and under the command of accused HEIM, then a major, and was stationed in the Cherisy Caserne at Constance, near Wallmatingen, Germany (R 57, 58, 73). In July 1944, prior to 20 July, the accused as a member of HEIM's command, attended a meeting at which HEIM read an order that enemy paratroopers, airborne troops, agents and saboteurs were to be annihilated immediately and also spoke to that effect, ordering that such enemy persons be immediately "shot dead" and directed strictest observance of this order (R 62, 63, 72, 75, 80, 98, 99, 128), threatening trial by court-martial for non-compliance therewith (R 127, 128). On 20 July 1944, several American flyers parachuted to earth in the vicinity of Constance and Wallmatingen (R 3, 18-23, 32) and there was an air alert (R 100). HEIM took the accused and two other officers on a drive in an automobile (R 59, 60, 102, 103) and as they were riding they encountered an unarmed American flyer (R 7, 28, 42, 73) who was accompanied by a crowd of about 50 persons, which included German soldiers and civilian men and women (R 16, 43, 61, 103). The officers, including HEIM and the accused stepped out of the automobile (R 19, 25, 61, 103). HEIM stated that he said to the accused: "Airborne troops. This man is

to be annihilated" (R 105). The accused stated that HEIM said to him, referring to the flyer, "These are gangsters and are all to be shot" (R 61, 133). HEIM ordered the accused to shoot the flyer immediately (R 19, 20, 25, 61). SAALMUELLER stated that the order surprised him (R 61) and that, upon hearing the order, he repeated it to HEIM in the form of a question, as follows: "I am supposed to shoot this flyer (or "Allied flyer") . . . I am to shoot him immediately?" and HEIM then said to the accused: "Tell him that he is a gangster; that is sufficient" (R 61). HEIM then gave a general order relating to security, re-entered his automobile and rode away (R 25, 62, 105). The accused then killed the flyer by shooting him once in the chest with a rifle or carbine (R 9, 12, 14, 15, 33, 37, 38, 42, 62, 74, 78), as he stood near or against a wall about 6 or 7 meters from the accused with his hands raised (R 9, 16, 33, 78).

Evidence for Defense: The accused testified that when accused HEIM ordered him to shoot the flyer he was surprised because it was not a pleasant task for him to shoot another person (R 73) and that he considered himself "in combat" even when the flyer was standing unarmed against a wall with his hands raised (R 73, 74).

Sufficiency of Evidence: The evidence is conclusive and undisputed that the accused committed the killing charged. With respect to the claim that this accused acted in obedience to the order of his military superior, HEIM, the evidence is substantial and strong that the accused was fully aware that HEIM gave him the order to kill the flyer as a personal order and obviously an illegal one for the accused himself testified that HEIM accompanied his order to the accused with the remarks: "These are gangsters and are all to be shot" and "Tell him that he is a gangster; that is sufficient" (R 61, 133), revealing that HEIM gave the order because of his own desire and personal volition that the flyer should be assassinated and not in the course of considered military duty. In addition, the evidence shows that this accused, after the order

was first given him directly by HEIM, hesitated and weighed in his mind the nature of the order, repeating it in the form of a question to HEIM (R 61). The accused testified that he was surprised at the order because it was not a pleasant task for him to shoot another person (R 73), indicating that he realized the illegality of the order. The evidence shows further, indisputably, that after HEIM a second time revealed the latter's personal homicidal motivation impelling his giving of the order, by saying: "Tell him that he is a gangster; that is sufficient" (R 61), The accused carried out the illegal order, not with HEIM present, for the latter had departed, and thus without the presence or immediate compulsion of the latter. Of his own volition and after deliberation, he killed the unarmed flyer while he stood against a wall with his hands raised (R 9, 12, 14-16, 33, 37, 38, 42, 62, 74, 78). The statement of the accused that he considered himself "in combat" with the flyer at this time (R 73, 74) manifestly is not only absurd but frivolous. The accused failed to sustain the burden of proof required of him by pertinent authorities discussed in Section V, post, in respect of mitigation of punishment.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: Petitions for Review were filed by Mr. Frank Walters, Chief Defense Counsel, 11 February 1947; and Dr. Max Burger, associate defense counsel, 27 December 1946. Petitions for Clemency were filed by Marin Seiler, 23 October 1946; Eugene Guillard, 5 December 1946; and Goes, 20 December 1946.

