

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 407

31 October 1947

UNITED STATES)
v.)
Ludwig HOLLACHER, et al.)

Case No. 12-2064

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 4-5 August 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Ludwig HOLLACHER and Friedrich METZ, German nationals, did, on or about 21 September 1944, at or near HUELLENBERG, Kreis NEUMILD, Germany, wrongfully encourage, aid, abet and participate in the killing of a member of the United States Army who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On 21 September 1944 an American flier parachuted to earth, landing near a Hitler Youth school a short distance from the village of Huellenberg, Germany. Accused METZ with the help of Kuchem captured the flier after accused METZ fired his pistol several times in the air. The captured flier was taken to the dining room of the school and was searched. His personal effects were removed by the accused. The flier was then locked in a room in the cellar. Policeman Lich called the accused METZ on the telephone and ordered him to shoot the flier. Accused METZ and HOLLACHER discussed the shooting, and after considerable bickering as to who would shoot the flier, they both went to the cellar. Accused

flier from behind. The flier fell to the floor. Accused METZ then took the pistol from accused HOLLACHLER and examined the flier. Accused HOLLACHLER was then given the pistol again by accused METZ, and HOLLACHLER fired a second shot into the head of the American flier. The body of the American flier was removed from the cellar by both accused and placed on a cart driven by one Leher, who took the body of the flier to the cemetery at Hollendorf. The flier was buried there two days later.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Ludwig HOLLACHLER

Nationality:	German
Age:	29
Civilian Status:	Farmer
Party Status:	Unknown
Military Status:	Wehrmacht, Corporal
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: On 21 September 1944 an American flier parachuted to earth, landing in the vicinity of the Hitler Youth school near the village of Huellenberg, Germany. Accused METZ, who was an administrative leader of the school, and Kuchem captured the flier, took him to the school and locked him in the cellar (R 11-14). The accused stated in his extra-judicial sworn statement and in his oral testimony that on 21 September 1944 he visited the town of Neuwied, returning to the school in the late afternoon, and was told by METZ that a flier had been captured and was locked in the cellar (R 62, 46; P-Lx 4 p. 3). The accused and another soldier went

(R 46; P-Ex 4 p. 3). The accused again met LETZ who informed him that he had had a telephone call from the police chief who stated he would pick up the dead flier. The accused replied, "The flier surely is not dead, he is certainly still alive." LETZ replied, "No, you must shoot him." The accused then said, "Why should I shoot the flier, he did not do anything to me?" LETZ then said, "You are a front-line soldier, you must be able to do that and you must do it too." This continued for some little time, LETZ insisting that the accused shoot the flier and the accused refusing. Then LETZ told the accused to come to the cellar with him. The accused did not wish to go but was afraid he would be reported for insubordination and brought before a court, so he went with LETZ to the cellar. In the cellar hallway, LETZ loaded his pistol, unlocked it, and gave it to the accused with orders to shoot the flier from behind when he came out of the room in which he was locked. LETZ then went into the room where the flier was, and the accused remained by the door (R 63, 64, 46; P-Ex 4 pp. 2-4). As the flier came into the passageway with LETZ following, the accused shot the flier from behind, causing the victim to fall to the floor. The accused then handed the pistol back to LETZ who examined the flier who was lying on the floor and said, "You must fire once more." He then reloaded the pistol, unlocked it, and handed it back to the accused saying, "Now shoot him into the head", which the accused did from a distance of two to three meters. LETZ then examined the flier again and removed his wristwatch. The two accused left the cellar, locking the door after them (R 65, 66, 46; P-Ex 4 p.5).

The accused testified that he was under the impression that it was a crime to shoot the flier but thought that "It

the order by METZ, and METZ had been given the order by the police, and after all the police is a central organization which has to look out after the welfare of the nation." (R 75)

Witness Kutscher testified that she saw both of the accused standing in the hall of the basement facing each other and looking very disturbed. Shortly thereafter she saw the lower part of the body of the flier lying on its back on the floor of the hall (R 15-17). Later that day she asked the accused, "Have you done it?", and he replied, "Yes, I have done it" (R 17). Both of the accused were corporals, but sometime after this incident the accused was made a sergeant (R 21, 22).

About 1700 hours Eich arrived and informed them a car would come later and pick up the flier (R 46; P-Lx 4 p. 6).

At least part of the students were sent out of the building by METZ prior to the shooting. They stopped at a distance of about 50 meters. From that point approximately 15 minutes later they heard a shot from the direction of the school (R 34, 35). The students then moved around towards the back of the building, and sometime thereafter they saw a horse drawn cart pull up to the door leading to the coal cellar, and both of the accused carried the body of the flier out and loaded it on the cart (R 35).

