

DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
UNITED STATES FORCES, EUROPEAN THEATER

20 December 1946

UNITED STATES

v

Matthias ZAHNEN, a
German National

Case No. 12-2261

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused was tried on 15 and 16 May 1946, at Ludwigsburg, Germany, by a General Military Government Court appointed by paragraph 3, Special Orders No. 100, Headquarters, Third US Army, APO 403, dated 20 April 1946.

<u>FINDINGS</u> : The offense involved was:	<u>Fleas</u>	<u>Findings</u>
CHARGE: Violation of the Laws of War.	NG	G

Particulars: In that Matthias ZAHNEN, a German national, did at or near Oberkail, Germany, on or about 15 August 1944, wilfully, deliberately and wrongfully kill 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.

NG	G
----	---

3. SENTENCE: The court by at least a two-thirds vote of the members present at the time the vote was taken, concurring, sentenced the accused to be imprisoned for a term of fifteen (15) years commencing June 15, 1945, at such place as may be designated by competent military authority (R 98). Since no sentence of death has been pronounced in this case, the Theater Judge Advocate is by paragraph 8d of Letter, Headquarters, US Forces, European Theater, file 4G 000.5 JAG-AGO, subject: "Trial of War Crimes Cases", dated 14 October 1946, authorized to exercise the powers of the Theater Commander concerning approval or disapproval of the sentence meted out by the court.

4. DATA AS TO ACCUSED:

Accused is a German national, residing in Orolfeld, Kreis Bitburg, Germany. He is about 48 years old, married and had originally nine children, seven of whom are alive and of ages ranging between three and seventeen (R 66). By his civilian profession he is both a blacksmith and a locksmith (R 67).

There is nothing on record concerning his civilian education save his own remark that he had "never studied much" but is "a simple upright hardworker" (R 3). He claims that he has never before this case been implicated in any criminal matter (R 67), and there is no evidence of previous convictions regarding him (R 98). He served as a German soldier in the First World War (1917, 1918) and again joined the German Army at the beginning of World War II (R 67). In 1944 he became a "Feldwebel" (sergeant) and belong to PI 23 Iag 1944, apparently an Engineering Unit stationed at Bitburg, Germany (Pros. Exh. No. 3). According to his own statement, which is not very clearly set forth in the record, he seems to have been discharged as a prisoner of war on 2nd June 1945, and to have almost immediately thereupon voluntarily reported himself to an American command post (R 78, 79). He was arrested on 8th June, 1945, and had remained under arrest since (R 79). After having been a member of the organization called "Stahlhelm", he joined the Nazi Party and the SA in 1933 and held in the SA the rank of a "Gruppenfuhrer" (Pros. Exh. 3).

5. RECOMMENDATION:

On the basis of the discussion hereinbelow at 8, it is recommended that the findings and the sentence be disapproved.

6. EVIDENCE:

a. The opening statement of the Prosecution substantially offered to prove that on or about August 15, 1944, an American plane crashed in the vicinity of Oberkail, French Zone, Germany. Several of the airmen were apparently killed before or on striking the ground. Prosecution is not concerned with any of them, but with another one who landed safely, but with a leg injury, and came into a field where he dragged himself to or near a hedge. The accused Matthias ZAHNEN, as a sergeant in the German Wehrmacht, and another German soldier, lower in rank, came on a motorcycle upon the road to a point quite a few meters away from the hedge. They met some people along the road and made inquiries concerning the whereabouts of the American airmen. Both then drove off from the road into the field where the above mentioned hedge was located, and accused there killed the injured and helpless American by a gunshot through the head.

b. Prosecution's Evidence:

Prosecution introduced as its first witness a boy of 12 years, Ludwig BLASIUS, who had before the trial, namely, on 11 June 1945, made a sworn affidavit; of which the contents are:

"My name is Ludwig BLASIUS, am 11 years old, and live SRINSFELD, #35, Germany.

On the day of the big air battle in 1944, in the summer, I was guarding cows in the valley. I was in the district HOHECHT. I saw a flyer and I think that he was an American. He was near the hedge, was walking up and down, and looked as if he had an injured leg. The flyer was 300 or 400 meters away from me. Then a motorcycle with two soldiers came from the OBERKAIL-KYLLBURG crossing, from the direction of KYLLBURG. The motorcycle drove into the field. As the motorcycle turned into the field, there were no people at all on the street. The flyer, at the time, was on the other side of the hedge as seen from the motorcycle. The flyer cried out, but I do not know what he cried. The soldiers got off and one of the two began to shoot at the flyer. Three shots fell. The soldiers mounted again, and drove off in the direction of OBERKAIL, without further looking at the flyer. Then a truck came from the direction of OBERKAIL, and drove up close to the flyer. Some people also came over there from the fields, The flyer was dragged onto the truck.

