

HEADQUARTERS THIRD ARMY  
OFFICE OF THE STAFF JUDGE ADVOCATE  
WAR CRIMES BRANCH  
ATO 403 US ARMY

24 April 1946

THE UNITED STATES

vs  
Fritz Iohla  
and  
Ernst Vogler  
German nationals.

Case No: 12-1745

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

The accused were tried at a joint trial from 2 April 1946 to 3 April 1946 at Ludwigsburg, Germany, by a General Military Government Court appointed by par. 12, Special Orders SA, Headquarters Seventh United States Army (Western Military District) ATO 758, 25 March 1946.

2. CHARGES, FEELS, FINDINGS AND SENTENCE:

Charges and Particulars	plea	Finding (as to both accused)
Charge: Violation of the Laws of War	NC	G
Particular:	NC	G

In that Fritz Iohla and Ernst Vogler, German nationals, did, at or near Kleinzerbst, Germany, on or about 7 July 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of Samuel J. Levine, Walter Dufsmore and John M. Chojacki, members of the United States Army who were unarmed, surrendered prisoners of war in the custody of the then German Reich, by shooting them with guns.

Sentence: The court by at least two-thirds vote of the members present at the time the vote was taken concurring, sentenced each accused to death by hanging.

3. DATA AS TO ACCUSED:

a. Friedrich Iohla, a.k.a. Fritz Iohla, is a male civilian German citizen, 51 years old, married, one child, and a resident of Dessau, Germany. (R2, 32) Accused was a member of the Police Department at Dessau, Germany, from 1919 until 1945. At the time of the commission of the offense occurring occupied the position of criminal secretary. (R32, 72) He joined the NSDAF in 1939 and as a member of the police force at Dessau became assimilated in the SS in 1941. (R 39, 66) He was a member of the German Armed Forces 1914 to 1916.

b. Ernst Otto Vogler, a.k.a. Fritz Fohler, is a male civilian German citizen, 43 years of age, married, two children and a resident

of Dessau, Germany. He was a member of the Police Department at Dessau, Germany, from 1934 to April, 1945, and at the time of the commission of the offense herein also held the position of criminal secretary. (R 74) He joined the NSDAP in 1933 and as a member of the police force at Dessau, Germany, became assimilated in the SS in 1941. Also joined the SD in 1942.

#### 4. JURISDICTION:

a. It is settled law that civilian nationals of one belligerent nation may be tried and punished by the duly constituted tribunals of another belligerent nation for violations of international laws governing land warfare. When a civilian wrongfully kills an enemy who has come into his hands as a prisoner of war, it is an offense falling within the scope of this rule.

b. This General Military Government Court was duly and legally appointed and the charge and particular against each accused was properly referred to this court for trial by order of G.R. Bard, Col., JAGD, and the charge was preferred by Howard F. Brossie, Col. The required jurisdictional number of five (5) members of the court panel were present throughout the trial. The charge and particular were served on each accused prior to trial. Each accused was represented by the regularly appointed defense counsel and a German civilian attorney from the Ludwigsburg bar and defense announced that they were ready for trial. The court was vested with full power to try each accused for the offense alleged. The sentence as to each was legally within the power of the court to impose.

