CASE No. 87

TRIAL OF JOSEF HANGOBL

GENERAL MILITARY COURT, DACHAU, GERMANY
17TH-18TH OCTOBER, 1945(1)

A. OUTLINE OF THE PROCEEDINGS

The accused was charged with a violation of the laws of war in that he "an enemy national, did, at or near Lamprechtshausen, Austria, on or about 16th November, 1944, wilfully, deliberately and wrongfully kill . . . a member of the United States Army, who was then unarmed and in the act of surrendering, by shooting him with a rifle."

The victim was a United States airman who had baled out of his aircraft and landed on Austrian territory. The accused, who was a member of an Austrian civilian defence formation called *Gauwehrmannschaft*, maintained that, on being told by a young girl that a flyer had baled out of a plane, he had set out to search for him, armed with a rifle. On finding the airman he called five times in a loud voice without any appreciable pause "Halt." As he called the fifth time the flyer put either his left or right hand inside his jacket or coat. Thinking that he might be about to draw a gun, the accused shot him. According to Hangobl, the airman then turned to run away, but was shot at again by the accused and fell to the ground. Hangobl confessed that he had not seen the victim in possession of a weapon.

Hangobl then left the scene to bring help and while he was away certain of his neighbours took the victim to a doctor, who sent him to a hospital after giving him treatment. He was then sent to a second hospital and was operated upon. He died after the operation because of internal bleeding. It was shown that the accused did not approach the neighbours referred to for help, and stated in Court that the reason for his walking in another direction was that they were busy harvesting. The alleged date of the shooting, November 16th, 1944, was not disputed.

The Court found the accused guilty of the charge, with the omission of the words "and in the act of surrendering," and sentenced him to be confined with hard labour for life.

A petition for review was filed on behalf of the accused on the grounds that the accused was a lawful belligerent, and that he acted in self-defence. The Reviewing Authority reduced the sentence to one of confinement for ten years with hard labour.

B. NOTES ON THE CASE

1. THE STATUS OF THE ACCUSED

The accused was, at the time of the shooting, a member of a civilian defence organisation existing in the neighbourhood of Innerfurth, Austria, called Gauwehrmannschaft. According to the accused, he "was a farmer

(1) This Report is based, not on a complete transcript, which was not available to the Secretariat of the United Nations War Crimes Commission, but on a summary received from the United States authorities.

at the time of the shooting and never was a soldier, but was a member of the District Defence Group at the time, but did not wear a uniform." He added that " no uniform or any other object patently identifying our organisation emblem was ever issued to us or to the other members thereof." He had received orders to capture enemy fliers and hand them over to the police.

It was shown that the organisation did not have any uniform or insignia. The unit drilled and did a little shooting practice on one Sunday a month. It was organised into a company and groups within the company, each of which had its leader. Some weapons had been issued, but they could not be carried publicly and after duty were stored in a weapons room. It was not a voluntary organisation, for the members were forced to join under the law. There was a standing obligation on its members to round up enemy fliers. On 6th November, 1944, all members of the Home Guard (Landwache) and Gauwehrmannschaft were registered for the Volksturm and the Gauwehrmannschaft was automatically transferred into the Volksturm, but the individual members were not sworn into the Volksturm until 10th December, 1944. The Volksturm issued its equipment on 20th December, 1944 ; consequently, the Volksturm was not fully organised until after 16th November, 1944.

Appearing as a witness for the Defence, a second lieutenant of the United States Headquarters Third Army, Judge Advocate Section, testified that he attended a Military Intelligence Training course at Camp Ritchie and had been engaged in interrogating and classifying prisoners of war for approximately one and a half years. The Gauwehrmannschaft, he said, was an old institution which was revived in 1939. The activities of the units varied, in some instances being only a Sunday outing club. Its primary purpose was to cope with any emergencies which might arise. Although no member of the Gauwehrmannschaft had been captured by the United States forces, the witness would have considered them prisoners of war. In his opinion, according to general directives, the Gauwehrmannschaft was a para-military organisation. He also stated that the organisation had no authorised distinctive emblem though some members wore S.A. brassards. In the Gau of Salzburg where the Gauwehrmannscahft unit involved was located, the Volksturm took over in the later part of November and December.

The Prosecution maintained that the accused was not a lawful belligerent since he did not comply with the four requirements of Article 1 of the Hague Convention No. IV of 1907, in that he did not wear a fixed distinctive emblem recognisable at a distance. Therefore Hangobl could not lawfully engage in combatant activities. At most the accused could act in self-defence and even on the basis of the accused's version of the incident, it was clear that he had used more force than was necessary in view of the fact that the victim was going away at the time the second shot was fired.

Article 1 of the Hague Regulations to which the Prosecution referred, provides that :

> " The laws, rights, and duties of war apply not only to the army but also to militia and volunteer corps fulfilling all the following conditions :
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> (1) They must be commanded by a person responsible for his subordinates ;

(2) They must have a fixed distinctive sign recognisable at a distance ;

(3) They must carry arms openly ; and

(4) They must conduct their operations in accordance with the laws and customs of war.

" In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ' army '."

It seems possible that the Court did indeed find that the accused had violated the laws of war by conducting hostilities while a civilian, and, if so, the decision is useful evidence of what constitutes the characteristics which would turn a civilian into a lawful belligerent. It will be noted that, while the accused's formation may be said to have had responsible commanders, it was not supplied with uniforms or other recognisable insignia and did not carry arms openly.

2. THE STATUS OF THE VICTIM

The Court must be taken to have found that the airman had not been shown to have been in the act of surrendering at the time of shooting. It would follow that he was not at that moment protected by the Geneva Prisoners of War Convention. The mere fact of having baled out does not automatically entitle an airman to prisoner of war rights.

There is not means of knowing definitely whether or not the Court found the accused guilty of a breach of Article 1 of the Hague Convention, and whether solely on that ground. There is some authority, however, for saying that a line could be drawn beyond which it was illegal even for a lawful combatant to go on carrying out hostile acts against airmen who parachute to safety behind their enemy's lines. It has been argued that an enemy whose aircraft has landed on territory held by the opponent may not be attacked if he does not continue to resist or try to escape for he will be captured in any event, but that he may be attacked if he continues to resist. Spaight in " Airpower and War Rights " (first edition, 1924) wrote, on p. 125, that if an aircraft comes down in ground held by the attacking airman's forces, and the occupants do not continue to resist or try to escape, it is obviously unnecessary to kill them, for they must be captured in any event.

There remains a third possibility that the Court may have found the accused guilty on the grounds that he showed negligence in the way in which he went about securing medical aid for the victim.(1)

(1) Regarding war crimes of omission committed by persons under a duty to take certain action (apart from the question of the responsibility of a commander for offences committed by his troops) see for instance Vol. I, pp. 91-2, and Vol. VII, pp. 78-81.