I could not recognize either of the two soldiers who had come on the motorcycle." (Pros. Exh. No. 1).

At the trial Ludwig BLASIUS, after a preliminary examination by the Prosecution, satisfied the court of his capacity to testify (R 5, 6). Upon direct examination, he confirmed that the content of Prosecution's Exhibit 1 was a correct rendition of what he had said to the American investigator. Moreover, he testified that in the summer of 1944, on the day of the big air battle near his home village Seinsfeld, he went at four o'clock with the cows to the field and the meadows. There was a hedge there and a flyer was walking up and down in front of it, limping with one leg. Subsequently two men dismounted from a motorcycle. One of them still later on did the shooting. He did not shoot directly at the flyer, but "over to the side somewhat" (R 6-9).

Upon cross-examination witness testified that the air battle took place around 12 or 1 o'clock. He observed it from his home, but did not know how many pilots were seen by him bailing out of the airplanes. At 4 o'clock he went with his cousin Walther GAIL, to tend cows, and then, around four thirty, saw the flyer. It took another half hour until the people in the motorcycle arrived. During this time the flyer went up and down and limped on one side.

Witness did not know exactly who had cried out, but thought it was the flyer (R 9-12).

The Prosecution's next witness, Hans Walther GAIL, was at the time of the trial about 13 years of age. After preliminary examination, by the prosecution the court was satisfied with his capacity to testify (R 12, 13). Upon direct examination he testified that on the day of the air battle he and his cousin, Ludwig BLASIUS, were tending cows on a meadow at some distance from the village of SEINSFELD. He did not know whether this was after four o'clock or at what other time. The first thing he then saw was an American flyer walking up and down or creeping near the hedge. The next thing he observed were two soldiers coming up on a motorcycle. Immediately thereafter shooting started. He did not hear one of the people, who had come in the motorcycle cry out, but the American flyer several times cried out. He did not hear the words, "Halt, Halt" and did not know how many shots were fired. The flyer was later on taken away by people who came in an automobile (R 13-15).

Upon cross-examination by Defense Counsel, he added further details. Before the incidents described took place, he had learned from talk of people in the village that several flyers had bailed out in distress and that some of them had already been taken prisoners. He and his cousin knew that the flyer they observed had not yet been taken prisoner. After the two soldiers arrived, there were no words spoken, there was only the crying by the American flyer. Several shots were fired. He did not know whether both of the German soldiers or just one of them did the shooting (R 16, 17).

Upon examination by a member of the court, the witness related that, when the motorcycle arrived, the flyer was behind the hedge. Witness could not see him then (R 18).

The Prosecution's next witness was Maria GRUN, of Oberkail, in the French Zone of Germany, a farm worker. Upon direct examination she related substantially as follows: About noon on a day in the middle of August 1944, there was an air raid alarm in Oberkail. About half an hour or an hour later, while she and others were working in the field, squadrons of planes were flying around over their heads. Then suddenly it seemed as if the air was full of clouds or

puffs of smoke, and they saw burning planes and parts of them falling down. Moreover, a parachute appeared over their heads and came down within a hundred meters of where they were. They saw the parachutist land. He lay first on the ground, completely covered with his parachute, looked around, and finally crawled into a hedge on his hands and knees. He had an injured leg, as the witness afterwards (in the afternoon) heard from a French prisoner of war (R 19, 20).

Upon cross-examination by Defense Counsel, the witness among other things explained: Oberkail and Seinsfeld are at a walking distance of about an hour from each other. The hedge in question was approximately in the middle of that distance. Beside the particular one which landed near her, a number of parachuters, perhaps ten, were seen bailing out. Those airmen bailing out of their planes did not make the impression of so-called paratroopers, but just of ordinary parachutists, forced down by the burning of their planes. A number of planes were shot down.

There was a rumor that in the surrounding villages a number of parachutists had come down, one of whom was found dead, while the others were taken prisoners. The pilot whom she herself observed must have bailed out at about noon time. She did not know whether he was able to walk, but only saw him crawling out on his hands and knees. She did not see any gesture on his part indicating a wish to surrender, but she did not know whether he saw her and the two people with whom she was then in the field. In the evening she heard the rumor that that particular flyer had been found shot. There were several other dead flyers lying in a small house next to the school house in Oberkail. At that time the battle front had already moved up to the center of France and was continually coming closer. Oberkail was outside the West Wall, but the first fortification belonging to it began just about where the pilot had landed on the Seinsfelder Strasse. The next garrison was Bitburg, at a distance of about 15 kilometers from the hedge in question (R 20-25).

