

UNITED STATES FORCES IN AUSTRIA
OFFICE OF THE JUDGE ADVOCATE
War Crimes Branch
APO 777, U.S. ARMY

14 April 1947

Subject: Review of Proceedings of a Military Commission in the case of the United States versus Franz GOETZ, Norbert GRUBER, Friedrich HUEBNER, Josef PAULEZYNSKI, Johann PRESSL, Josef SCHUEH, Friedrich WEINERTH, Rudolf BAST, Ferdinand EDELMANN, Ernst ERHART, Rudolf GEYERHOFER, Herta HAUSWIRTH, Friedrich KISCH, Gretl KUBISKA, Stefanie KARNER, Elisabeth PERBEL, Franz SCHLOEGELHOFER, Josefa SCHMIDHAMMER, Stefan SCHWARTZ, Victor ZIEGLER, Karoline HENDL, Alois LACHINGER, Rudolf MAYERHOFER, Paul NIEMIEZ, Franz BRUCKBOECK. Case No: 5-37

TO : Commanding General
Headquarters, United States Forces in Austria
APO 777, U. S. Army

1. The record of the proceedings of the Military Commission appointed by this Headquarters for the trial of the accused having been referred to me for review under the provisions of paragraph 14c, War Crimes Memorandum Number 3, this headquarters, 29 April 1946, I submit herewith my review, with opinion and recommendations and reasons therefore.

2. Trial:

The accused, all Austrian nationals, were tried at Salzburg, Austria, from 7 January to 22 January 1947, by a Military Commission, appointed by Special Orders No. 304, paragraph 2, dated 31 December 1946, Headquarters, United States Forces in Austria.

3. Findings:

All of the accused were tried upon the following charge and specification:

Charge: Violation of the Laws of war

Specification (as amended):

In that Franz GOETZ, Norbert GRUBER, Friedrich HUEBNER, Josef PAULEZYNSKI, Johann PRESSL, Josef SCHUEH, Friedrich WEINERTH, Rudolf BAST, Ferdinand EDELMANN, Ernst ERHART, Rudolf GEYERHOFER, Herta HAUSWIRTH, Friedrich KISCH, Gretl KUBISKA, Stefanie KARNER, Elisabeth PERBEL, Franz SCHLOEGELHOFER, Josefa SCHMIDHAMMER, Stefan SCHWARTZ, Victor ZIEGLER, Karoline HENDL, Alois LACHINGER, Rudolf MAYERHOFER, Paul NIEMIEZ, and Franz BRUCKBOECK, did, at or near Amstetten, Austria, on or about 20 March, 1945, wilfully encourage, aid, abet and participate in committing assaults and batteries upon fifteen unknown American airmen, members of the United States Army, who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

All of the accused pleaded not guilty to both the charge and the specification. BAST, EDELMANN, HAUSWIRTH, KISCH, KUBISKA, SCHWARTZ, ZIEGLER, HENDL, LACHINGER and NIEMIEZ were acquitted by the

The Commission, in closed session, by secret written ballot, and with the concurrence of at least two-thirds of its members present at the time of the voting, found the remainder of the accused guilty of both the charge and the specification.

4. Sentences

The commission, in closed session, by secret written ballot, and with the concurrence of at least two-thirds of at least two-thirds of its members present at the time of the voting, sentenced those of the accused who were found guilty as follows:

FRANZ GORZ	To be confined at hard labor for 2 years
Norbert GRUBER	To be confined at hard labor for 4 years
Friedrich HIEBNER	To be confined at hard labor for 2 years
Joseph BULEZYNSKI	To be confined at hard labor for 2 years
Johann FRESSL	To be confined at hard labor for 2 years
Josef SCHUEH	To be confined at hard labor for 4 1/2 years
Friedrich WILMERTH	To be confined at hard labor for 1 1/2 years
Ernst EHLART	To be confined at hard labor for 1 1/2 years
Rudolf GEYENHOFER	To be confined at hard labor for 2 years
Stephanie KARNER	To be confined at hard labor for 3 months
Elisabeth FENDEL	To be confined at hard labor for 1 1/2 years
Frenz SCHLONWELCHER	To be confined at hard labor for 5 years
Josefa SCHMIDHAMMER	To be confined at hard labor for 1 1/2 years
Rudolf MAYERHOFER	To be confined at hard labor for 1 year
Franz BRICKBOECK	To be confined at hard labor for 2 years

5. Evidence of the prosecution

(a) General Statement of the Offense.

