

CASE No. 80

TRIAL OF HEINZ HAGENDORF

UNITED STATES INTERMEDIATE MILITARY GOVERNMENT COURT
AT DACHAU, GERMANY, 8TH-9TH AUGUST, 1946

Improper Use of Red Cross Insignia.

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGE

The accused, Heinz Hagendorf, a German soldier, was tried by a United States Intermediate Military Government Court at Dachau, Germany,⁽¹⁾ being charged with having "wrongfully used the Red Cross emblem in a combat zone by firing a weapon at American soldiers from an enemy ambulance displaying such emblem."

2. THE EVIDENCE

The evidence before the court showed the following :

On 15th January, 1945, at about 2 p.m., an American unit, the 3rd Platoon, Company "G," 329th Infantry, was located in the little hamlet of Henyelez, in Belgium. A German ambulance, bearing Red Cross insignia, approached the road intersection at a high speed. It was first noticed by an American captain, by the name of Bates. The vehicle passed Captain Bates rapidly, and shots were fired from it through windows and doors. It then continued through the village and was next seen by two American privates. Here again shots were fired from the ambulance at the two soldiers. The latter took cover in nearby houses, while a third U.S. private hit the ambulance with a shot from a bazooka. The vehicle stopped and two German soldiers got out of it and began to run toward one of the houses. Both were fired upon by American soldiers. One was killed, and the other, accused Hagendorf, was captured.

It was established that the ambulance was driven by the German killed, and that the accused was the sole passenger. The accused pleaded not guilty, alleging that he had not fired any shots from the ambulance, but that it was the latter that received fire from the Americans.

3. FINDINGS AND SENTENCE

The defence plea was rejected on the grounds of the evidence proving the facts as stated above. The accused was found guilty of the charge and sentenced to 6 months' imprisonment.

B. NATURE OF THE OFFENCE

Liability for improper use of Red Cross insignia is covered by an express provision of The Hague Regulations respecting the Laws and Customs of

⁽¹⁾ For the origin and jurisdiction of United States Intermediate Military Government courts see Vol. III of this series, pp. 113-20. The full transcripts of this trial and of the trial of Erich Weiss and Wilhelm Mundo, reported below, are not available to the United Nations War Crimes Commission. Reports of both trials are based on war crime trial summaries received from the United States authorities.

War on Land, appended to the IVth Hague Convention of 1907. Article 23 (f) of The Hague Regulations provides that "it is particularly forbidden" to "make improper use of a flag of truce, of the national flag, or of the military insignia, and uniform of the enemy, as well as of the *distinctive signs of the Geneva Convention*." The latter is a reference to the Convention for the Amelioration of the Conditions of Soldiers wounded in Armies in the Field of 1864, revised in 1906 and more recently in 1929.⁽¹⁾

Under the terms of the above Geneva Convention, "mobile medical formations which are intended to accompany armies in the field" are to be "respected and protected by the belligerents" (Article 6 of the 1929 Convention). The same applies to hospitals or any other "fixed establishment of the medical service of the armed forces." According to Article 7 of the 1929 Convention vehicles equipped for the evacuation of wounded and sick persons, such as ambulances, are treated as mobile medical formations.

In order to facilitate the protection of vehicles, establishments, personnel and material of the medical service from the hazards of warfare, provision was made for the display or wearing of the Red Cross sign and rules were laid down as to those entitled to use it. The effect of these rules is that no person wearing the Red Cross sign may be treated as a combatant, or his equipment taken as a military objective or target.

The above-mentioned protection was, however, made subject to a general condition. According to Article 7 of the 1929 Convention, the protection ceases to exist if medical formations or establishments "are made use of to commit acts harmful to the enemy." This comprises the general prohibition for the medical personnel to use arms or serve as combatants. According to Article 8 the use of arms by medical personnel is permitted only in one exceptional type of case: if they have used arms in their own defence or in that of the sick and wounded in their charge. The following additional exceptional cases equally do not deprive medical personnel from the protection concerned:

- (a) If in the absence of armed orderlies, the formation or establishment is protected by a piquet or by sentries;
- (b) If small arms and ammunition taken from the wounded and sick, which were not yet transferred to the proper service, are found in the formation or establishment;
- (c) If personnel and material of the veterinary service are found in the formation or establishment without forming an integral part of the same.

In the case tried it was the rule concerning the use of arms in self-defence which was implicated. In his plea the accused had contended that his ambulance had been machine-gunned by the Americans while driving in order to collect wounded Germans at Henyelez. The accused had denied having answered the fire even in self-defence. When considering the accused's allegations the court established, among other facts, that the evidence was clearly that shots were fired from the German ambulance at

⁽¹⁾ Germany ratified the 1929 Convention on 21st February, 1934, and the United States on 4th February, 1932. Consequently, in the trial reviewed here, it was the text of the 1929 Convention which was relevant.

American military personnel. In face of the same evidence the court at the same time rejected as untrue the allegation that, prior to that, the ambulance had been fired upon by the Americans. This was apparently done as a result of inconsistencies in the accused's defence. He had contended that he was in the back of the ambulance at the time of the alleged crime, and that the vehicle was of a right-hand drive type. This, in view of the position of the vehicle on the spot of the incident, was meant to show that the accused could not have fired the shots charged. This allegation was disproved by photographic evidence taken immediately after the accused's capture, which showed that the vehicle was of a left-hand drive type, and that, by admitting that he was not driving, as was corroborated by the evidence, the accused must have sat on the side from which the shots were fired, that is, the right-hand side.

It was in this manner that the possibility of the use of arms in self-defence was discarded by the court, and the improper use of arms by the accused under the shield of the Red Cross insignia ascertained.

As previously stressed, misuse of the Red Cross emblem is a specific violation of the terms of The Hague and Geneva Conventions. It is hard to conceive of a more flagrant misuse than the firing of a weapon from an ambulance by personnel who were themselves protected by such emblems and by the Conventions, in the absence of an attack upon them. This constituted unlawful belligerency, and a criminal course of action.

It should be observed that not every violation of the Conventions concerning the use of the Red Cross insignia would of necessity constitute a punishable act. The need for maintaining a distinction between mere violations of rules of warfare, on the one hand, and war crimes on the other,—the latter being the only ones to entail penal responsibility and sanctions—is urged by authoritative writers, such as Professor Lauterpacht.⁽¹⁾ In the opinion of the learned author war crimes are violations of the laws of war as are criminal in the ordinary and accepted sense of fundamental rules of warfare and of general principles of criminal law by reason of their heinousness, their brutality, their ruthless disregard of the sanctity of human life and personality, or their wanton interference with rights of property unrelated to reasonably conceived requirements of military necessity.⁽²⁾ Violations not falling within this description would remain outside the sphere of war crimes and consequently of acts liable to penal proceedings.

The Court's findings in the trial under review were limited to the specific case of unlawful use of arms under the cover of the Red Cross emblem. It would therefore be unjustified and at any rate premature to conclude from the Court's implementation of the Geneva Convention, that any other violation of the latter's rules is of necessity a war crime.

⁽¹⁾ H. Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, British Year Book of International Law, 1944, pp. 77-78.

⁽²⁾ *Op. cit.*, p. 78.

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.