

HEADQUARTERS
THIRD UNITED STATES ARMY
Office of the Staff Judge Advocate

AIO 403
11 March 1946

SUBJECT: Review of Proceedings of Intermediate Military Court in the case of the United States vs Rudolf Auburger and Johann Hemauer. Case No: 12-1905

TO : Commanding General, Third United States Army, AIO 403, US Army.

1. THE TRIAL:

The accused Rudolf Auburger and Johann Hemauer were tried before an Intermediate Military Court at Dachau, Germany, on 5 February 1946, on the following Charges and Particulars:

CHARGE: Violation of the Laws of War.

PARTICULARS: In that Rudolf Auburger and Johann Hemauer, German nationals, did, at or near Moetting, Germany, on or about 9 June 1944, wrongfully encourage, aid, abet and participate in an assault upon an unknown member of the United States Army Air Force, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich, by hitting him in the face and head with their fists and with a rifle.

2. FINDINGS AND SENTENCE:

The accused were found guilty of the Charge and of the Particulars with the exception of the words "and with a rifle". Each of the accused was sentenced to prison for a term of one year, the sentence of the accused Hemauer to commence as of 9 June 1945 and the sentence of the accused Auburger to commence as of 26 June 1945.

3. EVIDENCE FOR THE PROSECUTION:

On 9 June 1944 an American flier parachuted to safety near Moetting, Germany (R 5, 15, 27, 32, 41). It was about 10:00 o'clock A. M. (R 5). In an open field the accused Hemauer and Auburger found the flier who surrendered. Hemauer struck the flier, on the neck with his hand or fist repeatedly (R 6, 7, 10, 14, 25, 35). Hemauer shook and rushed the flier (R 6, 16). The flier, during this period of mistreatment, had his hands raised (R 6, 16, 32). As he was being led toward the village, Hemauer pushed him repeatedly with the handle of his pitchfork (R 7, 11, 42). In the meantime a crowd had gathered. Hemauer said, "That aviator, that beast, beat his to death, that bum" (R 7). Hemauer also added, "all they can do is to be shot" (R 16, 35). Auburger had lifted his rifle toward the flier as if he intended to strike him (R 7, 14, 34). He then aimed the flier with his rifle (R 34, 43). Auburger struck the flier in the face with his open hand and fist and beat the flier on the chest (R 16, 18, 35, 38). Auburger remarked "These murderers of women and children" (R 16, 36). Auburger also rushed the flier (R 21).

The flier had kept his hands over his head during the assaults and at one time had fallen to the ground (R 22, 43). Even after he had fallen to the ground Auburger and Hammer continued to hit him (R 43).

A pre-trial affidavit executed by the accused Hammer in his own handwriting before William G. Rockwell, Captain, Infantry, Investigator-Examiner, CFI 6624, was admitted into evidence (Pros Ex 2). It reads in pertinent part as follows:

"Around the 9th of June 1944 an American flier landed by parachute in Moetzing. At this time I was the leader of the Landwacht (Country Watch). I saw the flier the first time in a height of 200 meters in the air, as I was picking up fodder on the clover field. I ran towards the flier as he landed. Rudi Auburger, a soldier, also ran there. I was about 300 meters away from the place where the flier had landed. Auburger was about 300 meters away in his house, from where the flier had landed. I was the first one by the flier and one minute later Auburger came there.

"When I saw the flier he was kneeling in the field. I gave him a sign and he got up and raised his hands above his head. I took him by both sleeves and shook them, to see if he had any weapons underneath the sleeves. I did this because it was written in the German newspapers; the American fliers lift their hands high and then when someone gets there, they drop their hands and shoot out of their sleeves with pistols.

"He had no weapon on him, even though I searched his whole body.

"I told the flier he should give me his pistol but he only shook his shoulders and I did not know what he meant by it. To find out if he had any explosives I grabbed him by the collar and shook him. In the other hand I held the hay fork. Auburger got there at the time I had the flier by the sleeves and was shaking him. Auburger covered me with the rifle when I searched the flier. Auburger hit the flier twice in the face with his hand.

"The flier was captured about 500 meters away from the first house of the Moetzing. I searched the flier on the same place where he landed and at the same time Auburger hit him twice with the hand in the face. Then I motioned to the flier that if he would try to escape I would beat him with the fork. I did not hit the flier with the hand or with the fork.

"I saw that Auburger hit the flier twice in the face, with the other hand he held his rifle. Auburger beat him for about one minute. I told Josef Niklas to pick up the parachute and take it to the Police Station in Suanching. No one else saw Auburger hit the flier. Auburger walked on the right side and I walked on the left side of the flier, on the road towards Moetzing. Auburger carried the rifle on the right side in a horizontal position. We met the first people from Moetzing, about 70 meters away from the place where the flier had landed. I met Josef Niklas about 20 meters away from where the flier had landed and he was all alone. I left the shoes and the parachute on the place of the landing. About 50 meters from the landing place I sent Auburger away because Auburger's rifle made the flier nervous.

"After Auburger had left Niklas walked 10 meters behind us with the parachute.

