

30 January 1948

UNITED STATES )

v. )

Case No. 000-50-5-19

Eduard KLERNER, et al. )

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, on 26 November 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Eduard KLERNER, Georg KRUEGER, Walter KRUEGER, Hermann SCHINLAUER, Paul SCHLUENDER, Karl SCHULZ, Franz ENGELBERGER, Wigand HEINE, Karl HERCHEN, Philipp MULLE and Karl POLT, German nationals or persons acting with German nationals, acting in pursuance of a common design to subject the persons hereinafter described to killings, beatings, tortures, starvation, abuses, and indignities, did, at or in the vicinity of the Mauthausen Concentration Camp, at Castle Hartheim, and at or in the vicinity of the Mauthausen Sub-camps, including but not limited to Ebensee, Gros-Raming, Gunskirchen, Gusen, Hinterbruehl, Lambach, Linz, Loiblpass, Melk, Schwechat, St. Georgen, St. Lambrecht, St. Valentin, Steyr, Vienna, Wiener-Neudorf, all in Austria, at various and sundry times between January 1, 1942, and May 5, 1945, wrongfully encourage, aid, abet, and participate in the subjection of Poles, Frenchmen, Greeks, Yugoslavs, Citizens of Soviet Union, Norwegians, Danes, Belgians, Citizens of the Netherlands, Citizens of the Grand Duchy of Luxembourg, Turks, British Subjects, stateless persons, Czechs, Chinese, Citizens of the United States of America, and other non-German nationals who were then and there in the custody of the then German Reich, and members of the armed forces of nations then at war with the then German Reich who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, to killings, beatings, tortures, starvation, abuses and indignities, the exact names and numbers of such persons being unknown, but aggregating thousands.

(Prior to arraignment the particulars under the charge were amended to include the middle name of Richard in the name of accused SCHULZ; thus changed it reads Karl Richard SCHULZ (R 2)).

III. SUMMARY OF EVIDENCE: The two convicted accused were members of the SS at Mauthausen Concentration Camp for considerable periods of time

department clerks in the Mauthausen Concentration Camp mass atrocity. Both accused admitted that they administered beatings to the inmates on a few occasions. Both accused pleaded guilty. The nature of such pleas is discussed hereinafter. Prosecution's Exhibit P-Ex 6 (R 10) is a certified copy of the charges, particulars, findings and sentences in the parent Mauthausen Concentration Camp Case (United States v. Altfuldisch, et al, 000-50-5, opinion DJAWC, February 1947, hereinafter referred to as the "Parent Case"; see Section V, post).

IV. EVIDENCE AND RECOMMENDATIONS:

1. Eduard KLENNER

Nationality:	German
Age:	35
Civilian Status:	Commercial employee
Party Status:	Unknown
Military Status:	SS Sergeant
Plea:	G
Findings:	G
Sentence:	5 years, commencing 1 July 1945

Evidence for Prosecution: The accused was stationed at Mauthausen Concentration Camp from 30 January 1940 to 1 February 1945 (R 16), during which time he worked as a clerk in the political department (R 11; P-Ex 10a).

In an extrajudicial sworn statement Fichtner stated that he saw the accused mistreat inmates of every nationality by hitting them with his hands (R 10; P-Ex 7a). The extrajudicial sworn statement of Verge-Armengol related that in September 1944, he was called to the political department to take an inmate to the hospital who had been beaten by the accused. He also saw the accused administer 25 "strokes" with a stick to a wounded inmate (R 11; P-Ex 9a).

In his extrajudicial sworn statement Doppelreiter, a former member of the SS who had worked in the political department at Mauthausen Concentration Camp with the accused, stated that at times when the accused

interrogated inmates he slapped and beat them with an oxtail (R 11; P-Ex 10a).

The accused testified under oath that he slapped the faces of inmates with his hands a few times (R 14). On one occasion an inmate accused him of having withheld 10 marks belonging to the inmate. Because of this, the accused slapped the inmate's ears (R 14). Another time, on orders of SS Lieutenant Schulz, the accused slapped the ear of an inmate with his open hand (R 14).

Evidence for Defense: The accused took the stand and testified under oath (R 12). He stated that he slapped inmates a few times, once he did so by order of his superior, Lieutenant Schulz. Other times, he did so rather than report them and thus cause a more severe punishment (R 14). As a result of the slappings which he gave inmates, none of them ever had to be sent to the hospital (R 15). He denied beating inmates with an oxtail (R 14). He helped an inmate, Mr. Slier, who was half Jewish, by forging a document for him. Because of the forged document, Mr. Slier was not sent to Auschwitz with other Jewish inmates but remained in Mauthausen Concentration Camp (R 15).

Sufficiency of Evidence: With regard to the evidence offered in support of superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: No Petitions for Review were filed. A Petition for Clemency was filed by, L. G. Stockinger, 4 January 1948.

Recommendation: That the findings and the sentence be approved.

