

15 December 1947

UNITED STATES)

v.)

Case No. 000-50-2-120

Peter OTTER.)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period of 14-18 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 Peter OTTER, a German national, did, at or in the vicinity of Dachau, Germany, in or about October 1939, wrongfully encourage, aid, abet and participate in the killing of approximately 72 Polish nationals, inmates of the Dachau Concentration Camp, who were then in the custody of the then German Reich, the exact names and numbers of such persons being unknown.

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

Particulars: In that Peter OTTER, a German national, did, at or in the vicinity of Dachau, Germany, in or about July 1940, wrongfully encourage, aid, abet and participate in the killing of approximately 38 Polish nationals, inmates of the Dachau Concentration Camp, who were then in the custody of the then German Reich, the exact names and numbers of such persons being unknown.

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

Particulars: In that Peter OTTER, a German national, did, at or in the vicinity of Dachau, Germany, in or about April 1940 wrongfully encourage, aid, abet and participate in the killing of an unknown Yugoslav national, an inmate of the Dachau Concentration Camp, who was then in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: The accused was an SS Master Sergeant, a block leader and detail leader in the Dachau Concentration Camp, during the years 1937-1942. It appears that during the month of July 1940 he participated in the killing of 38 Polish nationals, inmates of the Dachau Concentration Camp. In April 1940 he participated in the killing of a Yugoslavian national, an inmate of the Dachau Concentration Camp. Little weight was given the testimony herein of witness Carl Kraemer.

IV. EVIDENCE AND RECOMMENDATIONS:

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Peter UTER

Nationality:	German
Age:	34
Civilian Status:	Farmer
Party Status:	Nazi Party from 1933
Military Status:	SS Master Sergeant
Pleas:	NG, Charge I; NG, Charge II; NG, Charge III
Findings:	NG, Charge I; G, Charge II; G, Charge III
Sentence:	Death by hanging

Evidence for Prosecution: The accused was an SS master sergeant, block leader and detail leader at the Dachau Concentration Camp, during the period 1937-1942 (R 6, 43).

One witness testified that in April 1940 he was assigned to a garage construction detail; that a Yugoslav worked with him thereon; that the accused caught the Yugoslav stealing garbage; and that he saw the accused severely beat and kick him. The victim was pushed into camp in a cart. At noon the witness saw the Yugoslav sitting in front of a block and saw the accused knock him to the ground and then kick him several times. After the accused rode away on his bicycle, two inmates lifted the victim. Blood came out of his mouth. The victim was taken to the washroom in the block. A named capo told the witness that the victim died soon afterward (R 21).

In his testimony a second witness (apparently describing what he saw and heard) corroborated the beating near the block. The capo named by the first witness, after examining the body, said that the victim was dead. Apparently he made the statement directly to this witness (R 43, 44). It was stipulated that, if a named additional person were present, he would testify that he saw the accused beat the Yugoslav inmate in April 1940 but did "not see the end of the incident and cannot testify that the Yugoslav died as a result of his injuries" (R 50).

Witness Kraemer testified that in April 1940 he saw the accused severely beat and kick a Yugoslav inmate. Later the accused caused the

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and to be removed to the washroom where he was placed in a container, all the showers were turned on, and Krasmer witnessed this incident through the window of the bunker building. The dispensary capo was brought to the washroom where he examined the inmate and pronounced him dead (R 14, 15).

Witness Gattinger, who was an inmate of Camp Dachau from 1937 to 1944, testified that he knew the accused (R 6). He testified that in the summer of 1940 approximately 38 or 40 Polish inmates were selected from the inmates in the camp; that the inmates were first called to the orderly room by the clerks and then sent to the dispensary; that after the examination they were taken to the property room where they received civilian clothes; that at about 1700 or 1800 hours, the Polish inmates were led to the Kommandantur arrest place, hereinafter called the "arrest building" (apparently the witness was told this) (R 6, 7). He further testified that he saw the Polish inmates in the dispensary being examined (R 8); that at approximately 1900 hours, he saw SS personnel, including the accused, go into the arrest building (R 10); that they were equipped with steel helmets and rifles (R 9); and that shortly thereafter from a distance of 200 meters he heard single shots coming from the arrest building (R 10). At approximately 2000 hours it was well known throughout Camp Dachau that the Polish inmates had been shot (R 11).

