

HEADQUARTERS SEVENTH ARMY  
Office of the Staff Judge Advocate  
APO 758 US Army

22 June 1945

Subject: Review of Record of Trial by Military Commission in the cases of United States vs Lieutenant Gunther Thiele and United States vs Grenadier Georg Steinert, both Members of the German Army, tried by common trial.

Case No. 12-494

To: Commanding General  
Seventh United States Army  
APO 758

1. The above named accused were tried at a common trial by a military commission appointed by the Commanding General, Seventh United States Army, at Augsburg, Germany, on 13 June 1945. They were tried on the following charges and specifications:

As to Lieutenant Gunther Thiele:

CHARGE: Violation of the Laws of War.

Specification: In that Lieutenant Gunther Thiele, 1st Company, Kampfgruppe Schwaben, a member of the German Army, did, at or near Billingsbach, Germany, on or about 17 April 1945, wrongfully and unlawfully order that Captain Peter M. Cummins, 44th CIC Detachment, an American prisoner of war, be killed, which order was then and there executed by a member of his command.

As to Grenadier Georg Steinert:

CHARGE: Violation of the Laws of War.

Specification: In that Grenadier Georg Steinert, 1st Company, Kampfgruppe Schwaben, a member of the German Army, did, at or near Billingsbach, Germany, on or about 17 April 1945, wrongfully and unlawfully kill Captain Peter M. Cummins, 44th CIC Detachment, an American prisoner of war.

The record is now before you as reviewing authority. The authority to appoint the military commission was delegated by the Commanding General, European Theater of Operations, to the Commanding General, 12th Army Group, by letter dated 19 November 1944, with power of redelegation. This power was delegated by the Commanding General, 12th Army Group, to the Commanding General, Seventh United States Army, by letter dated 21 May 1945.

In the above first named letter it is provided "Authority is granted to the Commanding Generals, Sixth and Twelfth Army Groups, with authority to delegate such power to commanders of all United States Armies, Corps and Divisions under their command, having regard for, but not being bound by, the prescribed composition of general courts-martial, to appoint military commissions of not less than three officers of the United States Army, for the trial of persons subject

to the jurisdiction of such a commission and who are charged with espionage or with such violation of the laws of war as threaten or impair the security of their forces, or the effectiveness and ability of such forces or members thereof." By radio A18439 from the Commanding General Seventh Army to the Commanding General, 12th Army Group, dated 4 June 1945, the facts of this case were stated and the opinion was expressed that these cases come under the above underlined provisions in that they were acts that threatened or impaired the security of our forces, or the effectiveness and ability of our forces or members thereof. By this radio advice was given of the intention to try these cases and concurrence was requested in this and similar trials. By radio Q22211, dated 7 June 1945, a reply was received from the Commanding General, 12th Army Group specifically approving the trial of these cases and stating that such trials were in accordance with existing policy.

1. By paragraph 4 and 6 of Letter of 19 November 1945 (AG 334 Op GA) Subject: Authority to Appoint Military Commission, from Commanding General ETOUSA to Commanding General, Twelfth Army Group it is provided:

"4. No sentence by any such commission shall be carried into effect until the record of trial thereof shall have been examined by the Staff Judge Advocate of the commander appointing the commission, and, when confirmation is required, by the Staff Judge Advocate of the confirming authority.

"6. No sentence of death shall be executed until it has been approved by the authority appointing the commission and confirmed by the Army Group Commander concerned: provided that no sentence to death by any such commission appointed by the Commanding General Sixth Army Group or the Commanding General Twelfth Army Group, shall be executed until it has been approved by the Theater Commander."

2. By paragraph 14 of Circular 14, dated 2 October 1944, Headquarters Twelfth Army Group, Subject: Military Commission Regulations, it is provided: "14. Confirmation of death sentences. No sentence of death shall be carried into execution until it shall have been confirmed by the Commanding General, Twelfth Army Group, who, prior to such confirmation, shall refer the record of trial to his Staff Judge Advocate for examination."

