

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

September 1945

UNITED STATES

v

Albert BURY, also known as
Alfred BURY (Police Chief of
Langenselbold, Kreis Hanau,
Germany), and Wilhelm HAFNER
(Sergeant, Reserve Police),
both German Nationals.

Case No. 12-1397

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused were tried at Freising, Germany, on 15 July 1945, by a Military Commission appointed by paragraph 11, Special Orders 190, Headquarters, Third U. S. Army, 16 July 1945.

2. FINDINGS: The offenses involved were: (As to each accused)

	<u>Pleas</u>	<u>Findings</u>
CHARGE: Violation of the Laws and Usages of War	NG	G

Specification: In that on or about 12 December 1944, Albert Bury, also known as Alfred Bury, a German National, then the Police Chief of Langenselbold, Kreis Hanau, Germany, and Wilhelm Hafner, Karl Henkel, and Wilhelm Plitt, all German Nationals, then Policemen of Langenselbold, Kreis Hanau, Germany, and Johan Friedrich Wilhelm Loser, a German National, then Landrat of Kreis Hanau, Germany, and Georg Heinrich Kalte, a German National, then Oberleutnant of Police of Kreis Hanau, Germany, did at Langenselbold, Kreis Hanau, Germany, wrongfully and unlawfully kill Technical Sergeant Donald L. Hein, ASN 33563157, a member of the Armed Forces of the United States of America, the said Albert Bury having wrongfully and unlawfully delivered the said Donald L. Hein, who had come into his, Albert Bury's, custody, as a prisoner of war, and was then and there unarmed and defenseless and was not under sentence of death for any offence committed by the said Donald L. Hein, to said Wilhelm Hafner, Karl Henkel, and Wilhelm Plitt, with directions that the said Wilhelm Hafner, Karl Henkel, and Wilhelm Plitt, should shoot the said Donald L. Hein, and pursuant thereto the said Wilhelm Hafner, Karl Henkel, and Wilhelm Plitt, having conducted the said Donald L. Hein to a secluded spot at or near Langenselbold, Kreis Hanau, Germany, where the said Wilhelm Hafner, in the presence of the said Karl Henkel and Wilhelm Plitt, did wrongfully and unlawfully shoot the said Donald L. Hein with a pistol, causing the death of said Donald L. Hein, the said Karl Henkel and Wilhelm Plitt then and there wrongfully and unlawfully standing by and failing to prevent the aforesaid unlawful act of the said Wilhelm Hafner, all of the foregoing having been done pursuant to the wrongful and unlawful orders of the said Johann Friedrich Wilhelm Loser and the said Georg Heinrich Kalte that each and every enemy flier who landed within the territory of their jurisdiction was to be shot.

3. SENTENCE: Each of the accused was found guilty of the charge and specification by a two-thirds vote of the court. Each of the accused was sentenced to be hanged by the neck until dead by a two-thirds vote of the court (R 53). The Commanding General, Third U. S. Army, has approved of the sentence, and the record of trial is now before you for confirmation (Letter, Headquarters, U.S. Forces, European Theater, AG 250.4, JAG-AGO, 25 August 1945, subject: Military Commissions).

4. DATA TO THE ACCUSED:

Accused BURY was the Police Chief of Langenselbold, Germany, a position he had held for about one year prior to the commission of the offense. He had been a member of the uniformed police for 22 years (R 40). He is 45 years of age and is married.

Accused HAFNER, a carpenter by trade, attended school eight years. He was drafted for auxiliary police work in April 1943, and was a sergeant of the Police Reserve at the time of the commission of the offense (R 50). He is 50 years old, is married and has children.

5. RECOMMENDATIONS: That the action of the court and of the reviewing authority, as to each accused, be confirmed.

6. EVIDENCE: The evidence establishes that on 12 December 1944, during an air attack on Hanau, Germany, an American flyer, by the name of Technical Sergeant Donald L. Hein, parachuted to earth. Hein was captured by civilians and taken to the office of accused BURY, who was chief of police. Accused BURY ordered accused HAFNER, a sergeant of the reserve police, to kill Hein. Accused HAFNER took Hein into the woods and killed him with a shot from his service revolver. Further detailed evidence will not be set forth here, but the recapitulation contained in the review of the Staff Judge Advocate, Third U. S. Army, appended hereto, is adopted in its entirety.

7. JURISDICTION:

a. The jurisdiction of military commissions to try cases involving war crimes is well recognized in the common law, and by statute (Winthrop Military Law and Precedents, 1920 Reprint, page 839).