#### 5. EVIDENCE:

a. For the Prosecution: On the morning of 7 July 1944 Arthur Jetzinger, chief of criminal police at Dessau, Germany, called the two accused and another policeman, one Jakob Kempf, to his office and informed them that they were to go to a nearby town (Hohen-Erdleben or Gerwitz) and get three American fliers who were in custody of the burgomaster. The witnesses differ as to the exact words used by Jetzinger but in substance he stated they should shoot the fliers in accordance with a general written order issued by Himmler regarding terror fliers, which order had been read by the police chief a couple of months prior thereto at one of the daily morning conferences. (R6, 22, 33; exhibits 4, 5, 6). Accused Fohla said that Jetzinger read the order and added: "You know the order. Go out: take the fliers over; and do your duty." (R33) The three men all armed with pistols, accompanied by a driver, left by auto at about noon. (R 7, 22, 34) When the police officers arrived the three fliers were incarcerated in the fire station at the above named town. On the request of the accused they were turned over to them by the burgomaster. (R 18, 23, 34) The fliers, all unarmed, were placed in an automobile with the two accused and Kempf and were then driven a short distance beyond the town of Kleinzerbst to a woods which was a short distance off the main road. (R 9, 24, 34 & 15) En route to this point the three policeman had some conversation among themselves for carrying out the orders to kill the fliers. (R 28, 36) When the car stopped, Fohla told the others to get out and said that the fliers were to be shot. (R 9) The group then walked about ten to twenty meters into the woods, each policeman being near one of the fliers, and Fohla then said that they will be shot. Fohla immediately fired the first shot into the head, the neck, or back of one of the fliers. (R 10, 26, 37, 46) Immediately thereafter Vogler shot the second airman and the witnesses differ as to whether Kempf, Vogler or Fohla shot the third airman. (R 10, 37, 48) The three victims were identified as Americans and as individuals, to wit: John H. Chojacki, ASN 3635590, Walter Duismore, ASN 3325227, and Samuel Levine, ASN 207287. (R 9 & 10, 55; exh. 19-2). As soon as the airman were shot Fohla left the scene to notify the burgomaster of Kleinzerbst and

arrange for the burial of the victims. Kempf and Vogler remained behind to guard the bodies. (R 10, 27, 39, 57) During that time Vogler and Kempf searched the bodies and removed from them their identification tags and two watches which were subsequently turned over to Jetzinger. ( 10, 24, 57) - 15 to 20 minutes later Fohla returned with the burgomister and told him "those three men were shot and they shall be buried in a secret way when it is possible". (R 10, 28) The two accused and Kempf then left the scene. The burgomister of Kleinzerbst had the bodies removed by a horse cart and buried in a common grave at the local cemetery at Kleinzerbst later in the afternoon. (R 52, 59; exh. 17-2, 7).

b. For the Defense: Friedrich Fohla testified as follows: At a morning conference of the town's officials in May, 1944, Arthur Jetzinger, chief of police, read a secret order which stated that all pilots who were shot down and taken prisoner should be shot to death. (R 66) On July 7, 1944, when Jetzinger called Vogler, Kempf and myself to his office, the order was lying on a writing table and he referred to it by saying: "You know the meaning of this, of the law. Please go out now and carry it out." (R 67) I complied with this order because if I hadn't complied with it I would have been taken before an SS police court and shot. (R 67) I had no personal knowledge of such punishment ever having been imposed for disobedience of such orders but we were told in the morning conference that this time that other courts had imposed the death sentence for violation of orders. (R 71, 72) I believed it to be a proper and legal order. En route to the woods on the morning of 7 July, 1944, we spoke among ourselves regarding the carrying out of the orders issued by Jetzinger. (R 69) When the fliers got out of the car they stood in line one after the other and "Each one of us took a position behind one of the fliers" and then it happened. (R 70) Jetzinger had said earlier "There are three fliers and for each flier there is one man". (R 70) None of us made any objection to the order at any time. (R 71).

Ernst Vogler testifies as follows: In July, 1944, Jetzinger called Fohla, Kempf and myself into the office and said that three American fliers had been captured near Bornburg and we were to go and take them. He directed our attention to a secret order which stated that fliers taken prisoners should be shot. Jetzinger had told us about this order earlier in the Spring at one of the morning conferences but he did not make any remarks of his own at that time, only read it. (R 74) At this particular conference numerous examples were given of drastic punishments for refusal to obey orders of superiors. On the day of the killing we had no discussion among ourselves about the execution of the order while enroute to the woods. (R 75) Neither were we given any order by Fohla at the scene of the incident, we just started shooting. (R 75) I am a member of the SS criminal police and when we receive an order I knew that I had to obey it, even if it meant shooting my wife. (R 77) We had been previously told of the death sentence having been imposed for failure to obey general orders, although not in reference to the particular order to shoot fliers. (R 75)

#### 6. DISCUSSION:

a. The two accused were charged, found guilty, and sentenced to death for a war crime approximating a common law murder. The proof is undisputed that each accused deliberately killed a defenseless surrendered prisoner of war by shooting. No witnesses were called by the prosecution. The material proof introduced by the prosecution consisted of three confessions, one from each of the accused and one from Kempf, the third member in the death party, and the statement of the burgomister of Kleinzerbst and certain documentary evidence pertaining to identity, death and cause of death. The

accused do not deny and the proof is uncontroverted that each shot and killed an American prisoner of war. Their sole defense is that they killed in pursuance of orders from their superior, Arthur Jatzinger, the chief of police, Dussau, Germany.

b. In the course of the trial, counsel for the accused raised several objections to the admissibility of evidence which shall be discussed in the order in which they appear in the record.

