

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

UNITED STATES

21 November 1945

Case No. 12-481

Dominikus Thomas, a German
National.

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused was tried at Heidelberg, Germany, on 9 October 1945, before 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, and paragraph 10, Special Orders No. 277, 4 October 1945, same headquarters.

2. FINDINGS: The offense involved was: Plea Findings
CHARGE: Violation of the Laws of War NO G

Specification: In that Dominikus Thomas, a German civilian, did, at Wollendorf, Germany, on or about 21 September 1944 willfully, deliberately and wrongfully kill 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.

NO G

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 to be hanged by the neck until dead at such time and place as higher authority should direct. The sentence was upheld upon review 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 (Letter, Headquarters, United States

Forces, European Theater, AGO 250.4 JAC-AGO; 25 August 1945,
subject: "Military Commissions").

4. DATA AS TO ACCUSED: Accused is a German civilian, 51 years of age. He is a shoemaker by trade, and at the time of the commission of the offense for which he was tried, he was a member of the "Home Guard". It also appears that he is married. He served in the German army from 1914 through 1918, and was wounded in the head, as a result of which he claims to have suffered nervousness and headaches since that time.

5. RECOMMENDATION: That the action of the Commission and of the Reviewing Authority be confirmed, but that the method of execution be by hanging, in conformity with the original sentence.

6. EVIDENCE:

(a) The evidence is clear that on or about the afternoon of Sunday, 21 September 1945, an American airplane was shot down in the vicinity of Wollendorf, Germany, and that at least two, and possibly four, occupants parachuted from the ship and landed safely (R 5, 6; Pros. Ex. 1-27). One of them, probably S/Sgt. Charles E. Hollenbeck, Jr., (R 10; Pros. Ex. 1-7, -8) was captured by other members of the Home Guard and taken to a restaurant on the border of the community of Wollendorf (R 11; Pros. Ex. 1-27, -28). He had been disarmed, but a crowd of civilians was still threatening him, so he was removed under guard of accused to the house of a policeman named Linz, and then to the basement of the building which housed the local fire brigade (R 10, 11; Pros. Ex. 1-27, -28). During the half hour in which the flier remained in this basement, matters were in charge of one Conrad Eich, who was the local "Gendarmerie-master", and who appears to have been accustomed to assigning the members of the Home Guard to various duties (R 7, 8, 14).

Finally, Eich ordered accused to take the flier in the direction of Nouwied, to shoot him while enroute, and to wait at the scene of the execution until Eich should arrive (R 11; Pres. Ex. 1-28). This accused did. The actual execution was witnessed by one Lena, another civilian, who had seen accused marching the flier down the road and into a stone quarry, and who followed them at a distance (R 6). Accused shot twice, the second time after the flier had already fallen to the ground (R 6, 11; Pres. Ex. 1-28). Accused was not present when deceased was first searched and did not know whether he was armed, but admitted that deceased had made no effort whatever to escape. Accused told Lena that deceased had tried to escape (R 6). He said this because "our orders were always to say he tried to escape" (Pres. Ex. 1-28). Eich, who had given the orders to shoot the deceased, was not present at the time of the actual shooting (R 6; Pres. Ex. 1-28, -32). Accused knew at the time that he was doing wrong and, as a former soldier himself, that he was supposed to take captured prisoners of war "back from the front and save them" (Pres. Ex. 1-29). He committed the act because of Eich's orders and because he was "nervous". He suffered a head wound while serving as a German soldier in the first war and has had "trouble with headaches" since (R 11; Pres. Ex. 1-30).

(b) Further detailed evidence will not be set forth here, but the recapitulation contained in the review of the Staff Judge Advocate, Seventh U.S. Army, dated 3 November 1946, and 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. Hoge, et al (1865), 8 Rebellion Records, Series II, 674, 678; 56 Harv. 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 (Memorandum by the Judge Advocate General (SPJGW 1943/17671, subject: Jurisdiction to Punish War Criminals, 13 December 1943; Dtg. 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 Universality of Jurisdiction over War Crimes, (Cowell), reprinted from 33 Calif. Law Review (June 1945)). There is a hint in accused's confession prior to trial that deceased may have been a Canadian national (Pres. Ex. 1-30). But it clearly appears from other testimony, and from evidence obtained at the time of exhumation of deceased's body, that he was in fact an American staff sergeant by the name of Charles E. Hollenbeck, Jr., LSN 33630073 (Pres. Ex. 7, 9). Civilian nationals of a belligerent power are bound to recognize lawful enemy combatants and to accord to them the treatment required under international law (Art. 2 of the Geneva (Prisoners of War) Convention, 27 July 1929; Art. 23, para (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 cited conventions, which in general express the practice and unwritten law of civilized nations at war (Foreword, FM 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).

