

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

30 April 1946

THE UNITED STATES

vs

NICKOLAUS HARTMANN,
a German National

Case No. 12-2074

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

The accused was tried at Ludwigsburg, Germany, on 20 March, 1946, by a General Military Government Court appointed by Par. 17, Special Orders No. 77, Headquarters Seventh United States Army (Western Military District), APO 758, 18 March 1946.

2. CHARGES, PLEAS, FINDINGS AND SENTENCE:

Charges and Specifications	Flea	Finding
Charge: Violation of the Laws of War	NG	G

Specifications:

In that Nickolaus Hartmann, a German national, did, at or near Dillingen, Germany, on or about 11 May 1944, wilfully, deliberately and wrongfully commit an assault upon an unknown member of the United States Army, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich, by shooting him with a gun.

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Sentence:

The Court by at least two-thirds vote of the members present at the time the vote was taken concurring, sentenced the accused to imprisonment for a term of twenty-five years commencing 20th of March 1946 at such a place as may be designated by competent military authority. (R-47).

3. DATA AS TO ACCUSED:

The accused, Nickolaus Hartmann, is a male, civilian, German citizen, 40 years old, married, twelve living children ranging in age from six months to sixteen years, and a resident of Dillingen Sell, Germany. (R-2-44). He has never been a member of the NSDAP or any of its affiliates other than as a medic in the SA, which he apparently joined for the purpose of employment in 1935. (R-43-44). Neither the record nor allied papers disclosed the accused occupation other than as a medic. His military experience is limited to three weeks in the

German armed forces and as a member of the Volksturm.

4. EVIDENCE:

a. For the Prosecution: On or about 1700 to 1900 hours, 11 July 1944, an American airman, Calvin C. Ferrari, parachuted from his disabled plane and landed in a tree in the town of Dillingen, Germany. (R-8, 13, inc., 17, 20). As he came down the townspeople immediately gathered and surrounded the tree where he had landed. (R-9, 11). The accused, as one of the villagers, came running toward the flyer with an "old, long rifle" of 7.82 calibre, and when about one hundred and fifty meters distant from the victim he stopped, took aim toward the flyer, and an instant later a gun shot was heard and smoke was noticed coming from the muzzle of the gun. (R-11, 20, 28, 30, 31) The bullet struck the flyer going completely through the lower left arm. (R-14) An officer of the German armed forces cried out that he shouldn't shoot and the accused then lowered his gun and continued to the tree where the victim was caught with his parachute in the branches of a tree. (R-9, 11, 21) The accused at no time made any comment as to why he had shot the flyer. (R-21, 33). A German officer climbed to the tree and cut the flyer loose from his parachute and assisted with the others in lowering the pilot to the ground. (R-9, 11, 22) The flyer was too sick to stand and was laid on the ground. The officer and others tried to treat him. (R-22) It was then revealed the pilot had a bandage around his mid-section, a severe stomach wound and a fragment from anti-aircraft shell was found in this wound. His intestines were swollen and exposed. He had a flesh wound in his left arm which was bleeding. A bullet, 7.82 calibre, and a kind used in the gun carried by the accused, was found in the flyer's jacket. (R-9, 11, 22, 24) Shortly thereafter the victim was taken to a hospital at Dillingen Sall, Germany. A doctor was called to operate on the victim. The pilot remained conscious until his death, except for the period during the operation and a short time thereafter. The flyer told the doctor his name, age, nationality, residence, and further stated that he had been wounded by anti-aircraft fire before he jumped from his plane. The operation was commenced at 1930 hours. Examination by the doctor disclosed the small intestine was protruding and perforated in many places and 127 cm of the small intestine were removed and the two ends were united. There was also a "penetration caused by a shot through the left lower arm." The doctor was unable to determine if this wound was caused by anti-aircraft shrapnel or by another weapon. He stated the pilot, "would have died from the stomach wound alone, without the shot in the arm." The wound on the left arm "went through end through and had smooth edges. Such wounds have the characteristics of injuries caused by shells of a smooth upper surface, such as pistol or carbine wounds, although I can't say for certain if the injury*** was caused by such a weapon." (R-14) At no time after the pilot landed and before his death did he make any mention of how he received the wound in his left arm. The pilot died at 1100 hours the following morning. His body was removed from the hospital to the cemetery near Dillingen and buried. The grave was marked with a wooden cross carrying the inscription "Calvin Ferrari, U.S.A." (R-17)

