

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 AIR BRIGADE GROUP
EUROPEAN COMMAND
APO 178

25 June 1947

UNITED STATES)
) v.)
Heinrich OTTE, et al.)

Case No. 12-1968

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 30 April - 2 May 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

PARTICULARS: In that the accused Heinrich OTTE, Hans Otto SEIDEL, and Willy LANG, German nationals, did, at or near KEMEL, KREIS BAD SCHWALBACH, Germany, on or about 10 February 1945, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of a member of the United States Army, believed to be Cecil ALLEN, ASN 38529143, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich. (Amended (R 86) to strike out the words "Kreis Bad Schwalbach" and inserting in lieu thereof, "Kreis Unter-Trannus".)

III. SUMMARY OF EVIDENCE: Following a bombing attack upon Kuroth, Germany, on or about 10 February 1945, an American flyer parachuted to earth from his disabled plane, landing in a woods. A crowd of civilians gathered, the flyer was captured and assaults made on him. Later, he was turned over to OTTE and LANG, who marched him along a road near Kemel where he was shot and killed by OTTE.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Heinrich OTTE

Nationality:	German
Age:	52
Civilian Status:	Police Master Sergeant

Party Status:	NSDAF 1937
Military Status:	None
Flee:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: OTTE, a rural policeman, accompanied by LANG, received delivery of the captured flyer from two civilians on a road near Kamel (R 12, P-Ex. 2A, p.3). OTTE inquired of the two civilians as to why they had not already shot the flyer (R 28, 29). The flyer was not armed (R 24). He was marched about one (1) kilometer (P-Ex. 2A, p.4) at which point OTTE, in the presence of LANG, from a distance of about three steps behind, shot the flyer in the head. OTTE and LANG left the scene and reported the incident to the mayor of Kamel (P-Ex. 2A, p. 6). The next day, the body of the flyer was removed to the cemetery and buried (P-Ex. 2A, p.7). In his extrajudicial statement (P-Ex. 24, p.7), OTTE was asked the flyer's name and replied: "I don't know it by heart. It was a short name. The first letters of the first name were C and of the second name A". The record of trial (R 18, 19, 20) shows a stipulation, agreed to by counsel and all accused and accepted by the Court that Cecil ALLEN, a member of the Army Air Forces, Army of the United States, ASN 38529143, was shot and killed near Kamel on or about the 10th of February 1945, and was buried in the cemetery at Kamel. Accused OTTE stated (P-Ex. 24, p. 11) that it was his duty to take into custody all enemy fliers landing in his district; that every flyer taken by him was "surrendered" "live except the one involved in this incident. OTTE, on the day of the shooting, admitted the killing of the flyer to his wife, who, in his presence, reported it to his daughter (P-Ex. 4). At a community meeting a short while prior to the shooting of this flyer, OTTE instructed all present that captured airmen were not to be brought in alive (R 12, P-Ex. 2A, p.3; R 40, 41, P-Ex. 7, p. 5).

Evidence for Defense: OTTE did not elect to testify, although, after the findings of the Court had been announced, made an oral unsworn statement (R 132, 133) in mitigation, asserting that, at the time of receiving a telephone order to secure the captured airmen, he was told by the Ortsgruppenleiter, speaking for the Kreisleiter, "under no circumstances are you allowed to bring this flyer alive". Therefore, he shot him in fear of being put to death were he to disobey this direct command (R 133). The Kreisleiter (District Leader) was the accused's superior officer (P-Ex. 2A, p.2), who had previously severely reprimanded him for bringing in prisoners alive and threatening the cost of "my head if I would bring in another flyer alive" (R 133).

Sufficiency of Evidence: With regard to the evidence offered in support of superior orders, it appears that prior to this incident the accused had encouraged local inhabitants to kill all captured flyers and that he in effect criticized the two civilians from whom he accepted custody of the flyer for not having already shot the flyer. In any event, the accused failed to establish that he acted under immediate compulsion to any degree. The accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

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

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendations: That the findings and sentence be approved.

2. HANS OTTO SEIDEL

3. WILLY LANG

Nationality:	German
Age:	46
Civilian Status:	Farmer
Party Status:	None
Military Status:	Home Guard

Plea:	NG
Findings:	G
Sentence:	1 year

Evidence for Prosecution: LANG, a member of the Home Guard (R 77), accompanied OTTE on the mission to receive the flyer (P-Ex. 2A, p 3), OTTE explaining that the order of the district leader was to kill the airmen. LANG did not object to going with OTTE and was armed with a pistol (P-Ex. 2A, p.4). At the moment OTTE shot the flyer, LANG was at his right side (P-Ex. 2 A, p. 6). After the shooting, LANG remarked: "That was very quickly done", and on instructions from OTTE, removed the body of the dead prisoner to the side of the road (P-ex. 3a).

Evidence for Defense: LANG elected to testify and admitted accompanying OTTE, his superior officer (R 77), and receiving the captured flyer who was later shot by OTTE. LANG denied being armed (R 79).

Although knowing of the intent of OTTE to kill the flyer, he remonstrated with him saying, "We both have sons out in combat; think over what you are about to do". LANG testified that he stopped when OTTE took out his pistol because he "knew what was going to happen and I did not want to look at it" (R 79).

Counsel for the prosecution and the defense stipulated that certain individuals, if present in the Court, would testify that LANG was a decent person of good character (R 87).

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

Petitions: No Petitions for Review nor for Clemency were filed.

Recommendations: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: The Court was legally constituted and had jurisdiction of the persons of the accused and of the subject matter.

Superior Orders: Accused OITE as shown in Section IV, paragraph 1., *supra*, sought to justify his actions by offering evidence to show that he was acting in compliance with "superior orders". Compliance with superior orders does not constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives, Ex. Dec. No. 23, page 812; Vol. II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Dominikus Thomas, December 1945; and United States v. Alfons Klein, et al., (Hadamar Murder Factory Case), February 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Hermalyn, 13 How. 115, and "Manual for Courts-Martial, U.S. Army", 1928, paragraph 148).

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior directing that he commit the wrongful act, (b) that he did not know, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945), Concerning Prosecution and Punishment of Major War Criminals of the European Axis; File 27-10, War Department, U.S. Army, "Rules of Land Warfare", paragraph 305.1, Change No. 1, 15 November 1944; Oppenheim, "International Law", *supra*,

and the Llandovery Castle Case cited therein: "Manual for Courts-Martial", supra: "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U. S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of Our Enemies", found in footnote, page 53, "Military Occupation and the Rule of the Law", by Ernst Fraenkel; and opinions of the Deputy Theater Judge Advocate for War Crimes in U.S. v. Albert Sany and Wilhelm Hofner, September 1945, U.S. v. Dominikus Thomas, December 1945, and U. S. v. Gerd Beck and Otto Weinreich, December 1946).

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 the sentences be approved.

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

/s/ Oliver C Hardy
OLIVER C. HARDY
Attorney
Post Trial Branch

Having examined the record of trial, I concur.

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