Witness Echer testified that on the day in question he received an order from policeman Eich to go to the Hitler Youth school and pick up the body of an American flier who had been shot while escaping and take the body to the cemetery. Upon arrival at the school, this accused and accused METZ were standing outside the canteen door, and the body of the flier was lying on the floor. The flier was dead, and his head was covered with blood. Both accused helped to load the body of the flier on a cart. Echer then drove to the cemetery at Huellenberg where he delivered the body to a

Witness Mager testified that Leher delivered the body of the flier to him at the cemetery in Huellenberg and that the American flier was buried there two days later. A cross was placed on the grave, but no name was placed thereon (R 55, 56).

Evidence for Defense: The accused testified that he was transferred to the school at Huellenberg on 26 August 1944 with duties of attending the horses (R 61). When the commanding officer left for the west wall, he issued orders to accused METZ making him the deputy camp commander (R 62). The accused was subordinate to METZ, and all his orders were received from METZ (R 62-64, 69). The only duty of the accused was that of driver of the supply wagon (R 24). He received the order to shoot the flier from METZ. He did not want to shoot the flier, but he did have to obey every order that METZ gave him. He was afraid of METZ and afraid he would be reported for insubordination and brought before a court, if he failed to obey his orders (R 63-64, 66, 67, 69, 46; P-Ex 4 pp. 2-4, 6, 7).

Defense witness Meyer testified that he had known the accused for approximately 20 years and that the accused had a good reputation in the town of Thiessing, Germany, and had never done anything against the law (R 141, 142).

Sufficiency of Evidence. The evidence clearly establishes, and it is admitted by the accused, that he shot the flier with METZ's pistol. The testimony of the accused and that of METZ is contradictory on many points. However, on the whole they corroborate each other to a very substantial degree. The contention of the accused that METZ as his superior ordered him to shoot the flier is not established by any substantial weight of testimony. If METZ was the superior

rank. The Court might well have concluded that the accused and METZ, after the discussions as to the shooting of the flier, planned the killing in all details; and that the accused willingly participated. There is no showing that the accused acted under immediate compulsion. Having possession of METZ's pistol the accused had the means of controlling the situation. The Court was warranted from the evidence in its findings of guilty. The sentence is not excessive.

Petitions: A Petition for Review was filed by Major A.R. Wyatt, Jr., Chief Defense Counsel, 9 August 1947. He also filed two Petitions for Clemency, undated.

Recommendation: That the findings and sentence be approved.

2. Friedrich METZ

Nationality:	German
Age:	43
Civilian Status:	Deacon and missionary worker.
Party Status:	None
Military Status:	Wehrmacht, Corporal; Sergeant, Hitler Youth.
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: On 21 September 1944, an American flier parachuted to earth, landing in the vicinity of the Hitler Youth school near the village of Huellenberg, Germany. The accused, who was an administrative leader of the school, and Kuchem left the school together and proceeded in the direction the flier was coming down. The accused carried his pistol in his hand and fired it several times in

removed his personal effects and then locked him in the cellar (R 11-14, R 47; P-Ex 5, pp. 14, 15). Witness Kutscher testified that policeman Eich telephoned the school about the time the flier was locked in the cellar and instructed her that the flier was to be shot. The witness replied, "I will not do that, I shall call Mr. ALTZ." She then informed the accused of the instructions that she had received on the telephone. Later the accused told her, "The man has to be shot" (R 14). The accused stated in his extrajudicial sworn statement that he received a telephone call from an unknown man who told him the flier was to be shot. He objected to this and was told, "You are a soldier and you know how to shoot." He again objected to the order and was told, "This is a higher order by Himmler, chief of the Ersatzheer" (R 47; P-Ex 5 p. 16). After this telephone conversation he informed HOLLACHER about the telephone conversation. Shortly thereafter in the accused's office they discussed the orders to shoot the captured flier. HOLLACHER suggested that he shoot the flier, and the accused replied, "I can't do that, I won't do that, I never shot." The accused further said, "Can you do it?" HOLLACHER replied, "Yes, I can do it" (R 47, P-Ex 5 p. 17). Witness Kutscher further testified that she left the building after her conversation with the accused as to the shooting of the flier and returned in approximately 15 minutes. When she returned she saw both of the accused standing in the hall of the basement facing each other looking very disturbed. Shortly after this she saw the lower part of the body of the flier lying on its back on the floor of the hall in the cellar (R 15-17). The accused instructed her that she was not to mention a thing about the incident (R 17). The

HOLLACHER took the accused's pistol and together they went to the cellar. From the passageway HOLLACHER called the flier out of the room and shot him from behind. He then fired a second shot into the head of the flier. The accused then told HOLLACHER to stop (R 47; P-Lx 5, pp. 18-20).