Prosecution's fourth witness was one Anna FALTES of Oberkail. Her version on direct examination is substantially as follows: On the day of the air battle in August 1944, at about noon, she was working in the fields next to the side of the street which leads from Oberkail to a place named Kylburg, and saw a

parachute coming down to a small depression near the other side of the street. She went over to that place and found the parachute, but did not see the flyer. There were tracks leading from the parachute to a hedgerow which was in the vicinity, and looked like tracks of a man who did not walk in an ordinary manner, but rather dragged himself. She looked around in the hedge for about three quarters of an hour and tried to find the pilot but did not succeed in this attempt. When she was about to go home, she saw two soldiers on a motorcycle, one of them a sergeant. They asked her where the pilot was and she said that he presumably must be in the hedge. Then she went home. When she got to the next road crossing on the same street, probably a few hundred meters away, she heard two shots fired. She did not know who shot (U 26-28).

Upon extensive cross examination by Defense Counsel she made further statements of which the following should be mentioned: Around noon of that day she observed an air battle and saw about thirty parachutes in the air, of which only the one previously referred to landed in her immediate vicinity. The hedge in question was at a distance of a hundred meters from the road; it was a cultivated hedge, one side of which was meadow land, while its other side was field land. The remainder of the land, apart from the hedgerow, was free and open. But directly next to the hedge there was a field of oats which had not yet been harvested and these oats stood almost as high as the hedge. The parachute lay about 20 meters away from the hedge, and she saw a track leading from the parachute to the hedge. She looked on both sides of the hedge and did not find the pilot, but she did not see tracks from the parachute leading beyond the hedge, nor anything indicating that the flyer might have gone into the adjoining field of oats. She did not see the motorcycle while it was in motion. When she met the two German soldiers their motorcycle stood in the fields and they had already dismounted therefrom. She was not able to say whether or not the accused ZARNEN was one of these two soldiers. The hedge had thorns and its breadth was not more than one meter. She added "I can't explain it myself, how this man could have possibly hidden in the hedge but he must have been in there because there were no other tracks." The motorcycle was standing on the other side of the hedge from the parachute, so that the hedge was in between motorcycle and parachute. The

distance between parachute and motorcycle may have been 200 or 300 meters. When she had given her information to the soldiers, they went to the hedge while she went home. At least ten or fifteen minutes passed then before she heard the shots (R 28-37).

Upon examination by the President of the Court, the witness added that she was not alone when she searched the hedge. Her cousin and one Josef BESSLICH were with her (R 37).

Next, Josef BESSLICH himself, 18 years old, of Oberkail, worker on a dairy farm, took the stand as witness for the prosecution. At about noon of the day in question he saw an American parachute, first in the air and then reaching the ground, in the vicinity of the Kyllburg Road, on the other side of "the hedge". He went over and saw the parachute lying thirty or forty meters below the hedge. Witness also examined the ground near the hedge but did not find anything. A motorcycle came across the meadow, and a Feldwebel (Technical Sergeant) and an Unteroffizier (Sergeant) were in it. Witness did not talk with them. He went over to the field of oats and after a quarter of an hour, when he was about 100 to 150 meters away, he heard about two or three shots. He did not know who fired the shots, but one of the two (Feldwebel or Unteroffizier) had a carbine (R 38-42).

Upon cross examination by Defense Counsel, the witness testified further that on the day in question, quite a few pilots were seen bailing out from their planes. One of them came down in the vicinity of the fields where the witness just busied himself. Witness searched the thorn hedge in its whole length, but did not find the flyer. The motorcycle came across the field, stopped, and the soldiers got off it. Five to ten minutes later, but surely not after one o'clock, the shots were fired. Witness went off with a fire engine. When on his way home, at around three o'clock, he again passed by the hedge, he found the flyer's body lying there. He then reported the incident in the mayor office of Oberkail. One Silbanus, a civilian, was ordered to go on a truck with the witness and a member of the police to the place where the dead flyer was lying and they brought his body to Oberkail, together with the body of another dead flyer whose back was full of machine gun bullet holes and who was lying at a distance of four or five kilometers from the other one. Both were buried in

Oberkail (R 42, 50).

On redirect examination, witness admitted that he was uncertain concerning the correctness of the time indications made by him with regard to specific phases of the day in question. Moreover, he testified that he did not hear anybody cry "Halt, halt" (R 50).