3. By Radio EX 76986 dated 21 December 1944 from the Commanding General, ETOUSA to the Commanding General, Seventh Army, it is provided: "Reference letter this Headquarters 19 November 1944 (AG 334 Op GA) Subject: Authority to Appoint Military Commissions. Death sentences by Military Commissions appointed by authority of letter cited above may be executed by approval of authority appointing said Commission and after examination required by paragraph 4 of said letter without confirmation by Army Group Commander or Theater Commander, except where the Army Group Commander or Theater Commander expressly required such confirmation in a particular case."

4. By Circular 21 of Twelfth Army Group, par 14 of its Circular 14 of 1944 is amended to read as follows: "The execution of death sentences by Military Commissions is authorized upon approval by the authority appointing the commission and after examination of the record of trial by the Staff Judge Advocate of the appointing authority, except where confirmation is expressly required in a particular case by the Army Group Commander or the Theater Commander."

5. It will be noted from the above directions that both the Theater and the Twelfth Army Group have made an exception to the authority of the Army Commander to order the execution of any death sentence in any case in which "confirmation is expressly required in a particular case by the Army Group Commander or the Theater Commander." Obviously, the Theater Commander or the Army Group Commander would not be in a position to decide whether or not he desired to reserve the right of confirmation unless he were notified of the case. It is further clear that both the Theater Commander and the Army Group Commander already possess the power to require confirmation in any particular case of which they happen to have knowledge without putting the above quoted language in the circular. The mere presence of this language indicates a desire of the theater and Army Group Commander to be consulted in each case in order that he may make his decision as to whether or not he wishes to act in confirmation. This headquarters has been informally advised that the Judge Advocate of ETOUSA has taken the position that the Army Commander has the right to proceed to order such a sentence to be executed unless affirmative action is taken by the Theater Commander expressly notifying the headquarters that he desires to require confirmation. This headquarters was also advised that the Army Group Commander took the same attitude toward his reservation of the right to act in confirmation. This matter was presented to the Army Group Commander by Radio A 18832 dated 18 June 1945 and in a radio reply Q 24389 dated 21 June 1945 the Army Group Commander has confirmed such interpretation i.e. there is no necessity of presenting any case to him to learn whether he desires to require confirmation. Furthermore, he was officially notified of the case as hereafter mentioned and has given his clearance. However, there is no action by the Theater Commander which has the effect of stating that he does not require confirmation in these cases. Consequently it is believed that if it should be decided to approve the sentence, the execution thereof should be stayed until this question is answered by the Theater Commander.

Letter of 1 June 1945 (000.5 (JA)) from the Commanding General, 12th Army Group to Commanding General, Seventh Army; Subject: "Execution of War Criminals"; provides - "2. It is desired that such commanders stay the execution of a death sentence in any such case inasmuch as the accused may have information of value to pending war crimes investigations or the trial of other war criminals. The execution of the sentence should be 'stayed pending further orders' until clearance in this regard has been obtained from the Commanding General, 12th Army Group." Pursuant to the above letter upon completion of the trial of this case radio A18832 dated 18 June 1945, was sent by the Commanding General, Seventh Army to Commanding General, 12th Army Group advising of the convictions and sentence in these cases and requesting clearance on the authority of the Commanding General, Seventh Army, to order the execution of the sentences. By radio Q24389 dated 21 June 1945, the Commanding General, 12th Army Group gave his clearance on the authority of the Commanding General, Seventh Army, to proceed in these cases.

## 2. SUMMARY OF THE EVIDENCE.

a. Location of opposing forces. On 17 April 1945 the 44th Infantry Division was in an assembly area near Ebelbach, Germany. An area containing scattered German troops had been surrounded by troops of the division, but it was not known just how many enemy troops there were or where they were located (R 9, 12). This alleged offense occurred on a narrow dirt road between Ebelbach, Germany, and Billingsbach, Germany (R 10). A company of German troops under the command of accused Thiele occupied the area in question. He describes the area as being near some cliffs south of Zeilsenhausen and it was

a part of an area occupied by his battalion, Battalion Schwaben, Combat Group Sachs (R 26, 27). Organized resistance had ceased in the area on about 15 April 1945 (R 12).

b. Narrative of events.

(1) For the prosecution.