In the afternoon of 20 March 1945 a group of approximately fifteen American soldiers, who were then prisoners of war, were being transported by train through Austria, en route from Hungary to Germany (Pros. Ex. No. 1, 3, 4). On the outskirts of the town of AMSTETTEN, Austria, where a heavy air raid was in progress the train was halted (Pros. Ex. No. 1, 3, 4.). Shortly after the raid, at about 1630, the prisoners were taken from the train and marched into Amstetten under the guard of four Luftwaffe soldiers (Pros. Ex. 1,3,4.). As they entered the town the group was joined by several SS officers and men marched into the town square (Hauptplatz) (Pros. Ex. No. 1). One of the SS officers a captain (R 25), then ordered the four guards aside. This order was complied with (Pros. Ex. No. 1). He then proceeded, by words and gestures, to urge a crowd of approximately 200 civilians and soldiers which had gathered there, to use violence upon the prisoners (Pros. Ex. No. 1, 4, 5.). The Burgmaster of Amstetten, MITTENDORFER, also played a prominent and instigating part in the violence which followed (R 229, Pros. Ex. No. 9, 10). The men were hit with sticks, stones and fists (Pros. Ex. No. 1,2,3,4). They were kicked with hob-nailed boots (Pros. Ex. No. 1,4). Some of the SS men used their rifle butts as clubs and struck the prisoners with them (Pros. Ex. No. 1,2,3). One of the SS men used a horsewhip (Pros. Ex. No. 1,4,5).

The Americans were badly hurt although it does not appear that any of them incurred permanent injuries (Pr. Ex. No. 1). One of them was rendered unconscious (Pros. Ex. No. 4). Five of them sustained head injuries (Pros. Ex. No. 2). One had his nose "smashed". (Pros. Ex. No. 1). One witness (R 30) described their appearance after the assault

someone who received some good beatings". The assaults were committed intermittently over a period of approximately 45 minutes (R 89).

Finally, at about 1800, upon the intervention of the Ortsgruppenleiter of Amstetten the assault was stopped (Pros. Ex. No. 1, 2, 3, R 26) and the prisoners were marched away to a nearby Wehrmacht camp where they received first aid (R 209, Pros. Ex. No. 5).

(b) Evidence as to each accused.

1. Franz GOETZ

Two witnesses testified that this accused participated in the assault and battery. He hit the victims with his fists and kicked them with his feet several times. (R 175, 17, 18, 24). In a written statement he admitted that he "beat an American standing next to me" (Pros. Ex. No. 8).

2. Norbert GIBBER

This accused was identified by seven witnesses as having participated in the assault and battery (R 43, 58, 69, 70a, 86, 191, 203, 212). One of these witnesses stated that he kicked the flyers with his boots in addition to hitting them with his hands (R 94). In a written statement he admitted that he "hit an American 2 or 3 times" (Pros. Ex. No. 19).

3. Friedrich HUEBNER

One witness testified that this accused "also assaulted the American soldiers, one who was tall and rather stout, by jumping at him and hitting him a few times with his fists" (R 175). HUEBNER has also admitted his participation in the offense by a statement in writing that he "punched a prisoner once on his shoulder with my fist" (Pros. Ex. No. 20).

4. Josef PAULCZYNSKI

One witness testified (R 58) that he saw Paulczynski "taking part in the beating". Another that he "was there" (R 43). The accused admits (Pros. Ex. No. 9) that he "slapped" one of the victims.

5. Johann FRESSL

Three witnesses testified that Fressl participated in the offense (R 43, 126, 129, 191). One of them stated that he used his feet as well as his fists (R 129). He has admitted (Pros. Ex. No. 18) that he "beat one of the parachutists with my right hand".

6. Josef SCHUCH

Four witnesses testified that Schuch, a policeman (R 69, 75, 204), participated in the assault (R 43, 69, 75, 86, 204). Two of them (R 75, 86) stated that he kicked the flyers as well as hit them with his hands. He has also admitted that he "beat" the flyer (Pros. Ex. No. 10).

7. Friedrich WEINERTH

The evidence against this accused consists of a written statement by a witness, admitted into evidence as Prosecution Exhibit Number 13, that: "Friedrich Weinertth remarked in my presence on 20 March after the mistreatment of the American: 'My hands still hurt from beating'". Weinertth admitted in a written statement that he "slapped the American very lightly on the face" (Pros. Ex. No. 14).

8. Rudolf EAST

Two witnesses testified that this accused participated in the offense. One of them (R 91) testified that he "hit with his fists in the direction of the Americans", the other (R 138, 139) that he beat the prisoners "with his hands and with his fists" for "a couple of minutes, or five minutes".

9. Ferdinand EDELMANN

One witness testified that this accused participated in the assault "with his fists" for "about thirty minutes" (R 99). Another that "he hit with his hands" (R 191).

10. Ernst ERLHART

This accused was seen participating in the assault by two witnesses. One of them stated (R 140) that he "beat with his hand 3 or 4 times". The other testified that she saw him "beating with his hands" (R 190).

