

6 January 1948

UNITED STATES)

v.)

Josef BRAUNER)

Case No. 000-Flossenburg-8

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Lachau, Germany, during the period 8-13 October 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

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

Particulars: In that Josef BRAUNER, a German national, did, at or in the vicinity of Plattling, Germany, in or about March 1945, wrongfully encourage, aid, abet and participate in the killing of an unknown Czechoslovakian national, an inmate of Flossenbuerg Concentration Camp, who was then in the custody of the then German Reich.

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

Particulars: In that Josef BRAUNER, a German national, did, at or in the vicinity of Plattling, Germany, in or about April 1945, wrongfully encourage, aid, abet and participate in the killing of an unknown French national, an inmate of Flossenbuerg Concentration Camp, who was then in the custody of the then German Reich.

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

Particulars: In that Josef BRAUNER, a German national, did, at or in the vicinity of Plattling, Germany, in or about April 1945, wrongfully encourage, aid, abet and participate in the killing of approximately eight non-German nationals, inmates of Flossenbuerg Concentration Camp, who were then in the custody of the then German Reich, the exact names and number of such persons being unknown.

III. SUMMARY OF EVIDENCE: The accused was a member of the SS guard detail at Plattling, a subcamp of Flossenburg Concentration Camp, during the period of its short existence from 21 February 1945 until its evacuation on about 23 April 1945. The accused was found not guilty of Charge II and the particulars thereunder. The offenses alleged under Charges I and III will hereinafter be referred to as Incident Nos. 1 and 3, respectively.

Incident No. 1. In March 1945 the accused beat a Czech in-

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was on guard duty. The victim had to be carried to the dispensary in the camp. He died the next day.

Incident No. 3. In April 1945, while some of the inmates of subcamp Plattling were working at the nearby airfield, the accused hit a Polish inmate with the handle of a shovel. The inmate collapsed and was carried back to the camp. Later that same day the accused hit this inmate with a piece of wood, and the victim died one half hour later. On the inmate evacuation march from subcamp Plattling which began on about 23 April 1945, the accused shot to death two Polish inmates who were unable to continue the march. On the same day he shot to death another Polish inmate. On the second day of the march the accused beat to death with his rifle five inmates. The victims were two Czechs, one Frenchman, and two Jews.

IV. EVIDENCE AND RECOMMENDATIONS:

Josef HAUNER

Nationality:	German
Age:	41
Civilian Status:	Railroad Worker
Party Status:	None
Military Status:	Steffen SS Private
Plea:	NG Charge I; EG Charge II; NG Charge III
Findings:	G Charge I; NG Charge II; G Charge III
Sentence:	Death by hanging

Evidence for Prosecution: The accused was a member of the SS guard detail at Plattling, a subcamp of Flossenburg Concentration Camp, from 21 February 1945 until the camp was evacuated (R 122, 123). He also participated in the inmate evacuation march as a guard (12, 13, 28, 59).

Incident No. 1. Jonas Rosenzweig, a German Jew and former inmate of subcamp Plattling, stated in his extrajudicial sworn testimony that at subcamp Plattling in March 1945 the accused knocked a Czech inmate, who was suffering from diarrhea, to the ground so hard that the inmate remained lying down, covered with blood. He had to be carried back to camp from

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the work detail. The inmate was taken to the dispensary. After several days, the witness was told that the victim had died (R 62; P- x 7). On 14 and 15 August 1945, shortly after his capture, the accused signed two unsworn pretrial statements admitting that he had beaten Jonas Rosenzweig, who was suffering from serious diarrhea, at the work detail at the air base in March 1945. The accused admitted that he beat this inmate with a stick and kicked him in the abdomen until the victim bled and became unconscious. He also admitted that in March 1945 he beat eight other inmates in the same manner (P 64; P-ix 8; R 66; P-ix 9).

