

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

UNITED STATES)

29 November 1945

v.

Wilhelm Dieterman
and
Andreas Ebling,
German Civilians.

Case No. 12-643

REVIEW AND RECOMMENDATIONS

1. TRIAL: Accused were tried at a joint trial at Heidelberg, Germany, on 10 and 11 October 1945, by a Military Commission appointed by paragraph 10, Special Orders No. 260, Headquarters, Seventh U.S. Army, Western Military District, 17 September 1945, as amended by paragraph 5, Special Orders No. 275, 2 October 1945, same headquarters.

2. FINDINGS: The offense involved was: Pleas Findings
CHARGE: Violation of the Laws of War

Specification: In that on or about 27 October 1944, at or near Friedensdorf, Germany, Wilhelm Dieterman and Andreas Ebling, German civilians, did wilfully, deliberately and wrongfully encourage, aid, abet and participate in killing a member of the Army of the United States whose exact identity is unknown, who was then unarmed and a prisoner of war in the custody of the then German Reich.	Dieterman	G	G
	Ebling	NG	NG
	Dieterman	NG	G
	Ebling	NG	NG

3. SENTENCE:

The Commission, by at least a two-thirds vote of the members present at the time the vote was taken, sentenced the accused Wilhelm Dieterman to be hanged by the neck until dead, and found accused Andreas Ebling not guilty. Said sentence was approved by the Reviewing Authority on 9 November 1945, but the method of execution was changed by the Reviewing

Authority to shooting. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for final action as to accused Dieterman (Letter, Headquarters, United States Forces, European Theater, AGO 250.4 JAG-AGO, 25 August 1945, subject: "Military Commissions").

4. DATA AS TO ACCUSED:

The accused Dieterman, a German national, was, at the time of the commission of the offense, a resident of Friedensdorf, Germany, and a member of the local police force. He had been previously a locomotive engineer and, after 1935, a laborer in a quarry. He is 55 years of age and married. He was a member of the Nazi Party from 1932 to 1934, but not subsequently. He had been in the police reserve and was called to active duty as a member of the gendarmerie during the war.

5. RECOMMENDATION: That the action of the Commission and of the Reviewing Authority as to the sentence imposing the death penalty against the accused Dieterman be confirmed.

6. EVIDENCE:

(a) The record of trial shows that during the evening of 27 October, 1944, in the vicinity of Buchenau, Kreis Biedenkopf, Hesse, Germany, an American airman named Roberts (full name and rank undisclosed in the record of trial, but shown in the report of investigation to be Lt. I. Roberts, Jr., ASN 01289139, of Los Angeles, California), was taken prisoner by civilian inhabitants of Buchenau. He was disarmed, taken to the local burgomaster and there questioned. During the interrogation he was told by an SS lieutenant named Menge that he was going to be shot (R 30; Pros. Ex. 2, p 2). Menge also asked the accused Dieterman (who, as a member of the gendarmerie, had been summoned by Menge) if he

was familiar with the order of the Reichs Fuehrer of the SS that Allied fliers should not be taken prisoner (Pros. Ex. 1, p 1,2). Dieterman, who construed the order to mean that captured Allied fliers should be killed, replied that he was (Pros. Ex. 1, p 1, 2). At the direction of Menge, Dieterman tied the hands of the victim behind his back and bound his legs with a cord (R 35). He then, by order of Menge, took the prisoner on foot in the direction of the town of Friedensdorf, supposedly to confine him in a pilot detention point (Pros. Ex. 4, p 1; Pros. Ex. 5, p 2). Dieterman was armed with a pistol (R 28). En route Dieterman loosened the rope on the feet of the captive so that he could walk faster (R 35; Pros. Ex. 1, p 1). Dieterman testified that between leaving the burgemeister's office and arriving at the Karlschotte bridge the prisoner, although his hands were chained behind his back, grabbed Dieterman's testicles and also twisted his right wrist. Dieterman did nothing in retaliation (R 36). Meanwhile, Menge, Ebling, and another man drove to a point on the road near the Karlschotte bridge beyond where Dieterman and the prisoner were walking and there waited for them (Pros. Ex. 1, p 1). When Dieterman and the prisoner arrived they got in the car and were driven to a cross-roads (Pros. Ex. 1, p 1) where Menge, Dieterman, Ebling, and the prisoner got out. Menge walked with Dieterman and the prisoner to a nearby stone quarry, there gave Dieterman the prisoner's pistol, said: "Here, you have a pistol, shoot the man in the head", and then left (R 36). According to Dieterman, the prisoner then grabbed Dieterman by the side and by his testicles, lifting him off the ground (R 36, 37). Dieterman beat the prisoner with the gun and then shot him in the head (R 37, Pros. Ex. 1, p 1). Dieterman testified that he believed the victim

understood Menge's order that he was to be killed (R 37). Dieterman claimed that he shot in self-defense (R 37) and would not have killed the prisoner if he had not been attacked (R 39).