b. For the Defense: On direct examination the accused stated only that he shot at the flyer to scare him. (R-36) On cross-examination he testified as follows: There was an air raid at the time and I was just leaving my house to report to the Town Major when I heard someone call out "a parachutist." I returned to my house, grabbed a rifle and ran toward the woods. A female medic who was with me suddenly called "There, I can see something white," and

I then noticed a parachute in the tree. (R-37,38) I was about 80 meters from the flyer. (R-36,43) He was holding on to the tree with his left arm. A German officer and several other people were approaching the flyer from the front. (R-42) I called, "Hands up" twice, held the rifle up, and then the shot went off." (R-37,38) I didn't aim, only held the rifle up in this position. (R-43) (The record indicates the accused demonstrated on three occasions just how he held the rifle, but both the Court and counsel failed to dictate into the record what the demonstration revealed). I don't know whether I hit him but I can't deny that I shot at him because I was afraid and the newspapers had told us that flyers carried revolvers under their armpits. (R-44) I then continued running and when I reached the tree a German officer was talking to the flyer. The flyer was hanging in the tree and a soldier pulled him down. (R-37,42) The people who had gathered about wanted to jump on him but we pushed them back. I noticed his "incises" were hanging out and we tried to bandage his wound. Shortly thereafter a car came and took him to the hospital. (R-37) The pilot told us he had a wound in the lower arm. (R-38) The prosecution introduced in evidence a statement by the accused made out of Court which differed materially from the testimony given in Court in one respect. In the earlier statement he stated "I ran, having my rifle and called, 'Hands Up' and then I tripped and the shot went off." (R-38)

5. JURISDICTION AND PROCEEDINGS:

a. The General Military Government Court which heard this case was properly constituted and had jurisdiction over the subject matter and of the accused. (Par. 7, FM 27-10, Rules of Land Warfare; letter, Headquarters United States Forces, European Theater, dated 16 July 1945, AG 000.5-2, subject: "Trial of War Crimes and Related Cases.") It is well recognized that the offense in the instant case, assault with intent to kill by a civilian of a member of the United States Armed Forces, is a violation of the laws of war and properly triable by a military commission having custody of the accused. The sentence was legally within the power of the Court to impose.

b. In the letter, Deputy Theater Judge Advocate Office, War Crimes Branch, United States Forces, European Theater, dated 21 January 1946, AG 000.5, subject: "Case of the United States vs. Nikolaus Hartmann," Trial of the accused Hartmann by a General Military Government Court was directed. The Charge and Particular against this accused were referred to this Court for trial by C. K. Bard, Colonel, JAGD, Judge Advocate. The charges were preferred by Howard F. Bresee, Colonel, CMP. Seven members of the Court panel were present throughout the trial. The Charge and Particular were served on the accused prior to trial although such fact of service was not entered on Page 1 of the Charge Sheet. (R-4) The accused was represented by two American officers, each an attorney, who announced they were ready for trial. Challenges for cause were permitted.

6. DISCUSSION:

a. The accused was charged, found guilty, and sentenced to imprisonment for a term of twenty-five years for a war crime approximating a common law assault with intent to commit murder. The accused pled guilty to all the "Particulars which are stated" but with the exception that he didn't have the intention to kill the man." (R-5,6) The prosecution and the Court quite properly

