

DEPUTY THEATER JUDGE ADVOCATES OFFICE
 WAR CRIMES GROUP
 UNITED STATES FORCES EUROPEAN THEATER
 AFO 633

12 October 1946

UNITED STATES)

Case No. 12-1290

against)

Heinz HAGENDORF, a German)
 national.)

REVIEW AND RECOMMENDATIONS OF THE
 DEPUTY THEATER JUDGE ADVOCATE
 FOR WAR CRIMES

1. TRIAL: The accused was tried on 8 and 9 August 1946 at Dachau, Germany, by an Intermediate Military Government Court appointed by paragraph 9, Special Order 217, Headquarters, United States Forces, European Theater, dated 5 August 1946.

2. <u>FINDINGS</u> : The offense involved was:	<u>Plans</u>	<u>Findings</u>
CHARGE: Violation of the Laws of War.	NC	G

Particulars: In that Heinz HAGENDORF, a German soldier, did, at H. nyslee, Belgium, on or about 15 January 1945, wrongfully use the Red Cross emblem in a combat zone by firing a weapon at American soldiers from an enemy ambulance displaying such emblem.

NC G

3. SENTENCE: The court by at least a two-thirds vote of the members present at the time the vote was taken concurring sentenced accused to imprisonment for a term of six months, commencing 9 August 1946. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for final action (paragraph 2d, letter, Headquarters, United States Forces, European Theater, file AG 000.5 VGB-200, dated 11 July 1946, subject: "Trial of War Crimes Cases").

4. DATA AS TO ACCUSED: Accused is a German national, twenty-four years of age, and is married and has one child, aged two years. His residence is Alterbilingen, near Magdeburg, Germany. He had been a prisoner of war but was discharged from the German Army fourteen days prior to his trial. He joined the German Army on 30 April 1940 and was assigned to the Artillery. At the time of the offense for which he was tried he was a medical non-commissioned officer in the 9th Anti-tank Battalion, SS Panzer Division Hohenstauffen. He was a member of

the Hitler Youth from 1933 until 1936, had eight years of schooling, and was a cabinet maker in civilian life (R 3, 4, 23-25.)

5. RECOMMENDATION: It is recommended that the sentence of the Military Government Court be approved by the Theater Judge Advocate under the provisions of paragraph 8d of the letter referred to in paragraph 3, supra.

6. EVIDENCE:

a. For the Prosecution: The evidence for the prosecution consisted entirely of sworn affidavits of American military personnel who were involved in the incident in which accused is alleged to have misused Red Cross insignia. It appears from these affidavits (Prosecution's Exhibits 1 through 8) that at about 1400 hours on 15 January 1945 the 3rd Platoon of Company "G", 329th Infantry, was situated in the little hamlet of Henyoloz, Belgium. Prosecution's Exhibit 6 is a sketch which shows this to be a cluster of a few houses and a church centered around the intersection of a main road and a side road. Various American soldiers and officers occupied the respective houses. A German ambulance, bearing the proper Red Cross insignia, approached the road intersection at a high speed. It was first noticed by Captain Hugh BATES, of Company "G". He was checking positions which he had assigned to his platoon. The vehicle passed Captain BATES rapidly, and shots were fired from it "through windows and doors." It then continued through the village (Iros. Ex. 1). It was next seen by Private First Class WELLS and Private First Class SMITH as it drove up, and shots were fired from it in their direction by a German soldier who leaned out of the right front door. The American soldiers took cover in nearby houses and Private First Class DANIELSON hit the ambulance with a shot from a bazooka. The vehicle stopped and two German soldiers got out of the right front door and began to run toward one of the houses. Both were fired upon by American soldiers and one, Erich SCHLECHTER, was killed. Accused first hid behind some ammunition boxes, but surrendered with his hands up when approached by Private First Class WELLS (Iros. Exs. 4, 5).