At approximately 1930 on 17 April 1945, Major Bennett, G-5, 44th Infantry Division, and Captain Peter M. Cummins, CIC Section, of the same division, were seen near Ebelbach, Germany, going in the general direction of Billingsbach, Germany (R 9). They were driving a one-quarter ton government vehicle with divisional markings painted on the bumper (R 10). They did not return that night and could not be found the next morning when a search was made for them. (R 8, 9). On that day, 18 May 1945, several officers and men of the organization went to the place where the officers had been last seen and started along a narrow road from Ebelbach toward Billingsbach. At a point about half way between the two towns the vehicle in which the missing officers had been riding was found. There were three bullet holes in the vehicle, a field desk had been opened and the wires removed from the spark plugs. Upon search being made a bedroll was found belonging to Captain Cummins. Also found was an American issue carbine that was covered with blood and Captain Cummins helmet with a bullet graze across the insignia. The bedroll had been pulled apart. Later in the day the bodies of Major Bennett and Captain Cummins were found under a lean-to up on the slope of a hill about 300 yards from the vehicle. The bodies had been covered with branches and leaves (R 10). The shoes, insignia of rank and part of the clothing had been removed from the bodies. Captain Cummins had been shot through the head and through the body. Both officers were dead (R 11). An autopsy revealed that the cause of death was the bullet wound on the head, but the other bullet wound extended through the chest and there was a discoloration about the eyes and an abrasion on the right forehead and right nostril. The examining medical officer stated that the men had been dead from three to five days at the time of his examination on 23 April 1945 (R 13, 14).

On 1 May 1945, a CIC agent obtained a statement relating to the killing of an American officer from each of the accused (R 15, 18). The statements were typed, some changes made, and they were later signed by accused. It was shown that the statements were voluntarily made and signed (R 18, 20). The statements were received in evidence, the defense stating that there was no objection to either of them (R 18, 20).

The statement of the accused Thiels was in substance as follows: He is 23 years old, went to school until he was 17 years old then was inducted into the Wehrmacht on 1 April 1945; from his replacement unit in Munich he joined the Battalion Schwaben, Combat Group Sachs on 7 April 1945. He further stated (date not given) that a passenger car carrying two officers entered the forest where his unit was staying; the car stopped and one officer went around the bivouac on the right while the other remained with the car. The first officer saw several soldiers and opened fire; he was then fired on from the flank and started to run in an open meadow where he was struck by a shot and fell. The other officer took a position behind a tree and commenced firing his weapon. His fire was returned and he was struck and wounded on the head. He was then taken prisoner, disarmed and searched, and he and his papers were sent to Captain Schwaben. About a half an hour later both he and his papers were returned; all of his

personal effects were returned to him, and it was learned from his identification card that he was an officer. He was allowed to sit down and the soldiers talked to him. The soldiers who had returned the officer brought to Lieutenant Thiele an order "from Captain Schwaben that the officer was to be shot at nightfall." He then said "this order is not proper and no one could take the responsibility." Then one of the soldiers there suggested Grenadier Steinert "who would shoot the officer." Steinert was called and Captain Schwaben's order repeated to him, and Steinert said "It is in order." At nightfall the officer was told to return to his car. "Steinert, who stood somewhat aside, followed with the machine pistol in order to carry out the order originally given by Captain Schwaben." After a few minutes shots were heard and Steinert returned and said, "the Captain is dead." Steinert had been told to shoot the Captain in such a way as to make it appear that he had fallen in combat. After Steinert had reported, several men stated that the Captain was not dead. The Lieutenant then sent Steinert to shoot the Captain through the heart. Another shot was heard and Steinert again reported. He was asked where he had shot and replied "in the right side." The Lieutenant then said "But that is not the heart," and Steinert fired again. The body was then ordered carried to the vehicle, placed beside that of the "major" and covered with a shelter half from the bedroll (R 18, Exhibit A, B).