At least some of the students were sent out of the building by the accused prior to the shooting. They stopped at a distance of about 50 meters from the school. From that point approximately 15 minutes later, they heard a shot from the direction of the school (R 34, 35). The students then moved around towards the back of the building, and sometime thereafter they saw a horse drawn cart pull up to the door leading to the coal cellar, and the accused and HOLLACHER carried the body of the flier out and loaded it on the cart (R 35).

Witness Echer testified that on the day in question he was ordered by policeman Lich to take his cart and go to the Hitler Youth school and pick up the body of an American flier who had been shot while escaping and take the body to the cemetery. When he arrived at the school, the accused and HOLLACHER were standing outside the canteen door, and the body of the flier was lying on the floor. The flier was dead, and his head was covered with blood. The accused and HOLLACHER helped to load the body of the flier on the cart. He then drove to the cemetery at Wollendorf where he delivered the body to a grave digger (R 48-53).

Witness Mager testified that Echer delivered the body of the flier to him at the cemetery in Wollendorf, and two days later the body of the American flier was buried there in the cemetery. A cross with no name was placed on the grave (R 55, 56).

Evidence for Defense. The accused testified that on 21

pain he was in, he was lying down on his bed when he was called by Kuchem. He put on his shoes and went outside. The flier was pointed out to him. He then returned to his room, secured his pistol, and then went outside and walked toward the flier (R 86). The flier started to walk away so he shouted, "Hands up", several times. The flier failed to raise his hands so he fired twice over his head (R 87, 88). He then captured the flier and took him to the school where he and HOLLACHER searched him and removed his personal effects, but he did not learn the name of the flier (R 89, 90, R 47; P-Ex 5 pp. 14, 15). He received a telephone call from an unknown man who told him the flier was to be shot. He objected to this and was again given the order that the flier was to be shot and that this order was from higher headquarters. He wasn't sure if the man on the telephone identified himself as a police commissioner or policeman, but he believed at the time that the order had to be obeyed (R 47; P-Ex 5 pp. 16, 20). After the first discussion with HOLLACHER, he returned to his office. While sitting there in great pain, HOLLACHER returned to the accused's office. There was no conversation, and the accused did not observe what HOLLACHER did. After one or two minutes HOLLACHER left, and it was then that he noticed that his pistol was missing, so, disregarding his pain, he left his office and followed HOLLACHER to the cellar. Just as he arrived in the cellar, he yelled, "Ludwig", and at the same time he heard a shot fired from the direction of the door (R 93). This shot was fired by HOLLACHER (R 94). After this first shot, the accused took the pistol away from HOLLACHER and said, "Don't shoot again", but HOLLACHER replied, "Yes, I want to give him another one" (R 96). HOLLACHER then fired

The accused further testified that he had been ill with stomach ulcers for the past 15 years (R 82); that on the day of the incident he was suffering great pain (R 93); and that two or three days later he collapsed and was taken to the hospital (R 120, 121). The accused and HOLLACHER were both corporals so neither could give orders to the other (R 84). He neither gave nor could he give any orders in his capacity at the school (R 99). His only duty at the school was to take care of the rations (R 83). He was never made the temporary commander of the school by Hubatsch when he left for the front (R 85) though he reported to Hubatsch whenever he returned to the school (R 26).

Witness Kuchem stated in his extrajudicial sworn statement that he talked to both accused approximately three to four hours after this accused had told him that ^{policeman} Eich had ordered him to shoot the flier. At that time they told him that HOLLACHER had killed the flier (R 29; P-Ex 3 pp. 1, 2).

Witness Gessler testified that the accused was very active in church work and had been for over 20 years and that he enjoyed a very good reputation. He obeyed the laws, was responsible, and he obeyed the laws of Christianity. He would take the accused back into the society of which he was the representative, if the opportunity were presented (R 133-135).

Sufficiency of Evidence: The evidence clearly establishes that the accused participated in the killing of the flier. The testimony of the accused and that of HOLLACHER is contradictory on many points. However, the extrajudicial sworn statement of the accused (P-Ex 5) substantiates and corroborates the testimony of HOLLACHER in most respects. The Court might well have concluded that the accused and

flier; that the accused willingly participated; and that, if the police had any control over the accused as a soldier, the accused did not act under immediate compulsion and his desire to please superiors was more important than other considerations. The Court was warranted from the evidence in its findings of guilty. The sentence is not excessive.

