

CASE No. 81

TRIAL OF ERICH WEISS AND WILHELM MUNDO

UNITED STATES GENERAL MILITARY GOVERNMENT COURT
AT LUDWIGSBURG, GERMANY, 9TH-10TH NOVEMBER, 1945

Self defence as an exonerating circumstance of guilt for war crimes.

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGE

The accused, Erich Weiss and Wilhelm Mundo, were members of the German police forces in the area of Aken on the Elbe, Germany. They were tried by the United States General Military Government Court at Ludwigsburg, Germany.

Both accused were charged with "wrongfully killing an unknown American airman" who parachuted from a disabled aircraft near Aken, on or about 30th May, 1944, and "who was a prisoner of war of the then German Reich."

2. THE EVIDENCE

The evidence before the Court showed that, at about 11 a.m. on or about 30th May, 1944, an unknown American airman safely parachuted from his military aircraft over Germany, near Aken on the Elbe. He was captured by a Wilhelm Weitch, to whom he had surrendered, and was turned over to the accused Erich Weiss, an auxiliary policeman. The prisoner was wounded in the right arm. Weiss took the prisoner toward Aken and, on the edge of the town met the accused Wilhelm Mundo, a policeman. A crowd gathered around them and soon demanded that the prisoner be killed. An air raid was still going on.

At this point the prisoner suddenly moved his right hand in his pocket. Weiss fired a shot, and, as the prisoner was falling down, Mundo fired a second shot. The prisoner was instantly killed.

3. THE PLEA OF SELF-DEFENCE

Both accused pleaded not guilty on the grounds that they felt threatened by the victim's move in his pocket and fired in self-defence. According to their statements, Weiss was facing the prisoner and Mundo was facing the crowd, with his back to Weiss and the prisoner. When the prisoner moved his right hand in the pocket, Weiss believed he was reaching for a weapon and fired the first shot. Mundo, hearing the shot behind him, felt threatened, turned and fired the second shot. No evidence was produced that the victim had been searched for hidden arms when captured.

4. FINDING OF THE COURT

It appears that the Court gave credit to the accused's defence concerning the circumstances of the killing and found the accused not guilty on the grounds of self-defence. Both accused were consequently acquitted.

B. RELEVANCE OF THE PLEA OF SELF-DEFENCE IN WAR CRIME TRIALS

The finding of the Court is evidence that self-defence which, according to general principles of penal law is an exonerating circumstance in the field of common penal law offences when properly established, is also relevant, on similar grounds, in the sphere of war crimes.

The accused, as guards of a prisoner of war were under the duty to accord the prisoner proper treatment, even protection if necessary. Conversely, as guards they would be authorised to use force, but only such force as was reasonably necessary under all the circumstances either to secure the custody of the prisoner or to protect themselves from an attack by their prisoner. The Court would seem to have felt that considering all the surrounding circumstances, for instance, the air raid, the hostile crowd, the sudden motion of the captive in reaching in his pocket, such circumstances did in fact constitute a sufficient threat to justify the shooting.

In the light of the foregoing the rules contained in Articles 2 and 3 of the Geneva Convention, 1929, would appear to be subject to the principle that, given faithful observation of these provisions by the detaining authorities, the latter are generally entitled to use the force reasonably necessary to secure the custody of the prisoners or to protect themselves from an attack by the prisoners.