(1) The defense objected to the admission in evidence of the statement of witness Kempf and certain other witnesses in lieu of hearing said witnesses in open court. (R 5).

The rules for the admission of evidence in Military Government Courts are that the court shall "in general admit oral, written, and physical evidence having a bearing on the issues before it. Hearsay evidence, including the statement of a witness not produced, is thus admissible, but if the matter is important and controverted every effort should be made to obtain the presence of the witness." (Military Government Germany, Technical Manual for Legal and Prison Officers, 2nd Edition, par. 9, p. 43). Kempf was an important witness. The record fails to disclose why he was not called or what efforts had been made to obtain his presence at the trial. The record is also silent, both by way of evidence, stipulation, request for the court to take judicial notice, or any statement by counsel as to why this witness was not called. The record should show these facts and it is a fundamental duty of the prosecutor to see that such matters are brought before the court. The prosecutor is "responsible for the record of trial" (Outline of Procedure for Trial of Certain War Criminals by General and Intermediate Military Government Courts). It is imperative that the record indicate the facts upon which the court makes its determination not to hear witnesses in open court. It is not the duty of the reviewing authority to make an independent investigation to ascertain why certain witnesses were not called, as has been done in this case, to determine if accused has had a fair and full trial. Independent investigation discloses that Kempf's whereabouts is not known and some effort has been made by the War Crimes Branch to locate him by the filing of a wanted report. Apparently, though, it is not known with any degree of certainty. Witnesses Marx and Kittel are residing in Russian territory. Taking into consideration the results of this investigation, the confession of each accused and their testimony, any error committed by the court in admitting the statements of Kempf and the other witnesses was not prejudicial to the substantial rights of the accused.

(2) The defense counsel objects to the admission of the confession of each accused for the reason it is compelling "witnesses to testify against themselves" and the man "who conducted the investigation is not in court". The reasoning of counsel that the confession of accused is compelling him to testify against himself and in violation of the prohibition that no man shall be compelled to incriminate himself is more ingenious than ingenuous and as such needs no further discussion. The sworn statement of each accused may be used against the other on the theory that they have probative value to a reasonable man. They are not subject to the objection known in our domestic law that a confession of one co-conspirator made out of court is not admissible against another co-conspirator. The objection is also made that the investigator who took the statements should have been called and a proper foundation laid for the admission of the various statements. "It is the position of this office that such testimony (whether a narrative statement or in question and answer form) may be introduced in evidence without further authentication if it was procured by an officer officially appointed to

investigate war crimes. The presence of the investigating officer at the trial is not required either to authenticate such testimony or to authenticate his own report of investigation..... Any objection based on the hearsay nature of such documents or the need for authentication thereof may properly be overruled by the court". (Letter, Deputy Theater Judge Advocate's Office, dated 6 October 1945, AG 000.5, subject: Admissibility of Report of Investigation in the Trial of Suspected War Criminals.) Exhibits 1 and 2 show the assignment of the officers taking the statement as well as empowering them to conduct such investigations as were made in taking the statements in question. (R 4; exh. 1 & 2) The corpus delicti was sufficiently established by competent evidence from the statement of Kempf to admit the confession of each accused.