The evidence is clear that a weapon was fired from the right front door of the ambulance while it was still carrying along the road. The evidence is further clear that the vehicle was of the left-hand drive type (Iros. Exs. 7, 8). There is positive evidence that both accused and SCHLECHTER were carrying pistols and wearing holsters at the time of their respective capture and death. It is stated that there was no possibility for accused to have taken from SCHLECHTER's body, after SCHLECHTER was killed and before accused was captured, the pistol which had been carried by SCHLECHTER (Iros. Ex. 4). Accused was an accredited medical non-commissioned officer and was entitled to carry a weapon (Iros. Ex. 9). Photographs of the ambulance and affidavits made in connection with it indicate that the bullet holes which were found in the ambulance immediately subsequent to the shooting incident were caused as a result of fire from American weapons other than machine guns, in returning the original fire of the Germans involved in the incident.

b. For the Defense: Accused took the witness-stand in his own defense and testified as follows:

On the day of the incident he was driving from a German aid station back to his unit, which was in the vicinity of Cortes," and was met by a German medical officer who ordered him to pick up some German wounded at Hanyalez (R. 25, 34). These wounded were supposed to be in the vicinity of a "lone house" (R. 26). Accused was in the rear of the ambulance and his driver, SCHLECHTER, was in front. After they had been driving for about twenty minutes they received machine gun fire from both sides (R. 26, 27). When accused heard the machine gun fire and noticed that the ambulance had been hit he lay down flat on the floor of the ambulance. At the same time that the ambulance stopped its forward motion he heard a yell or an extended moan. This, he discovered, had come from the driver who had been hit. When accused got out of the ambulance by the right front door he found the driver lying dead outside of the ambulance (R. 27, 28). Accused then

stood up and found an American pointing a machine pistol at him. Accused raised his hands at once and was captured (R 27, 28). Accused claimed that the ambulance in which he was riding did not carry a Red Cross flag because a Red Cross flag was flown only when the ambulance was loaded with wounded (R 28). It did have "identifying marks (the exact nature of which was not specified) on the sides, at the front and at the back and on the top" (R 34). Prosecution's Exhibits 7 and 8 indicate that they were in all probability red crosses painted on the body of the vehicle. There were only two pistols assigned to his small medical unit (R 29). Accused was carrying a pistol that day; this was permitted for the purpose of protecting wounded who might be carried in the ambulance and for personal protection in case they were attacked. SCHLECHTER did not carry a pistol that day, and accused did not use his own pistol at any time (R 29, 30). Accused also testified that the vehicle used by him and SCHLECHTER on that day was a French right-hand driven vehicle (R. 31). He further maintained that the vehicle in which they were driving had been side-swiped by a tank on the day previous to the incident, that this accident had damaged the ambulance to such an extent that the hinges of the rear doors stuck out to the right and to the left, and that for that reason he had to sit in the back of the vehicle in order to hold one door shut (R 26, 27, 31, 32). The other door had been stripped off in the accident of the previous day, and lay in the back of the ambulance (R. 27).

Upon cross-examination accused further testified that the driver of the ambulance sat on the righthand side and that the vehicle was subjected to machine gun fire as soon as they entered the town of Henyelen (R 34). The firing came mainly from the right front and the left flank of the vehicle, most of it from the left (R 35).

7. JURISDICTION: The Military Government Court which heard this case was properly constituted and had jurisdiction over the subject matter and of the accused. The Charge alleged a violation of the laws of war and the particulars set forth a misuse of insignia which are

especially regulated in the Geneva Convention. It is specifically stated that:

Misuse of Flags, Insignia, Military Uniforms of Enemy. -

"It is especially forbidden^{***} to make improper use of a flag of truce, of the National flag, or of the military insignia and uniform of the enemy, forms of distinctive badges of the Geneva Convention" (Annex to Hague Convention No. IV of October 18, 1907; Treaty Series No. 539; 36 Stat. 2295; TR 27-10, Rules of Land Warfare, Sec. 41, p. 11.

When an enemy soldier is guilty of a violation of the laws of war, it is an offense against International Law, and as such he may be tried and punished by the duly constituted tribunals of an occupying belligerent nation. A general discussion of the jurisdiction of Military Government Courts is not required here, but reference is made to prior reviews written by this group in which the authority of such courts to try enemy nationals for violations of the laws of war has been set forth. (See Winthrop, Military Law and Precedents, 2nd Ed., pp 839, 840; US against GLEMENS WITEND. Opinion DTJAWC, November 1945).