Prosecution's last witness was Fritz SILVANUS, of Spang-Dahlen near Oberkail. On direct examination he substantially testified as follows: At about five o'clock Mr. BESSLICH and a member of the police of Oberkail called upon him to come along with a truck to pick up a body lying in the hedgerow, near the Oberkail-Kyllburg highway. At about three o'clock in the afternoon a boy about twelve years old had told him that someone had been shot near the Oberkail-Kyllburg highway.

The witness was then asked about his pre-trial affidavit dated 11 June 1945 and he acknowledged it as a truthful rendition of his statements then made (R 51-56).

In its substantial part, this affidavit (Pros. Exh. No. 2) according to an attached translation reads:

"In the middle of August 1944, on the day of the big air attack, I was ordered by the Gendarmerie Wachtmeister (rural police sergeant) NOTHELFER from BINSFELD, to bring into the Burgermeisteramt (office of the town mayor) live and dead American parachutists from the OBERKAIL forest and STEINBON neighbourhood.

"At about 7 or 8 o'clock in the evening I was told that an American flyer had been shot by ZAHNEN from ORSFELD, and that he was lying in a hedgerow near the OBERKAIL-KYLLBURG highway, about 100 meters from the highway. I took my truck and drove it to the above named location, accompanied by an auxiliary gendarme from WITTLICH. When I came to the spot I saw the head, (the bullet) having entered the temple, and coming out of the neck diagonally on the other side. This was the only gunshot wound. As we lifted him into the truck, I was able to notice that one of his legs was broken. The flyer was unarmed. He wore a leather jacket with slide fasteners, and olive-drab flying suit with large pockets and slide fasteners. He was about 1.75 meters tall, weight about 85 kilos, black hair. I delivered this body into the fire engine house in OBERKAIL. I also delivered five other dead flyers into the same building, and none of these five had been killed on the ground."

Upon cross examination by Defense Counsel, witness among other things maintained that it was some time after seven o'clock when he drove to the truck

to get the body of the flyer in question. He could not guarantee the correctness of any of his time indications (R 56-58).

Finally, with express acquiescence of Defense Counsel, Exhibit No. 3, a sworn affidavit of the accused Matthias ZAHNEN, dated 19 November 1945, was introduced as part of prosecution's evidence (R 61). An attached rendition thereof into English reads in its substantial part:

"On the morning of 15 August 1944 I was sent with Unteroffizier HEMMERS in the direction of OBERKAIL, Germany, with oral instructions from the 1st Sergeant to find and arrest all enemy flyers who parachuted in that vicinity. We left on a motorcycle in uniform. I was armed with a pistol using 06 ammunition. HEMMERS was armed with a carbine.

"On the OBERKAIL-KYLLBURG highway we were stopped by some civilians who told us that an allied airman came down around there, and that they could not find him. They pointed to the open field.

"HEMMERS and I searched the open field with the civilians and we failed to find anyone. HEMMERS and I then sat down to smoke a cigarette. We were some 60 meters apart. A few minutes later, about noon I heard HEMMERS yelling and saw him looking towards the hedgerows. I looked in the direction of the hedgerows and saw a movement in one spot. I could not recognize anything, but I thought it might be the allied airman. I yelled, 'Halt, halt, who's there.' I fired one shot in the air and then fired two shots into the hedgerow where I saw the movement. I was at a distance of about 30 meters from the hedge when I fired the last two shots. HEMMERS also fired one or two shots with his carbine. I then ran towards the hedgerow and found an allied flyer in his last dying moments. He was lying on his side and face in a crouched position. I saw that a bullet had entered his back. The soldier was dressed in a brown leather jacket.

"The soldier died. HEMMERS and I immediately left without touching the allied soldier at any time and reported the incident to our 1st Sergeant."

c. Evidence of the Defense:

Defense introduced as its first witness, the accused Matthias ZAHNEN. During his cross examination by the Prosecution, he admitted the correctness of his pre-trial affidavit which has been quoted previously. However, his trial testimony contains a more detailed and somewhat different version.

On direct examination (R 66-79) he testified that on the 7th August 1944, while on military duty at Bitburg, at about eleven o'clock, he received the order to go on his motorcycle in the direction of Oberkail, to make sure that the 25 or 30 flyers who had made emergency landings in that vicinity should be taken prisoners. Another soldier named HEMMERS was supposed to accompany him

(R 66, 70). Their instruction, which they had received on numerous previous occasions, was to the effect that a man who was supposed to take a prisoner, should first cry out an order to stop. If this order were not obeyed, or if escape or resistance were attempted, then use should be made of the shooting weapon, even as against a member of the German Wehrmacht (R 70).

