

HEADQUARTERS
THIRD U S ARMY AND EASTERN MILITARY DISTRICT
Office of the Judge Advocate

APC 403

11 December 1945

SUBJECT: Review of Proceedings of General Military Court in the case of the UNITED STATES vs JOSEF HANGOBL: Case No: 5-67 & 5-72

TO : Commanding General, Third US Army and Eastern Military District, APO 403. U. S. Army.

1. THE TRIAL:

The accused Josef Hangobl was tried before a general military court at Dachau, Germany, on 17 and 18 October 1945 on the following charge and particular:

CHARGE: Violations of the Laws of War.

Particular: In that JOSEF HANGOBL, an enemy national, did, at or near Lamprechtshausen, Austria, on or about 16 November 1944, wilfully, deliberately and wrongfully kill MORRIS CAUST, a member of the United States Army, who was then unarmed and in the act of surrendering, by shooting him with a rifle.

2. THE FINDINGS AND SENTENCE:

The accused was found guilty of the charge and of the particular except the words "and in the act of surrendering" and sentenced to be confined at hard labor at such place as the reviewing authority may direct for life.

3. EVIDENCE FOR THE PROSECUTION:

Shortly after noon on 16 November 1944 Lieutenant Morris Caust a member of the United States Army Air Forces, bailed out of his plane over Innerfurth, Austria (Pros. Ex. H, R 23). Lieutenant John M. Alcorn and two enlisted men, all of whom were also members of the crew, likewise bailed out (Pros. Ex. H). Lieutenant Caust landed safely in a field near the farm house of Peter Niederreiter (R 6).

Josef Hangobl, the accused, was notified by a child that a flyer had parachuted in the vicinity of the village of Innerfurth (Pros. Ex. E). Hangobl, who was a member of a civilian defense group, grabbed his rifle and went toward the field where Lieutenant Caust had landed (Pros. Ex. E, R 36). A pretrial statement which Hangobl had executed in his own hand writing on 2 June 1945 before Lieutenant Melvyn Arkas, War Crimes Investigator Judge Advocate Section, Seventh United States Army, and which was admitted into evidence, reads in translation in pertinent part, as follows:

"I came as close as seventy meters from him and called to him five times to lift up his hands, but the pilot didn't follow my orders and did not hold his hands up and used his hand to look for something in his chest, so that I thought that he was looking for a rifle to shoot. I got scared in my excitement and shot at him, and after I shot at him, he started to run away, so I shot at him again and he fell to the ground, but I didn't know whether I hit him or not. He turned round while on the ground, and I thought he was still able to shoot. I then went away to get some people to help me to catch the pilot, but

In another affidavit, which was typewritten in the English language and executed by Hangobl on 3 June 1945 before the same Lieutenant Barkas and which was also admitted into evidence, the accused stated in pertinent part, in translation:

"I spotted him at a distance of seventy meters and called to him in German five times to lift up his hands. The pilot stopped and faced me. He raised his hands to his chest. I thought that he might be looking for a gun whereupon I became scared and in my excitement I aimed my gun at him and shot. After I fired the first shot at him, he turned half way around and started to run away from me. While his back was turned toward me, I shot at him a second time and he fell to the ground face down. He squirmed on the ground thereafter and believing that he might want to get into position to shoot at me, I left. My purpose in doing so was to get some people to help me catch the pilot. However, at no time did I see a weapon of any kind on the American pilot" (Pros. Ex. E).