11. Rudolf GEYERHOFER

Four witnesses testified that this accused participated in the offense (R 58, 86, 127, 128, 129, 191). He hit with his fists (R 90) according to one. He "beat with his open hand" (R 128) according to another. A third said that he saw him strike the flyers (R 191).

12. Herta HAUSWIRTH

The evidence against this accused consists solely of the statement by one witness that she saw the accused standing among the crowd but "I cannot remember what he did" (R 165).

13. Friedrich KISCH

The evidence against this accused consists of the statement of one witness (R 187) that he saw him take a horse whip from a driver of a wagon and saw him "swinging the whip in the direction of the flyers". It "gave the appearance of beating someone" (R 188). He did not see any blows struck by the accused. (R 187).

14. Gretl KURISKA

One witness testified that she saw this accused "beat with her hands" (R 144). There is no other evidence in the record against this accused.

15. Stefania HANNER

Four witnesses testified that this accused spit at the Americans (R 92, 143, 148, 159). Two of them said that he also "pushed them with the hands" (R 159).

16. Elisabeth PERBEL

Two witnesses (R 143, 192) testified that Perbel pulled the hair of one of the flyers. Another (R 701) saw her at the scene of the assault. In a written statement (Pros. Ex. No. 21) in which she denied that she "even touched" one of the Americans, she admitted that she "only made disapproving remarks about the bomb-raid".

17. Franz SCHLÖGELHOFER

This accused

beat them with his fists. One of them said he wore "high boots, with nails" when he kicked them (R 74). The other (R 89) testified that he beat "with his fists and boots from the beginning to the end" of the beating.

18. Josefa SCHMIDHAMMER

Two witnesses identified this accused as having participated in the assault (R 127,129,176). One of them said that she "cursed the soldiers and spat at them"(R 176). The other that she "beat with the fist" and that she was "pushing with her foot" (R 129).

19. Stefan SCHWARTZ

The evidence against this accused consists of the testimony of one witness that he "hit at" the American flyers for a "quarter of an hour" (R 91).

20. Victor ZIEGLER

Two witnesses of the prosecution mentioned this accused in their testimony. One of them said that he struck the American flyers with his fists (R 86,91,125,126). The other said that he "saw Ziegler but when I saw him he did not do anything" (R 209).

21. Karoline HENDL

This accused was also identified by two witnesses for the prosecution. One of them testified that "she spit at the face of the American flyers and asked the crowd to beat them" (R 90). The other said: "she was supposed to have spitten but I did not see it" (R 75).

22. Alois LACHINGER

The evidence against this accused consists of the testimony of one witness (R 175) that he could "not supply more spit than he used for spitting at the Americans. Furthermore he called them gangsters and similar names."

23. Rudolf MAYERHOFER

The evidence against this accused consists of the testimony of another accused, GEYERHOFER, that: "Mayerhofer came with a shovel. I thought that he desired to hit with the shovel and I took away the shovel from him and told him he must be mad" (R 469). In a written statement the accused admitted that he had a shovel and that he remarked: "You cursed fellows, I'll knock you down like dogs" (Pros. Ex. No. 16).

24. Paul NIEMIEZ

The evidence against this accused consists solely of the testimony of one witness (R 192) that she saw him "hit with his hand" during the assault.

25. Franz BRUCKBOECK

The evidence against this accused consist of the testimony of one witness that he recognized the accused as having participated in the incident (R 32); and that of another (R 145) that the accused, after the beating "told me 'how my fists are aching' I asked him why. He said he just hit. I asked whom, he said at the soldiers." In a written statement Bruckboeck admitted that he "pushed one American once with my hand" (Pros. Ex. No. 12).

6. Evidence for the Defense

(a) as to each accused

1. Franz GOETZ

This accused elected to remain silent at the trial (R 228). His wife testified, principally in mitigation, (R 274) that he is a very sick man, that he is very excitable, and that he is subject to heart attacks. He "once tore off his clothes in his excitement". Two doctors' statements to the effect that accused had been under their care for an acute heart condition were introduced into evidence (Def Ex D & E).

2. Norbert GRUBER

This accused also elected to remain silent (R 228). In his written statement admitting that he hit an American (Proc Ex No 19) he denied that he kicked anyone. One of the witnesses for the prosecution (BRIGFELLNER) who had testified that he participated in the beating was shown to have made a previous statement in writing (Def Ex A) that: "I have seen too a man beating with a cudgel, but I did not recognize him, I only heard that he was said to be GRUBER Bertl". No mention of Norbert GRUBER was made in this previous statement of the witness.