Accused and his comrade took off in the indicated direction and eventually reached the area around the hedgerow. At the main crossroads there, they saw soldiers and civilians walking across the fields and gathering around. Upon inquiring what the matter was, they were told by the people that the whole area was full of parachutists. A certain direction was pointed out to them and in order to reach it, they had to go off the highway and to drive into the open field (R 70, 71). When they came to the spot which had been indicated to them, they again met a group of people and were told that a parachute was lying on a meadow there. They parked the motorcycle, and before inspecting the parachute had a conversation with a girl who presumably is identical with one of the prosecution's witnesses. From her, accused learned that a parachutist had come down, but that she did not know where he was. Several other civilians came along, and all of them (two soldiers and about six civilians) started to search the fields in order to find the parachuted flyer, in which endeavor they were subsequently supported by one more soldier who joined them and took part in the search. However, their efforts failed, and accused said to the people surrounding him "I guess our job is ended, we can't find anything here" (R 72, 73).

They went back to the place where the motorcycle was parked when accused suddenly saw something moving in the hedgerow sixty to seventy meters ahead. He said to HEMMERS "Over in front of the hedge", went toward the place of the movement, and called out "Stop, stop, stop; who's there?" He did not get an answer, nor did he see anything save a motion of the hedge itself, whereupon he gave a harmless warning shot into the air with his pistol (R 75). He then called out something like "He will shoot". He assumed that the enemy soldier was armed and was seeking cover behind a small elevation, and he said to himself ". . . it's either you or I". In a feeling of panic he fired three shots. He did this while he was running toward the man, and started shooting as he was running

because he said to himself, "He is probably armed and he's in cover there and you must make him keep his head down so that he can't take a shot at you while you are running up to him". He did not have a definite target. He shot against the motion in the hedge. While he was running toward the hedge he cried out "Stop, stop, stop; Who's there?" HEMMERS, using his carbine, was also shooting. He fired at least one shot, probably two. When accused reached the hedge he found the dead flyer inside it. Accused was "paralyzed" by what he thus saw. He and HEMMERS immediately left the spot. He reported the incident to a military command post but had nothing further to do with the matter (R 73-78).

From the cross examination of the accused by Prosecution (R 79-87) only the following need be mentioned. Confronted with the respective variance as against his affidavit accused maintained that not HEMMERS but he himself was the one crying out. When he fired the first warning shot he had not seen the body of the flyer but just the motion in the hedge from which he then was distant about 55 to 60 meters (R 85). From where he was standing, before he started to shoot, he only could see part of the hedge, because his view was obstructed by a box with corn in it (R 86). He fired the second shot when he was forty or fifty meters away from the hedge and the third shot when he was at a distance of twenty to twenty-five meters therefrom. He did not have his complete presence of mind. He felt his life was in danger because he thought that the man had crawled in behind that elevation of earth and, thus completely protected against accused, was waiting for him (R 86). Neither accused himself nor HEMMERS searched the body of the flyer for weapons or other objects, but immediately left the spot (R 77).

There were then several questions by members of the Court. From the answers respectively given to them by the accused, the following seem to have some importance: Between his warning shot and his first serious shot no more time elapsed than "until one could count to five". It was a puzzle both to him and HEMMERS whose shot had hit the flyer (R 88).

Defense then introduced a character-witness in the person of one Paul SCHOFU a farmer in Orsfeld, and since 1 April 1946 also mayor of that village community. The witness testified that he knew nothing done by the accused as a member of the

party or otherwise which must now be considered wrong (R 92).

On cross examination the Prosecution impeached this witness by his sworn affidavit, dated 24 October 1945, (Pros. Exh. No. 7) the substantial part of which in English version, reads:

"I know Matthias ZAHNEN of ORSFELD. He delivered himself to the Americans in May or June 1945 after he returned, having been a prisoner of war prior to his arrival in ORSFELD. I know that Matthias ZAHNEN was a fanatical Nazi. He often wore a SA uniform, and never greeted in any other way but by Heil Hitler. He always cursed the Jews and the Clergy. I think he was the worst Nazi in the village. I was told that he was illiterate."

After its being read in Court (R 95), witness admitted that it was a true and correct statement (R 96), but he explained that by calling ZAHNEN a fanatical Nazi, he merely had in mind that the accused used the "Heil Hitler" as his sole form of greeting, behaving in this respect differently from the farmers in that community (R 9). Witness could not specifically charge anything else against accused's character save that "there was talk that he cursed the Jews" and that he wore the Party uniform (R 97).

