

DEPUTY JUDGE ADVOCATE'S OFFICE  
7708 WAR CRIMES GROUP  
EUROPEAN COMMAND

April 1947

UNITED STATES )

vs. )

Case No. 12-1247

Gustav STORK, Gustav DEPPE,  
Franz DURSCHKE and Heinrich  
JURGENS, all German nationals. )

REVIEW AND RECOMMENDATIONS

1. TRIAL DATA:

Tried at Dachau, Germany  
Date: 24-29 January 1947  
General Military Government Court

<u>ACCUSED</u>	<u>DATA</u>	<u>SENTENCE</u>	<u>RECOMMENDATION</u>
Gustav STORK	Age 47 Married, son 13, daughter 17 years Sergeant (Weister) Rural police	Death	Approval
Gustav DEPPE	Age 53 Daughter Conducts grocery store Corporal, District Rural police during war	Death	Approval
Franz DURSCHKE	Age 45 Chimney sweeper Married, 3 children, 9, 11, 18 Rural policeman during war	Death	Approval

Heinrich JURGENS The Court, on motion of the Prosecution deleted the name of Heinrich JURGENS from the charge sheet by reason of the fact that he was not before the Court or in custody.

		<u>Pleas</u>	<u>Findings</u>
CHARGE: Violation of Laws of War	STORK	NG	G
	DEPPE	NG	G
	DURSCHKE	NG	G
PARTICULARS: In that Gustav STORK, Gustav DEPPE, and Franz DURSCHKE, German nationals, did, at or near HOHENHAUSEN, Germany, on or about 5 August 1944; willfully, deliberately and wrongfully encourage, aid, abet and partici- pate in the killing of five un- known members of the United	STORK	NG	G
	DEPPE	NG	G
	DURSCHKE	NG	G

States Army, who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

2. RECOMMENDATIONS: That the findings and sentences be approved.
3. STATEMENT OF FACTS: On August 5, 1944, a plane crashed at ESCHTERHAGEN, approximately 10 kilometers from and under jurisdiction of HOHENHAUSEN, between 1 and 2 in the afternoon and lay on the ground burning and exploding (R 9). Nine flyers parachuted from the plane (Ex P 2), of whom one was killed by reason of failure of parachute to open, one was injured and taken to the hospital, another escaped, was captured the next day in neighboring village and turned over to Wehrmacht (Ex P 2), another turned over to the Detmold Air Force Command and five brought to the house of a farmer BOKEMAIER, used as a collecting point in ESCHTERHAGEN. The accused STORK and DEPPE first took two of the flyers out of the house toward the woods and each shot one of the flyers to death (Ex P 1, R 88). They immediately returned to the house and then accused STORK and DEPPE, joined by accused DURSCHKE, took the three remaining flyers out and each of the accused shot one of the flyers to death (Ex P 3, 170).

4. EVIDENCE:

For the Prosecution: Witness BOKEMAIER, a farmer, after identifying each of the accused (R 8), testified that he went to the place where the plane was burning and upon returning to his house found accused STORK, who stated to him that he wanted to use the telephone and take a furnished room in the house to be used as a collecting point for the flyers (R 10). At first, two flyers were brought to the house, around 3 p.m., and upon interrogation they stated they were Americans. Later, about 3:30 p.m., three additional flyers came in and witness was asked by accused STORK if there was a way to get out of the house without the public seeing them (R 11). Thereafter, STORK and DEPPE left the house with two of the flyers at approximately 4:30 or 5 p.m., led them to a pasture and each

shot one of the flyers (Ex P 1, R 88). They returned about 10 minutes later and STORK told witness that the flyers were shot while trying to escape (R 13). Accused STORK then went into the house, talked to DURSCHKE, and walked out with the other three flyers and accused DEPPE at approximately 5 o'clock (R 13, 14) over the meadows up a hill and each of accused shot a flyer (R 170). All three of them returned to the house without the flyers in about 10 to 15 minutes (R 13, 14). Accused STORK told witness to take the dead flyers to the cemetery that evening at about 11 o'clock. STORK told the witness to call a neighboring farmer, HILDEBRANDT, to help with the dead bodies (R 14). Accused STORK had stated to the witness that the flyers were trying to escape and they shot them and this was after he returned the last time without the flyers (R 15). This was corroborated by witness HILDEBRANDT, who later heard accused STORK tell a German air corps officer, "They were shot trying to escape" (R 43). At about 8 or 9 o'clock that night, STORK returned with an officer and four or five soldiers in a car from a German air corps unit stationed at DETMOLD. The soldiers removed the clothing from the bodies, took their property and left (R 17). Each of the dead flyers had a shot in the back of the head (R 18, 19), corroborated by witness HILDEBRANDT (R 37, 38, 45, 46). About 11 o'clock accused STORK and DEPPE came back to help load the five naked dead bodies on a wagon and took them to the cemetery in HOHENHAUSEN (R 19, 20). All the accused admitted shooting the flyers (STORK, Ex P 1, R 88, 121; DEPPE, Ex P 2, R 80, 147; DURSCHKE, Ex P 3, R 170).