3. Friedrich HUEFNER

This accused also elected to remain silent at the trial (R 228). Nor was any evidence in his behalf introduced by the defense. In his written statement admitting his participation (Proc. Ex. No. 20) he stated that he only punched a prisoner once on his shoulder.

4. Josef PAULEZYNSKI

This accused has also elected to remain silent at the trial (R 228). His wife testified that he was in the last war, that he is very nervous, that he is always suffering, that he was in an air raid shelter for five or six hours immediately preceding the assault, and that he had been in a hospital for two months prior to the assault (R 253, 234).

5. Johann PRESSL

This accused also elected to remain silent at the trial (R 252). No witnesses testified in his behalf. A medical report dated 3 January 1947 stating that subject has high blood pressure, vasoneurosis, and goitre was admitted into evidence (Def. Ex. I).

6. Josef SCHUEH

This accused also elected to remain silent at the trial (R 233). No witness testified in his behalf. In his statement admitting the offense he states that he was induced "in my excitement to beat" upon the instigation of MITTENDORFER, the burgomaster (Proc. Ex. No. 10).

7. Friedrich WEINERTH

This accused also elected to remain silent (R 233) and there were no witnesses who testified in his behalf. In his written statement admitting the offense he said that he only "slapped an American very lightly on the face" (Proc. Ex. No. 14).

East elected to testify under oath (R 373). He states that he was never in the Hauptplatz during the time that the assault took place. After the all clear at 1413 he proceeded from an air raid shelter to his own home. He remained there until approximately 1700 when he walked from there to the home of a friend for the purpose of assisting in salvage work at that house which had been badly damaged in the air raid. He remained there until about 1820, leaving that place only two or three times for brief intervals. During these intervals he transferred salvaged items from the damaged house to his own by a wagon and did not go to the Hauptplatz. Between 1820 and 1830 he walked over to the Hauptplatz and saw the Americans but the crowd had dispersed by this time and the assault was over.

This testimony of the accused was substantially corroborated in whole or in part by nine other witnesses who testified in his behalf (R 383,389,387,391,394,396,399,400,403).

9. Ferdi nand EDELMANN

This accused also elected to testify under oath (R 352). He stated that he did not arrive at the Hauptplatz until two or three minutes before the Americans were marched off, that he did not get closer than 4 or 5 meters to them; that he did not strike them or spit at them; and that he did not incite anyone else to assault them.

One witness, who testified in his behalf, stated that he saw Edelmann when the latter arrived at the Hauptplatz and that at this time the beating was over (R 378). In addition, two witnesses for the prosecution had testified that they did not see him among the crowd during the assault (R 35,51).

10. Ernst EFFERT

This accused also elected to testify under oath (R 246). He testified that he never came closer than 25 meters to the Americans (R 247). On cross examination, however, he admitted that he came within two or three meters of them (R 251). No other evidence was presented in his behalf.

11. Rudolf GEYERHOFER

This accused also took the stand to testify in his own defense (R 468). He testified that he did not beat; spit at; swear at; or otherwise incite others to beat the Americans. He said that, on the contrary, he requested one soldier to stop beating an American with his rifle butt, that he helped one American to disentangle himself from his parachute, that he took away a shovel from the accused Mayerhofer because he thought he was going to hit the Americans with it, and that later he expressed his disgust at the beating to his family, his maid, and his labor organization (R 477). Another defense witness testified that the accused said the "prisoners are not to be beaten" while the assault was taking place (R 497). His maid testified that, when the accused arrived home, he stated that "it is a shame to beat such defenseless American fliers" (R 477). Another witness testified that he saw the accused help one of the Americans to disentangle himself from his parachute (R 437). Another testified that he saw the accused "drag one man by the shoulder and told him to have sense and not beat them" (R 489). Finally the defense introduced into evidence a letter written by Col. W. F. Yarborough, an American, which testifies as to the good character of the accused (Def. Ex. V).

12. Herta HENSCHWITZ

This accused has also elected to testify under oath (R 275).

period of the assault and that she did not go into the Hauptplatz at any time after the air raid. This testimony was corroborated in part by the written statement of another witness (Def. Ex.F).

13. Friedrich KISCH

This accused also elected to testify under oath (R 303). He denied that he used a whip on the Americans or that he had a whip in his possession on the day of the assault. He stated that the whip was wielded by a Sergeant of the air forces who was very close to him at the time. He did not strike, hit or kick any of the Americans, but, on the contrary, he tried, unsuccessfully, to interfere in their favor. One witness testified that the accused, after the assault "protested" the action of the crowd and told him that he left the scene of the assault because it made him sick. In a written statement (Def. Ex. G) another witness said: "I can only state that the soldier who beat with a whip was not Mr. Kisch".