The order appointing the commission issued by Headquarters, Third U. S. Army empowered the commission to make rules for the conduct of its proceedings, withi

the framework of its powers as a military commission. The order specifically provides that the military commission was not bound by the rules of procedure and evidence prescribed for general courts-martial, but that evidence which had probative value to a reasonable man was to be received. In pursuance to the authority given by the appointing order, the military commission announced certain rules pertaining to procedure and evidence, "it was to be governed generally by the rules of procedure and evidence as laid down in the manual for courts-martial with the following changes. Statements made by the accused in the course of investigations which appear to be regularly and properly authenticated will be admitted in evidence subject to such attack and explanation as the accused may desire to make. The statements made by the accused that are admitted in evidence will be received generally against all of the accused subject to such rebuttal as the accused or any of them may elect to make. The accused will be accorded the same privileges with regard to testifying as are accorded accused persons in trials before American courts-martial, but if the accused or any of them elect to take the stand as an unsworn witness, he will be subject to cross-examination."

b. The specification in this case alleges that accused BURY unlawfully and wrongfully turned an American prisoner of war over to accused HAFNER with orders to shoot the American prisoner of war and that HAFNER did in fact kill the American prisoner of war. The acts alleged constitute violations of the laws of land warfare, both written and unwritten. The principle that prisoners of war are to be dealt with humanely is enunciated in paragraph 75, WD FM 27-. The principle is also established in Articles 4 and 23, Chapter 2 of the Annex to the Hague Convention No. 4 of 18 October 1907, and in Articles 2 and 3 of the Geneva (Prisoners of War) Convention of 29 July 1929, to which both the United States and Germany were signatory powers. The offense alleged closely approximated common law murder. The offense was intrinsically so barbarous and inhumane that it can be properly said to violate those implied concepts of standards of decency to which every belligerent is bound by unwritten law.

c. All evidence received by the court was admissible under the rules of procedure established in the order creating the commission, and in the rules adopted by the commission. The essential elements of the offense were estab-

lished by the testimony of the accused themselves, and are undisputed.

d. The court was properly constituted, and had jurisdiction over the subject matter, and of the accused, and was authorized to impose the death penalty. There were no irregularities in the proceedings or trial which prejudiced any of the substantial rights of the accused. They were represented by competent counsel, and were given a fair trial.

8. DISCUSSION:

a. All the elements of proof of the alleged offense necessary to establish the guilt of both accused were properly adduced in evidence. It was proved by the prosecution and admitted by the accused that Police Chief BURY ordered HAFNER to shoot and that the latter, in consequence of the order, did shoot and kill the victim; that such deliberate killing was after the victim had been taken into custody; and that it was not done in self-defense nor to prevent an escape. The identity of the victim as an American soldier was properly established. The question as to whether or not the victim was a so-called "terror flyer" and the killing a justifiable reprisal was not directly raised by the defense, and is not considered pertinent to this case. In any event, if the killing was in the nature of a "reprisal" it was entirely unjustified within the meaning of the rules of land warfare (paragraphs 70 and 358, WD, FM 27-10).

b. Assuming, for the sake of argument, that the accused killed the victim in compliance with superior orders, it becomes necessary to pass directly upon the validity of such a defense. The most recent statement concerning what effect, if any, is to be accorded to superior orders, is found in Change 1, paragraph 345.1, WD FM 27-10, dated 15 November 1944. Said paragraph provides: "Individuals and organizations who violate the accepted laws 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. The person giving such orders may also be punished."

Paragraph 148, MCM, 1928, provides in part ". . . The general rule is that the acts of a subordinate officer or soldier, done in good faith, and without malice in compliance with his supposed duty, or of superior orders, are justifiable, unless such acts are manifestly beyond the scope of his authority, and such that

a man of ordinary sense and understanding would know to be illegal (Wharton on Homicide)."

The Chief Counsel for the United States, in the prosecution of Axis war crimes, Mr. Justice Jackson, has considered the question of the defense of superior orders. He has stated: "With the doctrine of immunity of a head of state usually is coupled another that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility. There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. But the case may be greatly altered where one has discretion because of rank or the latitude of his orders. And of course, the defense of superior orders cannot apply in the case of voluntary participation in a criminal or conspiratorial organization, such as the Gestapo or SS. An accused should be allowed to show the facts about superior orders. The Tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all." (Report to the President of United States, 7 June 1945).

c. Let us consider first the case of accused BURY. BURY was so evasive about the order given him from his superiors and changed his version of the order so many times that I am doubtful whether or not such an "order" did in fact ever exist. It seems more likely that there may have been an informal understanding among the police officials as to the manner in which captured flyers would be treated. At one time BURY testified the order was in reference only to "terror flyers" (R 40, 45). At another point in his testimony there is an indication that the order was to apply only to flyers who were attempting to escape (R 44). BURY testified that he had received an oral order from Lt. Kalte to the effect that "terror flyers" were not to be treated as prisoner of war and that he deduced therefrom that if such a flyer was not to be treated as a soldier it would be necessary to kill the flyer (R 44, 48). BURY later testified that he did not take orders from Lt. Kalte, and that the

flyer was killed as a result of the secret written order received either direct from or transmitted by the Commander of the Security Police in Essen (R 48).