The statement of the accused Steinert was in substance as follows: He was born 1 December 1927 in Upper Silesia; in 1937 he entered the German Young Folk, then entered the Hitler Youth in 1942. He then worked in a foundry until he was called into the Reich Labor Service in 1944. He was called into the Navy 15 October 1944 and trained with the Navy until he was detailed into the Infantry on 26 January 1945. On 25 March 1945, the course of instruction was closed with the remark: "The course of instruction continues behind the front." On 17 April 1945, the battalion was located near Billingsbach; an automobile carrying two men approached at about 2000. He was told that the men got out and, seeing soldiers opened fire; the Major was shot to death by Stabsfeldwebel Wirschnidt. The Captain continued to fight until a shot struck his steel helmet and wounded him and he surrendered. The Captain was given first aid and sent to the battalion command post. Very shortly thereafter the Captain was returned together with an order from Captain Schwaben that "The captured Captain must be shot." Lieutenant Thiele then sought volunteers to shoot the Captain, but no one volunteered; then he (Steinert) was ordered to report, but before he left to go to the Lieutenant his platoon leader told him "Steinert, shoot the Captain only if you are so ordered by Lieutenant Thiele." The statement then continues: "When I reported to the Lieutenant, he gave me the following order: 'Steinert, you will shoot the Captain.' Thereupon I asked: 'Is that your order, Herr Leutnant?' He then answered: 'Yes, I order that.' I now asked further: 'Herr Leutnant, how should I kill the man then?' After long reflection, he said: 'Take a machine pistol; the Captain is supposed to go in front of you, and you shoot him from behind, so that it appears as though he had fallen in battle.' I myself now had to carry out this order, exactly as any other soldier would have had to carry it out also. The Captain walked in front of me and received a burst of fire in the back from my machine pistol. I can no longer say exactly where I hit him because it was dark in the woods and I myself could no longer look at it out of pity. The Captain then fell, but was not yet dead. Then Lieutenant Thiele again gave me the order: 'Steinert, shoot him again with the pistol through the heart.' I now had to shoot a second time," but I do not know whether I hit the Captain, who lay on the ground." The Captain was then ordered carried to the automobile by the Lieutenant. The entire battalion left that evening in an effort to fight back to German lines. Steinert stated, "I myself have never been able to

understand why Lieutenant Thiele gave this order to shoot a helpless prisoner to me especially" (R 20, Exhibits C, D).

(2) For the Defense.

Accused Thiele, having been fully advised of his rights as a witness in the same manner as in a court-martial case, elected to testify under oath in his own behalf (R 25). He stated that he is a Lieutenant, Battalion Schwaben, Combat Group Sachs, German Army; that he signed the statement summarized above of his free will and that it is correct. He further stated on 17 April the battalion was extended; his company, the first, being the further north, the three other companies being south of him (R 26). He had about 60 men in his company out of a normal strength of about 120. He was the only officer where there normally were five or six. His company had come to the Western front during the latter part of March 1945 and had progressed through Wurzburg, Leuda and Koenigsrofen. At the latter place he had been transferred from the Ninth Company, where he was a platoon leader to the First Company. Thereafter they retreated through Creglinghausen, Schrottsberg to Zeissenhausen. It was near Zeissenhausen that the incident in question happened, and at the time American troops had pushed past both flanks and the unit was encircled (R 27). On the evening after the incident an attempt was made to withdraw but it was unsuccessful and from 27 to 30 men were lost as prisoners, and on the 27th he and 12 men were captured. On the 17th of April his company was in hiding along a dirt road through the forest and the members had been instructed not to shoot as their position might thereby be disclosed to the Americans who were about 800 meters away (R 28). During the evening a vehicle carrying two persons, later discovered to be officers, came up the road and stopped; the German soldiers all took cover, but the car stopped and the officers dismounted. The Major then left the Captain at the car and started around the bivouac where he saw some German soldiers and opened fire; a fire fight opened even though forbidden by the Lieutenant. The Major was fired upon from a flank and it became quiet. During the fire fight the Captain at the vehicle first fired from behind a tree then later got under the vehicle where he was injured by a grazing wound on the head. He was disarmed and sent back to the Battalion (R 29). It was not then known that he was an officer as they had never captured a prisoner and did not know what the two stripes on the helmet meant. Later a runner said that the Captain would be shot as they were encircled, and he called for volunteers. He then picked out Steinert because one of the men said, "Steinert is going to shoot him" but when Steinert came to him he said he would do it only under order. He last saw the Captain when he left with Steinert behind him (R 30). The next day Captain Schwaben told him, "The Captain had to be shot because in a situation like we are in we cannot take prisoners along. We are encircled and have to expect that we would be detected any minute." The witness then said "American troops had pushed through everywhere. The American prisoner would have had to utter only one sound and we would have been detected or discovered." The witness further stated that he had been taught that when an order is given this order must be executed whether the order is right or not (R 31). The decision is not with the subordinate and he has no right to question an order; he must obey and then, after 48 hours have elapsed, may protest it. Immediate action may be taken by a combat commander to carry out the death sentence for disobedience, and Hitler had issued a special decree that every soldier was entitled to shoot anyone that disobeys an order. He had to carry out the order in spite of the fact that it was against the customs of war or Captain Schwaben would have shot him (R 32, 33). He had been a member of the regular army for six years and had received three war decorations for