14. Gretl KURISKA

This accused also elected to testify under oath (R 424). She denied that she was in the Hauptplatz at any time during the assault. She stated, that after the air raid, she proceeded directly to her own home and then, after changing her clothes, she went directly to the home of her parents. She spent the rest of the day until dark carrying furniture and clothing from her parents home, which had been badly bombed, to her own home, and then returning to her parents' home for another load. Her testimony was corroborated in whole or in part by the testimony of six other defense witnesses (R 430, 432, 434, 436, 446, 448).

15. Stefanie KARNER

This accused also took the stand to testify under oath (R 283). She denied that she beat, spit at, pulled hair of, shouted at, or otherwise participated in the assault on the Americans. She stated that she never came closer to them than 5 or 6 meters. A defense witness testified that she saw the accused for 5 to 7 minutes during the beating (R 296) and that during that time the accused did not beat, spit at, or shout at the fliers.

16. Elisabeth PERBEL

This accused also elected to testify under oath (R 258). She stated that she was within 2 or 3 meters of the Americans for "not even one minute" but that she did not beat them or pull their hair. On cross examination she admitted that she made certain disapproving remarks at the time but stated that they were not directed towards the Americans but to a French prisoner of war who was standing next to her (R 265, 266). A witness for the defense testified (R 260) that she saw the accused approach and leave the scene, that the accused was within about 2 meters of the Americans for about 10 minutes, and that she did not beat, spit at, or pull the hair of any American. On cross examination (R 270) this witness stated that the accused shouted "you are the dogs who bombed us today". Another witness for the defense testified (R 270) to substantially the same facts, including the shouted remark of the accused concerning Americans.

17. Franz SCHLOEGELHÖFER

This accused also elected to testify under oath (R 229). He denied that he beat or kicked any of the Americans but stated that, on the contrary, he unsuccessfully attempted to prevent two German soldiers from striking them. No other witnesses testified in his defense.

This accused also elected to testify under an oath (R 252). She stated that, out of curiosity, she joined the crowd in the Hauptplatz for a short period of time but that she did not beat, shout at, spit at, or urge anyone else to beat the fliers. No other witnesses testified in her defense.

19. Stefan SCHWARTZ

This accused also elected to testify under oath (R 405). He testified that he was in his store, which is located on the Hauptplatz, during the entire period of the offense except for a twenty second period when he stepped a few paces out of his store into the square. He never came closer than 14 or 15 meters to the fliers. This testimony was corroborated by two other defense witnesses (R 413, 417). One of them was in his store during the entire period of the beating and the other was there for a substantial part of that period. In addition one witness for the prosecution had testified (R 34): "I am quite convinced he did not participate in the beating because at about 5:00 O'clock when I met him at the store he asked what was about the whole thing". Another witness for the prosecution testified (R 51): "I did not see him in the crowd".

20. Victor ZIEGLER

This accused also elected to testify under oath (R 240). He stated that he went into the crowd for two or three minutes but that, at that time, the Americans were not being beaten. He did not beat anyone or urge anyone else to. He remained silent. After standing there for 2 or 3 minutes he returned to his office. One witness for the prosecution testified that: "I saw Ziegler but when I saw him he was not doing anything" (R 203).

21. Karoline HENDL

This accused also elected to testify under an oath (R 323). She denied that she played any part whatsoever in the assault. She stated that she was in her store during the entire time that it took place and that she never left it during that time. Five witnesses for the defense who were in her store at various times during the beating corroborated her testimony in whole or in part (R 329, 330, 331, 333, 337). One of the witnesses (R 338) stated that she was in the accused's store from 1630 or 1645 until about 1830 and that the accused never left the store during that time, as far as she knew.

22. Alois LACHINGER

This accused also elected to testify under oath (R 311). He denied that he participated in the assault. When he was about 10 paces from the Americans he made a gesture of disapproval at the beating which he described as a "gesture of spitting". A witness for the defense testified that she did not see the accused come any closer to the Americans than 10 meters and that he did not spit at, beat, or incite others while she observed him (R 320). She saw him leave the crowd.

23. Rudolf MAYERSHOFFER

This accused also elected to testify under oath (R 234). He stated that he entered the crowd with a shovel in his hands, that Geyerhofer took it away from him, and that he reacted to this action of Geyerhofer's by saying: "You damn boys, I will hit you down like dogs". He explained this remark as follows (R 325): "I did not mean the Americans and did not direct my words at them. Maybe I wanted to say to Geyerhofer: 'Why did you take my shovel?' He stated that he did not strike the American

24. Paul NIEMIEZ

This accused also elected to testify under oath (R 452). He stated that he came into Hauptplatz for a few minutes at about 1800, but that he never came closer than 4 or 5 meters to the Americans, and he did not strike or raise his hand at the Americans (R 463). He did move his hands once in a gesture of disapproval. One witness for the defense testified that she saw the accused standing in the Hauptplatz, holding a bicycle, about 5 minutes before the Americans were marched away but that she did not see him come close to the Americans at any time. Another witness testified that she saw the accused enter and leave the Hauptplatz and observed all of his actions while he was there (R 464). He did not get close to the crowd or beat anyone. He raised his hand to his nose once.