Recommendation: That the findings and sentence be approved.

3. Herbert KUNZE

Nationality:	German
Age:	23
Civilian Status:	School teacher
Party Status:	Unknown
Military Status:	First Lieutenant, German Army

Plea:

NG

Findings:

G

Sentence:

Death by hanging

Evidence for Prosecution: On 20 July 1944, the accused was a first lieutenant in the German Army and under the command of accused HEIM, then a major, and was stationed at Constance, Germany (R 127, 128). In July 1944, prior to 20 July, the accused, as a member of HEIM's command, attended a meeting at which HEIM read an order which directed that enemy paratroopers, airborne troops, agents and saboteurs were to be shot immediately and trial by court-martial was threatened for non-compliance with the order (R 62, 63, 72, 75, 80, 99, 127, 128). On 20 July 1944, several American flyers parachuted to earth in the vicinity of Constance and Wollmatingen (R 8, 18-23, 32, 129). There was an air alert (R 100, 129). The accused took his bicycle and rode out from the caserne at Constance and after he had travelled about 500 to 600 meters, an automobile came along in which accused HEIM was standing (R 132). The accused speeded up so as to keep as close behind HEIM as possible (R 132). The automobile was stopped and the accused saw a flyer standing in a crowd of persons, some of whom were in uniform (R 132, 133). The accused rode toward the crowd and saw HEIM get out of the automobile and heard him shout in a loud voice: "All of them will be shot immediately" (R 133). Shortly afterward, HEIM rode away in the automobile and the accused followed on his bicycle (R 133). In Wollmatingen, the accused encountered a troop of soldiers who were marching toward the caserne (R 133). He changed direction and rode toward the caserne (R 134). After arriving in the vicinity of the caserne, the accused saw two German soldiers leading an unarmed American flyer between them (R 33, 34, 42, 136). The accused was under the impression that the flyer was offering resistance (R 136). He was brought to the accused (R 136). The accused questioned the soldiers who had custody of the flyer and was told that a sergeant of antiaircraft artillery had taken the

flyer's parachute, a map and a pistol from the flyer (R 137). The accused then decided to shoot the flyer (R 137) and ordered the two soldiers who had custody of the flyer to lead him toward a ditch located near a gate of the caserne (R 137), and then dismissed the soldiers (R 33). With his hand, the accused pushed the flyer forward (R 33, 39) and then shot him two or three times in the back with a pistol (R 33, 140). The flyer fell forward to the ground and turned onto his back (R 33, 140). A sergeant, standing close to the accused said: "He is stretching. He is dead" (R 140). Then an unidentified person present said to the accused: "Lieutenant, shoot again; he is not dead yet" (R 140). Then the accused shot the flyer twice more (R 33, 140) "so that he wouldn't suffer" (R 140). At the time when the accused shot this flyer, he was offering no resistance (R 34, 140).

Evidence for Defense: The accused decided to shoot the flyer because of (R 137) the order issued by HEIM at the officers' meeting above mentioned, directing that enemy paratroopers, airborne troops, agents and saboteurs were to be shot immediately (R 62, 63, 72, 75, 80, 99, 127, 128) and because of (R 137) the order he had heard HEIM shout: "All will be shot immediately", when a short time previously, he had seen HEIM get out of the latter's automobile after he had followed HEIM's automobile on a bicycle (R 133). The accused shot the flyer again after the latter had fallen to the ground from the first shots the accused had fired into him, "so that he wouldn't suffer" (R 140).