testimony of a key eye witness, a German officer named Eisenbarth, and certain written statements to-wit: Two eye witnesses, a German doctor who operated on the pilot, report of the results of an autopsy performed by an American officer and certain information obtained from German records pertaining to identity and burial. The prosecution states and the evidence is undisputable that the pilot died as a result of injuries received prior to the time of his parachuting to the ground and prior to the injury inflicted by the accused. (R-7,14) No error occurred which was prejudicial to the substantial rights of the accused and which prevented him from having a fair and full trial by the introduction of the written statements in lieu of calling the witnesses. As pointed out in previous reviews there should be strict compliance with at least the minimum requirements of the letter, Deputy Theater Judge Advocate Office, War Crimes Branch, United States Forces, European Theater dated 6 October 1945, AG 000.5-2, subject: "Admissibility of Reports of Investigation in the Trial of Suspected War Criminals." It is the duty of the prosecution to have the record show in each case the facts upon which the Court makes its determinations in this regard even under the liberal rules for the admission of evidence. Competent proof on all the essential elements of the offense charged by the Charge and Particular was properly introduced in evidence. A re-statement or discussion of the evidence on each essential element of the offense is not believed to be necessary in view of the substantial and undisputed proof. However, counsel for the defense devoted much attention to the state of mind of the accused at the time of the shooting. The accused is charged with a war crime, and not a common law felony. Counsel for the defense on Page 3 of their Petition for Review states:

"For, at the time of that shot he was still in the tree, had not been captured nor surrendered, and had not yet been searched for weapons. At the trial, the aforementioned witness Ludwig Eisenbarth expressly admitted that the accused, when firing the shot, according to the whole situation could well have considered the respective airman as then still being an unwounded and able enemy soldier, and the testimony of the accused himself went even more definitely in the same direction. It is beyond any doubt, and also ascertained by the testimony of said witness Eisenbarth that only after the shot of the accused had been fired, the flier was taken down to the ground and his previous abdominal wound discovered****"

No assumption the inference counsel desires to be drawn therefrom is therefore the accused had the right to engage in hostilities. However, the accused was a civilian and not a lawful combatant. If he participated in the fighting when a civilian, under the laws of war, he is liable to punishment as a war criminal. (Par. 348, FM 27-10, Rules of Land Warfare). Nor can the accused properly say, since he was the only one of the many townspeople who came that took up arms, that he is to be considered as a member of a *levée en masse*. "****this concession is made to a massed rising; it is not applicable to a few inhabitants who commit hostile acts." (J.A.G.S. TEXT No. 7, Law of Land Warfare, Pages 13 and 19). As a civilian or peaceful inhabitant, he enjoyed certain rights one of which being he was immune from warlike attack. Spaight says: "The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor****"

As a corollary of this right he had certain duties and obligations, one of which being, as pointed out above, not to engage in hostilities. Having taken up arms, his status immediately changed from a peaceful inhabitant to that of a war criminal. As a war criminal he was subject to any punishment up to and including death. A German civilian who assaults a prisoner of war may be punished as a war criminal. This proposition has been discussed at length in previous reviews. No new legal questions are raised in the instant case on this general proposition.

It is not improper to make a comparison to common law offenses if the distinction between war crimes and common law offenses is constantly kept in mind. It serves as a helpful guide to the tribunals and authorities in determining a fair and just sentence. With this thought in mind we shall try to determine the nature of the assault of which the accused has been convicted and further determine whether the sentence imposed by the Commission is a fair and just one.

"To constitute an assault with intent to murder by firearms it is not necessary that the weapon be discharged; and in no case is the actual infliction of injury necessary. Thus, where a man with intent to murder another deliberately assaults him by shooting at him, the fact that he misses does not alter the character of the offense." (140L, MCM, p. 179)

To constitute an assault to murder "a specific intent is a necessary element." The intent does not "necessarily mean hatred or personal ill-will***nor an actual intent to take his life or that the intention to kill must have been previously existed. It is sufficient that it exist at the time the act is committed." (Par. 148, MCM 1928) It may exist when the act is unpremeditated. "The specific intent must be established either by independent evidence, as, for example, words proved to have been used by the offender, or, by inference from the act itself." (Par. 126, MCM, 1928) (Underscoring added). In the instant case the record is silent as to any words or remarks by the accused other than his statement that he shot toward the pilot with the intention to scare him. (R-36) "****and I shot at him because I was afraid and the newspapers had told us flyers had revolvers in their armpits." (R-44) The intent required is "not a thing or entity but rather a mental state or condition promoting the doing of an overt act without legal excuse or justification***the mode of proof is not the demonstration but inference." (Wharton's Criminal Law, 12th Ed., vol. 1, par. 146) The evidence of an assault in the instant case is both overwhelming and uncontraverted. There is sufficient evidence from which the Court could reasonably have inferred that the assault was aggravated by the concurrence of a specific intent to kill. The Court did not act arbitrarily in finding the accused guilty of the Charge and Particular. The finding is supported by substantial evidence.