2. Karl Richard SCHULZ

Nationality:	German
Age:	44
Civilian Status:	Commercial Employee
Party Status:	Unknown
Military Status:	SS Sergeant

Findings:

G

Sentence:

5 years, commencing 8 May 1945

Evidence for Prosecution: The accused was stationed at Mauthausen Concentration Camp from 30 September 1940 to 15 January 1945 (R 17). During the period June 1941 to January 1942, he acted as a clerk in the political department (R 17). From January 1942 to June 1944, he worked in the department of vital statistics (R 17).

In an extrajudicial sworn statement, Halaba related that in the summer of 1944 he saw between 25 and 30 inmates lined up in the political department of the Mauthausen Concentration Camp. The accused and Lieutenant Schulz beat these inmates with a rubber hose and cowhide whips. When the inmates fell down, they kicked them (R 10; P-EX 8a).

In his extrajudicial sworn statement Doppelreiter, an SS man and former roommate and co-worker of the accused in the political department at Mauthausen Concentration Camp, stated that the accused handled all matters concerning escapes. He interrogated inmates who had been apprehended and returned to camp. At such times he frequently laid inmates over a chair and lashed them with an oxtail. He also beat inmates in the face with his fist until they bled (R 11; P-Ex 10a).

The accused took the stand and testified under oath (R 17). While a clerk in the political department (R 17), he was in charge of keeping the lists of the names of escaped inmates (R 18). He admitted slapping a returned escapee on one occasion. Another time he slapped a Ukrainian who had been an SS man (R 18-19). He also stated that once in a while he slapped the face of an inmate (R 19).

Evidence for Defense: The accused denied that he was ever stationed in the protective custody camp (R 17). He never served as a detail leader (R 17, 18). He never belonged to the Gestapo (R 20). The statement made by prosecution witness Halaba (R 10; P-Ex 8a) was either a lie, a mistake in identity, or an act of revenge (R 18). He once beat an inmate who had been returned after having escaped. This inmate had denied that

who had been returned after having escaped, was beaten by the accused because he behaved so badly as an SS man (R 18, 19). On one occasion he saved the life of a fellow countryman. This man's death had been requested by Lieutenant Schulz because he had stolen 300 marks from a woman (R 19). The accused did not assert in his testimony that he was ordered to administer any of the beatings. However, he so asserted in connection with his arraignment (R 7).

Sufficiency of Evidence: With regard to superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: No Petitions for Review were filed. Petitions for Clemency were filed by the accused SCHULZ's brother, Wilhelm Schulz, 5 January 1948; and by L. G. Stockinger, 4 January 1948.

Recommendation: That the findings and sentence be approved.

3. Franz ENGELBERGER

This accused was not served and not tried (R 9).

4. Wigand HEINE

This accused was not served and not tried (R 9).

5. Karl HERCHEN

This accused was not served and not tried (R 9).

6. Georg KRUEGER

This accused was not served and not tried (R 9).

7. Walter KRUEGER

This accused was served but not tried (R 9).

8. Philipp MULLER

This accused was not served and not tried (R 9).

9. Karl POLT

This accused was not served and not tried (R 9).

10. Hermann SCHINLAUER

This accused was not served and not tried (R 9).

11. Paul SCHLUENDER

This accused was served but not tried (R 9).

V. QUESTIONS OF LAW:

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

Informing Accused of Principal Rights: The "Outline of Trial" set forth in Section 501 of the "Manual for Trial of War Crimes and Related Cases", 15 July 1946, as amended, contemplates, at pages 404 and 405, that the Court will inform accused of their eight principal rights in the manner prescribed therein. The record in the instant case recites that the "interpreter read the six rights to the accused in their own language" (underscoring supplied) (R 5). The use of the word "six" instead of "eight" probably resulted from inadvertence on the part of the reporter and it should not be presumed that the Court failed to adhere to the established procedure in the absence of a clearer showing to the contrary. Furthermore, it does not appear that any of the eight principal rights were denied the accused.

Plea of Guilty: The question arises as to the legal significance which should be attached to the action of the Court in accepting the pleas of guilty by the accused.

Section 501, "Manual for Trial of War Crimes and Related Cases", 15 July 1946, provides that the Court may impose a sentence on a plea of guilty without further proof. Similarly, Paragraph 88 (a), TM 27-255, "Military Justice Procedure", provides that an accused can be convicted on the basis of a plea of guilty without any evidence being presented.

Section 5-328, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Office of Military Government for Germany (US), Change 1, 27 March 1947, provides in part as follows:

"The procedure in Intermediate and <sup>GENERAL</sup> German MG Courts shall be the same as that provided herein for Summary MG Courts except that: \*\*\*

"c. A plea of guilty to an offense punishable by death may be accepted provided the court is satisfied from the nature of the case that the punishment of death

would be clearly excessive and that a lesser punishment which it is within its power to impose would suffice."