The accused stated that he understood that, under German military law in July 1944, obedience to the order of a military superior was a valid defense (R 145, 146); also that German military law at that time required absolute obedience to an order of a military superior, affording to the person to whom an order had been given only the recourse of protesting after execution of the order and disclaiming personal responsibility therefor (R 145).

Sufficiency of Evidence: The evidence is conclusive and undisputed that the accused committed the killing charged. It also is conclusive and undisputed that although the accused committed the killing in accordance with orders given by his commanding officer, HEIM, that captured enemy flyers were to be killed, the killing by the accused was done in consequence of his own deliberate decision and outside of the presence and without any immediate compulsion of HEIM or anyone else. The order given by HEIM manifestly was an illegal one. The accused could not have been unaware of its patent illegality. The manner of his killing the defenseless flyer, by pushing and then shooting him in the back (R 33, 34, 39, 140) and then shooting him again after he had already been shot at least twice (R 33, 140), reveals the deliberateness of his own volition in the perpetration of the deed. The evidence on behalf of this accused as to superior orders clearly fell short of sustaining the burden of proof required by pertinent authorities discussed in Section V, post, in respect of mitigation of punishment.

Petitions: Petitions for Review were filed by Mr. Frank L. Walters, Chief Defense Counsel, 11 February 1947 and 22 September 1947, and by Dr. Max Burger, associate defense counsel, 27 December 1946. Petitions for Clemency were filed by Artur Albrecht, Horst Bennemann and Walter Driebusch, 30 December 1946; Bronno, 13 January 1947; Brunicke, 13 January 1947; Otto Ludwig Funk, 14 January 1947, Gisela Funk, 14 January 1947; Dr. Fritsche, 15 January 1947; Gisela Haase, 17 January 1947; Gerhard Tschopp, 21 January 1947; Dr. Herbert Krause, 20 January 1947; Haase, 22 January 1947; and Dr. Albert Ristow, 28 January 1947.

Recommendations: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: It is clear that the Court had jurisdiction of the persons of the accused and of the subject matter. In a Supplemental Petition for Review and a Petition for Stay of Execution of Sentences filed on behalf of accused HEIM and KUNZE it has been

asserted that the Court "was not duly constituted" and therefore "was without jurisdiction". No specific ground for this assertion was stated or indicated. Nor is any ground apparent on which this assertion could be based. Therefore, the contention cannot be considered to have any merit. The same observations are evoked by the assertion in these petitions that "The accused were denied during the trial several rights guaranteed to accused persons under the constitution and laws of the United States of America and they were therefore denied a fair and impartial trial and due process of law." No particular or mode is apparent from the record wherein any of the accused were denied or deprived of a fair trial or any right pertaining thereto. Again, in the absence of specification by the defense of any particular wherein a fair trial or any right pertaining thereto was denied to any of the accused, this assertion, also can only be regarded as without merit.

In the above-mentioned petitions it also has been asserted that the Court lost "jurisdiction" over accused HEIM and KUNZE because they were not proved guilty of any war crime. Apart from the point that this assertion, stated in terms of "loss of jurisdiction", admits impliedly that the Court did have jurisdiction of the persons of the accused and of the subject matter when the trial began, the contention presented does not relate to "jurisdiction", in that proper sense, but relates solely to the correctness of the Court's determination. The substance of the contention, as presented in these petitions, is that the Court's findings that accused HEIM and KUNZE were guilty of war crimes were incorrect because the acts they were charged with were committed in obedience to "superior orders"; and that such obedience constituted a complete defense as to each of the accused. This also was contended in a Petition for Review filed on behalf of all three of the accused. The merits of this contention will now be examined.

Superior Orders:

"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." (Oppenheim, "International Law", Vol. II, Sixth Edition, 1944, page 452).