In a third pretrial affidavit executed by the accused in his own handwriting, 5 October 1945, before Lieutenant Robert F. Shannon, Investigating Officer, which affidavit was likewise admitted into evidence, Hangobl wrote:

"When I saw him, I advanced toward him and from about 70 meters distance, I called him 5 times, 'Halt, raise your hands'. When I called him the 5th time, he did not raise his hands, but put them into his pocket. I had reason to believe that he was reaching for a weapon and was going to shoot at me. On that moment, I fired a shot. After I shot the first time, the flier turned around and started to escape. The flier was with his back turned to me. I did not know if I hit him or not and fired again. Then he fell to the ground. I did not dare to go near him, but would have gone for persons to help me carry him away or to bandage him. I did not want to bother Niedermuller because he was threatening with a machine. When I was about 600 meters away, I saw Niedermuller and others carry him away. I then turned around and was going home. Then I was called from the forest and requested to come there. When I arrived there, a parachute was found. I then followed the fresh tracks in the snow and found 2 more parachutes. Both of them were empty. At the same time, the forest was encircled. I was present at that. The other group went after the 2 fliers. Half of that group brought the 2 fliers to the village and the other half of them came to us." (Pros Ex F)

Niedermuller and some farmers, who had finished harvesting at one Niederreiter's farm, had gone into the house to eat at about 100 (R 17, 40, 43). Shortly after, they noticed some commotion on the street and went out to the rear of the house (R 17). Niedermuller saw Hangobl walking about 200 to 250 meters away toward the swamp (R 17, 28, 41, 43). The nearest house in that direction was about 2 kilometers away (R 27). Niedermuller heard someone call in English, "Help me" (R 17, 40). Niedermuller said to Spitzhauer, one of the farmers who was with him, "That's an Englishman calling; let's go and look" (R 18). They walked up to within 20 meters of Caust and Niedermuller asked him in English to raise his hands (R 18, 34, 38, 40). Caust replied he was wounded and could not raise his hands (R 18, 40). He raised his right hand a little (R 40). Niedermuller and Spitzhauer then proceeded up to Caust whom they found lying on his half-open parachute (R 19, 34, 40, 41).

1 The part of the parachute was attached to Caust and the harness was about 1 1/2 meters from his body (R 20, 34, 40). There was no gun in the area (R 19, 26, 41). Without moving Caust they carried him on the chute into Niederreiter's house, which was only about 70 to 80 meters away (R 18, 19, 20, 34, 40, 41, 43). It was about 1415 at the time (R 22). Niedermuller cut the left sleeve and extracted a bullet from the left shoulder which had penetrated the left elbow (R 20-21, 35-36). He bandaged an injury on the right upper leg at the nip (R 20). Caust indicated that he had pains in his abdomen and chest and Niedermuller bandaged a wound in that area and in his back (R 20, 21). Niedermuller already had searched Caust and found he had no weapons (R 26, 41). None of the crew members had carried guns (Pros. Ex. 1). Niedermuller sent for Doctor Huber in Lamprechtshausen which was about 3 1/2 kilometers away (R 20, 21-22, 41).

At about 1530 Lieutenant Alcorn and the 2 enlisted men who had bailed out with Lieutenant Caust and who had been captured were brought to Niederreiter's house (R 22, 24, 34, Pros. Ex. H). It was stipulated that the three were American airmen (R 23). Lieutenant Alcorn went in and spoke to Caust (R 22, 26, 36, Pros. Ex. H & I). Alcorn asked Caust "whether he was shot in the air or after he landed". Caust replied, "I was on the ground, taking off my parachute". Alcorn then said, "Can you describe who shot you?" and Caust answered "I don't know" (Pros. Ex. H). Hangobl and about 20 others had also come to Niederreiter's house at the same time (R 22, 34). Hangobl had his hunting gun with him (R 24). Niedermuller asked whether he heard the wounded airman call (R 24). Hangobl replied, "Yes, I shot him. He was running away" (R 24). Hangobl and the three Americans left shortly (R 25).