From BURY's long experience in police work and from his position as chief of police, it is reasonable to infer that he must have realized the inherent impropriety of his order to HAFNER to kill the flyer. From his own testimony BURY had some latitude in determining whether or not any specific flyer should be killed. He stated that he did not consider he was "doing right" in ordering the death of the flyer (R 44). It appears to me that the order for the execution of the flyer was not issued in compliance with superior orders or in compliance with any supposed duty on the part of BURY. Certainly BURY had some discretion because of his rank and the latitude of his orders. The sentence of the court in reference to BURY should be confirmed.

d. Accused HAFNER testified that he shot and killed Hein in accordance with the order given him by BURY, and testified further that he believed he would have been sent to a concentration camp or sentenced to death if he had disobeyed the order given him by BURY (R 51). Was the compulsion of superior orders on HAFNER so great that the death penalty imposed by the court should be reduced to life imprisonment or for confinement for a term of years? It seems to me that HAFNER stands in a somewhat different position than BURY. He had been drafted into the police service and had served therein for one year and nine months. Under ordinary circumstances he would not be expected to be able to exercise the degree of discretion exercised by Chief of Police BURY. However, his conduct in wilfully shooting and killing the unarmed flyer is intrinsically so reprehensible, and so obviously murder, that, as a reasonable man, he should be charged with the full and complete consequences of his act. HAFNER stated that he feared he would be punished with the death penalty if he disobeyed the orders to kill the flyer. Nevertheless, HAFNER stated that he knew of no policeman or otherwise, who had ever been court martialed or otherwise punished for a failure to shoot a captured enemy flyer. Under the circumstances, I do not believe that HAFNER ever was of the opinion that if he did not kill the flyer, that he himself would be killed. A very important element in determining the degree of HAFNER's guilt is the fact that he made absolutely no protest to

the order. Accordingly, I am of the opinion that the sentence of the court is just and in accordance with the evidence and should be confirmed.

9. CLEMENCY:

a. As applied to both the accused there is only one possible basis for clemency and that is the defense of compulsion by reason of superior orders which was considered in the preceding paragraph. The defense of superior order, not having been accepted, each accused is guilty of a war crimes, involving cold blooded murder. The penalty for any war crimes is death, though a lesser penalty may be imposed.

b. Subsequent to the trial a letter has been received at this headquarters, signed by the wife and daughter of HAFNER requesting clemency. Said petition reads in part: ". . . Then the Police T/Sgt (Polizemeister) BURY gave our father the official order to take the prisoner to the nearby airport (Fliegerhorst) at Langendiebach and to shoot him on the way. Our father, a carpenter by trade, with only the ordinary elementary school education believed that he had to execute this order of his superior, especially as he had been told that the SS leader HIMMLER, at that time Minister of the Interior had issued an order to this effect. In order properly to judge the act of our father, it should not be overlooked that on account of the (bombing) attacks occurring day and night, the population at that time was in a desperate mood which rendered them nearly insane and incapable of any sober judgment; on the other hand the temper was very bitter in view of the countless victims of these attacks among whom there were many children, women and old men.

"Only out of this general feeling are we able to explain our father's deed of which we did not know anything; for otherwise he was a peaceful man and incapable of committing such an act; he was not a member of any party, in particular not a Nazi. We know that our father has committed wrong, a very serious wrong, but on the other hand he was not a trained policeman and he believed he had to execute, under any circumstances, an order given by his superior order . . ." The petition further prays that in the event the death penalty cannot be altered that the mode of execution be changed from hanging to death by a firing squad "as our father's act certainly did not stem from oral turpitude,

but from a false sense of official duty." According to paragraph 103, MCM, 1929, hanging is considered more ignominious than shooting, and is the usual sentence for a violation of AW 92. Since, as already been stated, HAFNER's act did not arise by reason of compulsion of superior orders, he can be considered only as a war criminal murdering an unarmed captured soldier. The manner of the execution of the death sentence should not be altered.

10. CONCLUSION:

It is accordingly recommended that the sentence of the court as to each accused be confirmed. Forms of action prepared to accomplish this result are attached hereto.

FORD R. SARGENT
Major, JAGD