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INTERNATIONAL LAW ON USE OF ENEMY UNIFORMS AS A STRATAGEM AND THE ACQUITTAL IN THE SKORZENY CASE

MAXIMILIAN KOESSLER*

I. INTRODUCTION

Prior to the trial, by an American military commission entitled "Military Government Court,"¹ of Otto Skorzeny and his codefendants,² which trial took place in Dachau between August 18 and September 8, 1947, and ended with an acquittal of all the defendants, the international law on legitimacy or illegitimacy of the use of enemy uniforms as a stratagem was not settled in so far as use outside open combat was concerned, as will be later on discussed at some length. One writer has expressed the view that the outcome of that trial supports the view "that such deception is permissible if not done in battle."³ However, this is not necessarily so. In the trials conducted by the War Crimes Group of the U.S. Army of occupation in Germany, including the Skorzeny case, the judgments, at variance with the Nuremberg judgments, consisted of bare verdicts of guilty or not guilty, in case of conviction accompanied by announcement of the sentence, but did not contain findings of fact nor anything in the nature of legal reasoning. In certain simple cases the basis of the verdict appears, as a matter of implication, from the verdict itself. But this is otherwise where, as in the subject case, so many facets of fact and law are involved that the acquittal may be ex post facto rationalized on any of several grounds or on two or more of them. It is therefore pointed out in a publication of the United Nations War Crimes Commission that "no safe conclusion can be drawn from the

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²The voluminous trial record was perused by the writer through courtesy extended by the War Crimes Division, U.S. Department of the Army.

acquittal of all accused" in the *Skorzeny* case as to the scope of legitimate use of enemy uniforms as a stratagem. While the case has thus little, if any value, as a judicial declaration settling a point of international law with regard to which the experts do not agree, it may have been the basis of the definite position taken by the United States Department of the Army in an official publication subsequent to the Skorzeny trial that the use of enemy uniforms as a ruse is forbidden "during combat, but their use at other times is not forbidden." At any rate, however its outcome may be explained, and whatever conclusions may thus be drawn therefrom as to any legal ruling implied therein, the case, which has so far been covered only in a very succinct way, is historically and juridically important enough to deserve such a full discussion of facts and law involved as is attempted herewith.

II. HISTORICAL BACKGROUND

To place the case against its historical background, we must briefly refer to the Battle of the Bulge and to what had caused Hitler to entrust an important mission in that campaign to Otto Skorzeny.

A. The Battle of the Bulge

Like the Malmedy Massacre case, tried in Dachau between May 16 and July 16, 1946, which has been probed by the United States Senate because of highly questionable methods applied in the pre-trial investigation, the *Skorzeny* case goes back to that last offensive flareup of Hitler's "Wehrmacht" which is in this country usually referred to as the "Battle of the Bulge," in Germany as the "Eifel Offensive," and is also known as the "Ardennes" and as the "Von Rundstedt" offensive. Significantly covered by a distinguished author in a chapter entitled "Hitler's Last Bid," that offensive was planned to break up the Allied
front by driving a wedge into it in an area close to the German-Belgian border. This strategic masterplan was Hitler's own invention. And convinced of his superior military genius he stuck to it despite objections raised by some of his top military advisers. Among the major German units to which he entrusted the carrying out of his plan, were elements of the Sixth SS Panzer Army, commanded by General of the SS Josef ("Sepp") Dietrich. A formation within the Sixth Army was the "Combat Group Peiper," which was supposed to spearhead the break-through with lightning speed and members of which were involved in the Malmedy Massacre. Skorzeny's Brigade, of which we shall have more to say later, was for certain purposes attached to the Sixth Army and in part operating in conjunction with Peiper's Combat Group. The attack began on December 16, 1944, took the Allied intelligence and strategic experts by surprise, proceeded in the beginning with rapidity and success, but was soon halted and repelled. It collapsed, however, only after having caused numerous casualties on both sides. There were some critical moments for our troops in the course of this bloody campaign. But final German defeat was acknowledged by Hitler on January 9, 1945, in authorizing Von Rundstedt, at his request, to order a general withdrawal of the German forces. The failure of the offensive, which according to the "Fuehrer's" day dream was bound to turn the tides of the war in Europe, was an important part of the "death of Hitler's Germany," to borrow a phrase coined by a French writer colorfully covering the vicissitudes of that campaign the planning of which was the military swansong of the German dictator.

B. Skorzeny's Pre-Battle-of-the-Bulge Career

Otto Skorzeny, whose remarkable exploits under the Hitler regime are, in the writer's belief, too enthusiastically described in a book obviously inspired by himself, is one of those devoted adepts of nazism who were not adversely affected in a substantial way by the consequences of the collapse of the Hitler regime in Germany. After his release, following his acquittal in the war crimes trial, he left the "fatherland" and, according to newspaper reports, has engaged abroad in what may be called neo-nazi propaganda. Unquestionably, however, his most adven-
turous and to a measurable extent successful undertakings during the Hitler era characterize him as a man possessing a high degree of personal courage, resourcefulness and dexterity. Despite his Hungarian name a native Austrian, he became, after the German annexation of that country, euphemized by Hitler as “Anschluss,” a member of that part of the German army which originally was composed only of members of the Party’s SS who volunteered for regular military service and was therefore called “Waffen SS.” By his conduct during the war, in combat as well as on other military occasions, he earned praise of his superiors and recognition of his extraordinary capacities, expressed by giving him special assignments and by calling the attention of Hitler in person to the potentialities inherent in him. This bore fruit when Skorzeny, then a captain in the Waffen SS, was in July 1943 called before Hitler and by the latter entrusted with the task of organizing a parachute action to rescue Mussolini, then believed by the Germans to be detained on the island of Elba. Before engaging in such action, Skorzeny, on his own initiative, procured intelligence to the effect that Mussolini was actually detained in a hotel on the Grande Sasso, a mountain group forming part of the Appenines. His report thereon, given at a second conference with Hitler in person, was approved as the basis for the kidnap-liberation of Mussolini, which was thereupon planned by Skorzeny and with his personal participation successfully carried out. This achievement, broadcast by newspaper bannerlines all over the world and celebrated in Germany as a great triumph, was rewarded by Skorzeny’s promotion to Lt. Colonel. He had before been charged with the organization of a unit to be called “Jagdstaffeln” and to be formed after the pattern of the British Commandos and the American Rangers. While he was engaged in carrying out this assignment, he was, in the course of the planning of the Ardennes offensive, again called before Hitler to receive the mission described later.

III. LEGAL BACKGROUND

To trace the international law background of the charges raised against the defendants in the Skorzeny case, we must first deal with

14. There were originally ten defendants. But after the prosecution had rested its case and prior to the introduction of defense evidence two were acquitted, one on a nolle prosequi motion of the prosecution, the other in partial grant of a defense motion to acquit all the accused on the ground that the prosecution had not presented even a prima facie case. There remained thus eight defendants for final judgment, Skorzeny himself and the following who had had officers’ ranks in his Brigade: Wilhelm Kocherscheid, the one who, as will be seen later, was singled out by the
the indictment or "charge sheet" as it was called in those trials\textsuperscript{15} and thereupon cover certain rules established by multipartite international treaties.