For the Defense: The accused STORK testified that the contents of his statement (Ex P 1) admitting the shooting were true, but that at the time the orders in effect as to the treatment of parachuted enemy flyers were received from the Secret State Police in BIEDERFELD and handed down by the police in BRAVE, one of the instructions was to the effect that police were forbidden to protect enemy flyers

who were being attacked by the populace (R 88, 89). That extracts from the order of Chief of Security Police KALTENBRUNNER admitted in the evidence before the court (D Ex 1, R 74) were part of the instructions received; that a short time before the occurrence of the incident in HOHENHAUSEN, a Goebbels Propaganda Week was being given over the radio, in which the air war being waged by the enemy was designated as violating international law and that at the beginning of August 1944, the press was full of attacks against the manner in which the air war was being waged against residential quarters in German cities, trains and the German civilian population, and this was also designated as violating international law (R 89). That at the crashed plane on the day in question when SS Captain of Rural Police JURGENS ascertained some flyers had been captured, JURGENS gave him an order that no more prisoners were to be taken, that all prisoners were to be bumped off, and to pass the order along to accused DEPPE and that in case the county councilors demanded a report, resistance and attempts to escape could be given as reasons for the shooting (Ex P 1). That at the interrogation, because two of the prisoners had behaved in a rather challenging manner, JURGENS turned to him and DEPPE and ordered them to shoot the two prisoners. The accused STORK thereupon fell into a state of severe mental depression, nervous agitation and became quite stupified and could not think clearly any longer. In this connection, he testified he had suffered a nervous breakdown in January of 1943, when he was under medical treatment in the hospital of LEMGO until the end of March 1943; that he had no alternative as an officer of the Rural Police but to carry out the official order of a superior at any cost and was not supposed to question it particularly since the Rural Police were subject to SS jurisdiction and military law; that under the service regulations of 2 August 1939, regarding the use of weapons, the superior is solely responsible. That 2 or 3 weeks before the shooting of the flyers, Minister of State and Kreisleiter WEDDERVILLE,

at a meeting in the Hall of the Kroos Hotel in HOHENHAUSEN before a conference of party functionaries and gendarmerie ordered to attend, told all of the police that the air war being waged by the enemy violated international law and that "Should enemy flyers land in LIPPE after having been shot down, they should be bumped off and there need be no fear that the state prosecutor would make a case against any person or would prosecute any person acting in this manner". (R 90, Ex P 1). That Captain JURGENS was present at the conference and that he never discussed the legality or lawfulness of such instructions with him because he assumed that the State Minister WEDDERWILLE had given this talk by order of the government or Reichsfuehrer of SS, HIMMLER (R 91). That he obeyed and carried out the order of the district leader of the Rural Police since he was overcome by the frightened feeling of being punished were he not to carry out the order (Ex P 1).

The accused DEPPE testifying in his own behalf, stated he lived in SCHONEMORLIPPE where he took care of his grocery store, but that as a Rural Policeman he had to live in HOHENHAUSEN, 18 kilometers away. That when they were given instructions he had no right to question their legality (R 131) and were always told at their meetings that in case of not carrying out orders they had to expect the most severe penalty (R 132); that when STORK told him at BOKEMAIER's house that the flyers had to be shot, he told STORK to please leave him out of it, that he could not do it and STORK replied that it was impossible, the order of JURGENS had to be carried out (R 135). That when he went back to the house after shooting the first two flyers he went over to farmer BOKEMAIER and offered him his pistol and said "You do it, I can't do it", but BOKEMAIER refused. Then he went with the accused STORK and DURSCHKE and shot the other three flyers. That he did not know anything about JURGENS telling STORK that if a report were made, they were to write that the flyers had been shot while trying to escape (R 136). That he never