Herman Mayer, a local cafe owner and barber, was told that an injured American was at Innerfurth who had to be taken to the hospital and that it had been impossible to obtain an ambulance (R 49). Mayer went to his friend, Ludwig Wimmer, who owned an automobile, and they drove out to Niedermuller's house (R 49). They arrived at about 3:30 (R 22, 50, 25). Caust was put into the car and transported to Doctor Huber's home (R 25, 49). Doctor Huber, after having applied some emergency treatment, ordered that the American be taken immediately to the hospital at Oberndorf (R 49; Pros. Ex. A). Wimmer drove Caust to the Oberndorf Hospital where Doctor Wendt examined him and found a large shot wound on the left side of the stomach and on the right side of the back, a bullet having penetrated through this part of the body and a bullet wound in the elbow (R 50, Pros. Ex. b). Caust was X-rayed and given some emergency treatment (Pros. Ex. B). Doctor Wendt realized that an operation was necessary and phoned the hospital at Laufen to make the necessary preparation (Pros. Ex. B). Doctor Wendt accompanied the patient to Laufen where Doctor Rudolph Ortbauer and he performed the operation (Pros. Ex. B). Caust died immediately after the operation because of internal bleeding (Pros. Ex. C & B). The body was returned to the Oberndorf Hospital and later buried in the cemetery at Oberndorf, Austria (Pros. Ex. B). It was Doctor Wendt's and Doctor Ortbauer's belief that Caust was shot while standing with his left arm raised to the height of his chin (Pros. Ex. B & C). It was also their opinion that another bullet had entered the abdominal region while the American was standing (Pros. Ex. B & C).

It was stipulated that on or about 16 November 1944 near Innerfurth and Lamprechtshausen, Austria, a parachuted American airman was shot and wounded in the arm and shoulder and in the abdomen, dying later on the same day. It was also stipulated that certain medical and death reports concerned that American airman and that those reports were official civilian records of the facts stated herein and that those documents were a part of the stipulation

Pros. Ex. G). The documents are: (1) Sick page, dated 16 November 1944, signed by Doctor Wendt; (2) Sick report, dated 16 November 1944, signed by Doctor Metzler; (3) Description of the deceased, dated 16 November 1944, signed by Doctor Metzler; (4) Death notice, dated 7 December 1944, signed by the Chief Doctor; (5) Report of vital statistics dated 7 December 1944, signed by Doctor Metzler; and (6) Coroner's Certificate.

A defense organization composed of civilians in the neighborhood of Innerfurth, Austria, was in existence in November 1944 (R 27). It was known as the Gauwehrmannschaft (R 28, 35). The accused Hangobl was a member (R 28, 35, 44). According to his retrieval statement of 2 June 1945, supra, he "was a farmer at the time of the shooting and never was a soldier, but was a member of the District Defense Group at the time, but did not wear a uniform" (Pros. Ex. D, R 29, 30). He added in his statement of 3 June 1945, supra, that "no uniform or any other object patently identifying our organization emblem was ever issued to me or to the other members thereof" (Pros. Ex. E). The organization did not have any uniform insignia (R 28, 42). The unit drilled and did a little shooting one Sunday a month (R 45). It was organized into a company and groups within the company, each of which had its leader (R 33, 45). Some weapons had been issued, but they could not be carried publicly and after duty were stored in a weapons room (R 47, 48). It was not a voluntary organization for the members were forced to join under the law (R 44). It was a standing obligation of its members to round up enemy fliers (R 44). On 6 November 1944 all members of the Home Guard (Landwache) and Gauwehrmannschaft were registered for the Volksturm and the Gauwehrmannschaft automatically was transferred into the Volksturm (R 30, 42, 44, 46). However, the individuals were not sworn into the Volksturm until 10 December 1944, and the Volksturm issued its equipment on 20 December 1944 so that the Volksturm was not fully organized until after 16 November 1944 (R 30, 31, 42, 43).

It was stipulated that the accused Hangobl was on 16 November 1944 an enemy national, and on that day Austria was part of the German Reich which was at war with the United States (R 64).