(b) Further detailed evidence will not be set forth here, but the recapitulation contained in the review of the Staff Judge Advocate, Seventh United States Army, dated 27 October 1945, appended hereto, is adopted in its entirety.

7. JURISDICTION:

a. The Military Commission which heard this case was properly constituted and had jurisdiction over the subject matter and of the accused. A military commission has jurisdiction over the inhabitants of an occupied enemy country held by the right of conquest (Par. 7, FM 27-10, Rules of Land Warfare; Coleman v. Tennessee (1878), 97 U.S. 509). Military commissions are not restricted in their jurisdiction by territorial limits (United States v. Hogg, et al (1865), 3 Rebellion Records, Series II, 674, 378; 56 Harvard Law Review, 1059, 1065). Thus, an offense against the laws of war committed in a country prior to its occupation may properly be tried by a military commission of the victorious army upon occupation (SPJGW 1943/17671, Jurisdiction to Punish War Criminals, 13 December 1943; Dig. Op. JAG, 1912, p 1067; Trial of Henry Wirz (1868), 40th Cong. 2nd Sess. House of Representatives, Ex. Doc. No. 23; see also cases cited on pages 207-216 in Cowles, Universality of Jurisdiction over War Crimes, 39 California Law Review (June 1945)). Civilian nationals of a belligerent power are bound to accord lawful enemy combatants the treatment required under customary and conventional international law (Arts. 2 and 3 of the Geneva (Prisoners of War) Convention, 27 July 1929; Art. 23, par (c) of the Annex to the Hague Convention No. IV of 18 October 1907; Change 1, 15

November 1944, par. 345.1, FM 27-10, Rules of Land Warfare).

Both the United States and Germany were signatory powers to the above cited conventions, which in general express the practice and unwritten law of civilized nations at war (Foreword, TM 27-251, "Treaties Governing Land Warfare"; Garner, International Law and the World War (1920). pp 20, 21; Spaight, War Reports on Land (1911). p 12). It is beyond question that the offense in the instant case - the murder by a civilian of a surrendered, unarmed and manacled enemy soldier - was a violation of the laws of war properly triable by a military commission having custody of the accused.

8. DISCUSSION:

a. The findings of the Commission that the accused did not shoot the victim in self-defense, which was his sole defense, is in accord with the evidence. The claim that the shooting was necessary because of the resistance of the victim is completely overcome by the evidence and reasonable inferences therefrom. In the first place, the victim had his hands chained together behind his back. It would seem to be physically impossible for him to have inflicted serious injury or endangered the life of the accused by grabbing his testicles. It is noted, in this connection, that the accused at the time was wearing a "thin" overcoat over his uniform (R 42, 43), making it additionally difficult for the captive to inflict damage upon the accused Dieterman. In the second place, the accused, if attacked, could have cried out for assistance from Menge and Ebling, who were in the immediate vicinity, or he could have protected himself from his unarmed and manacled assailant by means other than killing him. Furthermore, on the night of the shooting the accused Dieterman said nothing to Ebling about resistance on the part of the victim as being the cause of the killing (R 28; Pros. Ex. 6,

p 5), though after his arrest he wrote a letter to Ebling claiming resistance (Pros. Ex. 2, p 5). On the contrary, the accused Dieterman told Ebling eight days after the homicide that he had killed the flyer by orders of Menge (Pros. Ex. 6, p 5, 6). Finally, it is reasonable to believe that the victim understood that he was to be killed (since he had been so told by Menge and had seen the gun given to Dieterman a moment before the shooting). Realizing his plight, he may very well have attacked Dieterman, as alleged, but his actions were but the frantic and futile efforts of a man who realized he was about to be killed. They could not justify or mitigate in any degree his murder by the accused Dieterman.

b. Although the accused specifically stated that he did not kill in obedience to superior orders (R 39), the record is clear that he was acting under the direction of the SS Lieutenant Menge. Whether or not asserted by the accused, the defense of superior orders, under the facts in his case, certainly should not be accepted as legal justification or in mitigation of the offense. The order was so palpably illegal and so "manifestly and indisputably contrary to International Law" that Dieterman should have refused to obey and, having obeyed, cannot escape liability for illegal acts committed in pursuance thereto (Oppenheim, International Law, Vol II, Sixth Edition, p 453, footnote 2, citing the Llandovery Castle case (Annual Digest, 1923-1924, Case No. 235; (1921) Cmd. p 45). In fact, the evidence that Dieterman was acting in pursuance of an illegal order from Menge to kill the victim tends to establish the wilfulness and deliberateness of the act, and correspondingly weakens the asserted defense that he killed to protect himself.

