

DEPUTY JUDGE ADVOCATE'S OFFICE  
7708 WAR CRIMES GROUP  
EUROPEAN COMMAND  
APO 407

19 January 1948

UNITED STATES )  
                  ) )  
                  ) v.                ) )  
                  ) )  
Kurt PETERSDORF, et al. )

Case No. 11-519

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 3-27 October 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

CHARGE 1: Violation of the Laws and Usages of War.

Particulars:

In that the accused Kurt PETERSDORF, Johann FUERBOECK, Alois HAAK, Viktor PHILIPP and Friedrich MUTSCHLER, German nationals, between the 9th day of December 1941 and the 8th day of May 1945, at sundry places within the then German Reich, individually and collectively, as principals, accessories, leaders, organizers, instigators and accomplices, did, engage in, formulate and participate in a common design to commit, or cause to be committed, violations of the Laws and Usages of War, and pursuant thereto did wrongfully encourage, aid, abet, order and participate in, or took a consenting part in the subjection of members of the Armed Forces of the United States of America, who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, to cruelties and mistreatment, including killings, beatings, tortures, abuses and indignities.

CHARGE 2: Violation of the Laws and Usages of War.

Particulars:

In that the accused Kurt PETERSDORF, Johann FUERBOECK, Alois HAAK, Viktor PHILIPP and Friedrich MUTSCHLER, German nationals, did, on or about 21 July 1944, at or near MUTTERSHOLTZ, Alsace, France, wrongfully encourage, aid, abet, order and participate in the killing of a member of the United States Army, who was then and there a surrendered, unarmed prisoner of war in the custody of the then German Reich.

CHARGE 3: Violation of the Laws and Usages of War.

Particulars:

In that the accused Kurt PETERSDORF and Johann FUERBOECK, German nationals, did, on or about 15 August 1944, at or near WOLFISHEIM, Germany, wrongfully encourage, aid, abet, order and participate in the killing of an unknown member of the United States Army, who was then and there a surrendered, unarmed prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: In June 1944 an American fighter plane landed near Ebersmunster, Alsace. The flyer, now believed to be Luther Reese,

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escaped into the woods nearby and was captured shortly thereafter and taken to Muttersholtz, Alsace. Accused HAAK issued orders to accused PHILIPP and MUTSCHLER to kill the flyer. Cullmann and accused PHILIPP and MUTSCHLER took the flyer to the woods near Muttersholtz where MUTSCHLER shot him to death. Previous to this incident accused HAAK had received orders from his superiors to the effect that emergency landed flyers were to be shot.

All accused charged in the second incident alleged in Charge III were acquitted.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Kurt PETERSDORF

This accused was acquitted as to all charges and particulars (R 902).

2. Johann FUERBOECK

This accused was acquitted as to all charges and particulars (R 902).

3. Alois HAAK

Nationality:	German
Age:	47
Civilian Status:	Gendarmerie Captain
Party Status:	Nazi party since 1937
Military Status:	None
Plea:	EG Charge I; NG Charge II
Findings:	G Charge I: of the particulars of the first charge: guilty, except that the word "or" be substituted for the word "and" appearing once in line 4, twice in line 6 and once in line 9; G Charge II
Sentence:	25 years, commencing 8 March 1946

Evidence for Prosecution: The accused stated in his extrajudicial sworn statement and testified that he was a captain in the gendarmerie and the district leader of the gendarmerie at Schlettstadt, Alsace (R 226, 651, 652, 653, 709; P-Ex 26A, D-Ex 13A). About May of 1944