4. EVIDENCE FOR THE DEFENSE:

Second Lieutenant Paul Guth, Headquarters Third Army, Judge Advocate Section, testified as follows:

He attended the Military Intelligence Training course at Camp Ritchie and had been engaged in interrogating and classifying prisoners of war for approximately one and a half years (R 68). The Gauwehrmannschaft was an old institution which was revived in 1939 (R 69). The activities of the units varied, in some instances being only a Sunday outing club (R 69, 72). Its primary purpose was to cope with any emergencies which might arise (R 70). Although a member of the Gauwehrmannschaft had been captured by the United States forces, Lieutenant Guth would have considered them prisoners of war (R 71). In his opinion, according to general directives, the Gauwehrmannschaft was a para-military organization (R 72, 76). He also stated that the organization had no authorized distinctive emblem though some members wore SA brassards (R 73). In the Gau of Salzburg where the Gauwehrmannschaft unit involved was located, the Volksturm took over in the later part of November and December (R 75, 76).

There was admitted into evidence a stipulation which stated: That if Doctors Hans Wendt and Rudolph Ortbauer were present they could testify that they can judge from the course of the bullet wound in the airman's left arm only (1) that the upper arm was about

horizontal to the ground with the elbow about chin high and (2) that as to the position of the lower arm, from the elbow to the hand, it may have been held at any angle from horizontal to vertical in relation to the ground" (Defense Ex. 1).

5. EVIDENCE FOR THE COURT:

The accused Hangobl, his rights having been explained to him by the court, testified as follows:

He was 39 years old, a farmer, Austrian and he lived in Lamprechtshausen, Austria (R 2).

On 16 November 1944 at about 1500 he was told by a young girl that a flyer had bailed out of a plane (R 6). He immediately grabbed his rifle and started out (R 6). He had proceeded about 70 to 90 meters when he saw a flyer standing alone in an open field (R 6, 7). He walked up to within 70 meters of the flyer and called 5 times in a loud voice without any appreciable pause "Halt, hande noch" (R 7). It was said loud enough for the American who was facing and had seen him to hear (R 7, 8, 9, 12). After Hangobl had called 4 times, the American had done nothing (R 8). However, as he called the 5th time the flyer put either his left or right hand inside his jacket or coat (R 8). Thinking that the flyer might pull a gun, Hangobl shot (R 8). The flyer turned around and ran about 10 meters away from Hangobl when Hangobl shot again (R 9). The flyer fell (R 9). Hangobl went toward the swamp in order to get help for he saw people there who would aid him in bandaging the flyer (R 9, 10). He did not approach the flyer because of the possibility he might be shot (R 14). Nor did he go to Niedermuller, who was nearer to the scene, because Niedermuller was working, and in his excitement he walked the other way to get other people (R 13, 14). When he had proceeded about 500 meters, Hangobl saw his neighbors help the flyer (R 10). He then started to walk home when he went to join someone who called him at the edge of the forest (R 10).

Hangobl had used his own rifle and never saw a weapon on the flyer (R 11). He was not a soldier but was a member of the District Defense and was a soldier of the homeland (R 3, 10). He had not worn or been issued any uniform or other insignia, and had received orders to capture enemy flyers and hand them over to the police (R 5, 11).

6. PROCEEDINGS:

In letter, Deputy Theater's Judge Advocate Office, War Crimes Branch, United States Forces, European Theater, subject: "Case of United States vs Josef Hangobl", 2 September 1945, trial by general military court of the accused Hangobl was directed. The appointment of the general military court and the proceedings thereof were in compliance with the provisions of letter, Headquarters United States Forces, European Theater, subject: "Trial of War Crimes and Related Cases", 16 July 1945. The accused was represented by a Captain and a First Lieutenant who is an attorney. A fair and impartial trial was had. An individual interpreter, who was sworn, was provided for the accused. Challenges for cause were permitted.

7. JURISDICTION:

In the letter, Headquarters United States Forces, European Theater, subject: "Trial of War Crimes and Related Cases", 16 July 1945, it is stated that as a matter of policy, cases involving offenses against the laws and usages of war or the laws of the occupied territory or any part thereof commonly known as war crimes committed prior to 9 May 1945 shall be tried before specially appointed military governments.

courts. The particulars alleged an offense against the laws and usage of war committed by an enemy national against a member of the United States armed forces while an active state of war existed and before 9 May 1945. Accordingly, the court which was specially appointed to hear the cause had jurisdiction over the person and the subject matter.