Incident No. 3. The accused was identified by a witness as having been present and participating in the inmate evacuation march from subcamp Plattling, which commenced on or about 23 April 1945. This witness testified that the accused shot two inmates to death shortly after the marching column left the town of Plattling on the first day of the march (P 12). On this occasion the accused forced two cousins, Polish Jewish inmates, to lie down along the road when they could not walk any further. He then shot them both in the neck with his rifle from a distance of about one and one half meters. The witness was about 5 to 10 meters from the accused when these inmates were shot (R 12-15). On the same day about one hour later, the accused shot another inmate, a Polish Jew (R 15, 16). After the column had passed Landau on the morning of the second day of the march, the accused beat five inmates to death, hitting them in the neck with the butt of his rifle (R 16, 17). At one point the witness testified that the accused shot the five victims to death (R 17). The victims were two Czechs, a Frenchman, and two Jews.

A second witness, a former capo at subcamp Plattling, testified that he was on the evacuation march assigned to maintain order on the march; and that he saw the accused leave with the column as the camp was evacuated on 24 April 1945 (R 26, 28). This witness did not observe any killings by the accused on the first day of the evacuation march. However, he did hear shots at the rear of the column and usually went there to try to determine who had fired the shots.

On the second day about 15 weak inmates were shot. The witness saw the accused shoot and kill two inmates on this day (R 29). He also saw the accused shoot two more inmates on the third day of the march (R 29). The witness did not know the nationality of any of these victims. However, he testified there were only seven or eight German inmates in the camp (25, 39). The witness further testified that the first day's march covered only eight to 10 kilometers (R 37), and on the second day the column reached Landau, another eight to 10 kilometers (R 38).

A third witness who was an evacuee on the evacuation march testified that on the second or third day of the march, he saw the accused beat two weak inmates at the rear of the column with his rifle butt (R 59, 60).

A fourth witness testified that he saw the accused hit a Polish inmate, Tulek Sessler, with a shovel handle at the work place in the vicinity of subcamp Plattling at the nearby airfield, approximately three weeks before the evacuation of the camp (R 105, 108). The victim was carried back to the camp by other inmates at the end of the day, where the witness saw the accused again beat the victim with a piece of wood. The victim died one half hour later, the witness viewing the body (R 109-111).

Evidence for Defense:

Incident No. 1. One witness, a former SS sergeant at subcamp Plattling, testified that he had never heard of any killings or mistreatments of inmates at subcamp Plattling (R 90, 91).

The accused testified that he never fired his rifle while at subcamp Plattling (R 125); that he never beat any inmates (R 127); that he never mistreated inmates in any way (R 125); and that he did not commit any of the atrocities as charged (R 135). The accused further testified that he signed a pretrial statement on 15 August 1945 after he had been kicked and beaten on the two days previous. (It appears that the accused was then in a CIC installation; that an American soldier was present; and by the description of the uniforms, that the beatings, if any, were by German personnel.) (R 132-134). The witness testified to having seen the accused at Pattenberg Internment Camp in June or July 1945 with a bloody nose, discolored eyes and blood on his jacket and pants (R 85, 86). The accused

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Hesitantly denied remembering signing either of the two documents, (P-Ex 8 and P-Ex 9) which were introduced in evidence by the prosecution, and asserted the signatures were not his (R 138, 139). However, by his former testimony he indicated he signed at least one paper at the time and place in question (F 134). A detailed extrajudicial sworn statement of a member of the 13th Interrogation of Prisoners of War Team, Fred S. Gerard, formerly a sergeant in the United States Army, was procured from Ohio and received in evidence. Gerard stated positively that no force or threats of force were utilized nor were any promises made to procure the accused's statement, P-Ex 8 (R 152; P-Ex 12). A hand writing expert of the German police system testified that the signature on P-Ex 8 was that of the accused (R 155, 156, 160; P-Ex 15).

Incident No. 3. The accused attempted to establish an alibi through two witnesses, one of whom testified that she resided in Flattling; and that the accused came to her house on the morning of the day when the inmate evacuation march left. The accused told her that the evacuation march had left and that he did not want to go along (F 70). She saw the accused at various times during the next four or five days (F 71, 72, 74, 76). The second witness testified that she lived in Altmain; that the accused arrived at her home on 28 April at noontime; and that he remained there either one or two nights (R 80, 81).

The accused testified that he was not present at subcamp Flattling when the inmate evacuation march column was assembled (F 124) and, when he did return to camp, it had already left (F 125). He did not join the march until 30 April at Egenfelden (F 140, 143), having remained away several days and nights (R 125-127). He denied that he ever fired his rifle while at Flattling (R 128); that he ever beat any inmates (F 127); that he hit any inmates with a shovel (R 128); that he mistreated them in any way (F 128); or that he committed any of the atrocities as charged (R 135).