A. The Charges

The accusation consisted originally of four counts, but one of them, charge II whereby the defendants were charged with unlawful treatment of prisoners of war and which rested on an initial suspicion that they had participated in the atrocities tried in the Malmedy Massacre case, was withdrawn by the prosecution when it rested its case since there was a complete lack of evidence in this respect. The substance of the other three accusations was that "acting in pursuance of a common design\textsuperscript{16} they had within a specified period of time and in a generally indicated geographical region encouraged, aided, abetted and participated in the following:

\begin{itemize}
\item [charge I] improper use of the military insignia, badges, emblems, markings, and uniforms of the Armed Forces of the United States of America by entering into combat disguised therewith and treacherously firing upon and killing members of the Armed Forces of the United States of America
\item [charge III] removing, appropriating, and using uniforms, identification documents, insignia of rank, decorations, and other effects and objects of personal use in the possession of members of the Armed Forces of the United States, who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich
\item [charge IV] obstructing and preventing the delivery of Red Cross and other parcels, containing food and clothing, consigned to members of the Armed Forces of the United States of America, who were then and there surrendered and unarmed prisoners in the custody of the then German Reich
\end{itemize}

All this was contained in that part of the charge sheet which was entitled "Particulars" and which was in the following respect alike

\begin{itemize}
\item evidence as having committed a homicidal act; Philipp von Behr; Ralph Bellstedt; Guenther Fitz; Hans Hass; Dennis Muentz; and Walter Scherf.
\item It was called by this name because drawn in the form designated "charge sheet" that was then in use in court martial cases.
\item For legal difference between "common design" and conspiracy charges, see 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 94-98 (1949).
\end{itemize}
with the "Particulars" set forth in other cases involving a great number of defendants, tried under the auspices of the War Crimes Group of the U.S. Army of occupation in Germany. There was no particularization of the specific acts charged to have been committed by the several defendants individually, a feature which is far from the ideal form of "Particulars," it would seem. And similarly amounting to a lump accusation was the first part of the charge sheet in which the defendants were without reference to any specific principle or rule of international law accused of "violation of the laws and usages of war."

From the quoted parts of the accusation it appears that in count I the defendants were charged with use of American uniforms and other American military paraphernalia "by entering into combat disguised therewith" as well as "treacherously" in combat action; that count III charged them with procurement of such uniforms and other paraphernalia from the personal possession of American prisoners of war; and that count IV referred to the fact, proved in the course of the trial, that to procure things to be used for camouflage purposes Red Cross parcels destined for American prisoners of war were requisitioned in the course of outfitting members of Skorzeny's Brigade.

B. Pertinent Hague Regulations

The Hague Regulations of 1907, which are universally recognized as the primary source of the international law governing land warfare, contain the following provisions closely or remotely bearing on the subject of count I of the described charges. Article 23(f) specifically prohibits "improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention." This is preceded by the prohibition, in article 23(b), of killing or wounding "treacherously" individuals belonging to the hostile nation or army. Article 1, in prescribing the conditions which "militia and volunteer corps" must fulfil to have the benefit of the "laws, rights, and duties of war," includes in subdivision 2 the requirement of "a fixed distinctive emblem recognizable at a distance." Article 24 sets forth that "ruses of war" and the employment of measures necessary for obtaining information about the enemy and

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the country are considered permissible. Article 29 provides in part that soldiers "not wearing a disguise" who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. And according to article 31, a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

Of course, of the foregoing rules, that contained in article 23(f) is the cardinal one, in so far as count I of the accusation in the Skorzeny case is concerned. It does not absolutely outlaw the use of enemy uniforms. It merely prohibits their "improper use," without, however, establishing a standard for the determination of when the use is improper. This question has obviously been left open by the Hague Convention. One writer attempts to prove from the history of article 23(f) that it was intended thereby to prohibit any use the purpose of which is to deceive the enemy. But irrespective of the soundness or unsoundness of the historical basis of his argument, it cannot be conclusive in view of the fact that nothing to this effect is expressed or implied by the language of that article.

On two points there appears to be universal, or at least general agreement: no violation of international law is involved in the wearing of enemy uniforms not for camouflage purposes, but to cope with a necessity created by lack of other clothing; and the use of the enemy's uniform for the purpose of deceiving the enemy by thus concealing one's hostile status is at least unlawful where this is done in open combat. Beyond that, however, there is a marked division of opinion among writers on international law. Some believe that the wearing of enemy uniforms

18. LAWRENCE, Principles of International Law 552 (6th ed. 1915); 2 WHEATON, International Law 208 (7th ed. Keith 1944); SPAIGHT, WAR RIGHTS ON LAND 106 (1911).
20. HOLLAND, THE LAWS OF WAR 45 (1908); LAWRENCE, op. cit. supra note 18, at 533; SPAIGHT, op. cit. supra note 18, at 106; 3 HYDE, INTERNATIONAL LAW 1812 n.9 (2d rev. ed. 1945); 2 OPPENHEIM, INTERNATIONAL LAW 423 n.7 (7th ed. Lauterpacht 1952); Jobst II, supra note 19, at 437 n.6.
21. BLUNTSCHLI, DAS MODERNE VOELKERRECHT 318, 319 (3d ed. 1878); 3 CALVO, LE DROIT INTERNATIONAL 152, 154 (1880); 2 WESTLAKE, INTERNATIONAL LAW 80 (2d ed. 1913); LAWRENCE, op. cit. supra note 18, at 552; U.S. ARMY FIELD MANUAL, THE LAW OF LAND WARFARE 23 (1956).
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for camouflage purposes is prohibited under all circumstances,\(^2\) whereas others exclude from the scope of the prohibition the wearing on other occasions than in open combat, for instance when approaching enemy lines prior to the battle.\(^3\) In support of the first mentioned opinion it is pointed out that an element of fraud is involved in any use for camouflage purposes, and that the settled distinction between ruses of war that are allowed\(^4\) and acts of treachery or perfidy that are unlawful\(^5\) must be kept in mind in determining when the use of enemy uniforms is improper. Emphasis is placed on the lack of a logically tenable reason for treating deceptive use of enemy uniforms outside open combat differently from use in open combat.\(^6\) Article 1 of the Hague Regulations, requiring that militia and volunteer corps must have a fixed distinctive emblem recognizable at a distance, has also been invoked as supporting the view that that distinction is unsound.\(^7\)

On neither side of that literary controversy has particular considera-

\(^2\) WINTHROP, MILITARY LAW AND PRECEDENTS *1223 (2d ed. 1886 reprinted in 1920), and writers cited by OPPENHEIM, op. cit. supra note 20, and in 9 LAW REPORTS OF TRIALS OF WAR CRIMINALS 92 (1949).

\(^3\) BORDELL, THE LAW OF WAR 283 (1908) ("allowed for purposes of approach"); 2 WESTLAKE, op. cit. supra note 21, at 80 ("allowed up to the last moment before fighting, when the true colours must be resumed").

\(^4\) LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 551 (6th ed. 1915) ("That they may be used at all is due to the fact that war is a conflict of wits as much as a conflict of arms"); STOWELL, INTERNATIONAL LAW 515 (1931) ("To prohibit them would be to arrest progress, and to favor mere brawn at the expense of brains").

