

19 September 1944

Memorandum for the Commanding General, Twelfth Army Group.

SUBJECT: Review of Record of Trial by Military Commission in the case of
 United States V. Rottenfuhrer Gunther Ohletz, 21 SS Panzer
 Grenadier Regiment, German Army.

1. The above-named accused was tried by a military commission appointed by the Commanding General, First United States Army, near Le Perray, France, 7 September 1944, on the following Charge and specification:

"Charge: Acting as a Spy.

Specification: In that Rottenfuhrer Gunther Ohletz, 21st SS Panzer Grenadier Regiment, German Army, did, in the zone of operations of the Armies of the United States near Saint Georges de Rouelle, France, on or about 10 August 1944, act as a spy by endeavoring, while disguised in civilian clothes, to obtain information with intent to impart same to the enemy."

He was found guilty of both the charge and specification and sentenced "to be hanged by the neck until dead."

The record of trial is now before you as the confirming authority.

2. Briefly, the evidence shows that the accused, a German soldier of a front-line unit, donned civilian clothes and then proceeded for several kilometers through an area occupied by units of the United States Army when he was questioned by members of our forces and taken into custody. By his statement to the interrogator, his testimony on the witness stand and a paper in his possession when captured it is established that his mission was to obtain information to be communicated to his own forces, the enemy.

Further detailed evidence will not be set forth here, but the recapitulation contained in the Review of the Staff Judge Advocate, First United States Army, and appended hereto is adopted in its entirety.

3. The charge is not laid under Article of War 62 but is obviously patterned after the definition of a spy contained in Article 29 of the Annex to Hague Convention No. IV of 18 October 1907, which reads in part as follows:

"Spies. A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent with the intention of communicating it to the hostile party." However, such a definition of a spy has long been recognized by the customary laws of war (Winthrop, Military Law and Precedents, 1920 Reprint, pp. 766-777; Hall, International Law, 6th ed., p. 650).

In my opinion all elements of the offense charged were established beyond cavil. Because the accused was a soldier, his disguise of civilian clothes obviously rendered his acts clandestine or on false pretenses (Wharton, International Law, 7th ed., p. 218). The avowed purpose of his mission was to obtain information of our forces to communicate it to the enemy. He was seeking such information when captured. It was not necessary that he obtain such information or convey it to the enemy (FM 27-10, par. 209). From all the testimony, including his own, he was well within the "zone of operations" of our forces according to the common meaning of the quoted phrase.

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The accused stated to the commission that he undertook the mission upon order of his platoon leader, that is, as he elaborated, the platoon leader gave him his mission and he did not say he wouldn't go. Thus he implied that he could have protested but did not, which eliminates the applicability of a plea of superior command. In any event the plea of immunity on this basis is rejected by eminent writers on international law (Oppenheim's International Law (6th Ed.), Vol. II, pp. 453-454; Garner, International Law and the World War, Vol. II, pp. 483-497).

4. Trial was had by military commission appointed under authority delegated by the Commanding General, Twelfth Army Group (see Incl. 1) to whom such authority had in turn been delegated by the Commanding General, European Theater of Operations (see Incl. 2, paraphrase of Cable No. E-45664). Although certain limitations as to persons over whom jurisdiction might be exercised were imposed in SHAFF cable No. S-58944, such limitations do not concern a German soldier in France as in this case.

War Department Field Manual 27-5, which is described in the foreward as a general guide, provides for the appropriate delegation by the Theater Commander of appointing and confirming authority with respect to military commissions. All conditions of the instrument of delegation relating to the trial have been met in this case.

Under customary international law as well as Article 30 of the Annex to Hague Convention No. IV of 18 October 1907, a spy shall not be punished without trial. Although the requisites of such a trial are not defined, the procedure in this case clearly meets all requisites of a fair and impartial trial under international law. In fact, in some respects, it goes beyond such minimum requirements of a fair hearing. Here, challenges for cause were allowed, counsel for the accused was provided, as was the assistance of an interpreter to keep the accused informed of what was said and done at the trial. Objections to testimony were permitted and heard, and a two-thirds majority of the members of the court present was required for both conviction and sentence. True, the classical Anglo-Saxon rules of evidence were not prescribed yet actually there was little if any departure from such rules. Certainly all evidence considered by the commission met the test imposed, i.e., that it should have probative value to a reasonable man, the same test prescribed for the military commission in Ex parte Quirin (317 U.S. 1).

Accordingly I conclude that the trial in this case was conducted under appropriate authorization, that it conformed to the terms of the delegation of power and to the standards of international law for a fair trial.

5. As noted in the review of the Staff Judge Advocate, First Army, Article of War 82, which condemns the offense of spying in terms not dissimilar to those of the Hague Convention, provides for but one penalty, that is, death. This article is, of course, not binding in respect of the charge in this case which was not laid thereunder. Nevertheless, it serves as a guide and in fact states a recognized penalty under international law for this offense (Wharton, International Law, 7th ed., p. 220). The method of execution is nowhere prescribed although hanging has been regarded as appropriate to the offense (MCM 1928, sec. 103; Winthrop, Military Law and Precedents, 1920 Reprint, p. 418).

6. The record of trial discloses no error or irregularities prejudicial to the substantial rights of the accused in a case such as this. The evidence being clear and compelling as to the guilt of the accused, I recommend that the sentence be confirmed. Draft of a form of action appropriate to the foregoing recommendation is appended hereto. There is also appended hereto (Incl. 3) an authorization by the Theater Commander to designate the Commanding General,

Seine Section, Communications Zone, European Theater of Operations, as the officer under whose direction the execution of sentences of military commissions may be carried out, the time and place to be designated by such Commanding General.

C. B. MICKELWAIT
Colonel, J.A.G.D.
Army Group Judge Advocate.

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