Sufficiency of Evidence: The guilt of the accused as to Charge I is not satisfactorily established. The evidence as to the accused's alibi in connection with Charge III is weak and indefinite in contrast with the testimony of three witnesses who definitely placed the accused on the evacuation

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It is established that the accused participated in the evacuation march and that he killed several evacuees during the march. The findings of guilty under Charge III are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by First Lieutenant Paul W. Hughes, defense counsel, 30 October 1947. No Petitions for Clemency were filed.

Recommendation: That the findings under Charge I be disapproved; and that the findings under Charge III and the sentence be approved.

V. QUESTIONS OF LAW:

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

Alleged Independent Illegal Acts: The defense objected to the admission of evidence relating to the alleged killing at subcamp Plattling, three weeks before the evacuation march on the ground that it related to a separate independent crime not covered by Charge III (1-105-107).

Paragraph b, Section 5-323, Title 5, "Legal and Penal Administration" of "Military Government Regulation," published by Office of Military Government for Germany (US), 27 March 1947, requires that each charge disclose one offense only. Each charge in the instant case alleges violation of the laws and usages of war. Regardless of the expression "laws and usages" of war, only one offense is alleged, i.e., a violation of the "law" of war. In the case of In re Yamashita, 66 Supreme Court Reporter 340, the charge alleged violation of the "laws of war," yet Mr. Chief Justice Stone, in referring to the charge, used the expression that it alleged "a violation of the law of war" (underscoring supplied). Thus it is clear that the more appropriate expression is "a violation of the law of war."

As to the question of whether each charge and the particulars thereunder allege more than one offense, inasmuch as more than one illegal act is involved, the following language in the Yamashita case, supra, is pertinent:

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"The Charge. Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war".

"Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command during the period mentioned. The first item specifies the execution of 'a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity.' Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments."

Another aspect of the question as to legal sufficiency of the respective charges and particulars not raised during the trial is whether each charge and the particulars thereunder are stated with sufficient particularity and definiteness. In the Yamahita case, supra, with respect to the broad allegations involving numerous criminal acts, the Supreme Court stated:

"Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. Collins v. McDonald, supra, 420. But we conclude that the allegations of the charge, tested by any reasonable standard, adequately alleges a violation of the law of war and that the commission had authority to try and decide the issue which it raised. Cf. Dealy v. United States, 152 U. S. 539; Williamson v. United States, 207 U. S. 425, 447; Glasser v. United States, 315 U. S. 60, 66, and cases cited."

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It is apparent that the allegations in the instant case specify the criminal acts and identify the time, the place, and the victims thereof with considerably more particularity than did the allegations in the Yamashita case.

The Court did not err in overruling the objection by the defense (E 107).

Admissibility of Accused's Statements: The defense objected to the admission of the unsworn pretrial statement by the accused on the ground that no showing had been made that it was made freely and voluntarily (E 63). In many jurisdictions in the United States the question of voluntariness of the statement or confession would have been submitted to the jury for its determination in light of the evidence bearing thereon (20 American Jurisprudence 444, 445, 453, 454, 456). In this war crimes trial the voluntariness was of necessity a problem for the Court.

As to sworn statements, subparagraph c(4), Section 270, "Manual for Trial of War Crimes and Related Cases," 15 July 1946, as amended, provides that war crimes tribunals will not require foundation evidence to establish that sworn statements offered in evidence were voluntarily procured but, on the other hand, will presume, subject to being rebutted by competent evidence, that the sworn statements were voluntarily procured. Moreover, a war crimes tribunal may admit any evidence which in its opinion is of probative value or helpful in arriving at a true finding (Paragraph a, Section 270, "Manual for Trial of War Crimes and Related Cases", supra). The Court properly admitted the evidence in question.

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 as to Charge I be disapproved, and that the findings as to Charge III and the sentence be approved.

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

EMANUEL LEWIS
Captain, INF
Post Trial Branch

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

C. W. PHIFER
Lieutenant Colonel, USAF
Acting Deputy Judge Advocate
for War Crimes

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