\(^5\) HOLLAND, op. cit. supra note 20, at 45 (article 24 of Hague Regulations does not authorize acts of treachery); 2 WHEATON, INTERNATIONAL LAW 208 (7th ed. Keith 1944) (article 24 is subject to prohibition of treachery as well as to that contained in article 23(f)); SPAIGHT, WAR RIGHTS ON LAND 105 (1911) (ruses of war are recognized, provided they do not involve treachery); Jobst II, Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?, 35 AM. INT'L L. 435, 440 (1941) (while ruses of war are legitimate, devices for deceiving the enemy which involve perfidy or treachery are unlawful); U.S. ARMY FIELD MANUAL, THE LAW OF LAND WARFARE 22 (1936) ("ruses of war are legitimate so long as they do not involve treachery or perfidy on the part of the belligerent resorting to them"); 2 OPPENHEIM, op. cit. supra note 20, at 430 ("Stratagems must be carefully distinguished from perfidy, since the former are allowed whereas the latter is prohibited").

\(^6\) 3 HYDE, INTERNATIONAL LAW 1811, 1812 (2d rev. ed. 1945); Jobst II, Is the Wearing of the Enemy's Uniform a Violation of the Laws of War?, 35 AM. INT'L L. 435, 440, 441 (1941); LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 552 (6th ed. 1915) (distinction between use in open combat and otherwise is denounced "with good reason"); HALL, TREATISE ON INTERNATIONAL LAW 649 (8th ed. 1924) (that distinction is a "curious and arbitrary rule"); SPAIGHT, WAR RIGHTS ON LAND 104, 105 (1911) ("The quiddity of the rule is difficult to follow. When the disguise has done what it was intended to do, there is little virtue in discarding it. If it is improper to wear the enemy's uniform in pitched battle, it must surely be equally improper to deceive him by wearing it up to the first shot or clash of arms").

\(^7\) 3 HYDE, op. cit. supra note 27, at 1812; LAWRENCE, op. cit. supra note 27, at 552, 553; Jobst II, supra note 27, at 439, 440.

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tion been given to the specific situation, appearing in the Skorzeny case, in which enemy uniforms are used as a stratagem to penetrate enemy lines for the purpose of action behind those lines. Nor, prior to the Skorzeny trial, has the question ever been considered whether the qualified immunity extended by article 31 of the Hague Regulations to a spy not caught in flagranti carries with it immunity from prosecution for use of enemy uniforms in espionage activities, where the perpetrators were not caught until after having rejoined the armed forces to which they belonged. 29

C. Pertinent Geneva Rules

Counts III and IV of the charges in the Skorzeny case were based on the following rules of the Geneva Prisoners of War Convention of 1929:30

Article 6. All effects and objects of personal use—except arms, horses, military equipment and military papers—shall remain in the possession of prisoners of war, as well as metal helmets and gas masks. . . . Identification documents, insignia of rank, decorations and objects of value may not be taken from prisoners.31

Article 37. Prisoners of war shall be allowed individually to receive parcels by mail, containing foods and other articles intended to supply them with food or clothing. Packages shall be delivered to the addressees and a receipt given.32

Defense counsel, however, invoked the following provision of another Geneva Convention of 1929, that for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field:33

Article 16 . . . the right of requisition recognized to belligerents by the laws and customs of war shall be exercised only in case

29. See 9 Law Reports of Trials of War Criminals 94 (1949), expressing the opinion that the defendants in the Skorzeny case were not entitled to the immunity extended by article 31 of the Hague Regulations since they “were not tried as spies but were tried for a violation of the laws and usages of war.”
31. The corresponding article 18 of the 1949 revision, cited supra note 30, contains this sentence: “Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment.” (Emphasis added.)
32. The corresponding article 72 of the 1949 revision, cited supra note 30, is in part different from the 1929 text.
of urgent necessity and after the wounded and sick have been provided for.\textsuperscript{34}

It was claimed, in countering counts III and IV of the accusation, that what was charged therein was a legitimate exercise of the right of requisition sanctioned by that provision, since there existed an urgent necessity and since wounded and sick were not affected by the particular actions. We shall come back to this point when taking up the question of what may have caused the war crimes tribunal to find the defendants not guilty of any of the offenses charged against them.

IV. THE EVIDENCE INTRODUCED IN THE SKORZENY TRIAL

It is in the light of the foregoing legal background that the facts brought out in the Skorzeny trial must be looked at to form a theory of the possible reason or reasons for the acquittal of all the defendants on all counts of the accusation. But before turning to an overall presentation of those facts, certain observations will be made on the nature of the evidence that was supposed to be the basis for the court's findings.

A. Principle Determining Admissibility

The principle determining admissibility of evidence was the one applied in all war crimes trials conducted in Germany under the auspices of the War Crimes Group of the American army of occupation. Under this principle any evidence could be admitted which in the opinion of the tribunal had "probative value to a reasonable man."\textsuperscript{35} With the exception of the so-called character rule, the Anglo-American so-called exclusionary rules were not applicable.\textsuperscript{36} While this may have been a surprise to the American officers convened to compose the court and to American military personnel acting as defense counsel,\textsuperscript{37} it was something familiar to the defendants and German defense counsel, since in the

\textsuperscript{34} No exact counterpart in 1949 revision, cited supra note 33.
\textsuperscript{35} Koessler, American War Crimes Trials in Europe, 39 Geo. L.J. 18, 69-70, 107 (1950). In the so-called Saboteurs case, tried in this country in 1942 by a military commission appointed by President Franklin D. Roosevelt and reviewed by the United States Supreme Court in Ex parte Quirin, 317 U.S. 1 (1942), the same principle was prescribed in the decree appointing the commission, namely: "Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man." 7 Fed. Reg. 5103 (1942).
\textsuperscript{36} Koessler, supra note 35, at 70.
\textsuperscript{37} Not only German defense counsel, but also legally trained American officers and U.S. War Department civilians were acting as defense counsel in war crimes trials conducted in Germany under the auspices of the War Crimes Group of the American occupation army.
civil law countries exclusionary rules of evidence of the Anglo-American kind do not exist, the admissibility of evidence being there largely a matter for reasonable exercise of discretion by the court. Thus hearsay evidence is admissible there, though looked at with great distrust in weighing its credibility. There is, of course, ample space for a reasonable difference of opinion on whether this civil law system of absence of strict regimentation of the admissibility of evidence or the common law system of rigid exclusionary rules would be more recommendable if the question came up de novo. The exclusionary rules are more radical than the civil law system in attempting to prevent miscarriage of justice that may be caused by reliance on evidence which because of its nature has only a slight degree of probative value. They kill the evil at the root, the admission stage, and not only at the end, the weighing of credibility phase. They thus constitute an important benefit of a defendant in a criminal case in this country. And they are highly appropriate where the fact finding is entrusted to jurors who, mostly devoid of legal training, may be inclined to take hearsay evidence at its face value. On the other hand, by the inherent adjunct of numerous objections and rulings thereon, the exclusionary rules are bound to delay the conduct of a trial and to lend themselves to abuse for dilatory tactics. Moreover, and most important, they thereby impair a coherent presentation of the facts and sometimes present a technical obstacle to the bringing out of facts the knowledge of which is necessary to obtain a clear and complete factual picture. All this is avoided in the civil law system where, however, the absence of rigid exclusionary rules does not prove dangerous because the fact finding is mostly in the hands of learned judges who are able to apply the necessary caution in weighing the credibility of second class kinds of evidence. It is the writer's impression, gained from a study of numerous war crimes trial records, that the war crimes tribunals, while in effect applying the civil law system in this respect, were not always successful in avoiding the pitfall inherent in the admission of evidence that in its nature is of questionable trustworthiness, rather, in certain cases, were to an undue degree impressed by such evidence when making findings of fact. And he has also some doubt as to the wisdom of the policy to dispense with the exclusionary rules just in proceedings against