Petitions. A Petition for Review was filed 9 August 1947 by defense counsel Major A. R. Wyatt, Jr., and Lieutenant Colonel Irving R. Crawford. Petitions for Clemency were filed by seven brother deacons, Hellwig, Kissmann, Eifl, Steilmann, Uffelmann, Rohrer, and Schramm, 15 August 1947; by L. Wepeer, the ecclesiastical warden of the deacon institution order in Duisburg, 16 August 1947; Officials of Ye Olde Home Hostel, Worms on the Rhine, 9 September 1947; Friedrich Weikshage, 7 September 1947; Schumacher, Pfarrer of the Protestant association of the home mission, 27 September 1947; Pastor D. Niemoeller, 27 September 1947; and Rudolf Storz, Doctor of Medicine, 27 September 1947.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: The jurisdiction of the Court to try the accused was questioned by the defense on the ground that the offense was committed in the French Zone of Occupation, Germany (R 6, 7). War criminals, brigands, and pirates are the common enemies of all mankind and all nations have an equal interest in their apprehension and punishment for their violations of international law. Concerning this question, it is stated in "Wheaton's International Law," Volume I, Sixth Edition, at page 269, that every independent state has the judicial power to punish "piracy and other offenses

over the nationals of any country who are in the United States Zone of Occupation, except as to certain classes of American and other nationals, e.g., military personnel, which are not pertinent to the jurisdictional question here involved. Concerning jurisdiction over war crimes, no limitation is imposed. (See Sections 5-300.2 and 5-300.3, Title 5, "Legal and Penal Administration," of "Military Government Regulations," published by Headquarters, US Forces, European Theater, 30 November 1945). Concerning the general question of universality of jurisdiction over war crimes see "Universality of Jurisdiction over War Crimes," by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp. 177-218.

It may be the defense intended to attack the jurisdiction of the Court (R 6, 7) on the ground that the accused could not be tried in the United States Zone of Occupation unless certain administrative steps were taken as provided by Section 4, Article III, Control Council Law No. 10, which provides:

" 4. Persons known to be wanted for trial in another zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section I(b) of this article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned."

The defense failed to make a showing that the provisions in question were applicable to this accused even from an administrative point of view. In any event the provisions in question are merely administrative and not jurisdictional. Failure to strictly comply therewith would not have affected the jurisdiction of the Court. Section 2 of the same article of that law provides:

" 2. The tribunal by which persons charged with offenses hereunder shall be tried and the

or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945."

It is clear that the Court had jurisdiction of the persons of the accused and of the subject matter.

Superior Orders: It appears that HOLL-CHER and possibly MITZ sought to justify their actions by offering evidence that they were acting in compliance with superior orders. Compliance with superior orders does not constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives Ex. Doc. No. 23, page 812; Vol. II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJAWC, December 1945; and United States v. Klein, et al., (Hadamar Murder Factory Case), opinion DJAWC, February 1946; and French Republic v. Wagner, et al., Court of Appeals (France), July 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 How. 115, and "Manual for Courts-Martial, U.S. Army", paragraph 148).

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior directing that he commit the wrongful act, (b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least

under a direct and immediate compulsion. Having satis-

sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; FM 27-10, War Department, U. S. Army, "Rules of Land Warfare", paragraph 345.1, Change No. 1, 15 November 1944; Oppenheim, "International Law", supra, and the Llandovery Castle Case cited therein; "Manual for Courts-Martial", supra; "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U. S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of Our Enemies", found in footnote, page 53, "Military Occupation and the Rules of the Law", by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945, United States v. Thomas, supra; and United States v. Beck, et al., Opinion DJAWC, December 1946.)

Objection to Admission of Extrajudicial Statements:

The Court's ruling on the defense's objection to admitting into evidence certain extrajudicial sworn statements was proper (R 28, 29; P-Ex 3; R 44-46; P-Ex 4; R 47; P-Ex 5). Such sworn statements by an accused or witnesses are always admissible regardless of the presence or absence of those who made them. Also, an extrajudicial statement of one accused against another accused is admissible to the same extent as any other hearsay evidence (paragraph c, (1), (2), paragraph e, section 270, "Manual for Trial of War Crimes and Related Cases", 15 July 1946).

Severance: While the defense did not specifically move the Court for severance, they nevertheless raised the point by inferences and innuendoes (R 12, 58). Severance is not a right or a privilege of an accused. The applicable

the trial of war crimes, the test is whether an injustice would result to an accused and not whether purported substantial rights of an accused would be violated, if the motion were overruled, because accused have no right in this connection (United States v. Altfuldisch, et al., opinion DJAWC, February 1947).

Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused.

VI. CONCLUSIONS:

1. It is recommended that the findings and the sentences be approved.

2. Legal Forms Nos 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

ELMER MOODY
1st Lt., INF
Post Trial Branch

Having examined the record of trial, I concur,
this _____ day of _____ 1948.

C. E. STRAIGHT
Lieutenant Colonel, JAGD
Deputy Judge Advocate
for War Crimes