service in Russia (R 33). On cross examination it was brought out that he had been instructed in certain of the laws of war and that he knew prisoners were not to be shot without trial, but he believed a trial was not possible in this case; that he passed the order on as from Captain Schwaben. He stated that he could not carry out the order as he never shot anyone who could not defend himself and he passed the order on (R 34, 35). Upon being recalled, the witness stated that in order for his troops to escape it was necessary to cross roads and travel at night; that if he had been in Captain Schwaben's position he would have taken the prisoner's word that he would be quiet, and given orders that he be shot if he disobeyed (R 42).

The accused Steinert, having been fully advised of his rights as a witness in the manner customary in trials before courts-martial, elected to be sworn and testify (R 25). He testified that he is 17 years old and a member of First Company, Battalion Schwaben; that his rank (Grenadier) indicates he is an Infantryman and has been in action only since 31 March 1945. He stated that the first thing unusual that he noticed on 17 April 1945 was when the fire fight started caused by the car coming into the ravine (R 38). He first saw the American prisoner at the dugout of the company troops where he was being attended by medical men. He never saw the American Major at all. He first heard the order that the Captain must be shot when he was given the order by Lieutenant Thiele, and he had to carry out the order, right or wrong, as he would have been shot if he had disobeyed (R 39). He asked the Lieutenant if it was an order and he replied, "Yes, I order it, the order comes from the Battalion Commander" (R 39). He first shot the Captain in the back, then upon further order, shot him again; he was not afraid for his own life but if he had not have shot the Captain someone else would have done it (R 40).

The defense also introduced in evidence Section IV, paragraph 47, Deutsches Militarstrafgesetzbuch (German Military Penal Code) (R 24, Defense Exhibit 1). This evidence shows that under German law the following prevails: "(1) If in the execution of an order relating to Service matters a penal law is violated, the commanding officer is solely responsible. Nevertheless, the subordinate obeying the order is subject to penalty as accomplice: 1. If he transgressed the order given, or 2. if he knew that the order of the commanding officer concerned an action the purpose of which was to commit a general or military crime of misdemeanor. (2) If the guilt of the subordinate is minor, his punishment may be suspended." The note attached to the provisions quoted is from the code and written by Von Rittau. It is certified that this law was in force on 17 April 1945 and still valid. This note sets out the German law as general requiring prompt obedience to every order, and it states that in determining the question military necessities come first.

### 3. COMMENTS AND AUTHORITIES.

#### a. Jurisdiction.

The power to appoint military commissions for the trial of violations of the laws of war is inherent in the Commander of the forces of the belligerent power and the authority to delegate such power to inferior commanders has been recognized by long established custom. In *Ex Parte Quirin* 35-L Ed. 1, 63 Supreme Court Reporter 2, the United States Supreme Court held that military commissions are proper tribunals for the trial of violations of the laws of war. In such case the court said:

is as follows:

"From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."

The practice and propriety of trying cases involving violations of the laws of War is covered by Sec. 356 of U. S. Field Manual 27-10 which provides as follows:

"No individual should be punished for an offense against the laws of war unless pursuant to a sentence imposed after trial and conviction by a military court or commission or some other tribunal of competent jurisdiction designated by the belligerent."

b. The Laws of War and charges against accused for violation thereof.