38. For the almost ubiquitous prevalence of this practice in the World War II war crimes trials, see 15 LAW REPORTS OF TRIALS OF WAR CRIMINALS 197-99 (1949).
39. This observation is made with particular reference to the concentration camp cases.
enemy defendants. It is a fact that the exclusionary rules, based on common law tradition, are in this country considered as sacrosanct, in so far as criminal trials are concerned, although the need for a certain streamlining of them is recognized, and their transplantation into the somewhat novel field of administrative proceedings is generally held inadvisable, and in some jurisdictions barred by statute. The doing away with them in the war crimes trials was therefore bound to create at least the semblance of discrimination. However, in so far as the Skorzeny case is concerned, the foregoing discussion is of merely academic interest, in view of the acquittal of all the defendants, the case thus being one of those refuting, by their outcome, the statement by the author of a book on an important war crimes trial that in no war crimes trial was there “an honest possibility of acquittal.” In the case of a conviction the question would have been appropriate whether, and if so to what extent, it was questionable because of in part untrustworthy evidentiary foundation. But, as there was an acquittal, the simple statement will be sufficient that the described admission practice opened the door for the introduction by both sides of documentary and testimonial evidence of a kind not falling within any of the recognized exceptions to the hearsay rule and which would therefore have been inadmissible in a criminal case tried in this country, either before a civilian or before a military court. We shall, nevertheless, before attempting to present a recital of the essential facts as they appear from the trial record, give a more particular description of the admitted evidence.

41. 1 Wigmore, Evidence §§ 4(a), (b), (c) (3d ed. 1940); Hart, Introduction to Administrative Law 606–20 (2d ed. 1950).
42. Cal. Gov’t Code § 11513(c) provides in part, “Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions.” It also provides, however, “Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.”
43. Reviewed in In re Yamashita, 327 U.S. 1 (1945).
45. See Manual for Courts Martial, U.S. Army 155 (1949), containing this statement: “Hearsay is not evidence. This means simply that a fact can not be proved by showing that somebody stated it was a fact... Underlying the hearsay rule is the principle that the testimony of witnesses, to be of value, must be taken in court so that the witnesses may be sworn, cross-examined, confronted by the accused, and observed by the court.”
B. Documents

The prosecution's direct case included written statements in sworn or affidavit form obtained in the course of the pre-trial investigation from several defendants, not including Skorzeny, and from other persons. While most of the pre-trial statements of defendants made only an insignificant contribution to the proof of the charges, were not self-incriminatory, and in part even tended to rebut the charges, the affidavit of the defendant Kocherscheid was extremely self-damaging, at least to the greatest extent, with regard to his action in an incident which was not specified in the charge sheet. But in its opening statement the prosecution described it as "one of the yellowest incidents of the war, wherein an American soldier, attempting to help what he thought was a fellow-American out of the mud, a fellow-American soldier being in an American jeep and dressed in an American uniform, was shot." The fact that Kocherscheid did not take the stand could well have been considered as an admission of the truthfulness of the self-incriminatory part of his affidavit, especially since it was corroborated by testimonies, though only of a hearsay nature.

46. In rebuttal of such an affidavit of a person who was not a defendant in this case the defense introduced a later affidavit of the same affiant. The manner of obtaining the pre-trial statements introduced by the prosecution was testified to by the chief investigator of the Skorzeny case, identical with one of those investigators of the Malmedy Massacre case, whose questionable methods are referred to in the Senate document MALMEDY MASSACRE INVESTIGATION, Hearings Before a Subcommittee of the Senate Committee on Armed Services, 81st Cong., 1st Sess. (1949). The record does not reveal, however, that similar methods were used in the investigation of the Skorzeny case, except for the defense affidavit mentioned in the beginning of the present note and for the testimony, on cross-examination, of a prosecution witness, an American born German, that in the course of the pre-trial investigation he had been placed under duress, especially by being threatened that he might be prosecuted as an American traitor.

47. It reads in part as follows: "When it was pitch dark . . . we took off . . . After we had crossed the class A road which leads from Ligneuville to St. Vith, we got stuck in a mudhole. After a short futile try to drive on, a man of my team went to the road in order to watch. A few moments later he returned with an American MP. According to plans our speaker conversed with him. We continued our efforts and the MP helped pushing at first. Then we began to dig out the wheels using a spade we carried with us. The MP had posted himself a few meters to the left of the car and looked at us. Since our linguistic knowledge was unsatisfactory, I surmised his suspicion. I could not follow the conversation between my speaker and the MP. When it was clear to me that my speaker did not master this situation, I decided to shoot this MP. . . . I discharged five shots with an American colt at the MP . . . at a distance of about three meters. I did not use the noiseless machinepistol which was given us for such situations."

48. In a part of his affidavit subsequent to the portion quoted in note 47, supra, he in effect alleges not to have killed the MP, probably because his shots had not hit but missed the target.
The pre-trial affidavit of another defendant, Muentz, is interesting because of the following statement contained therein. When in the course of the requisitioning of American uniforms from a prisoner of war camp, American officers, detained there, were ordered to turn in their field jackets, quite a few of them before complying with this order tore up their jackets so as to make them useless for the Skorzeny Brigade.

Included in the prosecution's documentary evidence was also a copy of a telegram of Field Marshal Keitel, which had been distributed among all units of the German armed forces, and shows that the original idea was to enlist only volunteers for the new organization. It mentions that "the Fuhrer" has directed the formation of a special troup, in the force of about two battalions, for particular undertakings on the Western Front, that this troup should be composed of volunteers from all branches of the armed forces, including the Waffen SS, and that, to be acceptable, volunteers must in addition to a high degree of physical and intellectual aptitude and training for man-to-man fighting have a certain command of the English language, including the American "dialect" and military terms.

One documentary item was introduced by the prosecution after the defense had rested. It was an official letter of General Omar N. Bradley, dated September 5, 1947, in which the former Commanding General of the 12th United States Army Group stated:

To the best of my knowledge and belief no American soldier was ever ordered or permitted to go into action against the German Army, or any other army, while dressed as a German soldier, a civilian, or in any manner other than that of an American soldier, and certainly not while under my command. This applying as well to the action at Aachen and Saarlauten as to any other action or battle engaged in by the United States Army. To have resorted to the wearing of the enemy uniform or civilian clothing in action would have been contrary to the usages of war, and would not have been approved or permitted by either the Supreme Headquarters in Europe for the Allied Forces, or by the United States War Department.