Other authorities to the same effect are: Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 812; French Republic v. Wagner, et al., Court of Appeals (France), July 1946; United States v. Thomas, opinion DJAWC, December 1945; United States v. Klein, et al., (Hadamar Murder Factory Case), opinion DJAWC, February 1946. An analogous rule has been applied in Anglo-American municipal law (Mitchell v. Harmony, 13 How. (U.S.) 115, (1851); 1 Wharton, Criminal Law (12th Ed. 1932) pps. 175, 176). In the Llandovery Castle Case, Annual Digest (1923-24), Case No. 235 (1921) the German Supreme Court held that the defense of superior orders afforded no justification for an act manifestly in violation of International Law (Oppenheim, op. cit. supra, p. 455; 16 American Journal of International Law, page 708).

The contention that obedience to superior orders was a complete defense for the accused in this case has been rested on the following provision of Section 347 of the War Department, U.S. Army, "Basic Field Manual", "Rules of Land Warfare", FM 27-10, (1940) relating to offenses against the laws of war:

"Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders."

Under date of 15 November 1944, the following provision was added to this Manual as "Change No. 1":

"345.1 Liability of offending individuals - Individuals and organizations 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 defense or in mitigation of punishment."

The argument of the defense, as presented in the Petition for / filed on behalf of all the accused, is that Section 347 of the Basic Field Manual, as it stood in July 1944, when the acts with which the three accused were charged were committed, was applicable as law to their acts, conferring upon them as a complete defense their alleged obedience to superior orders, and that the above quoted provision of Section 345.1, having been adopted subsequently to the commission of the acts with which they were charged, this provision or its expressed principle that obedience to superior orders is not a defense for offenses against the laws of war could not legally be applied by the Court and that application of that principle in this case constituted an ex post facto application by the Court of the above quoted provision of Section 345.1 in violation of the inhibition contained in Article I, Section 9, of the United States Constitution and contrary to "the laws of all other nations".

The answer to the contention of the defense that obedience to superior orders was a complete defense for those accused and to the arguments of the defense based upon the Basic Field Manual FM 27-10 is that this Manual and neither Section 347, thereof, as it stood unmodified in July 1944, when the acts charged against these accused were committed, nor the subsequently added section 345.1, thereof, were or are applicable as law to those acts and to those accused but that the principle that obedience to superior orders is not a defense for acts constituting war crimes, as that principle is stated in the above quotation from Oppenheim, op, cit. supra, 453, was and is the law of the case operative upon the acts committed by these accused.

The Basic Field Manual (FM 27-10) and Section 347 thereof have no **juridical** authority or applicability in or to the present case. The Manual is not and is not purported to be a legislative or **juridical** instrument or promulgation of international law or the

laws of war. Patently, it does not have or is not purported to have any judicial or adjudicative character or effect. Nor could such a publication, even though promulgated with the sanction of the government of a nation, have juridical effect in international law, since that is law between and among nations solely. It could, at most, constitute merely a directive to persons subject to the authority of the issuing agency or government. That it has not been published as a legislative or juridical instrument in international law is apparent from the Manual itself, which, as is explained in Section 5, page 2, thereof, has set forth in bold-faced type the written rules which have been "prescribed by treaties or conventions, each of which has been ratified without reservation, and not thus far denounced, by the United States and many other nations", and in Section 5, page 2, thereof, has declared concerning only those rules, thus set forth in bold-faced type, that they are to be enforced by United States forces in the field and subject to qualification, viz:

"As a general rule they will be strictly observed and enforced by United States forces in the field, as far as applicable there, without regard to whether they are legally binding upon all of the powers immediately concerned. It is the responsibility of higher authority, as occasions arise, to determine and to instruct the commander in the field, which, if any, of the written rules herein quoted are not legally binding as between the United States and each of the other powers immediately concerned, and which, if any, for that reason are not for the time being to be observed or enforced" (Section 5, page 2).

Section 347 and the provision therein already quoted above, that

"Individuals . . . will not be punished for . . . offenses . . . committed under the orders or sanctions of their government or commanders",

has been printed, not in bold-faced type but in ordinary type. Thus, clearly, this provision has not been set forth in the Manual with the purport or intended effect of being directive or mandatory even upon the United States forces in the field. It can, therefore, only be considered, at most, as an intended statement of

information or as the expression of a view on the subject concerned.