The next question is whether the sentence is appropriate to the offense. The maximum punishment under the table of maximum punishment in the Courts-Martial Manual for the offense of assault with intent to commit murder is confinement at hard labor for a term of twenty years. Winthrop in his discussion of the sentence of a Military Commission states that imprisonment for a term of years is "Sometimes and properly assimilated to the term prescribed for similar offenses by the local law." (Winthrop

of maximum punishment be used as a guide, and one of the factors in determining a just sentence. For the reasons stated, and in view of facts set forth in Paragraphs B and C, it is suggested a sentence of imprisonment for a term of fifteen years is a more appropriate sentence.

7. PETITION FOR REVIEW:

The American defence counsel have filed a petition for review on behalf of the accused alleging error on the part of the Commission on two grounds which shall be discussed in the order that they appear in the petition, to-wit:

a. Counsel alleges the victim was not a "Surrendered prisoner of war in the custody of then German Reich" for at the time of that shot he was still in the tree and had not been captured or surrendered and had not yet been searched for weapons." This objection is answered fully in the preceding paragraph under "Discussion." In addition it is stated on Page 34 of the J.A.G.S. TEXT No. 7, Law of Land Warfare that "Enemy personnel descending in parachutes from aircraft which is disabled or out of control may not on general principle be shot if the descent is over ground held by forces hostile to the parachutist." Seaight says: "One cannot say that there is any definite rule of law upon the point, but it may at least be affirmed that to attack a parachutists in circumstances in which he is certain in any case to be captured would be contrary to the principles of international law." (Seaight's Air Power, War Rights, 2nd Ed., p.140) The evidence is clear in this case that the accused was only one of many townspeople rushing toward the pilot. There were others nearer the pilot than the accused. The accused was the only one who had seen fit to take a gun. He was the only one who had seen fit to use it. The accused was a civilian and as such under the rules of Land Warfare if he participated in the fighting he was liable to punishment as a war criminal.

b. Counsel further alleges there was not the least evidence for the allegation that the accused committed the assault in question "With intent to kill." The intent is to be inferred from all the facts in the case. As pointed out in the preceding paragraph under "Discussion" when a man points a gun at another, discharges the firearm and admits he "Shot at him" (E-44) and there is substantial evidence indicating he hit the pilot in the arm, the Court did not act arbitrarily nor abuse its discretion in finding the assault was committed with the intent to kill. There was substantial evidence to support the finding of the Court.

8. CLEMENCY:

No pleas for clemency as such have been filed on behalf of the accused. The petition for review devotes such attention to the severity of the sentence which has already been discussed from a legal viewpoint. The accused is forty years of age, married, and the father of twelve living children ranging in age from six months to sixteen years. He lost a small child from a bombing attack some months prior to the incident. There is no claim that the victim was the pilot responsible for the bombing attack causing the death of this minor child. The accused was not an official in any organization of the NSDAP or any of its affiliates and denies that he was ever a member of the party. The record indicates he was an ordinary and simple man who for some unexplained motive spontaneously committed this assault. The accused has been in

prison since October 1945. It is believed for reasons stated in the preceding paragraph that a sentence of imprisonment for a term of fifteen years commencing 20 of March 1946 would be a more appropriate sentence.

9. RECOMMENDATION:

It is recommended that the findings and so much of the sentence as provides for imprisonment for a term of fifteen years, commencing 20 March 1946, be approved. The proper order for carrying out this recommendation has been appended for signature of the reviewing authority.

/s/ M. C. Setzekorn
M. C. SETZEKORN
Capt. Inf.
Chief of Trial Section

I concur:

/s/ Charles E. Cheever
CHARLES E. CHEEVER
Colonel JAGD
Staff Judge Advocate