Finally, as part of its direct case, the prosecution introduced documentary evidence that numerous members of the Skorzeny Brigade, in
American uniforms when captured, had, in most cases during the Battle of the Bulge, in one case subsequently thereto and shortly before the armistice in Europe, been tried by American military commissions as spies, found guilty, sentenced to death, and executed.\textsuperscript{50}

Turning now to the documentary evidence introduced by the defense, it was mainly devoted to an attempt to prove that the use of enemy uniforms as a stratagem had been indulged in also on the Allied side. An affidavit of a German named Guenther Wisliceny claimed hearsay knowledge of use of German uniforms by American patrols. An affidavit of the German General Walter Warlimont\textsuperscript{51} referred to similar stratagems that allegedly had been practised by British Commandos.\textsuperscript{52} A sworn statement of a Brigadier-General, Kurt Freiherr von Muehlen, mentioned the allegation that Americans, by the ruse of being clothed in German uniforms, had obtained control of a strategically important bridge and thus prevented the carrying out of a German plan to destroy it prior to the enemy's approach. Professor Dr. P. E. Schramm, a Major in the reserve, referred in his affidavit to hearsay that the British Lieutenant Alexander had been in German uniform when he attempted to kidnap General Rommel, then commander of the German Africa Corps, and that during the Battle of the Bulge German uniforms had been seen on Americans. An excerpt from an American book glorifying the heroic deeds of agents of the Office of Strategic Services and in this connection referring to the underground action in Austria of an American corporal wearing a German officer's uniform,\textsuperscript{53} was introduced for the same defense purpose. Finally, part of this group of documentary evidence introduced by the defense was a German official report on events at the Western Front in a period ending December 21, 1944. It contained

\textsuperscript{50} The respective part of the record consists of the original trial files of one case (December 6, 1944) wherein seven such defendants, another one (December 21, 1944) wherein three, another one (December 31, 1944) wherein three, and one (May 5, 1945) wherein one such defendant, were convicted and sentenced to death, and in addition an affidavit of a French war correspondent on the execution, on December 23, 1944, at a place in Belgium, of three Germans who, caught in American uniforms, had been convicted as spies and sentenced to death by an American military commission.

\textsuperscript{51} Identical with one of the defendants in Nuremberg case No. 12 (High Command Case). See Appleman, \textit{Military Tribunals and International Crimes} 230 (1954).

\textsuperscript{52} The writer did not find anything of this kind in the histories of World War II and the monographs on the British Commandos studied by him for the purpose of this Article.

\textsuperscript{53} Ford & MacBain, \textit{Cloak and Dagger} 16-19 (1946).
the statement that heavy losses had occurred due to the fact that Americans had attacked in German uniforms.54

C. Witnesses

The prosecution called in the course of its direct case numerous witnesses, mostly Germans, and among them mostly persons who had served in the Skorzeny Brigade. Other German witnesses of the prosecution included such nazi luminaries as the aforementioned General "Sepp" Dietrich and Colonel Joachim Peiper who had occupied important command positions during the Battle of the Bulge,55 SS General Gottlob Berger, who had been chief of the SS main office that was in charge of the administration of prisoners war camps,56 and his deputy in that office, SS Colonel Fritz Meurer. Also three American witnesses were called by the prosecution when it presented its direct case. Each of these German and American witnesses made a substantial contribution to the overall story arising from the record and summarized in the following main part of this article. In partial anticipation thereof, a few particulars appearing from those testimonies will be mentioned presently.

While according to one item of the prosecution's documentary evidence, those members of the Skorzeny Brigade who joined the Combat Group Peiper in the fighting in the vicinity of Malmedy did this in German uniforms,57 an American officer who had been engaged in that combat on the opposite side testified that some of his opponents wore American uniforms with German parachute overalls, admitting however, on cross-examination by defense counsel that this had had no deceptive

54. Nothing in corroboration of this self-serving statement from the German military side, which is at variance with the letter of General Bradley quoted in pt. IV, § B, supra, was found by the writer in pertinent literature obtained in preparation of this Article. And from Mr. Robert E. Merriam, author of DARK DECEMBER: THE FULL ACCOUNT OF THE BATTLE OF THE BULGE (1947), he received a letter dated March 10, 1958, referring to CLOAK AND DAGGER, op. cit. supra note 53, and stating in effect that there seems to be nothing in the existing literature pertaining to possible use, by American soldiers not acting as agents of the Office of Strategic Services, of enemy uniform for disguise.

55. Both had been defendants and were convicted in the Malmedy Massacre case, in which judgment was rendered July 16, 1946, thus more than a year prior to the beginning of the Skorzeny trial. However, the report of the Senate Committee, MALMEDY MASSACRE INVESTIGATION, Hearings Before a Subcommittee of the Senate Committee on Armed Services, 81st Cong., 1st Sess. (1949), was not rendered until October 1949, about two years subsequent to the termination of the Skorzeny case.

56. He was, subsequent to the termination of the Skorzeny case, one of the defendants tried and convicted in that Nuremberg trial which is usually referred to as the Ministries case. See APPLEMAN, op. cit. supra note 51, at 222.

57. Pre-trial affidavit of Defendant Scherf.
effect on him. But a German prosecution witness who had participated in that particular engagement of members of the Skorzeny Brigade definitely stated that no American uniforms were worn on that occasion, and to the same effect was the hearsay testimony of another German prosecution witness who had not participated in that particular action but had belonged to the Skorzeny Brigade.

Two American witnesses who had been prisoners of war in the same German camp testified about the fact that prisoners of war in that camp had been ordered to turn in American uniform pieces they were wearing. But two German prosecution witnesses, General Berger and Colonel Meurer, testified that according to an instruction given by Skorzeny, American uniforms and Red Cross packages had to be procured only from the warehouses of prisoner of war camps and booty magazines; that the two defendants, Fitze and Muentz, who in view of the insufficiency of those sources requisitioned American jackets from the personal possession of prisoners of war, acted in that respect contrary to the instruction, and were therefore reported for disciplinary action. Testifying with regard to the same part of the charges, another German called to the stand by the prosecution alleged that some of those trained for the Brigade's mission expressed doubts as to whether the requisitioning of American uniforms and of Red Cross parcels was in accordance with the international conventions bearing on this matter.

With regard to the shooting incident related in the defendant Kocherscheid's aforementioned affidavit there was no detailed account by any prosecution witness and no eyewitness testimony, but merely

58. First Lieutenant William J. O'Neill. Similarly, Teofil Mory, a German witness of the prosecution, who as a member of the Skorzeny Brigade had participated in that particular action, testified that he was in German uniform when captured, but that some of his comrades were in American uniforms when captured on the same occasion.

59. Albert Ernest who had been a member of the unit commanded by the defendant Scherf and of which the defendant Hass was the “Adjutant” (corresponding to American “Executive Officer”).

60. Franz Lang, a navy man, who had at his request been transferred to the Skorzeny Brigade.

61. Lieutenant Colonel Roy J. Herte and Master Sergeant Paul W. Hodnette.

62. To the same effect were also two items of the prosecution's documentary evidence, pre-trial affidavits of Colonel Paul R. Goode and Sergeant Walter W. Oakes who had been prisoners of war in the same camp with the witnesses Herte and Hodnette.

63. Joachim Heinz who had been assigned to the warehouse of the Brigade's training center.

64. Quoted and commented on in notes 47, 48 supra.
general corroboration by two German prosecution witnesses who knew
about it only from hearsay. One of them, whom Kocherscheid himself
had informed about it,\(^{65}\) testified that only one American MP had been
shot at on that occasion. The other one\(^{66}\) testified to having learned from
a different hearsay source that two American MP's had helped Kocher-
scheid's team and had been shot at by Germans wearing American uni-
forms.