8. DISCUSSION:

a. The evidence for the prosecution consisted entirely of affidavits taken at the time of the incident from American military personnel who witnessed it and were involved in it. Such evidence is of probative value and is admissible under the provisions of sections 270 b and c, Manual for Trial of War Crimes and Related Cases and Military Government Regulation, Title 5, section 354.4. A finding of guilty in a war crimes case, in which the prosecution's evidence consists of entirely written evidence, has previously been upheld by this office (U.S. v Ernst MILLER, Opinion DTJAWC, July 1946). This case is analogous. It is obvious that with the redeployment of the military personnel involved in the incident to the United States the best evidence available was their written statements. Therefore, Section 270 d of the Manual, referred to above, was also complied with: no prejudice to any substantial right of the accused appears to have resulted from the fact that he was not physically confronted with the

witnesses against him, as will be shown below in discussing the evidence itself.

b. Accused's sole defense was that he did not fire from the ambulance and that the ambulance was attacked first by American fire. He admitted being in it and at the place where the offense is alleged to have occurred. The crucial factor in his defense is his claim that he was in the back of the vehicle and that it was of a right-hand driven type. He hereby seeks to show that he could not have fired from it as alleged.

The photographs taken immediately after accused's capture show clearly that it was of a left-hand driven type. Accused does not claim that the pictures are not those of the vehicle in which he was riding. Accused admits that he was not driving. It becomes obvious that whoever was not driving must therefore have sat on the right hand side of the vehicle if he did not sit in the back. The likelihood is less that the driver did the shooting, than that his passenger did. Accused himself claims that the driver had no pistol, although the evidence presented by the prosecution is clear that he did. But at any rate, it may be seen that accused's testimony in his own behalf breaks down as a result of its own inconsistencies. As for his defense that the ambulance was fired upon by the Americans without cause therefor, there was presented a question of fact for the court to decide. The inconsistencies in other portions of his defense do not indicate any obligation on the part of the court to believe him in this respect. For he claims that he did not fire at all. Had he claimed that he fired from the vehicle in self-defense and in return of fire unlawfully directed by the Americans upon a protected vehicle, it would have some weight. As it now stands, his allegation in this respect in no way supports the theory of his defense.

c. At the close of the prosecution's case the defense moved for a finding of not guilty on the ground that there had not been a clear showing by the prosecution of a misuse of Red Cross emblems, and

consequently no violation of the laws of war. This motion was properly overruled by the court. As set forth in Section 7 of this opinion, supra, it is a specific violation of the terms of the Hague and Geneva Conventions to misuse such emblems. It is hard to conceive of a more flagrant misuse than the firing of a weapon from an ambulance by personnel who were themselves protected by such emblems and by the Convention, in the absence of an attack upon them. This constituted unlawful belligerency, and the particulars stated a criminal cause of action. The prosecution had made out a *prima facie* case of guilt on the part of the accused by introducing credible evidence that accused was in a vehicle protected by the terms of the Geneva Convention and that he fired at lawful combatant soldiers from such vehicle without first having himself been attacked.

There are no errors which prejudiced any right of accused. Except for the fact that he was not confronted physically with the witnesses against him, he enjoyed every right which would have been possessed by an accused in a court-martial or a trial under Anglo-American legal principles. The evidence of his guilt is clear and convincing.

9. CLEMENCY: No petitions for clemency or review have been received. In a statement to the court prior to being sentenced accused stated that he had been continuously confined since 15 January 1945, and that "the condition in camp, including the ability to do any work and the overcrowdedness" * * * mean a mental and spiritual breakdown for me" (R 40). The court was aware, when it sentenced accused to confinement for six months from the date of his trial, that he had already been imprisoned for twenty months. The total amount of confinement thus imposed is well within the limits of the sentence which the court was empowered to impose. Accused's offense, while it had no serious results except for the death of his own driver, was an open and unwarranted violation of the laws of war. No clemency is recommended.

10. RECOMMENDATION: It is accordingly believed that the sentence of the court should be approved by the Theater Judge Advocate under the provisions of paragraph 8 d, Letter, Headquarters, United States Forces, European Theater, File AG-000.5 "CE-500 subject: "Trial of War Crimes Cases," dated 11 July 1946. A form of action prepared to accomplish this result is attached hereto.

/s/ Samuel Sosenfield
/t/ SAMUEL SOSENFIELD
Attorney,
Chief, Post Trial
Section

Having examined the record of trial, I concur.

/s/ C. E. Straight
/t/ C. E. STRAIGHT,
Colonel JAGC,
Deputy Theater Judge Advocate
for War Crimes