questioned JURGENS' order and that he considered it lawful; that when he returned from the shooting of the three flyers STORK told him that he had given the order to bring the sixth flyer to ESCHTERHAGEN and that he told STORK, "Let him live, he is a German American", and STORK said, "All right, you take him back to HOHENHAUSEN" (R 137). That evening he took the sixth flyer's personal data; that STORK told him about 8 o'clock that night the flyers would have to be buried about 11 or 12 o'clock and that he should meet DURSCHKE at BOKEMAIER's house at about 11, which he did. After the flyers were buried they said a quiet prayer at the grave (R 138).

The accused DURSCHKE testified he lived in HOHENHAUSEN, was a member of the Rural Guard since 1943 (R 166), that he had to obey orders given by any policeman regardless of his rank because they were used as auxiliary police; that STORK instructed them in this respect and also called their attention to the fact that they were under the jurisdiction of the SS (R 167). That at the time of the plane crash he had gotten the order from STORK to come along to take the flyers to HOHENHAUSEN; that he was told by STORK the flyers were at BOKEMAIER's farm (R 168); that when he went there he met Captain JURGENS going out and reported he was there to assist in escorting the flyers; that JURGENS told him "They won't be taken away, they will be killed". Accused further testified that he refused, but was told that he was under the jurisdiction of the SS courts and of the rural guard and would have to carry out the order (R 169). He was not armed but JURGENS took the pistol of a Sergeant RIDDER, present at the moment, and handed it over to the accused, after which he went into BOKEMAIER's house and reported to STORK, accused STORK told him that he (STORK) and accused DEPPE would take the first two flyers, which they did, while accused remained with the other three flyers as a guard and when STORK returned accused went with him and DEPPE when the other three flyers were taken out of the house. When they arrived up on the hill through the meadows and

accused STORK gave the order, accused DURSCHKE drew his pistol and shot the flyer he was accompanying at the same time the other two flyers were shot (R 170). Accused DURSCHKE confirmed accused DEPPE's story as to the burial and a few days later was called to the office of DEPPE and signed a report that was all made out regarding the incident (R 171).

5. JURISDICTION: That the Court was legally constituted and had jurisdiction of the persons of the accused and of the offense.

6. COMMENTS: The testimony and confessions before the court establishes the guilt of the accused beyond doubt as to the killings. The only question presented by the defense is that of superior orders and the fear of punishment on the part of the accused if the orders to shoot the prisoners given by SS Captain JURGENS were not obeyed. Assuming, for the sake of argument, that the accused killed the victim in compliance with superior orders, it becomes necessary to pass directly upon the validity of such a defense. The most recent statement concerning what effect, if any, is to be accorded to superior orders, is found in Change 1, para 345. 1, WD FM 27-10, dated 15 November 1944. Said paragraph provides:

"Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished".

Paragraph 148, MCM, 1928, provides in part

"...The General rule is that the acts of a subordinate officer or soldier, done in good faith, and without malice in compliance with his supposed duty, or of superior orders, are justifiable, unless such acts are manifestly beyond the scope of his authority, and such that a man of ordinary sense and understanding would know to be illegal (Wharton on Homicide)".

The Chief Counsel for the United States, in the prosecution of Axis war crimes, Mr. Justice Jackson, has considered the question of the defense of superior orders. He has stated:

"With the doctrine of immunity of a head of state usually is coupled another that orders from an official superior

protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility. There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. But the case may be greatly altered where one has discretion because of rank or the latitude of his orders. And of course, the defense of superior orders cannot apply in the case of voluntary participation in a criminal or conspiratorial organization, such as the Gestapo or S.S. An accused should be allowed to show the facts about superior orders. The Tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all". (Report to the President of the United States, 7 June 1945).