The existence of a state of war between two nations and international laws binding upon such nations are not inconsistent. States are sovereign, and as no central authority exists above them able to enforce compliance with International Law, war cannot, under the existing conditions, always be avoided. International Law recognizes this fact, but at the same time contains obligations limiting the right to resort to war and provides regulations with which belligerents have customarily, or by special conventions, agreed to comply in case war breaks out between them. Accordingly, although with the outbreak of war peaceable relations between the belligerents cease, there remain certain mutual legal obligations and duties. Thus conceived, war is not inconsistent with, but a condition regulated by, International Law. Such regulations are known as the Laws of War. These rules of law are found in the treaties and conventions to which the United States and other nations are parties as well as unwritten rules which are well defined by authorities and established by ancient custom and usage (FM 27-10, page 1). Under these Laws of War, Prisoners of War are required to be protected and treated with humanity, and reprisals against them are prohibited. In Chapter 6, Article 2 of the Geneva Convention of 1929, to which both the United States and Germany were signatories, it is provided "Prisoners of War are in the power of the enemy power, but not of the individuals or bodies of troops who capture them. They must at all times be treated with humanity and protected, particularly against acts of violence, insults and public curiosity." Again by Article 23 of the Annex to the Hague Convention of 18 October 1907 to which the United States and Germany were signatories, it is provided: "In addition to the prohibitions provided by special Conventions, it is especially forbidden -- c. To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion." These laws are recognized by all civilized nations.

The specification under the charge of a violation of the Laws of War, in the case of Grenadier Georg Steinert, alleges that he did unlawfully kill Captain Cummins an American prisoner of War. The specification under the charge of a violation of the Laws of War, in the case of Lieutenant Thiele, alleges that he did wrongfully and unlawfully

that the order was then and there executed by a member of his command. These charges clearly allege violations of the Laws of War.

c. Right of accused to be treated as prisoners of War.

At the time of the commission of the offenses of which accused were found guilty they were members of a belligerent State which was bound by the laws of war. The offenses were not committed by accused at a time when they were prisoners of war but several days before their capture. One of the requirements of a lawful belligerent is that he conduct his operations in accordance with the laws of war (FM 27-10, Sec. 9). If a person is not a lawful belligerent he is not entitled to the treatment of a prisoner of war (FM 27-10, Sec. 351). In commenting on the section of the War Department Rules of Land Warfare, 1940, Hyde, International Law, Sec. 675, states: "The War Department Rules of Land Warfare do not fail to refer to particular forms of conduct which are deemed to deprive the actors (regardless of their civil status) of the privileges of prisoners of war. It is the irregular and nefarious aspect of their conduct which produces such deprivation."

In this regard, Wheaton in his work on International Law, page 180, has the following to say:

"If men are taken prisoners in the act of committing, or who have committed, violations of international law, they are not properly entitled to the privileges and treatment accorded to honorable prisoners of war."

Thus the accused are not held or tried while in a status of prisoners of war but instead as War Criminals.

d. Merits of the case and the grounds of defense.

The facts of the case are not disputed: Briefly Captain Peter M. Cummins, an American Officer was wounded and taken prisoner by members of the command of Lieutenant Thiele. Captain Schwaben, the Battalion Commander and superior officer of Lieutenant Thiele, sent an order to Lieutenant Thiele to kill Captain Cummins. Lieutenant Thiele then ordered Grenadier Steinert to kill Captain Cummins. Grenadier Steinert then carried out this order and killed Captain Cummins.

By way of defense both accused raised the defense of (a) superior orders and (b) Military necessity.

(a) Superior Orders.

The first ground of defense presented was that of superior orders i.e. where an order is given to a soldier or officer by his military superior he is bound to obey and cannot be held criminally responsible for such act. Under American law such an order would be an illegal order, and being such, the soldier would not be bound to obey. So, if he then did obey he would be responsible criminally for his act. Under German law the order is not an illegal order as regards the soldier's obligation to obey. Instead the order must be obeyed without question under pain of being summarily shot to death. This rule is set forth in the German Field Manual and thus it may be assumed that it was generally understood by German soldiers.

This raises the question as to whether any nation has the right (at least as to other Nations and the nationals thereof) to adopt any law or group of laws which is contrary to international law or the laws or usages of war and thereby avoid the consequences of the infringement of that law.