"The people of Koetzling came, when we were 70 meters away from the place of the landing. We took him along to the village and there we turned him over to the policeman Koshl who took him to Suenching. I did not go to Suenching but I went home." (Fros Ex 2)

The court, on motion of the prosecution, took judicial notice of the fact that a state of war existed between Germany and the United States on 9 June 1944 and that at that time Koetzling, Germany, was in German hands (R 58).

4. EVIDENCE FOR THE DEFENSE:

Kaspar Drechsler was one of the villagers who came upon the American flier after he had landed in the field near Koetzling, Germany on 9 June 1944. He saw the accused Auburger and Hemauner each hit the flier five or six times (R 54). However, the blows were not hard and the flier did not fall to the ground (R 54). He did not see either Auburger or Hemauner strike the flier with a rifle or a pitchfork (R 54).

The accused Hemauner elected to testify and made the following unsworn statement:

Hemauner admitted that his pre-trial affidavit was true and correct (Fros Ex 2, R 60). On 9 June 1944 he had seen the flier land and with Auburger had apprehended him (R 60). Hemauner admitted that he shook the flier for the purpose of discovering whether or not the flier had any weapons on him (R 60). He admitted that perhaps he had pushed the flier (R 61) and that he had a hay-fork with him, but denied that he used the fork on the flier (R 61). As the flier was being led towards the village, Hemauner grabbed the flier by the collar, who at the time had his hands raised (R 62). The crowd was yelling as the flier was being taken to the town and Hemauner was excited (R 63). Hemauner also saw Auburger slap the flier twice (R 64). Both Hemauner and Auburger cursed the flier (R 64, 65).

The accused Auburger elected to testify and made the following unsworn statement:

He was a soldier and a member of the air corps, and on 9 June 1944 was home on furlough (R 69). He saw the flier descending and immediately went to apprehend him (R 70). After he had called "Stop", the flier raised his hands (R 70). Hemauner, who also was present at that time, checked the flier for weapons (R 71). At that time Auburger saw Hemauner shake the flier by the collar (R 71). Other people from the village who were armed with various implements approached (R 71). The crowd was shouting (R 71). As the flier was being led towards the village, Auburger pushed him along twice (R 72). He shouted at the flier (R 72). Upon realizing that he had left his weapon behind, Auburger retraced his steps in order to obtain his weapon and then went home (R 72). He denied that he hit the flier with his rifle (R 72).

5. EVIDENCE FOR THE COURT:

Upon preliminary examination the accused Auburger stated he was 33 years of age, married, a German, and a civilian. Upon preliminary examination the accused Hemauner testified that he was 56 years of age, a German, and also a civilian. Both stated that they resided in Koetzling, Germany.

6. PROCEEDINGS:

In letter, Deputy Theater Judge Advocate's Office, War Crimes Branch, United States Forces, European Theater, subject: "Case of

United States vs Rudolf Luburger and Johann Hemauer", dated 6 December 1945, the case of the United States versus Rudolf Luburger and Johann Hemauer was transmitted for reference for trial by Intermediate Military Court. The appointment of the Intermediate Military Court and the proceedings thereof were in compliance with the provisions of letter, Headquarters United States Forces, European Theater, Subject: "Trial of War Crimes and Related Cases", 16 July 1945, and pertinent Military Government directives and instructions. The accused was represented by a First Lieutenant, who is an attorney. A fair and impartial trial was had. An individual interpreter, who was sworn, was provided for the accused. Challenges for cause were permitted.

7. JURISDICTION:

The Particulars allege a violation of the Laws and Usages of War, which was committed before 9 May 1945, by enemy nationals against a member of the United States Armed Forces while an actual state of war existed. Accordingly the court, which was specially appointed to hear the case, had jurisdiction of the person and subject matter, in accordance with letter, Headquarters United States Forces, European Theater, Subject: "Trial of War Crimes and Related Cases" 16 July 1945.

8. SUFFICIENCY:

There is ample evidence in the record to sustain the findings of guilty. Not only does the evidence presented by the prosecution establish the guilt of the accused, but the testimony of the accused themselves admits their participation in an assault upon a member of the United States Army Air Forces. There are no errors or irregularities affecting the fairness or impartiality of the trial or which are prejudicial to the substantial rights of the accused in proceedings such as these. Two-thirds of the members of the court concurred in the findings and sentence.

9. SENTENCE:

An Intermediate Military Court may impose any lawful sentence except death or imprisonment in excess of ten years, or a fine in excess of \$10,000.00 (Par 3 b, Article III, Ordinance No. 2, Military Government Courts). Under article of War 98 the maximum punishment which may be imposed for an assault and battery is six months confinement at hard labor. Under Article of War 93 the maximum penalty which may be imposed for an assault with intent to do bodily harm is one year of confinement at hard labor. The court in the instant case, although it sentenced each of the accused to a term of one year, stated that the terms were to commence in June of 1945, at which time the accused had been apprehended and confined. Thus, in effect, the accused were sentenced to approximately four months confinement from the date the sentence was adjudged. The action of the court does not appear to be unwarranted and the sentences imposed appear to be appropriate.

10. RECOMMENDATIONS:

I recommend that the findings and sentence be approved.

11. ACTION:

A form of action designed to carry the foregoing recommendation into effect, should it meet with your approval, is submitted herewith.

/s/ Charles F. Cheever
/c/ CHARLES F. CHEEVER,
Colonel, U. S. A.,
Staff Judge Advocate.