The foregoing is not exhaustive of but merely a sampling of parti-
cular features brought out by the prosecution in the course of its direct
case. For rebuttal purposes it called two witnesses. One of them was an
American\(^{67}\) who as a volunteer had participated in British Commando
raids on the French coast and who testified that no German uniforms
had been used in carrying out those actions. The other was a German\(^{68}\)
who had been the chief of the legal section of the German High Com-
mand and who testified that while occupying that position he had not
learned of any case of American or British troops fighting in German
uniforms. On cross-examination he mentioned that the British Lieutenant
Alexander had looked like a German, especially had been wearing
German headgear, when caught in an attempt to kidnap Rommel, and
that it had been contemplated to try him on this ground as a war criminal,
but that no such action had been taken.

We turn now to the defense witnesses. Only one of them, Skorzeny,
the only one among the defendants who took the stand,\(^{69}\) testified with
regard to the facts involved in the charges, of which he gave a rather
complete and on the whole truthful, it seems, account, not including,
however, the Kocherscheid incident. Three other witnesses were called
by the defense to support its tu-quoque plea,\(^{70}\) that is the allegation that
practices similar to those charged by the prosecution had occurred on

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\(^{65}\) Herbert Petter who had belonged to a reconnaissance team of the Brigade.
\(^{66}\) Otto Sternhuber, a German and member of the Skorzeny Brigade who, how-
ever, was American born and had spent his early youth in this country from which
his parents only thereupon returned to Germany.
\(^{67}\) First Lieutenant Elmer Moody.
\(^{68}\) Major General Rudolf Lehmann, one of those who were convicted in the
Nuremberg trial generally referred to as the High Command Case. See APPLEMAN,
MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 230 (1954).
\(^{69}\) On behalf of the other defendants counsel declared their readiness to testify
should the tribunal desire it, of which offer no use was made, however, the
record not disclosing any reason for this failure.
\(^{70}\) That term, according to AMERICAN COLLEGE DICTIONARY 1306 (1952) denotes
"a retort accusing of a similar crime an opponent who has brought charges against
one."
the Allied side. A German Brigadier General\textsuperscript{71} gave an affirmative answer to the question whether in his capacity as Division Commander in the Battle of the Bulge he had received reports on Americans wearing German uniforms in attacking Germans. He was not asked for and did not add any specification. Similarly vague was the testimony of another German defense witness,\textsuperscript{72} who in the capacity of first lieutenant had participated in the Battle of the Bulge and who alleged to have received during that campaign a report on the use of German uniforms by enemy troops. Not in the nature of hearsay, like the two foregoing testimonies, but based on directly acquired knowledge were the statements made by a British officer who appeared as a defense witness.\textsuperscript{73} But his testimony was hardly related to the point actually involved, namely the question of use of German uniforms in the course of Allied military actions. He mentioned that he had been in civilian clothes, and not in foreign uniform, when parachuted into France to cooperate with the underground group there, but that he had planned to liberate a French officer (belonging to that underground and caught and imprisoned by the Gestapo) by the following ruse. Certain members of the British Intelligence Service, who along with him as their superior had been parachuted into France and who had a perfect command of the German language, were to be put in German uniforms and to be provided with a fake German order pursuant to which they would be authorized to take that prisoner from the jail. The plan had not been carried out, however, since prior to its execution knowledge of it had leaked out and reached the Gestapo. He also alleged in a general way that members of the British Secret Service operating in France had for camouflage purposes used German uniforms, identity papers, insignia, and vehicles, that some of those German identity papers had been taken in an irregular manner from the German Headquarters in France, and that the use of German uniforms had been considered in a planned but never executed undertaking to kidnap Admiral Doenitz.

Defense counsel requested that depositions be taken of the British Admiral Lord Louis Mountbatten and of the former Chief of the American Office of Strategic Services, William Donovan, on the use, by British

\footnotesize{\textsuperscript{71} Hugo Kraas, Brigadier General in the Waffen SS, in the Battle of the Bulge in command of the 12th SS Armored Division.\textsuperscript{72} Wolfgang Loose.\textsuperscript{73} Wing Commander F.F.E. Yeo-Thomas of the Intelligence Service of the R.A.F.}
as well as American troops, especially British Commandos, during combat action and prior thereto, of German uniforms; on the alleged fact that Lieutenant Alexander, a nephew of the British Field Marshal Alexander, was in German uniform when he attempted to kidnap Rommel; and on related other facts alleged by the defense. The record does not show any action taken by the tribunal on this motion which, as the tu quoque plea as a whole, was legally based by defense counsel on a precedent allegedly created by the judgment of the International Military Tribunal in Nuremberg in announcing its reasons for the partial acquittal of Admiral Doenitz. It may finally be mentioned that according to Skorzeny’s testimony, which in this respect may have been a self-serving theory rather than based on recollection, reports on Americans who had successfully operated in German uniforms inspired Hitler to incorporate a similar feature in the masterplan for the Ardennes offensive.

V. FACTUAL ROUNDUP

Omitting most of those factual features that have been incidentally covered before, especially the episode related in the affidavit of the defendant Kocherscheid, this is a brief summary of the story of organization and action of the Skorzeny Brigade as it appears from the lengthy trial record.

A. Organization of the Brigade

Legend and history contain several accounts of ruses employed in fighting an enemy, including as the most colorful and best known one the story of the Trojan Horse. Whether inspired by any of those precedents, or by reports on alleged Allied practices, or independently flowing from that “Nordische List” (Nordic shrewdness) of which the nazis were proud, Hitler’s master plan for the Ardennes offensive included the use of a stratagem whose original code name was “Rabenhuegel” (Ravens’ Hill) and whose final code name was “Greif” (Griffin). The idea was to create a special task force, called the “150th Panzer Brigade” when

74. “In view of all of the facts proved and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answers to interrogatories by Admiral Nimitz stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that Nation entered the war, the sentence of Doenitz is not assessed on the ground of his breach of the international law of submarine warfare.” 1 TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TROIDNAL, NUREMBERG 313 (1947).

75. Quoted and commented on in notes 47, 48 supra.
activated, members of which, by being disguised as and posing as Americans, should infiltrate enemy lines and pass behind them. That special unit should first move with the advance elements of the army undertaking the offensive, but as soon as possible sever from and operate independently from the main body of the attacking forces. The principal task to be performed by it was to reach with lightning speed certain strategically most important bridges crossing the river Maas in Belgium and maintaining control of them until the German breakthrough should have reached that point. Other parts of it should carry out intelligence and sabotage activities and confuse and discourage the enemy by the spreading of fake news. All this was revealed to Skorzeny when towards the end of October 1944 he was called to Hitler's headquarters and by the "Fuehrer" in person entrusted with the mission to form and command that special unit. He was, however, at his request and in view of other important responsibilities then resting on him, allowed by Hitler to deputize Lt. Colonel Hardick\(^76\) as the commander of the unit in its organization and training stage and to take over only immediately before the beginning of the offensive. The recruiting and training center of the Brigade, located at a place called Grafenwoehr, was thus in charge of Hardick. But Skorzeny participated in the determination of certain policies, especially of the methods whereby American uniforms and other material should be procured for the Brigade. And he once appeared at the training center and delivered there a speech in the course of which he emphasized the importance of the Brigade's mission as well as the great risk involved in participating in the carrying out of it and expressly declared that anybody who on second thought would like to be assigned to other duties should say so and would see his desire fulfilled without being considered a coward.\(^77\) In addition to this talk by Skorzeny himself, the extraordinary nature of the Brigade's mission was impressed on the minds of those trained for it by the fact that they were sworn to secrecy regarding that mission and related facts. To enable them to avoid revealing the secret under duress when falling into enemy hands, they were supplied with suicide pills. The original plan was that enlistment for or transfer to the Brigade should be on a voluntary basis.\(^78\) But since the number of qualified volunteers was insufficient, that part of the initial