In Wheaton's International Law, Seventh Edition, page 180, 181, it is stated:

"If men are taken prisoner in the act of committing, or who have committed, violations of international law, they are not properly entitled to the privilege and treatment accorded honorable prisoners of war. The fact that they acted under orders cannot furnish a valid excuse; for, if such shifting of responsibility be admitted, then we arrive at the conclusion that millions of men, including responsible officers of the higher command, are to be held free from blame no matter what atrocious deeds they have perpetrated; and that only one person is answerable, namely, the monarch or President of the belligerent state, as the case may be. This is a conclusion which neither reason for humanity can accept."

Field Manual 27-10, paragraph 345.1 provides:

"Individuals and organizations who violate the accepted laws of war and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability either by way of defense or in mitigation of punishment."

In The Llandovery Castle (Annual Digest 1923-1924 Case No. 235) the German Reichsgericht held in the course of the so-called Leipzig Trials, that the killing of enemies contrary to Article 23 (c) of the Hague Regulations, or, in similar circumstances, at sea, constitutes an offense against International Law in regard to which the defense of superior orders affords no justification.

From a legal viewpoint it appears to be entirely clear that the laws of War established by solemn treaty are supreme laws and that no nation has the right to adopt local laws which are inconsistent therewith so long as the treaty stands. At the least it is clear that in a case in which such a local law conflicts with the higher law or would have the effect of nullifying it, such local law must be considered as inoperative.

#### b. Military Necessity.

The accused raised the defense that their acts were legal because based on Military Necessity. It is fully recognized that German jurists have in general adopted the view that in case of extreme necessity all rules of war may be disregarded. This rule is referred to as "necessitas non habet legem" and is expressed in a German proverb "Kriegsraison geht vor Kriegsmanier." The Hague Convention IV, in its preamble, states that the rules of war were framed with regard to military necessities, and this is clearly the basis of all laws of war. The result of such idea undoubtedly resulted in the statement of Count Von Bethman-Hollweg on 4 August 1914:- "Necessity knows no law. Our troops have occupied Luxemburg, and, perhaps, have already entered Belgium territory. Gentlemen, that is a breach of international law-----. We have been obliged to refuse to pay attention to the reasonable protests of Belgium and Luxembourg. The wrong - I speak openly - the wrong we are thereby committing we will try to make good as soon as our military aims have been attained. He who is menaced, as we are, and is fighting for his all, can only consider how he is to hack his way through." This doctrine of necessity is definitely in vogue in Germany and German jurists

justify under it, or under reprisals, all the atrocities committed by Germans during the World War as well as the present war. It is, therefore, clear that all rules of international law in German eyes are of no importance where self preservation is concerned. This matter goes even further and it is clear that German Commanders and the German government deliberately confuse military necessity with the expediency of military convenience and strategical interest as shown by the invasion of Belgium and of Luxemburg in 1914 and by the invasion of Norway, Belgium, Holland and Luxemburg in 1940.

In regard to the German position stated above, Oppenheim on International Law (Lauterpacht) Vol II, page 183, 184, states:

"As soon as usages of warfare have by custom or treaty evolved into laws of war, they are binding upon belligerents under all circumstances and conditions, except in the case of reprisals as retaliation against a belligerent for illegitimate acts of warfare by the members of his armed forces or other subjects. In accordance with the German Proverb, *Kriegsraison geht vor Kriegsmanier* (necessity in war overrules the manner of warfare) many German authors before the World War were already maintaining that the laws of war lose their binding force in case of extreme necessity. Such a case was said to arise when violations of the laws of war alone offers, either a means of escape from extreme danger, or the realization of the purpose of war --- namely, the overpowering of the opponent. This alleged exception to the binding force of the law of war was, however, not at all generally accepted by German writers. The proverb dates very far back in the history of warfare. It originated and found recognition in those times when warfare was not regulated by laws of war i. e. generally binding customs and international treaties, but only by usages. In our day, however, warfare is no longer regulated by usages only, but to a greater extent by laws - firm rules recognized either by international treaties or by general custom. These conventional and customary rules cannot be overruled by necessity, unless they are framed in such a way as not to apply to a case of necessity in self preservation, Article 22 of the Hague Regulations stipulates distinctly that the right of belligerents to adopt means of injuring the enemy is not unlimited, and this rule does not lose its binding force in case of necessity. What may be ignored in the case of military necessity are not the laws of war, but only the usages of war."