c. The identity of the airmen as American soldiers as well as individuals was clearly established. The proof leaves no question for doubt as to the victims' status as unarmed surrendered prisoners of war. No claim is made that they were shot while escaping or resisting lawful orders. The two accused took the three victims from the custody of the burgomaster of a nearby town where they were locked up in the fire-station house, placed them in their automobile and drove to a secluded spot in the woods. While en route they talked over the manner in which the victims were to be killed. The evidence is uncontroverted that accused Fohls shot and killed one American airman and accused Vogler shot and killed a second American airman. The killing could not have been more cold blooded and deliberate. Their only defense is that of superior orders, not from a superior military official but their superior police official. They claimed if they disobeyed the order they feared they would be shot, although they know of no such action ever having been taken for refusal to obey such an order, but they claim that their police chief had read to them that such action had been taken in other districts for failure to obey general orders of superiors. There is some discrepancy in the proof as to whether Kempf, Vogler, or Fohls shot and killed victim #3. However, there is no discrepancy in the testimony that each aided, abetted and participated in the killing of victim #3. "The modern rule is that all persons who are present and concerned in the commission of a crime are liable as principals. The principal and aider and abettor may be indicted and tried jointly or separately; (14 Am. Jur. 822, par. 79, and authorities cited therein) furthermore it is provided by section 332 of the United States Criminal Code that "whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commissions, induces or procures its commission, is a principal." (chap. 321, sect. 332, 35, statutes 1152). (Annex F, letter Deputy Theater Judge Advocate's Office, dated 21 January, 1946, subject: Preparation of case analysis) The legal aspect of superior orders has been discussed so frequently in recent reviews that no lengthy discussion is believed necessary here since there are no new or additional legal points raised and no unusual factual elements. The court properly admitted such evidence of superior orders for they "may be taken into consideration in determining culpability either by way of defense or in mitigation of punishment" (Change 1, 15 November 1944, par. 345.1, Field Manual 27-10, Rules of Land Warfare.) "The tribunal can then determine whether they constitute a defense or merely extenuating circumstances or perhaps carry no weight at all" (report to the President from Justice Robert H. Jackson, 7 June 1945, The American Journal of International Law, July, 1945, p. 183). There was no abuse of discretion, nor did the court act arbitrarily in determining the defense of superior orders carrying "no weight at all" in the instant case. It should be noted but it is not necessary to the determination in the instant case to pass upon the question

whether the accused as members of the Police Department when they became assimilated in the SS in 1941 were then such an integral part of a conspiratorial organization that the defense of superior orders would not apply. "The defense of superior orders can not apply in the case of voluntary participation in a criminal or conspiratorial organization such as the Gestapo or the SS". (report to the President from Justice Robert H. Jackson, 7 June, 1945.)

d. All the elements of proof of the alleged offense necessary to establish the guilt of each accused were properly adduced in evidence. The sentence is legal. The trial was fairly conducted. Neither in the procedure nor in the admission of evidence do any errors appear so prejudicial to the accused as to offend against the rules of fairness and justice applicable in General Military Government Courts.

7. PETITION FOR REVIEW:

The regularly appointed defense counsel has filed a petition for review in behalf of each accused, the basis of which is that each acted under orders from his superior police officer. No errors prejudicial to the accused which prevented him from having a full and fair trial are alleged. The petition is really a plea for mercy based upon superior orders. Superior orders, both as a defense and as an extenuating circumstance, have been discussed in the preceding paragraph.

8. CLEMENCY:

No pleas for clemency have been received other than a petition for review. This petition set forth no facts as to either accused which were not presented to the court at the time of trial. The court considered the fact of superior orders and it is not believed that they acted arbitrarily when they determined from their finding and their sentence that superior orders in the instant case carried "no weight". The offense for which the accused stand convicted is a war crime but closely approximates common law murder. It was not done in the heat of passion; it was not done by men who recently had lost wife, home or children in an air attack. It was done deliberately by two policemen who had long periods of service with the Police Department at Dessau, Germany. The offense was particularly heinous because it involved police officers killing in cold blood an absolutely defenseless prisoner of war. The usual penalty among civilized people for such an offense is life imprisonment or death. The alleged superior orders were not considered by the court as an extenuating circumstance of such character as to warrant a life sentence. The reviewer does not consider the alleged superior orders in the instant case sufficient to warrant changing the penalty of death imposed by the Court.

9. RECOMMENDATION:

It is recommended that the sentence of the commission as to each accused be approved. The forms of action designed to carry this recommendation into effect are attached hereto.

/s/ M. C. Setzekorn  
/t/ M. C. SETZEKORN  
Capt., INF  
Chief, Trial Section

I concur.

/s/ Charles T. Cheever  
/t/ CHARLES T. CHEEVER  
Colonel, JAGD  
Staff Judge Advocate