8. MERITS AND DEFENSES:

As indicated above, the particular alleged that the accused did wilfully, deliberately and wrongfully kill Morris Caust, a member of the United States Army, who was then unarmed and in the act of surrendering. Such action clearly constituted a violation of the laws of land warfare and international law.

The court's finding that Caust was not in the act of surrendering was warranted. None of Hangobl's pretrial statements nor his testimony indicated that Caust was surrendering. Furthermore, Lieutenant Caust had told Lieutenant Alcorn shortly after the shooting that he did not know who shot him and that he was merely taking off his parachute at the time. Hence the question arises as to whether or not the killing was unlawful where the victim had not surrendered and was not in the act of surrendering.

The theory of the case as presented by the prosecution was that the accused was not a lawful belligerent since he did not comply with the four requirements of Article I, Annex to Hague Convention No. V, 18 October 1907, in that he did not wear a fixed distinctive emblem recognizable at a distance. (Par 9, Rules of Land Warfare, FM - 27-10). Therefore Hangobl could not lawfully engage in combatant activities (Par 348, Rules of Land Warfare, FM - 27-10). Thus at most the accused could act in self-defense and even on the basis of the accused's version of the incident, it was clear that he had used more force than necessary in view of the fact that the victim was going away at the time the second shot was fired.

With the advent of air power certain customs and usages have been established concerning the treatment of enemy airmen who parachute to safety behind the enemy lines. Thus it is stated in the "Law of Land Warfare" JAGS Text No. 7: "An enemy whose aircraft has landed in territory held by the opponent may not be attacked if he does not continue to resist or try to escape for he will be captured in any event. He may be attacked if he continues to resist." Spaight in "Airpower and War Rights" (first edition, 1924) wrote at page 125: "If, however, the aircraft comes down in ground held by the attacking army's forces, and the occupants do not continue to resist nor try to escape, it is obviously unnecessary to kill them, for they must be captured in any event. There was, therefore, some justification for the protest which a French airman made against the act of a Bulgarian pilot in the following case: The French pilot was brought down in an air fight in Bulgaria on 30 September 1916, through engine failure, and was followed by two enemy machines in his descent; the pilot of one was 'tre's correct' and 'contented himself with being that the descent was not a faint to escape', but the other, Bulgarian continued to fire even when (the Frenchman) and his observer were trying to extricate themselves from the debris of their crashed machine."

"It is on record that a captured American pilot also made a vigorous protest to his captors on the ground that he was fired at after landing. The German airman who had fired upon him explained that he did so with the object of preventing the American pilot's escape, not of killing him, to which the other replied that the Americans would never

... sink so low as to fire on the enemy 'when he was already down'. The fact that 'a man is down', it should be added, has nothing to do with the matter. What is material is that he is 'down' in a place in which he is certain to be captured and in which it is therefore needless brutality to kill him. So resisted, the American pilot's protest was satisfied."

In the instant case the brutality of the accused resulted in the flyer's death. It was satisfactorily shown that Lieutenant Caust, after he had parachuted to safety in the field, while unfastening the harness to his parachute, received a shot in his left arm below his elbow which lodged in his shoulder. Apparently the shot spun him round and a second shot entered his back and came out directly below his ribs. Thereupon Caust fell face downward on his parachute. Caust had never seen or heard the accused Hangobl. The accused's contention that the flyer saw and heard him call "Halt, hande hoch" is uncorroborated. His testimony that the flyer ran 10 meters after the first shot is tenuous in view of the fact that Caust was found lying on the same parachute which had been completely unharassed. Nor was it reasonable for the accused to go for aid in the direction of the swamp when Niederreiter's house was only about 70 meters away. The accused's avowal that Niedermuller was busy working at the time is absurd. The credibility of the accused's testimony is extremely doubtful. In this connection it may be noted "that entire credit should not be given to his statements except in so far as he is corroborated by unprejudiced witnesses or reliable written testimony". (Wintrop's Military Law & Precedents, 2d Ed, 1920, p 359). The American had put up no resistance, had not been warned, was far behind the enemy lines, and was certain to be captured. Under those circumstances the acts of the accused were unwarranted.