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76. Not among the defendants since he had died prior to the trial.
77. The evidence is conflicting on whether, and if so, to what extent, use was made of this offer.
78. See the description of Keitel's circular order in pt. IV, § B, supra.
the idea had to be abandoned even to the extent that whole parts of certain military units were transferred to the Brigade. For similar reasons another feature of the original scheme had to be dropped, namely, the requirement of a good command of the English language including American slang. It was attempted to be made up for by intensive linguistic training as a result of which, however, only a part of those who had had no prior knowledge of the English language or had had such knowledge but had not been familiar with the American linguistic peculiarities, acquired some, but only a poor, knowledge of English and of its American variety, whereas the remainder, including most high ranking officers, did not get even so far prior to the Brigade’s entering into operation. It is related to this fact that ordinarily only one member of a Commando team of the Brigade was to be the “speaker.” To enable them to successfully impersonate American soldiers, those trained for that deceptive practice were shown American films in which American soldiers appeared as principal characters. They were given instruction on habitual attitudes of American GI’s, including, for instance, their manner of smoking cigarettes. The visiting of prisoner of war camps was arranged to give the trainees an opportunity of gaining a vivid impression of how American soldiers would speak and behave. Included in the training program was also a course on American unit designations and insignia, to prevent any member of the Brigade speaking on behalf of his team from disclosing his enemy character by showing lack of familiarity with those designations and insignia.

According to directions issued by the top officials in charge of this matter, including Skorzeny, the material to be used by the Brigade for camouflage purposes was to be procured only from booty and prisoner of war camp magazines, and the two defendants, Fitze and Muentz, who requisitioned certain uniform pieces from the personal possession of American prisoners of war acted against this instruction; or so it appears from unrebutted defense evidence mentioned before. According to one prosecution witness, the defendant Captain von Behr was

79. Ibid.
80. See the portion of Kocherscheid’s affidavit quoted in note 47 supra.
81. There was evidence to the effect that at that time the camp magazines had some reserve stock of American uniforms since the Red Cross furnished two sets of uniforms for each prisoner of war.
82. See pt. IV, § C, supra.
83. Franz Lang.
in charge of that part of the processing at Grafenwoehr whereby the trainees were sorted into several classes on the basis of their degree of knowledge of English. There was apparently no further evidence linking defendants, other than Skorzeny himself, with any particular phase of the preparatory activities.84

B. The Brigade in Action

Shortly before the beginning of the Ardennes offensive, which, as mentioned before, started on December 16, 1944, the Brigade, then already under the direct command of Skorzeny himself, assembled in a forest close to the German-Belgian border. It consisted of four main units: a commando company in charge of a Lieutenant Stielau and three combat groups respectively in charge of a Lt. Colonel Wulff, the aforementioned Lt. Colonel Hardick and the defendant, Captain Scherf. Three types of teams were formed for the carrying out of the planned special activities: reconnaissance, sabotage and broadcasting teams. Each team normally consisted of four men: a leader, a speaker, a driver and a specialist in the kind of activity the particular team was supposed to engage in. American weapons, ammunition, and jeeps were made available to these teams. Each member of a team was given an American name and rank and a corresponding American identity paper. Also, American pay data sheets, PX cards, trip tickets, pictures of American soldiers and women, and American letters were distributed, as well as American Red Cross packages containing soap, chocolate, canned meat and cigarettes. The food rations consisted of about two-thirds German and about one third American rations, the American rations to be used only on infiltration though enemy lines. American money too was made available to the teams.

Only after having reached the aforementioned assembly center were the men of the Brigade allowed to put on American uniforms. However, as long as they were not about to reach enemy lines they had to cover up the American uniforms by wearing over them German parachute combination suits going down over the knees and therefore in military slang called "Knochensack" (bones bag). Similarly, although they carried with them American helmets, they had to wear German field caps until the

84. In part of its opening statement the prosecution referred to the fact that each of the defendants had had officer's rank and that each of them had taken part in organizing the Brigade.
time when they would drop the German combination suits and be ready to pose as Americans. To avoid being treated as enemies by German troops, they were supposed to use certain signaling acts for the disclosure of their true national character. Although noiseless weapons were given to them, they were ordered to avoid direct contact with enemy troops as much as possible.

As was the case with respect to the entire Ardennes offensive, so also the commitment of the 150th Panzer Brigade proved to be a failure. Its main purpose, to reach and occupy the Maas bridges, had to be abandoned when the lightning advance of the Sixth Panzer Army was stopped by ever stronger Allied counter operations. Only a few of the commando teams were successful in crossing or infiltrating enemy lines without being caught and treated as spies. Except for the Kocherscheid incident, there is not the least indication that a single one of these independently operating commando teams was ever engaged in a fight with enemy troops. But the evidence is conflicting, as has been shown before, on whether or not American uniforms were used by that substantial part of the main body of the Brigade which was engaged (around December 20, 1944) in combat action in closed formation around Malmedy. It appears highly unlikely that in this kind of action any purpose could have been achieved by American disguises. Hence, Skorzeny's testimony that according to definite orders they had to carry out that action in German uniforms would seem to be highly credible despite its self-serving effect. A possible explanation of the conflict in the evidence may be that some of the men had lost the German combination suits they were supposed to wear over their American uniforms and were thus wearing only the latter, without, however, intending or producing the effect of concealment of their true national character. Those men of the Brigade who were still alive when the German retreat was begun were brought back to Grafenwoehr and there disbanded. When some of his former subordinates had been arrested to be prosecuted as war criminals, Skorzeny who at that time was in Salzburg, Austria, surrendered to assist them in their defense, or so he testified. He himself had never worn American uniform. His code name had been "Solar."

VI. THE JUDGMENT OF ACQUITTAL AND A SPECULATIVE EXPLANATION OF IT

The Skorzeny trial, unique because of the subject matter involved in the charges and the historical significance inherent in it ended with
an anticlimax. As mentioned before, the tribunal found Skorzeny and his codefendants not guilty of any of the accusations raised against them, without announcing the reasons for this judgment. The following discussion is therefore merely the writer's speculation about the possible grounds of acquittal—in other words an after-the-fact attempt of rationalization. It will neglect the always existing possibility that prosecution counsel may not have been a match for defense counsel, and will merely look for reasons inherent in the facts as presented in the trial and in the pertinent law. The acquittal of the defendant Kocherscheid must be considered separately from that of the other defendants since with regard to the first count of the accusation the case against him was singled out by his self-incriminatory pre-trial affidavit.85

A. Acquittal Theories in Kocherscheid's Case

Kocherscheid did not testify. Only hearsay testimony corroborated his written story. Therefore, and since an admission, like any piece of evidence, is subject to the court's weighing of its credibility, the possibility cannot be excluded that the facts stated in his affidavit were considered as not established by it beyond any reasonable doubt.86 Moreover even on the face of that affidavit there was nothing showing that the Alp shot at was killed or wounded.87 Hence, despite the obviously most perfidious manner of Kocherscheid's action as stated by him, the aforementioned article 23 (b) of the Hague Regulations prohibiting a treacherous "killing or wounding" of individuals belonging to the hostile nation or army was not applicable, at least not according to its wording. And even if all this were disregarded, Kocherscheid may have been acquitted on the basis of either of the following two legal theories. The court may have been persuaded by the argument of defense counsel that he had acted in self-defense,88 although it would seem that this plea was hardly sound in the