c. The corpus delicti and the identity of the victim as an American soldier were adequately established by eye-witnesses. His identity as an individual was not an essential

element of proof under the specification as drawn and was not proved. All other elements of proof necessary to establish the guilt of the accused were properly adduced in evidence.

d. From an examination of the entire record it appears that no error or omission, technical or otherwise, on the part of the Commission resulted in injustice to the accused. The proceedings satisfied all the requirements of a full and fair trial. The accused was represented by competent military counsel and German civilian counsel of his own choosing; a two-thirds vote of the members present was required for both conviction and sentence; competent interpreters were used to keep the accused and counsel informed of what was said and done; and all evidence considered by the Commission met the test of admissibility, i.e., that it should have probative value to a reasonable man. Only four members of the Commission were in attendance during the trial and voted on the findings and sentence. This was not a jurisdictional defect or an irregularity injuriously affecting the rights of the accused. Neither the order appointing the Commission nor any pertinent directive requires the presence on a military commission of a minimum number of members thereof. It is concluded that the trial accorded with natural justice and with the general principles of international law recognized as applicable to the trial of such cases.

e. It is noted that in the Specification and the record of trial the name of the accused is given as "Diejerman" and in the review of the Army Judge Advocate and the action of the Reviewing Authority as "Diederma". Because there is no question as to the identity of the accused, and because he was not misled thereby, the discrepancy is considered entirely immaterial. Both spellings are used in the suggested form of action attached hereto.

f. The record of trial indicates that Lt. Col. Kemman, a witness for the prosecution, was not administered an oath before testifying (R 5). This witness testified only concerning the facts surrounding the taking of pre-trial statements from the two accused. Both accused stated in the record of trial that the statements were correctly reported and interpreted (R 7), and did not contend that they were improperly obtained. It is concluded, therefore, that the irregularity did not injuriously affect any substantial right of the accused Dieterman.

9. CLEMENCY:

It is believed that no valid reasons for the exercise of clemency are disclosed in the record of trial. The killing amounted to murder, for which the death penalty is lawful upon conviction. The evidence is clear that the offense was committed in accordance with a preconceived plan to murder the victim. The plea of self-defense, considering that the victim was unarmed and bound with his hands behind him, is patently absurd. The killing was wanton and needless. The record does not disclose any reluctance on the part of the accused toward killing the victim, other than as alleged in his own testimony. He made no oral protest to Menge and appeared to follow instructions to the letter.

The sentence of the Commission and the action of the Reviewing Authority thereon are just and commensurate with the nature of the offense committed by the accused. There are no extenuating circumstances disclosed in the record of trial to warrant changing the penalty or death imposed by the Commission.

The Reviewing Authority, for reasons not set forth in his action or elsewhere, changed the method of execution from hanging to shooting. It is suggested that the method of execution originally imposed by the Commission be used, for the reason that

shooting is generally imposed for the commission of a strictly military offense. Accused's crime has no direct analogy to a military offense. It was particularly heinous, and ignominious death should be his punishment. It is suggested that hanging would be more appropriate and commensurate with the nature of the offense.

10. CONCLUSION:

It is accordingly believed that the sentence of the Commission should be confirmed. A form of action prepared to accomplish this result is attached hereto.

JAMES D. MURPHY,
1st Lt., JACD

HEADQUARTERS SEVENTH ARMY
WESTERN MILITARY DISTRICT
Office of the Commanding General
APO 758 US Army

November 9 . 1945

In the foregoing case of Wilhelm Dieterman, a German Civilian, the sentence is approved and the method of execution will be by shooting. The record will be forwarded for confirmation of the sentence.

s/ Geoffrey Keyes
GEOFFREY KEYES
Lieutenant General, USA
Commanding

HEADQUARTERS
UNITED STATES FORCES, EUROPEAN THEATER

12 December 1945

In the foregoing case of WILHELM DIETERMAN, also known as WILHELM DIEDEMAN, a German National, the sentence is confirmed, and will be executed by hanging. The Commanding General, Western Military District, will issue appropriate orders promulgating the sentence as confirmed, and will carry the sentence into execution at a time and place to be determined by him.

s/ Joseph T. McNarney

JOSEPH T. McNARNEY
Commanding General. U S Forces
European Theater