25. Franz BRUCKHUECK

This accused elected to remain silent (R 292). No evidence was presented in his behalf. In his written statement admitting the offense (Pros. Ex. No. 12) he said that he was "excited so much" and that he had "lost control of my senses". He also said in this statement that he only "pushed" the American once.

(b) General Matters of Defense.

It was emphasized by defense counsel, in his closing argument (R 520,521) that: (1) the people of Amstetten had undergone an extremely heavy airraid immediately prior to the offense (Paragraph 6a supra), (2) the ringleaders of the offense were the SS captain and the Burgomaster (paragraph 6a supra), and not any of the accused and (3) no permanent injuries were received by any of the victims (paragraph 6a supra).

7. Proceedings

The Military Commission which tried this case was appointed pursuant to authority delegated by the Commanding General, United States Forces, European Theater, to the Commanding General, United States Forces in Austria, by letter, Headquarters, United States Forces European Theater, AG 250. 4 GAF-AGG, 10 October 1945, subject: "Authority to appoint Military Commission". The commission was appointed by paragraph 2, Special Orders Number 304, Headquarters United States Forces in Austria 31 December 1946. The provisions of paragraph 3 d, War Crimes Memorandum Number 3, Headquarters United States Forces in Austria, 23 April 1946, were complied with in that the commission was composed of more than three commissioned officers, and that a Trial Judge Advocate and Defense Counsel and assistants for each were appointed. The charges were properly sworn to, and were referred by proper endorsement to the Trial Judge Advocate for trial. The charges were served on the accused more than five days prior to the date of the trial. The accused were represented by two United States civilian attorneys. A fair and impartial trial was held. Two competent interpreters were sworn, and the entire proceedings were interpreted into the German language for the benefit of the accused.

8. Jurisdiction

That the Military Commission has the power to try enemy nationals for offenses against the laws and usages of war is settled. Such a Commission is a tribunal created under the common law of war and has, under international law, jurisdiction of offenses against the laws of war (SPJGW 1945/17671) and over individual perpetrators thereof (Articles 2 and 3 of the Geneva (prisoners of war) Convention, 27 July 1929; Article 23, paragraph (c) of the Annex to the Hague Convention Number IV of 18

October 1907; Change 1, 15 November 1944, paragraph 345.1, FM 27-10, Rules of Land Warfare). It is beyond question that the offense in this case - the assault and battery by civilians of surrendered, unarmed prisoners of war - was a violation of the laws of war properly triable by a military commission having custody of the offenders against those laws.

9. Procedure.

The proceedings of the Commission were, in general, conducted in accordance with the rules of procedure prescribed for general courts-martial, which is in accord with paragraph 4, War Crimes Memorandum Number 3, cs, which provides that Military Commission will have regard for, without being bound by, such rules.

The accused were arraigned at the beginning of the trial in the usual manner and all of them pleaded not guilty to the specification and not guilty to the charge (R 5.6.7.8). Prior to the pleas to the general issue a motion to sever two of the accused SCHLOEGELHOFER and GEYERHOFER, on the ground that their defense would be antagonistic to the defense of other accused, was made by defense counsel (R 3). The motion was denied (R 5). The determination of this question was clearly within the discretion of the Commission (See MCM 1928, Section 716, page 55); nor does the subsequent presentation of the evidence reveal that any substantial right of any accused was injuriously affected by the denial of this motion.

After the Prosecution's opening statement, and before any evidence was introduced, the prosecution with the approval of the appointing authority (R 13), moved to amend the specification by adding the words, "and batteries" after the word "assault". The purpose of this amendment was to meet an objection by the defense to the use of the term "beating" by the prosecution while describing the offense in its opening statement. The defense argued that since an assault did not necessarily imply a battery it was improper and prejudicial for the prosecution to describe the offense as such. In view of the fact that a battery is defined as "an assault in which force is applied--" (see MCM 1928, Section 149L, page 177), and in view of the fact that the evidence is incontrovertible that such force was applied, this argument of the defense appears to be somewhat tenuous. In any event, the amendment was clearly permissible under MCM 1928, Section 73, page 57, and furthermore, the defense specifically affirmatively stated that they had no objection to it (R 13).