Section 5-325, a, Title 5, supra, provides in part, with respect to the procedure in Summary MG Courts, as follows:

"Upon a plea of guilty of all offenses charged, a Summary Court will hear such statements for the prosecution and the defense and such evidence as it requires to enable it to determine the sentence to be imposed. \*\*\*"

Section 501, page 406, of the "Manual for Trial of War Crimes and Related Cases", 15 July 1946, as amended, provides that qualified pleas should not be accepted .

Both accused at the outset of the arraignment, upon being asked how they pleaded, stated in effect that they were guilty of having beaten with their hands in compliance with orders. After an explanation by the Court as to the effect of a plea of guilty, both answered in the affirmative to a question as to whether they understood, one adding, "We agree with it and we <sup>have</sup> complete trust in our defense lawyer". This was followed by a discussion between prosecution and defense counsel and the Court, the true import of which is not clear. The prosecutor stated among other things that "the prosecution will not prove as a part of a prima-facie case here anything but that these particular accused, as a part of the common design, participated in beatings only. \*\*\* the accused may be guilty of any one part of these various allegations, like killings, beatings, tortures and abuses, as a member of this common design under the parent case he would be guilty of the charge and the particulars and it would be for the court to determine what sentence to give them in accordance with the evidence of the overt acts". This language is susceptible of an interpretation compatible with the true nature of the charge, i.e., allegations of participation in the execution of a common design; evidence as to the positions held by the accused and evidence as to possible killings and beatings, etc., by the accused with their own hands being of significance primarily because of its value in gauging the extent and nature of their participation, which in turn should be reflected in the sentences imposed.

However, his remarks were followed by further discussion, Court and counsel apparently focusing their attention on probable proof being limited to and accused desiring to admit individual cruelties by beatings only. All agreed that the particulars should be amended by excluding "all offenses except beatings, abuses and indignities" (underscoring supplied). The Court directed the prosecutor to give the exact wording to the reporter after having it approved by the defense counsel. A recess was granted for defense counsel to consult with the accused, after which defense counsel stated that the accused understood they were pleading guilty "to beatings, abuses and indignities". The accused then pleaded guilty to the charges as amended. However, the prosecutor did not give "the exact wording" to the reporter (R 7-9).

Immediately thereafter the Court received, with the approval of the defense, the Prosecution's P-Ex 6, being a copy of the charges, particulars, findings and sentences in the Parent Hauthausen Concentration Camp Case (R 9, 10).

There is an indication that the Court and counsel intended that the plea of guilty be accepted as to an amended charge. However, the wording of the charge as amended is not indicated as is desirable and as apparently contemplated by the Court. Moreover, the acceptance of the Prosecution's P-EX 6 in evidence indicates that all concerned may have intended that the case should proceed as though the accused were being tried as participants in the execution of the common design involved in the Parent Case. The acceptance thereof in evidence is also an indication that they believed that was the legal effect of what had transpired. Certain it is that all concerned had in mind protection of the accused and not placing them in the position of having conceded that they killed inmates with their own hands, a matter which would have righted itself when the Court received evidence to determine the extent and nature of their participation, i.e., evidence "to enable it to determine the sentence to be imposed".

It is believed that in legal effect the Court merely accepted a



qualified plea. Qualified pleas are frowned upon in order to effect certainty and protection of accused. The applicable rules provide against it. However, the applicable rules also provide that: "Technical and legalistic view points will not be allowed to interfere with such a result" (Section 5-350, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Office of Military Government for Germany (US), Change 1, 27 March 1947).

Furthermore the applicable procedure provides:

"The proceedings shall not be invalidated, nor any finding or sentence disapproved, for any error or omission, technical or otherwise occurring in such proceedings, unless in the opinion of the Reviewing Authority, after an examination of the entire record, it shall appear that the error or omission has resulted in injustice to the accused" (Section 5-338, Title 5, supra).

It does not appear that the Court in determining the sentence took cognizance of any possible individual acts of cruelty by the accused in their participation other than beatings.

No injustice resulted to the accused by the acceptance of the qualified pleas.

Application of Parent Case: The Court was required to take cognizance of the decision rendered in the Parent Case including the findings of the Court therein, that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, subjected persons to killings, beatings, tortures, etc., and was warranted in inferring that those shown to have participated knew of the criminal nature thereof (Letter, Headquarters, United States Forces, European Theater, File AG 000.5 JAG-AGO, subject: "Trial of War Crimes Cases", 14 October 1946, and the Parent Case). The convicted accused were shown to have participated in the mass atrocity, and the Court was warranted by the evidence adduced, either in the Parent Case or in this subsequent proceedings, in concluding that they not only participated to a substantial degree, but that the nature and extent of their participation were such as to warrant the sentences imposed.

Superior Orders: The accused sought to justify at least some of

their actions as being 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 the 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", 1928, 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 in fact, 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 to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his 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 the 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.)

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.

JOHN J. RYAN  
Capt. CMP  
Post Trial Branch

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

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