8. DISCUSSION:

(a) The evidence clearly established that an American soldier was twice shot in the back of the head by accused in a stone quarry between Vellendorf and Neuwied, Germany, on the afternoon of 21 September 1944. Accused freely admitted in two pre-trial confessions (Pros. Ex. 1-5), and from the stand at his trial (R 11, 13), the commission of this act. His only defense was that he acted under the orders of one Eich, head of the local Gendarmarie. Eich, however, was not present at the time of the commission of the crime. There is some hearsay testimony, introduced into the record by accused's counsel, as to the extent of the punishment which accused, as a member of the Home Guard, could have received for failure to carry out Eich's order to kill deceased. It appears that the maximum punishment imposed for failure to obey a legal order was a fine of 300 marks or imprisonment for three weeks in jail (R 14). Little citation of authority is necessary to sustain the position that obedience of flagrantly illegal orders, such as these, is no defense to a criminal charge of murder. Assuming that the Home Guard to which the accused belonged was a military organization, and that Eich, as local leader, ordered accused to kill deceased, it was an order so palpably illegal that accused should have refused to obey (See Oppenheim, International Law, Vol. II, 6th Ed., p 455, and particularly footnote 1 on page 455, in which the German Supreme Court held in the case of the Llandovery Castle (Annual Digest, 23, 24, Case No. 235 (1921) Cmd, p 45) that superior orders constituted no defense to a palpably illegal act such as killing unarmed enemies). It is also noteworthy that Eich, who gave the order, was not present at the time accused carried it

out, and that it was carried out some time later and at a distance from the place where the order had been given. In other words, accused was not acting under any sort of immediate compulsion. He had time to reflect upon the illegality of his act, and he practically admits in his confession that he then knew he was doing wrong from both the legal and moral point of view. On the basis of his own confessions and testimony, accused was guilty of the offense charged.

(b) The identity of the deceased was not alleged in the specification, other than to say he was an American citizen. This was conclusively established by evidence admitted at the trial without objection from the accused. Deceased's actual identity was not established to the same degree, but was not an essential element of the specification or of the crime of murder. Every other element of the crime was clearly shown by the testimony of the witnesses, by accused's confessions, and by his own testimony in the witness stand.

(c) It is clear that the confessions made by accused and admitted in evidence against him were entirely voluntary. (Prov. Ex. 1-33, -35).

(d) Accused was represented by military counsel and by a civilian German lawyer of his own choosing. It appears from the record of trial that Eich, who issued the orders carried out by accused, had not been apprehended at the time of the trial. It was suggested that Eich was dead (R 13, 14). The offenses committed by accused and Eich, however, were not identical. The accused was in no way prejudiced by failure to try Eich simultaneously with him.

(e) It does not appear from the record whether accused's testimony upon trial was sworn or unsworn (R 10). This cannot, however, be said to be prejudicial error, inasmuch as the other evidence, entirely without any testimony by accused,

embraced every essential element of the crime, and all aspects of the defense sought to be interposed by the accused. The record would be legally sufficient without accused's testimony. The Commission was properly constituted and had jurisdiction over the subject matter and accused, and was authorized to impose the death penalty. Both the findings and the sentence were approved by a two-thirds vote of the members of the Commission present. There were no irregularities in the proceedings or trial which prejudiced any of the substantial rights of the accused. He received a fair trial, consistent with Anglo-Saxon concepts of due process, and no doubt whatever exists as to his guilt.

9. CLEMENCY:

Accused was found guilty of the commission of a war crime. All war crimes are subject to a death penalty, although a lesser penalty may be imposed (Par. 357, FM 27-10, Rules of Land Warfare). In this particular instance, the offense was the cold-blooded murder of an unarmed and defenseless prisoner of war, whom accused shot from behind without warning, and for no reason, outside of his own malicious and evil nature, than he had been told to do so by another German national. The intent to kill is admitted, as is the fact that such intent had existed in accused's mind for some time prior to the actual commission of the crime. All the elements of common law murder are present, and such an offense is punishable under the laws of all civilized nations. There are no extenuating circumstances. Accused stated that he suffered from nervousness and headaches as a result of a head wound suffered while serving as a soldier in the last war. He expressly disclaimed insanity as a defense and declined to undergo a mental examination (R 14). The case fully warrants the imposition of the death

sentence. 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.

SAMUEL SONENFELD
Captain, JAGD