The record reveals no errors or irregularities of importance or which affected adversely any of the substantial rights of the accused. The trial was held with impartiality and a full opportunity was given to each accused to present any matter in his defense which he might desire to. The Commission explained fully to all of the accused their right to remain silent, to testify as a witness, or to make an unsworn statement (R 225). Although hearsay evidence was admitted in several instances, this is clearly permissible under paragraph 5 War Crimes Memorandum Number 3, cs, the only condition being that it have probative value to a reasonable man. The proceedings satisfied all of the requirements of a fair trial.

10. Sufficiency

There can be no question but that the charge and specification allege an offense against the laws of war. Article 3, Geneva Convention of 27 July 1929, relative to the treatment of prisoners of war, as cited in paragraph 74, FM 27-10, Rules of Land Warfare, states as follows: "Prisoners of war have the right to have their persons and their honor

respected." Article 2 of the same Convention, cited in paragraph 73, FM 27-10, page 17, states, "Prisoners of war --- must at all times be treated with humanity and protected, particularly against acts of violence, insults, and public curiosity." It would appear to be uncontroversial that the commission of assaults and batteries upon surrendered, unarmed prisoners of war is a violation of these articles.

The Commission, then, was faced with the question of determining whether each individual accused was or was not a participant in the offense. In this connection, reference is made to the rule of law normally applied to participation in offenses of this nature. This rule has been stated as follows (Wharton's Criminal Law, Vol II, p 2195):

"In riotous and tumultuous assemblies, all persons who are present and not actually assisting in their suppression may, where their presence is intentional and where it tends to the encouragement of the rioters, be prima facie inferred to be participants, and their obligation is cast upon a person so circumstanced, in his defense, to prove his actual non-interference."

Ten of the accused were acquitted of the charge and of the specification. It is deemed sufficient to say that, although a prima facie case was established against each of them, the Commission was justified in finding as it did. Each of them presented in their defense evidence which, if believed, could have resulted in no other justifiable finding.

There is also ample proof in the record to sustain the conviction of each and every accused who was found guilty by the Commission. Eight of them, COMPE, CRUER, HUENNER, PAULEVINSKI, FREDOL, SCHUEH, WEINERT, and BRUCKBOECK, admitted their guilt in written statements which were properly admitted into evidence. In addition to their confessions there was, in every instance, competent corroborating evidence to sustain their convictions (see paragraph 6 supra). All of the other seven who were convicted, i.e., EHLERT, GEYERHOFER, KARNER, FERREL, SCHLOEDERHOFER, SCHIEDHAMMER, and MAYERHOFER, denied that they participated in the offense (see paragraph 7 supra). The Commission, by its verdict, found to the contrary, and it is only necessary to review the evidence against them (see paragraph 6 supra) to conclude that it was amply justified in electing to believe that evidence rather than the evidence presented by the defense.

Counsel for the accused GEYERHOFER has presented a petition for "consideration and reversal" of his conviction. In this petition it is argued that, since MAYERHOFER was found guilty, the Commission must have believed the evidence against him, and that that evidence, if believed, excludes the possibility of the guilt of GEYERHOFER. The evidence against Mayerhofer consisted of a statement by Geyerhofer that "Mayerhofer came with a shovel. I thought that he desired to hit with the shovel and I took the shovel from him." In addition, there was an admission by Mayerhofer that Geyerhofer took the shovel away from him and that he (MAYERHOFER) remarked: "You cursed fellows, I'll knock you down like dogs." Since the Commission must have believed this evidence to convict Mayerhofer, the defense argues, it must have believed that Geyerhofer was innocent. In so far as this argument tends to highlight an element of Geyerhofer's defense, it is not without merit. However, it is not believed that the conclusion drawn, (i.e., of Geyerhofer's innocence) is one that necessarily follows. Conceding that the Commission believed that Geyerhofer took the shovel away from Mayerhofer it was not, for the reason alone, forced, by logic or otherwise, to believe that Geyerhofer took the shovel away for the purpose of protecting the Americans. As stated in paragraph 6 supra, four witnesses positively identified this accused as having participated in the assault. Having shown by its verdict that it did believe them it cannot be said that this testimony is

irreconcilable with the shovel incident, or that there is not sufficient competent evidence in the record to sustain the finding of guilty. It is believed, therefore, that this petition should be denied.

11. Sentence

According to the provisions of paragraph 131, War Crimes Memorandum Number 3, this Headquarters, 29 April 1946, the Commission could adjudge any type of punishment referred to in paragraph 45 War Department Field Manual 27-5, subject: "Military Government and Civil Affairs", dated 22 December 1943, up to and including the death penalty. This is in accordance with the general principle of international law that all war crimes are subject to the death penalty, although a lesser penalty may be imposed (see paragraph 357, FM 27-10, Rules of Land Warfare, page 39).