9. PROCEDURE:

Part of the statement of Doctor Ortbauer executed on 5 October 1945 (Pros. Ex. B-1) per agreement between counsel was not admitted into evidence and was physically torn from the English translation. However, the original German statement was placed in evidence in its entirety. That part of the original German statement should also have been deleted.

The defense's motion for a finding of not guilty at the close of the prosecution's case was properly denied.

In a number of instances the court rejected testimony upon objection by the defense on the ground that the evidence was hearsay (29, 33, 47). Such rulings were contrary to the test of admissibility, that the court was to exclude any evidence which was of no value as proof and obviously hearsay evidence had some such value. Furthermore, in the "Outline of Procedure for Trial of Certain War Criminals in General and Intermediate Military Government Courts" it is stated on page 4, "Hearsay evidence, including the statement . . . sworn to . . . of a witness not produced is inadmissible". After the court had announced its findings, the prosecution offered to prove previous conviction through a witness. The court denied the offer upon objection by the defense. This action was erroneous. Though in general, the court should require the introduction of the best evidence available, where as a practical matter it would have been extremely difficult, if possible at all, to produce an Austrian court record of 1934. The court should at least have required the accused to controvert the proffered evidence.

In the closing argument, prosecution referred to the accused as a "hard-boiled little Nazi". Though the accused had admitted he was a member of the Nazi party, the prosecution's characterization was

previously made to prejudice the court. However, the president of the court directed that the remark be disregarded and was "satisfied that the court will decide the case on the evidence that has been admitted" (R 77). In view of the president's remarks it can not be said that the rights of the accused were substantially and prejudicially affected.

10. SUFFICIENCY:

The findings of guilty are sustained by the evidence. There are no errors or irregularities affecting the fairness and impartiality of the trial or which are prejudicial to the substantial rights of the accused in proceedings such as these. Two-thirds of the members of the court concurred in the findings and sentence.

11. SENTENCE:

A general military court may impose any sentence up to and including death. In view of the circumstances under which the crime was committed, particularly the fact that the accused was a member of a defense organization whose duty it was to capture enemy flyers, and the rules peculiar to the capture of enemy airmen who have landed behind enemy lines, it is believed that the sentence imposed is too severe. In this connection it may be noted that two members of the court submitted a "Recommendation for Clemency" recommending that the confinement be reduced to a lesser period. Reduction of the confinement imposed in this case to a period of 10 years would not condone the offense and would sufficiently serve the purpose of the trial of war criminals such as the accused.

12. PETITION FOR REVIEW:

The assistant defense counsel filed a petition for review, the basis of which were (1) that the accused was a lawful belligerent, and (2) that the accused acted in self-defense. As set forth in the discussion in paragraph 8 above, the accused's status as a belligerent is not necessarily determinative with respect to the unlawfulness of his action. With respect to contention of self-defense, the petition justifies Hangobl's first shot on the basis of Hangobl's uncorroborated version of the incident, but in no way justifies the second shot. The "Recommendation for Clemency" which was submitted by two members of the court likewise is predicated on the premise that, if the accused was a lawful belligerent, his actions were lawful.

13. RECOMMENDATIONS:

I accordingly recommend that the finding and the sentence be approved and that so much of the confinement at hard labor as exceeds 10 years be remitted and as thus modified the sentence be duly executed. It is recommended that the Zuchthaus and Sicherungsanstalt Straubing be designated as the place of confinement.

14. ACTION:

A form of action designed to carry the foregoing recommendations into effect, should they meet with your approval, is submitted herewith.

/s/ Charles E. Cheever,
CHARLES E. CHEEVER,
Colonel, J.A.G.D.,
Staff Judge Advocate.