

10 November 1947

UNITED STATES)

v.)

Franz MIELENZ)

Case No. 000-50-2-118

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 14-15 August 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

FIRST CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Franz Mielenz acting in pursuance of a common design to commit the acts hereinafter alleged, and as individual aiding in the operation of the Dachau Concentration Camp and camps subsidiary thereto, did, at or in the vicinity of DACHAU and LANDSBERG, Germany, between about 1 January 1942 and about 29 April 1945, willfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of civilian nationals of nations then at war with the then German Reich to cruelties and mistreatment, including killings, beating, tortures, starvation, abuses and indignities, the exact names and numbers of such civilian nationals being unknown, but aggregating many thousand who were then and there in the custody of the then German Reich in exercise of belligerent control.

SECOND CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Franz Mielenz acting in pursuance of a common design to commit the acts hereinafter alleged, and as individual aiding in the operation of the Dachau Concentration Camp and camps subsidiary thereto, did at or in the vicinity of DACHAU and LANDSBERG, Germany, between about 1 January 1942 and about 29 April 1945, willfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of 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 cruelties and mistreatment, including killings, beatings, tortures, starvation, abuses and indignities, the exact names and numbers of such prisoners of war being unknown, but aggregating many hundreds.

III. SUMMARY OF EVIDENCE: The accused participated in the

Dachau Concentration Camp mass atrocity as a roll call and detail leader at outcamps Kaufering Nos. 3, 4 and 7 during a portion of the time alleged and he personally participated in the mistreatment of inmates of many nationalities. He beat many inmates so severely that they died as a result thereof. Prosecution's P-Ex 2 is a certified copy of the charges, particulars, findings and sentences in the parent Dachau Concentration Camp case (United States v. Weiss, et al., 000-50-2, opinion DJAWC, March 1946, hereinafter referred to as the "Parent Case"; see Section V, post, R 25).

IV. EVIDENCE AND RECOMMENDATIONS:

Franz MILIENZ

Nationality:	German
Age:	44
Civilian Status:	Unknown
Party Status:	Unknown
Military Status:	SS Sergeant
Pleas:	NG Charge I; NG Charge II
Findings:	G Charge I; NG Charge II
Sentence:	Death by hanging

Evidence for Prosecution: The accused was roll call and detail leader at outcamps Kaufering Nos. 3, 4 and 7 from August 1944 to April 1945 (R 8, 22, 32, 36, 38, 44, 50).

Six witnesses testified that the accused forced all inmates, including the sick and feeble, to attend roll call regardless of the weather. Many weak and sick inmates collapsed due to their physical condition and the bad weather during roll calls which lasted as long as four hours. The accused beat many inmates during roll call with a club or his fist and kicked them with his feet. Many of the victims had to be carried to the dispensary where some of them died (R 9, 10, 15, 16, 20, 21, 23, 24, 33, 47).

One of these witnesses testified that those who collapsed were kicked by the accused with his heavy booted foot and on those occasions he would say, "away with that swine" (R 20).

Two of the above witnesses and an additional witness testified that the accused ordered inmate dentists to extract certain healthy teeth from the witnesses' mouths. On one occasion approximately 300 inmates were required to parade before the accused. He inspected their teeth and ordered the dentist to extract certain healthy teeth which ^{he} indicated (R 15, 19, 20, 27, 28, 30, 31).

Two of the foregoing witnesses testified that during roll call either in October or November 1944 a Polish inmate, who was wearing wooden shoes, informed the accused that he was unable to work due to his badly swollen feet. The accused kicked the inmate in the stomach, knocking him to the ground. He then jumped on this inmate with his feet and beat him with a club. This Polish inmate was then removed to the dispensary where he died a day or two later (R 9, 15, 16).

Wachsberg, one of the above witnesses, testified that during a roll call in November 1944, two Polish inmates, who were poorly clothed, complained to the accused about being cold and unable to work. The accused beat these two inmates with a club until they collapsed. These two victims died a few days later in the dispensary (R 9, 10).

Sieradzki, another of the above witnesses, testified that once when his work detail was returning to camp the accused searched the inmates and found two sugar beets in the possession of one of the Polish inmates. The accused beat this inmate so severely that he had to be removed to the dispensary. The victim died approximately two days later (R 28, 29).

Lecjycki, another of the above witnesses, testified that

erely by the accused on roll call square that it was necessary to remove him to the dispensary where he died two days later (R 33).

Sielzer, an additional witness, testified that during August or September 1944 on the work detail known as "Helo and Frank" the accused beat many Hungarian and Polish inmates on their heads and backs with the butt of a machine pistol and kicked them with his feet after they had fallen to the ground (R 35, 36). These beaten inmates were carried to outcamp Kaufering No. 7 (R 36), and two of the victims died there. Their bodies were sent to Camp Dachau (R 37).

