

23 October 1947

UNITED STATES )

v. )

Case No. 12-1502

Ludwig KLUETTGEN )

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 11-12 August 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Ludwig KLUETTGEN, a German national, did, at or near KRANENBURG, Germany, on or about 17 September 1944, wrongfully kill two members of the United States Army who were then and there prisoners of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: Following an aerial attack on the fortifications near Kranenburg, Germany, on 17 September 1944, two American flyers were captured and taken to the town of Kranenburg, Germany, by a border patrolman. The border patrolman delivered the flyers into the custody of the accused, who immediately shot both prisoners through the head as they stood with their hands raised, killing one instantly. The other desperately wounded flyer, having been shot through the head but still showing signs of life, was shot again by an SA man.

IV. EVIDENCE AND RECOMMENDATIONS:

Ludwig KLUETTGEN

Nationality:	German
Age:	38
Civilian Status:	Not shown

Party Status:	Member Nazi Party
Military Status:	SA Lieutenant Colonel
Flea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: On 17 September 1944, two allied flyers, either British or American, were brought to the town of Kraegenburg, Germany, by a border patrolman. The accused stepped out of the mayor's office, took charge of the flyers and immediately shot both of them in the head (R 7, 22, 32-34; P-Ex 4A, pp. 1, 2). The victims had their hands crossed behind the back of their heads at the time they were shot (R 8, 23, 33). One victim died immediately, but the other probably was not dead at the time when soon thereafter the bodies were thrown over a fence into a garden nearby, although, according to the testimony of one of the eyewitnesses he had been shot through the head (R 7, 8, 22, 32). Another SA man stepped to the fence and fired a shot into one of the flyers (R 23). The bodies were later buried in this garden (R 8, 22, 23, 32), and the next day were removed and buried in the local cemetery (R 8, 34). The clothing identified the flyers as being Americans (P-Ex 3). There were policemen in the town (R 30, 35, 77), an arrest cell and also soldiers on duty, nearby (R 77).

Evidence for Defense: The accused admitted in his testimony that he shot the two flyers (R 60). He explained his act by the fact that on 17 September 1944 there were about 3,500 laborers under his control and that about 2,000 of these were foreign laborers (R 48) who were innately hostile to Germany (R 51). He had only 15 SA men armed with one round small caliber rifles to guard them (R 48). (But see R 67 where the accused testified that he had 400 men.) He had no soldiers at his disposal (R 49). There were many air

attacks on that date as well as landings by enemy airborne troops (R 50). He had orders to bring the laborers back to a safe area and bring them under authority of any available army units and fight along with those units (R 51). The foreign laborers consisted of Poles, Dutch and Russians (R 52). Reports came to him that these foreign laborers were raiding farms and plundering them (R 52). All communications were disrupted except by couriers (R 52). It had been reported to the accused that these two American flyers had fired upon his laborers and had killed two foreign laborers and two members of the Hitler Youth and wounded many others. He thought it was dangerous to leave these two flyers unguarded. He had no guards at his disposal and no way to move them. Therefore, he decided to overcome the situation by shooting them (R 59). The accused further testified that it was his duty to prevent the enemy from obtaining information (R 56), and that there were no police in the vicinity (R 60). He said that he believed that, if he permitted the flyers to come into contact with the foreign laborers, they would be able to incite the laborers to riot, because of the lack of enough guards; and that the flyers would then escape to their own lines with the information that there were no army units in the immediate vicinity (R 60). After the shooting the accused ordered that the bodies be disposed of under the trees by the roadside (R 61).

Sufficiency of Evidence: It is clear that the accused shot the flyers without excuse or justification and that one died immediately. In view of the fact that he shot the second flyer through the head and he showed few signs of life, the Court would have been warranted in concluding that it had been proved beyond a reasonable doubt that the wound inflicted upon the second flyer would have been fatal in the

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

Petitions: A Petition for Review was filed by Frank L. Walters, defense counsel, 15 September 1947.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: It is clear that the Court had jurisdiction of the person of the accused and of the subject matter.

Intervening Causes: While the issue was not raised by the defense, the question arises by implication as to whether the accused is guilty of illegally killing the second flyer in view of the fact that the evidence clearly establishes that he did not die immediately and that soon after being shot by the accused the flyer was again shot by an SA man. In this connection, the evidence indicates that the flyer in question showed few signs of life after being shot by the accused. Moreover, the shot by the accused entered the front and came out of the back of the head. It is established beyond a reasonable doubt that the second flyer would have died, even in the absence of the second shot. Under such circumstances, a person who inflicts the first injury may be found guilty of illegal killing, inasmuch as the injury or wound inflicted by him would have caused death had there been no intervening act by another. (See 26 American Jurisprudence, title Homicide Section 50, Note 2.) On the basis of both logic and principle, this is the rule which should be applied in cases of this character.

Petitions for Review: The defense in effect by its petitions for review asserts (1) that the killing of the two flyers was justified because they had killed local inhabitants in violation of the laws of war and (2) that the killings

by the accused were acts of legitimate warfare resulting from military necessity.

Summary Killings. The defense did not demonstrate that the flyers had committed war crimes. However, if they had violated the law of war, the defense asserted by the accused would not be meritorious because, while under international law a person who has been found guilty of committing a war crime may be legally executed, the execution must be preceded by a proper trial and sentence by lawfully constituted authority. There is no basis in law nor in the universally accepted standards of human conduct for the type of outlawry practiced by the accused in this case (Volume II, Oppenheim's "International Law," Sixth Edition, pages 331, 435, 437; Article 30, Annex to Hague Convention No. IV of 18 October 1907, set forth in TM 27-251, War Department, U. S. Army, "Treaties Governing Land Warfare," 7 January 1944; Volume 2, "Wheaton's International Law," Seventh Edition, pages 220, 240).

Military Necessity. Article 2 of the Geneva (Prisoners of War) Convention of 27 July 1929 provides a positive duty to protect prisoners of war against acts of violence, and specifically prohibits measures of reprisal against them. It is stated in Wheaton's, "International Law", Seventh Edition, Volume 2, page 179:

"In some quarters it is claimed that a commander is entitled to put prisoners to death in case of imperative necessity, e.g., when their presence is dangerous to the existence of the captors and there is no means of keeping them. But the better and weightier opinion of to-day is contrary to this view."

To concede that military necessity goes as far as contended by the defense would destroy most of the elementary restraints on war handed down from antiquity. More specifically, it would permit governments and commanders to deliberately

confuse military necessity with strategical interest and military convenience.

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

VI. CONCLUSIONS:

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

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

FLOYD M. LUNDBERG  
Major, J.G.D.  
Post Trial Branch

Having examined the record of trial, I concur, this \_\_\_\_\_  
day of \_\_\_\_\_ 1948.

C. E. STRAIGHT  
Lieutenant Colonel, J.G.D.  
Deputy Judge Advocate  
for War Crimes