Witness Lager, who was an inmate of Camp Dachau from June 1938 to 1942 (R 24-25), testified that he knew the accused who was an SS block leader (R 24). He testified that in June 1940 38 Polish inmates were called for discharge (apparently the witness was told this) (R 24). He further testified that they were brought to the dispensary where he worked (R 24, 26); that he saw them in the dispensary being examined by the doctor (R 24, 26); that he saw them, from the dispensary window, being taken to the property room where they changed into civilian clothes (R 24, 26, 27); that he then saw the Polish inmates led into the arrest building (R 25, 27); and that he saw from a distance of about 100 meters SS personnel, including the accused, equipped with steel helmets and rifles, enter the arrest building (R 25, 27, 28). He further testified that, shortly thereafter, shots were heard from the arrest building.

Approximately 4 days after the shooting, he was told by an inmate who worked in the property room that the names of the 38 Polish inmates had been stricken from the roster as dead (R 26).

The accused was known as one of the worst beaters in Camp Dachau. He beat many inmates, including Jews and Jehovah's Witnesses (R 110-112, 115, 118, 119, 120-122; P-Exs 3-7).

Witness Kraemer testified that when he learned that 38 Polish inmates were going to be shot, he with ^{two} other inmates went to the attic of the laundry building where they could see the yard of the arrest building. The inmates were brought three at a time to the rifle range and were then shot. The accused was one of the SS men doing the shooting (R 13, 19). Prior to the shooting of the 38 Polish inmates, nothing was read to them nor was anything explained to them (R 13, 19).

Evidence for Defense: The accused testified that he joined the Nazi Party in 1933 to secure a better future for himself and to save Germany from communism (R 71). He attempted to help inmates to the best of his ability. He secured additional bread and food for the inmates of his block (R 72). He never made a written punishment report against an inmate, but if they were caught stealing food belonging to other inmates or otherwise misbehaved to the detriment of other inmates, he boxed their ears (R 72). He did not beat or mistreat a Yugoslav inmate in April 1940. At that time he was a block leader and was not on the garage construction detail, nor were there any Yugoslav inmates in Camp Dachau in April 1940 (R 77). Yugoslav inmates did not arrive in Camp Dachau until after April 1941 (R 79). He did not participate in the killing of 38 Polish inmates in July 1940, nor did he ever hear of such killing taking place (R 80). He denied the truth of the testimony of witness Kraemer, inasmuch as he would not have been able to see a shooting in the arrest building yard from any building at 1900 or 2000 hours because the buildings were always closed and locked at 1800 hours. Furthermore, the witness would have had to be present about that time for roll call (R 108).

A witness testified that he believed that there were no Yugoslav inmates in Camp Dachau in April 1940 (R 77, 78).

in the inmate property department (R 57).

Another witness testified that the accused tried to prevent punishment reports from being sent to headquarters. He also allowed bread and tobacco to be brought to the inmates of his block. The work details the accused was in charge of were considered fairly good details (R 60, 61). The accused was not seen participating in administering disciplinary punishment with an oxtail whip. The accused was known as a decent person among many of the inmates (R 62).

A witness stated in an unsworn pretrial statement that the accused treated the special prisoners, including minister Niemöller, correctly and allowed them many privileges beyond his orders (R 106; D-Ex 1).

Sufficiency of Evidence: The allegations under Charge II are not satisfactorily established. It is established that the accused killed the Yugoslav involved in Charge III.

The findings of guilty as to Charge III are warranted by the evidence. However, it is believed the sentence is excessive.

Petitions: A Petition for Review was filed by Major Olaf Tolnas, defense counsel, 25 August 1947. Petitions for Clemency were filed by Hans Buchheller, German attorney, 20 September 1947, 24 September 1947, 10 October 1947, and 18 October 1947; and Josephine Gottsmann, 9 December 1947.