7. JURISDICTION:

Upon examination of the record with regard to the question whether the Military Government Court had jurisdiction to try the present case, it is believed that the answer should be in the affirmative. In view, however, of the recommendation hereinabove made, and since no jurisdictional issue save the one to be discussed in this section of the Review and Recommendations, has been raised, it is not necessary to discuss such detailed aspects of the jurisdictional problem as are related to the fact that the alleged crime was not localized within that part of Germany which is now the American Zone of Occupation; that the American nationality of the victim was not proven; or that no officer with legal training was among the members of the court. Brief reference should, however, be made to one particular jurisdictional issue which has been raised by defense.

After the Prosecution had rested, Defense Counsel asked the court to dismiss the Charge and its Particulars for lack of jurisdiction, on the ground that the accused was a member of the German army at the time of the alleged crime, and that he was a prisoner of war almost up to the time of his arrest or surrender

in connection with the present accusation, and that he therefore should be held entitled to all the procedural privileges of a member of the American armed forces, including the right to be tried by a Court Martial proper (R 61-64).

The court denied this motion, and its ruling was correct, for two reasons. First of all, the accused was no longer a prisoner of war when the present trial began, or even when an American authority for the first time had the opportunity of dealing with this accusation against him. He had previously been discharged. No allegation has been made that this discharge was arranged with a view to the present trial, or otherwise for the purpose of rendering his privileges as prisoner of war illusory. Therefore, Article 63 of the Geneva Convention of 1929 (17 Stat. 2052) does not apply to him. There is an additional argument leading to the same result. It is true that the Article 63 provides: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power". But the Supreme Court of the United States, by its majority opinion in the Yamashita case, persuasively showed that this only applied in a situation in which a sentence is pronounced against a prisoner of war for an offense committed by him while in that status. The accused in the present case is charged with an offense committed by him, if at all, before he became a prisoner of war. Defense Counsel's challenge of the jurisdiction of the Military Government Court on the ground that the accused must be tried by a Court Martial was therefore properly rejected.

8. DISCUSSION:

a. In a war crimes trial before an American Military Government Court in Germany, not less than in any other American criminal procedure, the guilt of the accused must be proved beyond a reasonable doubt, in order to satisfy the requirement of sufficiency of evidence. It has been well said by Mr. Justice Robert H. Jackson in his report to the President of the United States, dated 7 June 1945, in his capacity as Chief of Counsel in the Prosecution of Axis War Criminals, (39/1945 American Journal of International Law, Documents 178): "We must establish incredible events by credible evidence". If by the American war crimes trials in Germany, according to an established Allied policy, justice is to be

accomplished on the basis of proved guilt rather than a summary proceeding grounded on mere suspicion, the presumption of innocence, an elementary ingredient of criminal justice, cannot be ignored. Its corollary, however, is the principle that no accused should be convicted unless his guilt is proved beyond any reasonable doubt. It may be noted that the International Military Court of Justice, in its Nurnberg decision, expressly based part of its findings on the declared absence of proof of the guilt of the respective accused beyond a reasonable doubt.

b. In the present case, it is believed that the evidentiary material produced on trial did not beyond a reasonable doubt lead to the conclusion that the flyer killed by the accused was an unarmed and surrendered prisoner of war; even less to the conclusion that accused, at the time of his unfortunate action, was aware of, or, as a properly behaving soldier, should have been aware of a declaration of surrender or even of an intention of surrender on the part of the mysteriously hidden enemy against whom he fired his weapon. Nor was the evidence, it is submitted, sufficient to refute beyond a reasonable doubt the proposition that accused, by his fatal shot at that suspiciously moving and only ex post facto identified object, was accomplishing a bona fide act of warfare. Rather, it appears that he was acting in accordance with legitimate general instructions received with regard to the carrying out of an arrest under similar circumstances; and that he was substantially motivated by a reasonable apprehension for his and his comrade's safety which he believed to be jeopardized by the dangerous proximity of a still armed and not yet surrendered enemy.

c. Before further expounding this idea, it should be pointed out that the background of the present case is fundamentally different from that of most of other German war crimes cases. Accused's action was not related to the frivolous and ruthless political philosophy and practice of Nazism. His was a legitimate purpose and action; to search for and attempt to arrest an enemy flyer who, after parachuting on German territory, was not yet disarmed and had not yet surrendered. So much less should this accused be deprived of the benefit of doubt. At least doubtful, however, was his guilt, as will be shown presently