85. See the portion of that affidavit quoted and commented on in notes 47, 48 supra.
86. "... it would appear that the accused Kocherscheid's acquittal was based on lack of sufficient evidence, as he did not give evidence at the trial and the Prosecution's case rested entirely on his pre-trial affidavit." 9 LAW REPORTS OF TRIALS OF WAR CRIMINALS 94 (1949).
87. "In ... the case of the accused Kocherscheid who in an affidavit admitted that he fired on an American military police sergeant when dressed in American uniform, the accused stated in his affidavit that he fired several shots at the sergeant, but there was no evidence to show that he killed or even wounded him as was alleged in the charge." Id. at 93.
88. "... even if Kocherscheid had shot at the MP, this act does not amount to a war crime. He was on an espionage mission in No Man's Land when he met the MP. He believed on reasonable grounds that he and his comrades were discovered.
given situation. Finally, the court may have adopted another proposition of defense counsel, submitted on behalf of all defendants, namely that what they were accused of amounted in substance to espionage and that therefore, and since they had not been caught in flagranti but had been subject to prosecution after they had joined the forces to which they belonged, they were entitled to the immunity extended by the aforementioned article 31 of the Hague Regulations. In the course of commenting on the judgment, it has been suggested that that immunity is applicable only with regard to the act of espionage itself, but not to a concurrently committed offense, especially a violation of the prohibition by article 23 (f) of the Hague Regulations of improper use of enemy uniforms. But the relation between articles 31 and 23 (f) is an unsettled matter and the court may have given the accused the benefit of the doubt by liberally construing article 31 in this respect.

B. Acquittal of Other Defendants Under Charge I

There was no proof that any of the defendants other than Kocherscheid had been engaged in combat action while wearing American uniforms. The evidence, as mentioned before, was conflicting on whether other members of the Brigade had deceptively used American uniforms in the course of that campaign, and the court may have reached a negative determination in this respect. But irrespective of any such result of its weighing of the conflicting evidence, it could have reached the conclusion that the masterplan behind the formation and use of the Brigade did not contemplate combat action in American uniforms, that any use of American uniforms during the campaign around Malmedy was contrary to that masterplan and to the instructions issued pursuant to it, and that therefore not even Skorzeny and certainly not the other accused officers could be made responsible therefor in the absence of proof that they themselves had participated therein or had directly or indirectly caused it. The foregoing was sufficient for an acquittal under charge I if, but only if, the court, in construing article 23 (f) of the Hague Regulations adopted the view entertained by our Department of the Army, that is,

In circumstances as these, where his own life and that of his comrades was at stake, he would have had no other choice but to shoot ... in the agony of the moment he fired. ... It was pitch dark. ..." Part of argument of defense counsel, as rendered in official trial transcript.

89. See comment to this effect in 9 LAW REPORTS OF TRIALS OF WAR CRIMINALS 94 (1949).
that that article does not prohibit deceptive use of enemy uniforms under all circumstances, but merely deceptive use in combat action.

However, even if the court went further than that, more specifically believed that the prohibition in said article 23(f) covered also use of enemy uniforms as a stratagem for infiltrating or crossing enemy lines, it could nevertheless have acquitted the defendants from the accusation in count I for any or both of the following two reasons. It could have given them the benefit of the immunity under article 31 of the Hague Regulations, which matter has been discussed before with specific relation to the defendant Kocherscheid, or it might, in deviation from the practice generally followed in the World War II war crimes trials, have believed that the defendants, all of whom were military men, could not be held responsible for carrying out superior orders in organizing or participating in a method of warfare any unlawfulness of which may not have been patent to them in view of the uncertainties befuddling the pertinent part of the international law. In this connection it may be mentioned that especially in the case of defendants carrying out orders of their military superiors, the discounting of the plea of superior order has met with dissent from distinguished sides and is contrary to the position taken until November 15, 1944 by the United States Basic Field Manual, Rules of Land Warfare.

C. Acquittal of All Defendants Under Charges III and IV

By charges III and IV the defendants were in effect accused of violations of articles 6 and 37 of the Geneva Prisoners of War Convention of 1929, both of which have been quoted before. In a comment on their acquittal from these accusations it has been suggested as a possibility that "having acquitted the accused of the main charge the Court applied

91. See, for instance, Kelsen, Collective and Individual Responsibility in International Law With Particular Regard to the Punishment of War Criminals, 31 Calif. L. Rev. 530, 556 (1943) stating, "As to the admissibility of the plea of superior command, the different positive legal orders as well as the opinions of the jurists differ. From a military point of view, the plea must certainly be admitted. Discipline is possible only on the basis of unconditional obedience of the subordinate to the superior, and the obedience of the subordinate has its necessary complement in the exclusive responsibility of the superior." The eminent author raises this question, "But is it really possible to assume that every soldier knows what international law forbids?" Id. at 558.
92. War Dep't Basic Field Manual, FM 27-10, art. 347 (1940), quoted in Koessler, supra note 90, at 83.
the maxim *de minimus non curat lex*,\(^3\) also acquitting the accused of what were lesser violations of the Geneva Convention.\(^4\) It is not likely, however, even if the court looked at those relatively minor and in a way merely secondary charges in a "cavalier" fashion, that that consideration *ad hominem* was the only basis of its decision to acquit. A better guess would seem to be that the court leaned backward in favor of the accused only in that it adopted the theory of legitimate exercise of a belligerent's power of requisition, advanced by defense counsel, as mentioned before. It may in this connection have reached the conclusion that such power of requisition had overriding effect as against the specific provisions in articles 6 and 37 of the Geneva Convention. Defense counsel also claimed that said article 6 was not applicable on the ground that it protected only private property of prisoners of war\(^5\) which the uniforms in question were not, counsel alleged. It is hardly believable that the court was impressed with this argument which, moreover, even if it would have been sound, could have justified only an acquittal under charge III, but not under charge IV. Finally, at least with regard to charge III the court hardly based its acquittal on the fact of obeyance, by the accused\(^1\) of superior military orders, since it acquitted also the defendants Fitze and Muentz who, according to evidence mentioned before, had acted contrary to instruction in requisitioning American jackets from the personal possession of prisoners of war.

VII. CONCLUSION

The *Skorzeny* case highlights the need for a clarification of the international law on the use of enemy uniforms as a stratagem by an international convention substituting for the vague phrase "improper use" contained in article 23(f) of the Hague Regulations a definite and clear statement on the kind of use that is intended to be prohibited. If this Article, mainly written in a scholarly vein, will inspire the International Law Committee of the United Nations to action toward bringing about such a convention, it will have achieved a practical purpose too.

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93. Author's note: The actual text of that originally Roman law maxim is: *De minimus non curat praetor*. See BALENTEINE, LAW DICTIONARY 356 (2d ed. 1948).
94. 9 LAW REPORTS OF TRIALS OF WAR CRIMINALS 94 (1949).
95. By the words added to the contents of article 6 of the 1929 Convention in the corresponding article 18 of the 1949 revision, the possibility of such a construction has been precluded for the future. See the portion of article 18 quoted supra note 31.