A ninth witness, Glickmann, testified that during November 1944 the accused kicked and jumped on a Polish inmate, injuring him in such a manner that the victim died two days later (R 40). At outcamp Kaufering No. 3 the accused beat this witness. The accused pulled him to the ground from the top of a wagon load of hay, causing him to fall on his face. When the witness attempted to get up the accused struck him in the mouth with a stick. The resulting injury necessitated the extraction of six of his teeth (R 44).

A tenth witness, Guschke, testified that at outcamp Kaufering No. 7 in March 1945 the accused stated, "One should liquidate the entire bunch before the Americans come" (R 50).

Evidence for Defense. Defense counsel asserted in Court that the accused was very ill and had, at the best, only six months to live, due to the fact that he was suffering from aggravated tuberculosis, heart disease, and anemia. Defense counsel also asserted that the accused, due to his illness, was unable to take the stand and testify. Defense counsel requested leave to enter a general denial of all testimony given by the witnesses for the prosecution (R 50, 51). The prosecution conceded that if the accused would have testified

he would deny everything (R 51).

Sufficiency of Evidence: The evidence clearly establishes the fact that the accused participated in the Dachau Concentration Camp mass atrocity as an SS roll call and detail leader at outcamps Kaufering Nos. 3, 4 and 7 for a considerable period of time between the dates alleged. In addition thereto it was clearly proven that the accused personally mistreated and beat a great number of inmates. Many of these inmates died as a result of these brutal and vicious beatings administered to them by the accused.

As to defense counsel's assertions as to the effect of the accused's physical condition upon his ability to aid in the preparation and defense of his case, it is apparent that the accused's condition did not prevent his being present in Court throughout the trial; that the accused understood his rights and that the defense offered no evidence as to the accused's physical or mental condition except the mere assertions of counsel. The accused was not denied a fair trial.

The findings of guilty are warranted by the evidence. However, under all the circumstances it is not believed that the death penalty is warranted. The sentence is excessive.

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved, but that the sentence to death by hanging be commuted to life imprisonment.

V. QUESTIONS OF LAW:

Jurisdiction: The defense, prior to the arraignment of the accused, filed a motion to dismiss the charges and particulars against the accused on the ground that the Court was without jurisdiction. In support of its motion the defense relied upon an order of Military Tribunal III, Nurnberg,

Case No. (P 244). The defense renewed this motion at the

conclusion of the prosecution's case (R 52).

The order referred to is a ruling on the defendant's motion against Count I of the indictment in Case No. 3, Military Tribunal III, Nurnberg, Germany, The United States of America vs. Josef Altstoetter, et al. The pertinent part of this order reads as follows:

"Count I of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, wilfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article 2. It is charged that the alleged crime was committed between January 1933 and April, 1945.

"It is the ruling of this Tribunal, that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense."

Without conceding that the jurisdiction of Military Government Courts is limited to the trial of those war crimes cases contemplated by Control Council Law No. 10, it is clear that this order has no application to the instant case because the charges and particulars thereunder do not allege a common design to commit a war crime as a "separate substantive crime." They allege that the accused "acting in pursuance of a common design to commit the acts hereinafter alleged,..... did...wilfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of.....(certain persons),to cruelties and mistreatment, including killings...." etc. Thus, the particulars in this case charge as an offense, a common design to commit described unlawful acts. They do not allege common design as a "separate substantive crime."

The extent of the ruling relied upon by the defense is clarified by the last two paragraphs of the order which provide:

"Count I of the indictment, in addition to the separate charge of conspiracy, also alleges unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of Count I from the indictment, but, insofar as Count I charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the tribunal will disregard that charge.

"This ruling must not be construed as limiting the force or effect of Article 2, paragraph 2 of Control Council Law No. 10, or as denying to either prosecution or defense the right to offer in evidence any facts or circumstances occurring either before or after September 1939, if such facts or circumstances tend to prove or disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10."

The motion to dismiss was properly denied by the Court.

It is clear that the Court had jurisdiction of the person of the accused and of the subject matter.

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 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 46 000.5 J.G.-100, subject: "Trial of War Crimes Cases," 14 October 1946, and the Parent Case). The accused was 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 its findings of guilty.

Examination of the entire record fails to disclose any error or omission in the conduct of the trial which resulted in injustice to the accused.

VI. CONCLUSIONS.

1. It is recommended that the findings and the sentence be approved but that the sentence to death by hanging be commuted to life imprisonment.

2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

ELMER MOODY
1st Lt., Inf.
Post Trial Branch

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

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