The Commission was, therefore, entitled to adjudge such sentences as it deemed appropriate based on the facts adduced at the trial. With one exception, discussed below, the sentences given seem to be fair and commensurate with the degree of guilt of each accused. Only three of those convicted were sentenced to more than two years confinement at hard labor (see paragraph 4 supra). Two of the three, SCHUEH and SCHLOEGELHOFER, were shown to have been policemen (R 69, 75 and 229) of Amstetten, and the Commission undoubtedly felt that, as such, their responsibilities towards the victims were greater, and therefore, that their violation of those responsibilities should carry a greater penalty. No fault can be found with this reasoning.

The record does not seem to account, however, for the severity of the sentence imposed upon GNEBER, except for the fact that he was identified by more witnesses (seven) as having participated in the offense, than any of the other accused. The degree of his guilt does not appear to have been greater than those of the accused who were sentenced to two years. It is not believed that a mere cumulation of evidence to the same fact justifies the imposition of a more severe punishment than would be imposed when that fact is established by evidence which is only quantitatively less. It is accordingly recommended that the sentence of this accused be mitigated to two years confinement at hard labor.

In a letter, dated 22 January 1947, addressed to the Commanding General USFA, and signed by all of the members of the Commission, which has been appended to the record of trial, the reviewing authority was requested to take into consideration the length of time that each accused had spent in confinement prior to the trial. Since this request clearly infers that the court did not take such time into their own consideration of the sentences, and since there appears to be no sound reason why this time should not be taken into consideration, it is recommended that the request of the Commission be complied with, and that that part of each sentence which the accused has spent in confinement prior to trial be remitted. In this connection, a list of those accused who were found guilty, together with the length of time each has spent in confinement (R 536, 537) and the sentence imposed upon each, follows:

<u>ACCUSED</u>	<u>LENGTH OF TIME IN CONFINEMENT *</u>	<u>SENTENCE</u>
GOETZ	18 months	24 months
GROBER	20 months	4 years **
HUEBNER	18 months	24 months
PAULKOWSKI	15 months	24 months
PRESSL	20 months	24 months
SCHUEH	20 months	54 months
WEINERTH	18 months	18 months
ERHART	19 months	18 months
GEYERHOFER	20 months	24 months

PERBEL	19 months	18 months
SCHLOEGELHOFER	11 months	60 months
SCHMIDHAMMER	20 months	18 months
MAYERHOFER	19 months	12 months
BRUCKBOECK	19 months	24 months

* Up to 22 January 1947

** Recommended that it be mitigated to 2 years for reasons stated above.

It is not believed that, in addition to those suggested above, any valid reasons for clemency exist. All of those convicted have filed petition for such clemency are given except that the accused are in bad health, that their continued confinement will work a hardship on themselves and their families, and that they are of good character. Conceding the truth of these statements, it is not believed that they furnish a sound basis for any additional clemency.

12. Opinion

It is my opinion that:

- (a) The Military Commission was legally constituted.
- (b) The Military Commission had jurisdiction over the offense and the persons charged.
- (c) The record of trial is legally sufficient to support the finding of guilty and the sentences.
- (d) No errors injuriously effecting the substantial rights of the accused were committed during the trial.

13. Recommendation

It is accordingly recommended that:

- (a) The sentences of Franz GOETZ, Friedrich HUEBNER, Josef PAULCZYNSKI, Johann PRESSL, Josef SCHUEH, Friedrich WEINERTH, Ernst ERHART, Rudolf GEYERHOFER, Elisabeth PERBEL, Franz SCHLOEGELHOFER, Josefa SCHMIDHAMMER, Rudolf MAYERHOFER, and Franz BRUCKBOECK, be approved, but that part of each sentence which the accused has spent in confinement prior to trial be remitted.
- (b) The sentence of Stefanie KARNER be approved.
- (c) The sentence of Norbert GRUBER be approved but that the period of confinement be reduced to two years at hard labor, and that, owing to the length of time said accused has been in confinement, twenty (20) months of the confinement imposed, as reduced, be remitted.

14. Action

No confirmation of the sentences is required where the Commanding General, United States Forces in Austria, is the appointing authority, as is the case here (paragraph 3 h War Crimes Memorandum Number 3, this Headquarters, 23 April 1946). Accordingly, actions designed to carry the foregoing recommendations into effect, should they meet with your approval, are submitted herewith.

/s/ Robert W. Mapes
/t/ ROBERT W. MAPES
Review Attorney
War Crimes Branch

I have read the record of trial in this case and concur in the above review.

/s/ C. R. Bard
/t/ C. R. BARD
Colonel JAGD
Judge Advocate