In the British Manual of Military Law, a change corresponding and similar to, though not identical with, that made on 15 November 1944 in the War Department, U.S. Army Basic Field Manual (FM 27-10) was adopted in April 1944. Prior to that change, the British Manual declared in paragraph 443 (Chapter XIV) that:

"Members of the armed forces who commit such violations of the recognized 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 other means of obtaining redress"

In April 1944, the provisions just quoted were replaced by the following sentences, the first of which, it will be noted, is a verbatim quotation of Oppenheim's statement of the applicable rule of international law, as set forth above in this discussion (Oppenheim, *op. cit.*, *supra*, p. 453):

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

Commenting on paragraph 443 of the British Manual of Military Law, quoted above, and to an earlier edition than the 1940 edition of the War Department, U.S. Army, "Rules of Land Warfare" (Basic Field Manual, FM 27-10) and referring to statements in these Manuals to the effect that obedience to superior orders was a complete defense to or afforded complete immunity from punishment for acts otherwise constituting war crimes, Oppenheim (*op. cit.*,

supra, pp. 453, 454) has remarked:

"A different view has occasionally been adopted in military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle."

However, as has been noted above concerning the War Department, U.S. Army Basic Field Manual, the statements in these Manuals declaring that, prior to recent changes, obedience to superior orders constituted a defense or conferred immunity from punishment are immaterial and present only an apparent, and not a real, legal problem in the present case because these Manuals have no legislative or juridical authority or force in international law. That they do not have, has been adjudicated both in reference to the British Manual of Military Law and the War Department, U.S. Army, Basic Field Manual (FM 27-10), specifically of paragraph 443 of the former and of Section 347 of the latter, as the provisions of these Manuals existed prior to April 1944 and 15 November 1944, respectively.

In The Palau Trial, "Law Reports of Trials of War Criminals", (English Edition, 1947), Volume I, page 1, published by the United Nations War Crimes Commission, a British Military Court held in October 1945, at Hamburg, Germany, that paragraph 443 (Chapter XIV) of the British Manual of Military Law, which stated that acts committed in obedience to superior orders "cannot be punished" was inapplicable although this provision stood unaltered at the time of the commission of the acts charged. The tribunal in this case imposed the death penalty on the two accused on whose behalf this provision was presented in defense and in mitigation of punishment.

That the War Department, U.S. Army, Basic Field Manual (FM 27-10) ¹⁹⁴⁰ and Section 347, thereof, quoted above, had no juridical or legislative authority or effect in international law was held by a United States Military Commission in Rome, Italy, in October 1945, in The Destler Case, "Law Reports of Trials of War Criminals" (English edition, 1947), Volume I, page 22. It may be noted that in this case the defense submitted that for the Court to adjudge

the accused guilty, notwithstanding that this provision of the War Department, U.S. Army, Basic Field Manual had not been changed at the time of the commission of the acts charged, would be to subject the accused to a different law than that which had existed at that time, i.e. to ex post facto law, contrary to the maxim "nullum crimen sine lege, nulla poena sine lege". To this contention, the Prosecution pointed out that this maxim is confined to municipal law and has no operation in international law. In that case, the defense contended that obedience to superior orders constituted a complete defense because the declaration of Section 347 of the Basic Field Manual (FM 27-10, 1940) that "individuals . . . will not be punished for . . . offenses . . . committed under the orders or sanction of their government or commanders" existed at the time when the acts charged were committed and Section 345.1 of that Manual, declaring that "Individuals and organizations who violate the accepted laws and customs of war may be punished therefor" (notwithstanding that the acts constituting violations thereof were committed in obedience to superior orders), had not then been adopted. The Commission, however, held that such obedience was not a valid defense, despite the above quoted provision of Section 347 of the Basic Field Manual, thereby necessarily deciding that that provision was uncontrolling, inoperative and inapplicable as law in the case. It should be noted, also, with reference to the further provision of Section 345.1 that obedience to superior orders "may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment"; that the Commission imposed the death penalty on the accused for the acts to which obedience to superior orders was presented in defense and in mitigation of punishment.