d. In the light most favorable to the accused the evidence seems to allow the drawing of the following very general picture of events. After an air battle over a certain part of Germany, in which either American or Allied planes participated, some of those planes were disabled and several members of their crews were thus forced to parachute down to German territory. Part of those parachutists were seized or surrendered themselves, and part of them had not yet been taken hold of by the Germans, either because they had no opportunity of surrendering or because they preferred to remain in hiding rather than to expose themselves to the vicissitudes inherent in the falling into the hands of the Germans. The accused and another German soldier were sent out by their command post to see to it that all of those parachuted flyers who were still at large were made prisoners. In carrying out their mission they drove on a motorcycle near to a vicinity in the open field where, according to the information they had received from civilians on their way, an Allied flyer had parachuted to the ground during the air battle and where the parachute really lay, while the parachutist himself, according to the same informants, could not be found, though he was most probably hidden in a hedge which existed in that vicinity. They dismounted from their motorcycle, went to the hedge, searched it for the enemy parachutist, but failed to discover him. Thereupon they considered their mission, insofar as this particular flyer and this particular vicinity were concerned, as ended without success, and returned to their motorcycle, where they relaxed a little while before mounting it again. At that moment the accused saw a movement in the hedge which he related to the Allied parachutist sought for, even though the latter was not directly visible. The accused immediately notified the other soldier, and both, with their shooting weapons ready for action, ran toward the hedge, with the specific intantion of arresting the flyer. After the accused's "Halt" call was not answered immediately and in view of the danger that the flyer might be the first to shoot, thus killing or seriously injuring them and frustrating the purpose of their mission, they fired several shots against the hedge, the accused with his revolver, the other soldier with a carbine. Only one of the shots hit the flyer who was killed thereby. Accused was himself shocked by the unintended result of his action when he then

discovered the body of the enemy flyer.

e. In examining the problem whether this picture of the factual situation squares with its legal construction as criminal homicide committed in violation of the laws of war, the question must first be taken up whether the flyer killed by the accused at the time of his unfortunate action was aware of, or as a properly behaving soldier should have been aware of a declaration of surrender or even of an intention of surrender on the part of the mysteriously hidden enemy against whom he fired his weapon. It is believed that the question thus posed cannot with any degree of reasonable certainty be answered in the affirmative.

Whether the unfortunate victim of accused's action had or not the intention to surrender, and if he had this intention, why he did not behave in a manner which would clearly indicate such an intention, especially whether he wilfully or rather due to his physical condition at the critical time, so long remained undiscovered and undiscoverable, is a mystery which cannot be solved on the basis of the existing evidence. It may be that the Allied flyer was, by his leg injury or otherwise, and without any intention on his part to remain in hiding, physically incapable of properly acting as an enemy intending to surrender would normally act. However, this is a mere hypothesis which has not been sufficiently established by the evidence. Moreover, insofar as accused's criminal responsibility is concerned, the fact must be disregarded that the Allied flyer had a serious leg injury which circumstances was only ex post facto disclosed to accused, at least insofar as the evidence goes. There is no proof that accused at the time of his action was aware of any such physical condition of his victim.

In the light of the circumstances which alone are proven to have been known by accused at the time of his action, he could even as a reasonably and properly acting soldier well have assumed that he was faced with an enemy purposely hidden behind a hedge forming a certain natural protection; that he was not intending to surrender and that he thus represented a danger for accused and his comrade if they continued to approach him without first caring for their own safety. Viewed from this angle, the reaction of accused to the fact that his

"Halt" call was not answered immediately, was, it is believed, in accordance with legitimate general instruction prevailing in any army with regard to the proper attitude of a would-be arrester of an enemy individual.

f. The provision of Article 23c of the Annex to the Fourth Hague Convention of 1907, prohibiting "to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion", must not, by way of a mechanical argument a contrario, be understood to the effect that the killing or wounding of an enemy before he had laid down his arms or before he has surrendered or even after the surrender but before he had no longer means of defense, is legitimate under all circumstances. One important situation where that argument a contrario certainly does not apply is indicated by the provision of Article 23d of the same Annex, which prohibits a declaration that no quarter will be given. This, it is believed, obviously implies an obligation to give the enemy combatant, who apparently wishes to surrender, an opportunity of accomplishing this intention, and it also implies a prohibition of depriving him of the chance to surrender by killing him without waiting for his surrender, or by killing him after surrender, before he had been searched for arms and made to deliver any weapons which he might still have. Otherwise the prohibition of a practice not to take prisoners, which was a fundamental rule of customary international law of war even before its incorporation in the aforementioned Article 23d, could be so easily circumvented as to render it illusory.