From the above and as applied to the instant case, it appears that something further must be considered and this would seem to resolve itself into the question, Is the defense of superior orders presented in good faith? Were the acts here being considered manifestly beyond the scope of the authority of the accused and such that a man of ordinary sense and understanding would know to be illegal? (Paragraph 148, MCM, 1928, supra). Here we do not have the case of soldiers acting under the stress of imminent present danger where instant action is imperative if security or safety for themselves is to be maintained and there can be little or no time for deliberation, or where there is a legal order that malefactors or persons violating accepted codes of conduct be executed, or where at least an execution order may be mistakenly thought to be legal and is actually promulgated and carried out before the eyes of all men or in such manner that no attempt is made to hide it from the populace. The accused STORK testified that from 1920 until 1939 he had never received any orders from superiors which carried with them the necessity for making false reports about the manner in which the orders were carried out, and even then he stated specifically that he never received any such orders between 1939 and the time the alleged order was received from Captain JURGENS which occurred on 5 August 1944 (R 95, 96). The accused here were police officers,



not in the Army, who had obtained the custody of surrendered unarmed prisoners of war. None of the accused were in extreme or urgent need or pressing danger and STORK must have known the order was illegal from the circumstances connected with its issuance, when Captain JURGENS specifically told him that if a report were to be made later they were to state that the flyers had been shot resisting and attempting to escape (Ex P 1). The attempt to surround the execution with secrecy and hide these acts from the eyes of men (R 11) would ordinarily have instantly raised the imputation of illegality in the mind of any normal person, particularly one long experienced in police work such as the accused STORK, and should have aroused the highest degree of suspicion as to the legality of the order. The best that can be said for the accused in this respect is that the accused STORK testified that the police received so many contradictory instructions and orders that the subordinate officers had no clear picture of the regulations at all (R 96). However, this would all the more have seemed to put them under the imperative duty of clearing up the situation arising from the issuance of the JURGENS' order to execute the flyers and the supposed reluctance of the accused to carry it into execution. His testimony regarding his great unwillingness, nervous agitation, etc. (Ex P 1) apparently did not impel him to question this order even once.

Furthermore, Captain JURGENS who allegedly gave the order was not present and there was more than ample time for reflection and action on the part of all of the accused before carrying the alleged order into execution; and, if this were so before the first shooting, how much more manifest must it have been after the first two flyers were shot. If, as the accused DEPPE testified (R 136), he wanted in good faith to avoid killing the flyers, it would appear that instead of attempting to induce BOYEMAIER to kill the flyers, he might have refused to have anything to do with it and thus to have mitigated to some extent, if such a thing were possible, the guilty conscience

...coming from the five flyers. The testimony of both accused STORK and DEPPE (R 100, 107, 142, 159) shows clearly that no severe punishment would have been meted out to them had they simply turned the flyers over to the Detmold Air Corps Detachment who took the sixth flyer at HOHENHAUSEN, and in fact STORK's Testimony indicates that perhaps no punishment at all would have resulted (supra). What better proof of the truth of this fact could be found than to compare the fate of these flyers with that of the flyer turned over to the Detmold Air Corps Detachment and taken to HOHENHAUSEN, as a result of which he survived. All of the accused knew he was there and JURGEN's order to the effect that no more prisoners were to be taken did not make any exception. The attempt on the part of STORK to explain this away by saying he thought it only referred to the five flyers present (R 108) appears very weak and futile in the light of the surrounding circumstances. All of this applies with equal force to the acts of accused DURCHKE in carrying out the killing. He was present and was aware of the nature of the acts involved in the execution of the order, and after the first two flyers were shot, so far as the testimony indicates, he made no real objection but participated willingly by actually killing the third flyer. Thus, it would seem that the defense of superior orders as set forth in this case is actually not made in good faith, but by reason of it being the only possible means at hand to save them from the consequences of their acts, is thus seized upon as availing a possible means of escape. All of this was no doubt considered by the court. Actually when all of the circumstances of the case are considered, there would appear to be no defense to this cold-blooded, deliberately planned, wanton taking of five lives (R 143), and the court cannot be said to have erred in determining that whatever alleged compulsion may have been placed upon the accused was not such as to warrant a different sentence than the one imposed.

7. CLEMENCY: There is a petition from Elizabeth STORK, wife of

accused STORK, dated 20 February 1947, asking mitigation merely by reason of the accused STORK having been a member of the police force for 20 years, obeying orders and carrying out instructions. No basis for any clemency is presented in this petition.

8. CONCLUSIONS:

- (a) It is recommended that the sentences be approved.
- (b) Legal Forms No. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

/s/ Jacob Silberman  
JACOB SILBERMAN  
Attorney  
Post Trial Section

Having examined the record of trial, I concur.

/s/ C. E. Straight  
C. E. STRAIGHT, Colonel, JAGD  
Deputy Judge Advocate  
for War Crimes