Since neither Section 347 nor Section 345.1 of War Department, U.S. Army, Basic Field Manual (FM 27-10), had operation or effect as law in the present case, the Court, although it applied as law the international law rule which had the same effect and operation

as the statement adopted in Section 345.1 of the Basic Field Manual (FM 27-10) declaring obedience to superior orders not a defense, could not and did not apply that statement or that Section, itself, as law in this case. Therefore, there can be no basis for the contention that the Court applied that statement or that section as law, *ex post facto* contrary to Article I, Section 9 of the United States Constitution. Moreover, it may be noted that the United States Constitution is not a part of and is not juridically applicable in international law. It has no controlling operativeness or effect therein as law, either substantively or procedurally. International law, as such, is not subject to the United States Constitution or any provision thereof. (See *Ex parte Quirin*, 63 Sup. Ct. (U.S.) 2, 10, (1942); *The Paquete Habana*, 175 U.S. 677, 700, (1900); Hyde, *International Law* (1922) 11, 12.)

The discussion above has concerned simply the contention that these accused had a complete defense, that is, complete immunity from punishment upon the asserted ground that their acts were committed in obedience to superior orders. As has been pointed out, there is no such complete defense or immunity afforded under the rules of international law. However, as distinguished from recognizing obedience to superior orders as a defense or as affording, in itself, immunity from punishment, international law does authorize a court before which an accused is tried for an offense against the laws of war to consider in mitigation of punishment that the accused acted in obedience to an order "not obviously unlawful" and subject to "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." (Oppenheim, *op. cit.* supra, pp. 452, 453). An accused who seeks mitigation of punishment on the ground that he acted in obedience to superior orders

an order from a superior directing that he commit a wrongful act but in addition (b) that he did not know; or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; Oppenheim, "International Law", op. cit. supra, and The Llandovery Castle Case, supra, cited therein; "Report to the President of the United States", 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of Our Enemies", found in footnote, page 53, "Military Occupation and the Rules of the Law", by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945, United States v. Thomas, supra; and United States v. Beck, et al., opinion DJAWC, December 1946.)

None of these accused acted under immediate compulsion. No superior of accused HEIM was present with him. Accused SAALMUELLER committed his act of killing after HEIM had departed after giving his order to kill and admittedly after deliberation over the unpleasantness of the task of killing a fellow human being. Accused KUNZE committed the killing he is charged with on his own decision, according to his own admission, and neither HEIM nor any other superior of accused KUNZE was present.

All these accused, it is established by the evidence, were fully aware that the order under which each of them has claimed to have acted was illegal and contrary to the accepted standards of human conduct. All had had brought to their attention the editorial of Goebbels, presented in their own defense (R 96-98; D-Ex 2) and paradoxically resorted to on their behalf in excuse for

their acts, which itself contained this declaration:

"It is not provided in any military law that a soldier is (sic) the case of a despicable crime is exempt from punishment because he passes the responsibility to his superior, especially if the orders of the latter are in evident contradiction to all human morality and every international usage of warfare."


It is manifest from the evidence that all three of the accused have failed entirely to sustain the burden of establishing the propositions, outlined above, required to merit consideration of the claim of obedience to superior orders in mitigation of punishment.

Examination of the entire record fails to disclose any error or omission which resulted in injustice to any of those accused.

VI. CONCLUSIONS:

1. It is recommended that the findings and the sentences be approved.

2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.


RAYMOND J. HEILMAN
Major Inf.
Post Trial Branch

Having examined the record of trial, I concur, this 23rd day of December 1947.


C. E. STRAIGHT
Lieutenant Colonel, JAGD
Deputy Judge Advocate
for War Crimes