However, some credit must be given to the fact that the enemy who had shown an intention of surrendering, but has not yet actually surrendered or is not yet unarmed, still represents a certain danger for the man who approaches him with the idea of making him a prisoner by accepting his surrender. This justifies a certain amount of caution and apprehension on the side of the would-be captor, which must be liberally taken into account when the question has to be answered whether in a given situation that has been done which could reasonably have been done in order to give the chance of surrendering to an enemy who apparently desires to surrender. Surely the combatant's care for his own safety and the safety of his comrades deserves preference, in his motives, to his consideration for the possible but not manifest desire of his enemy to surrender.

Applying these general considerations to the attitude and the action of accused at the critical place and time, it is believed that he cannot be considered to have violated either the letter or the spirit of the above mentioned Hague Convention.

g. Finally, accused is entitled to the protection of that rule of law which immunizes acts of legitimate warfare. The fact that something which otherwise would constitute a crime was done as an act of legitimate warfare - that is, in accordance with the rules of warfare - is a so-called "justification" and as such is an absolute defense. The accused could certainly not be charged even with manslaughter if his action, though otherwise sufficient to constitute criminal homicide, was an act of legitimate warfare.

That it had this privileged character is substantially the theory of Defense Counsel developed in his petition for review dated 1 June 1946. Says he, among other things:

" . . . the record is clear that at the time of the killing of the Allied airman the defendant was lawfully engaged in warfare and was justified in shooting at the hedgerow from which a disturbance was observed by the accused although the cause of the disturbance was unknown and undetermined at the moment of shooting . . . the accused was a combatant . . . and . . . not duty-bound to examine the hedgerow first and then retreat before shooting at the hedgerow when he had already shouted his obvious intentions . . . when in the search and pursuit of a fugitive airman, it was not known nor reasonably expected that the person behind the hedge was a surrendered, unarmed combatant. The act of shooting in the direction of the hedgerow and the concurrently shooting at it were justifiable, prudent, reflexive actions . . ."

It cannot be denied that this argument of Defense Counsel is in point and that even apart from the foregoing other considerations it should have resulted in an acquittal of accused.

9. CONCLUSION:

There are therefore several grounds, expounded hereinabove, each of which appears as sufficient to justify the recommendation set forth in the previous part of this review. A form of action to accomplish this recommendation is attached hereto, should the recommended action meet with approval.

/S/ Maximilian Koessler
/T/ MAXIMILIAN KOESSLER
Attorney
Post Trial Section

MILITARY GOVERNMENT COURT
(Militaergericht)

ORDER ON REVIEW
Verfuegung nach Ueberpruefung

Case No.
Strafsache Nr. 12-2261...

Order No.
Verfuegung Nr.

Whereas one... Matthias ZAHNEN
(Name of Accused) (Name des (der) Angeklagten)

was convicted of the offence of wrongfully killing a prisoner of war
wegen der folgenden strafbaren Handlung..gesetzwidrige Toetung eines Kriegsgefangenen

by the ~~Intermediary Military Court~~
*General
*Kriegsgerichte
vom ~~Militaergerichte~~
Oberen

at Ludwigsburg; Germany
in Ludwigsburg, Deutschland
(Address of Court)
(Inschrift des Gerichts)

and sentenced to 15 years' imprisonment commencing 15 June 1945
schuldig erkannt und zu Haft fuer die Dauer 15 Jahren, beginnend ab 15. June 1945

by Judgment dated the 18 May 1946
durch Urteil vom 18. Mai 1946 1946 and
(date)
(Datum)

Whereas the case has now come before me by way of review and after due consideration and in exercise of the powers conferred upon me, I hereby order:

Diese Strafsache ist mir zur Ueberpruefung vorgelegt worden und nach entsprechendem Studium des Sachverhaltes und in Ausuebung der mir uebertragenen Befugnisse veruege ich:

That the findings and the sentence are disapproved. The Commanding General, Third U. S. Army Area, will discharge Matthias ZAHNEN from the War Criminal Prison, Landsberg, Germany.

Dass der Befund und das Urteil nicht geheissen werden. Der Kommandierende General im Bereich der Dritten Armee der Vereinigten Staaten wird die Freisetzung Matthias Zahnens aus dem Kriegsverbrechensgefuehngnis, Landsberg, Deutschland, veranlassen.

Dated this
Gegeben am 15. January 1947...

s/ C. B. Mickelwait
(Signature of Reviewing Authority)
(Unterschrift der nachpruefenden Behoerde)

*Strike out words not applicable.
*Nichtzutreffendes ist zu durchstreichen.

C. B. MICKELWAIT
Colonel JAGD
Theater Judge Advocate
(Title)
(Titel)

Having examined the record of trial, I concur:

/S/ C. E. Straight
/T/ C. E. STRAIGHT
Colonel. JAGD
Deputy Theater Judge Advocate
for War Crimes