Recommendation: That the findings of guilty as to Charge II be disapproved; that the findings of guilty as to Charge III and the sentence be approved, but that the sentence be commuted to life imprisonment.

V. QUESTIONS OF LAW:

A question, not raised at any stage of the trial, but implicit in the facts, warrants discussion. Inasmuch as the particulars allege that the offenses were committed prior to the date the United States entered the war against Germany (11 December 1941), did the Court have jurisdiction of the offenses covered by the Charges?

A validly constituted court of an independent state derives its powers from the state; and the state is independent of every other in

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the exercise of its judicial power. This power of a sovereign state extends "to the punishment of piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed" (Wharton's International Law, Sixth Edition, Volume I, p. 269). Recognition of this sovereign power is contained in the provision of the Constitution of the United States which confers upon Congress the power "to define and punish offenses against the law of nations" (Winthrop, "Military Law and Proceedings", Second edition, Reprint 1920, at page 831).

It is clear that the laws and customs of war comprise a part of the law of nations. An offense against the former is a violation of the latter. The judicial power of an independent state, embracing the latter, includes trial and punishment of offenders against the law and usages of war; and jurisdiction to try war criminals is an incident of the sovereign power of an independent state (Memorandum for the Joint Intelligence Committee, the Joint Chiefs of Staff, file SPJGW, 1943/17671, 13 December 1943, by The Judge Advocate General, at page 3). Such power is full and complete except where restricted by the body of principles comprising the law of nations (S.S. Lotus, France v. Turkey, 2 Hudson World Court Reports 23). The power of an independent state in connection with the trial of war criminals is not limited to the trial and punishment of war criminals for offenses committed subsequent to its entry into war. Nor does a logical analysis of the character of judicial power of a sovereign state compel such restriction.

It is axiomatic that a sovereign state adhering to the law and usages of war is a fortiori interested in their preservation and hence their enforcement. The power to try and to punish violators thereof is a necessary incident of this interest. Any war crime, whenever committed, constitutes an invasion of the interest of the sovereign.

Whether such power will be exercised in a particular case is a matter resting within the discretion of the sovereign. In this instance, the United States has elected to try the accused.

To avoid vain and empty processes by the sovereign and to assure the enforcement of its sentences, physical custody of the person of a

war criminal is a primary requisite. The United States has custody of the accused.

While the existence of a state of war is a necessary condition precedent to the existence of a "war crime", it is not a sine qua non of jurisdiction of an independent state to try and to punish an offense against the law and customs of war. That power stems from the sovereign character of an independent state. Therefore, it rests on a basis apart from actual participation in warfare as a belligerent. That it is not a belligerent is logically unimportant to the jurisdiction of a sovereign state. By the same token, a neutral nation, securing physical custody of a war criminal, would have jurisdiction to try and to punish him for the commission of a war crime. Time of entry of the sovereign state into warfare is immaterial to judicial power of the state over the offense. Furthermore, providing the offense charged is a war crime, the time of commission of the offense is neither causative nor determinative of the existence of the jurisdiction of a sovereign state's validly constituted courts over either the offense or the offender. The fact that the accused may have committed the offense prior to the entry of the United States into war with Germany does not bar the United States from jurisdiction to try and to punish the accused for the offenses charged. Time of commission is inconsequential to the judicial power of the United States over the offenses.

Participation in warfare accentuates the primary interest of the independent state in the enforcement of the laws and customs of war and does, in most instances, strongly induce the state to exercise its jurisdiction. The present case is an example.

It is stated by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp. 177-218, "Universality of Jurisdiction of War Crimes" that, "every independent state has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or place where the offense was committed".

It is clear that the Court was not deprived of jurisdiction because the charges and particulars alleged offenses committed prior to entry in the war by the United States.

The Court had jurisdiction of the person of the accused and of the subject matter.

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 of guilty as to Charge II be disapproved; that the findings of guilty as to Charge III and the sentence be approved, but that the sentence 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