

HEADQUARTERS THIRD ARMY
OFFICE OF THE STAFF JUDGE ADVOCATE
WAR CRIMES BRANCH
APO 403 US ARMY

9 May 1946

THE UNITED STATES

VS

KURT HARTUNG, a
German national

Case No: 12-1776

REVIEW AND RECOMMENDATIONS OF STAFF JUDGE ADVOCATE

1. TRIAL:

The accused was tried at Ludwigsburg, Germany on 12 April 1946 by an Intermediate Military Government Court appointed by Par. 4, Special Orders No. 86, Headquarters Third United States Army, (Western Military District), APO 403, dated 4 April 1946.

2. CHARGES, PLEAS, FINDINGS AND SENTENCE:

Charges and Specifications	Plea	Finding
Charge: Violation of the Laws of War	NG	NG (On motion for finding or Not Guilty)

Particulars:

In that Kurt Hartung, a German national, did, at or near Bucha, Germany, on or about 7 July 1944, wrongfully encourage, aid, abet and participate in committing assaults upon five unknown members of the United States Army who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

Sentence:

The Court at the conclusion of the Prosecution's case granted the motion of the Defense for a finding of Not Guilty, and acquitted the accused of the particular and the charge. (R-13)

3. DATA AS TO ACCUSED:

KURT HARTUNG is a male, German citizen, civilian, 57 years of age, and a resident of Kahl Winkel. Accused is a grocerman by occupation and at the time of the commission of the incident was member of the Security Police.

4. EVIDENCE:

For the Prosecution: The Prosecution called no witnesses. The prosecution introduced three exhibits which consisted of written statements from two Polish displaced persons, sworn to before an American Military Government officer and a statement made by accused out of Court. The substance of the Polish statements is as follows: They were standing approximately eight meters from the scene when Hartung beat an unarmed soldier by hitting him with his fist and rifle which caused the American soldier to fall to the ground. After he had fallen to the ground, the accused kicked him after he had regained his feet and again struck him with his rifle. Accused took the uniform of the American just referred to and also the uniforms of four other American soldiers. After the beating, accused and one Otto Uniwis removed the shoes from the victims and forced them to walk barefooted to Bad Nibra (R-8, 7) The substance of the statement of accused is as follows: During the summer of 1944 a parachutist landed in a tree and was wounded at Bucha, Kreis Eckartsberga. "My brother**ran to a nearby village to get a horse cart" to remove the pilot. As we were removing the pilot in the horse cart an automobile containing some Gestapo members approached and reprimanded us for the kind treatment we were giving him. A second parachutist who had in the meantime been picked up by the Landwacht "noticed my excitement, took a very threatening attitude against me, and spit in my face**since I was angry now I took my rifle and pushed it several times against his body." (R-11) The balance of the incoherent statement refers to the kind treatment that accused had given American pilots on other occasions and also the disposition of the personal effects of the two pilots above-mentioned.

5. JURISDICTION AND PROCEEDINGS:

a. The Intermediate Military Government Court which heard this case was properly constituted and had jurisdiction over the subject matter and of the accused. (Par. 7, Field Manual 27-10, Rules of Land Warfare; letter, Headquarters, United States Forces, European Theater, dated July 16, 1945, AG 000.5-2; subject: "Trial of War Crimes and Related Cases.") It is well recognized that the offense in the instant case, an assault by a German civilian of a member of the United States Armed Forces who was then a surrendered prisoner of war, is a violation of the laws of war and properly triable by a Military Commission having custody of the accused.

b. In letter Deputy Theater, Judge Advocate Office, War Crimes Branch, United States Forces, European Theater, undated, (Outstamp 7 March 1946), AG 000.0, subject: "Case of United States vs. Kurt Hartung, trial by an Intermediate Military Government Court was directed. The charge and particular against this accused was preferred by H. F. Broese, Colonel, CMP and referred to trial by C. R. Bard, Colonel, JAGD. The charge sheet fails to disclose service of charge prior to trial but service was made on accused. (R-2) Six members of the Court panel were present throughout the trial. The accused was represented by an American officer, an attorney, who announced he was ready for trial. Challenge for cause was permitted. Accused was advised of his rights to German defense counsel but waived it.

6. DISCUSSION:

a. The total proof adduced by the Prosecution consisted of three exhibits, to wit: The sworn statements of two Polish witnesses and statement of accused. Each of these statements was vague and general and they were taken on or about 25 May 1945 by an American officer assigned to a Military Government detachment. An examination of these statements indicates that each witness was requested to write out on a

sheet of paper what he knew regarding the alleged incident and was then sworn by the Military Government officer. The statements of the Polish witnesses were vague and general. Letter, Deputy Theater Judge Advocate Office, War Crimes Branch, United States Forces, European Theater, dated 6 October 1945 AG OOO.5, subject: "Admissibility of Reports and Investigation for Trial of suspected War Criminals" provides: "In many instances it will not be possible to obtain the presence at the trial of the suspected war criminal or witnesses who had previously given pertinent testimony to the officer investigating the alleged war crime. It is the position of this office that such testimony whether in narrative statement or question and answer form may be introduced in evidence without further authentication if it was procured by an officer officially appointed to investigate war crimes." (underscoring added) None of the statements introduced into evidence was procured by an officer officially appointed to investigate war crimes. The minimum requirements for the introduction of written statements were not complied with in the instant case. It is believed that the Court erred in the admission of the statements of these two Polish witnesses. The reviewer appreciates that the test for the admissibility of evidence before a Military Commission is whether the evidence has "probative value" to a reasonable man. Such a test of admissibility is admittedly vague and subjective. The Court in the instant case apparently believed that these statements had some probative value and therefore admitted them, however, it is the belief of the reviewer that even under this liberal rule of admissibility such a statement can have no value to reasonable men considering the circumstances, its source, and an appreciation of the feeling of Polish displaced persons at the time these statements were taken. However, since the Court did admit them, how much weight, if any, should be given to them was, of course, a matter for the determination of the Commission. After admitting the statements they determined they should be given no weight at all. It is not believed that the Court acted arbitrarily or abused its discretion in its finding on the motion in this regard.

b. In reference to the statement or confession of accused, there is considerable doubt whether the incident referred to therein was the one and same incident for which he was being tried. Apparently the Court believed the confession contained no evidence bearing on the offense for which he was being tried and it is the belief of the reviewer that the Court did not act arbitrarily or abuse its discretion in its determination. Some interesting questions of law present themselves by the introduction of this particular confession, but in view of the Court's ruling on the motion they are considered academic and will not be discussed in this review.

/s/ M. C. Setzekorn
M. C. SETZEKORN
Capt. Inf.
Chief of Trial Section

I CONCUR.

/s/ Charles E. Cheever
CHARLES E. CHEEVER
Colonel, JAGD
Staff Judge Advocate