The accused in this case have violated the laws of war as expressed in solemn treaty obligations and, therefore, the doctrine of military necessity is no defense.

c. The finding of guilty of each accused of the specification and charge is supported by the evidence and is in accord with law. There are no errors or irregularities in the trial which would render the trial unfair or the findings unjustified. The trial was properly and fairly conducted and conformed to the standards required by military and international law. Each accused was defended by an able lawyer who made a vigorous and able defense.

#### 4. The Sentence.

Field Manual 27-10 Section 357, provides, "All war crimes are subject to the death penalty, although a lesser penalty may be imposed." As previously stated, the fact that the person charged was acting under orders of a superior may be taken into consideration as a defense and in mitigation of the punishment (FM 27-10, Par 345.1).

The sentence as to each accused is; to be hung by the neck until dead. These sentences are obviously severe.

When the situation of each accused is considered from their position it is at once observed that both of them were in a most difficult dilemma. This is especially true of Grenadier Steinert. Under the German law they were each required to carry out the order of Captain Schwaben. Under orders of Adolph Hitler any officer or soldier who refused to obey orders was to be summarily shot to death. Thus they were both subject to immediate death if they should refuse to obey. Furthermore, under the German view of the laws of necessity, the order was a perfectly legal order, and if this view of the law were accepted throughout the civilized world they would be guilty of no violation of the laws of war if they should obey. Thus from the German view they were forced under the pain of instant death to comply with an order which under the German view would be a legal act when committed. Thus the position of both accused is one to attract the careful consideration of any reasonable and fair thinking person.

The matter of punishment of crime has two main aspects, namely appropriate punishment of the individual concerned and punishment as an example to others for the purpose of deterring further acts of a similar nature. The latter is, in the eyes of the civilized world, and particularly the Christian world, the most important. One of the reasons why a great war has been fought in modern time in which death and suffering of appalling proportions has been forced upon the world, not to mention the economic losses of billions upon billions of dollars of the wealth of all nations, was the willingness of the German Nation to violate all treaty obligations and customs of war in an effort to conquer all of Europe, if not the World. Any means, no matter how illegal or depraved was no deterrent to the ends desired. To the German mind any means was justifiable as military necessity to accomplish the end desired. Thus the fact that a German law would force German military personnel to violate international law under pain of death was a means to the end desired -- illegal as it may be to the rest of the world. To extend sympathy or clemency to the individual who was thus caught in the meshes of their own law would, perforce, allow the German nation to succeed in their nefarious plans without such adequate punishment to the individual criminal as would act as a deterrent to the future rulers of Germany or other nations, and would result in a failure of one of the purposes for which the Allied Nations waged this war. In order that there may be a lasting peace, to the extent that a state of peace may endure in a world filled with clashing interests, it is essential that the governments of all nations as well as the people thereof shall know that there will be no escape from the violations of solemn treaty obligations by the establishment of inconsistent local law or the adoption of legalistic theory antagonistic thereto.

In the administration of justice conditions often arise which require prompt and stern measures which are out of proportion to the normal means of combatting the evils involved. In such cases the few wrongdoers suffer excessively for the common good. In war innocent

civilians are often killed in a legal manner as the result of necessary military operations. In the act of spying there is an act which is perfectly lawful and is a very honorable one from the view of the principal nation, yet, as a deterrent to spying such act is universally made punishable by death, and, this is true even though the act of spying was not voluntary but pursuant to military orders the failure to obey which would have resulted in summary execution.

However, in this case the source of evil was the commanding officer, Captain Schwaben, for it was he who conceived the original criminal plan to shoot the deceased and who issued the orders that set the fatal machine in motion. Captain Schwaben has not been tried for his crime. If the present accused are executed, the two most damning witnesses against him will be gone.

5. Recommendation.

I recommend that the sentence be approved and commuted to imprisonment for life, and then ordered executed. This action is within your power as reviewing authority. A form of action designed to accomplish this recommendation is submitted for your signature if you approve.

/s/ P. G. McElves  
by E.R.B.  
/t/ P. G. McELVEE  
Colonel, JAGD  
Staff Judge Advocate.