gendarmerie meetings were held at Colmar and Strasbourg. The district leaders were informed by their superiors that enemy flyers were to be shot by the gendarmerie or turned over to the Kreisleitung. The accused was present at both of these meetings (R 225, 663-667; P-Ex 26A). The Kreisleiter in his district also informed the accused of this order (R 225, 668; P-Ex 26A). The accused and accused MUTSCHLER stated in their extrajudicial sworn statements and the latter testified that about June 1944 and subsequent to these meetings an American fighter plane landed near Ebersmuenster, Alsace (R 225, 226, 845, 846; P-Exs 27A, 28A). According to the accused he was notified of the landing and went to the scene but the flyer had "escaped" (R 225, 671, 672, 673; P-Ex 27A). Shortly thereafter the flyer was captured by others in the woods nearby and taken to the gendarmerie station in Muttersholtz (R 224, 225, 743, 848; P-Exs 25A, 27A). The accused was informed of this by Cullmann at the scene of the landing. Accused PHILIPP and MUTSCHLER stated in their extrajudicial sworn statements and testified that the accused then ordered them to kill the flyer (R 224, 226, 794, 848, 849, 861; P-Exs 25A, 28A, 39 p. 3). Accused PHILIPP and MUTSCHLER were subordinate to the accused in the gendarmerie (R 188, 828, 845). Cullmann and accused PHILIPP and MUTSCHLER testified and the two accused stated in their extrajudicial sworn statements that they, accompanied by a gendarme, took the flyer to the woods where he had been captured (R 199, 202, 224, 226, 796, 852; P-Exs 25A, 28A); that he was then shot to death by accused MUTSCHLER (R 205, 207, 208, 224, 226, 796, 853, 854, 861; P-Exs 25A, 28A, 39 pp. 4, 5). Accused PHILIPP testified and this accused and MUTSCHLER stated in their extrajudicial sworn statements that prior to this time the accused had notified his subordinates that flyers were to be shot and not turned over to the airport (R 225, 226, 709, 791, 807; P-Exs 27A, 28A; D-Ex 13A pp. 5, 6).

Evidence for Defense: The accused stated in his extrajudicial sworn statement and unsworn pre-trial statement that it was reported to him that the flyer had escaped into the woods near the place where his plane had landed and that articles were missing from the plane. He gave orders

to search for these articles (R 225, 709; P-Ex 27A, D-Ex 13A). This is substantiated by other evidence (R 226, 682, 849, 850; P-Ex 28A). The accused denied in his testimony that he gave any orders to shoot the flyer (R 225, 702; P-Ex 27A). He admitted therein passing on the order to shoot flyers but indicated at the time that this order should not be followed (R 668-69). He testified that he gave orders to accused MUTSCHLER to go to Muttersholtz and search the woods with Cullmann and the flyer for the missing articles and then turn the flyer over to the army (R 682). Evidence introduced by the prosecution showed that all orders issued by the accused were issued in obedience to orders received by him from his superiors (R 225, 663-667, 668; P-Ex 26A).

Sufficiency of Evidence: It was clearly established that the accused issued orders to and helped induce others to kill the flyer.

Although the defense relied upon a denial and did not affirmatively rely on superior orders as a defense, the issue was presented by the evidence offered by the prosecution. However, from the evidence the Court might well have concluded that the accused willingly participated; that his participation was not in the presence of any superior; that he did not act under any immediate compulsion; and that the evidence wholly failed to meet the burden of proof required by pertinent authorities discussed in Section V. post.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by defense counsel, Frank E. Morse, 5 November 1947.

Recommendations: That the findings and sentence be approved.

4. Viktor PHILIPP

Nationality:	German
Age:	62
Civilian Status:	Lieutenant in gendarmerie
Party Status:	Nazi party since 1933
Military Status:	None

Plea: NG Charge I; NG Charge II

Findings: G Charge I; of the particulars of the first charge, guilty, except that the word "or" be substituted for the word "and" appearing once in line 4, twice in line 8 and once in line 9; G Charge II

Sentence: 3 years, commencing 28 December 1946.

Evidence for Prosecution: The accused was a lieutenant in the gendarmerie and a section leader of the gendarmerie at Schlettstadt, Alsace. He was a subordinate of accused HAAK (R 224, 851, 793; P-Ex 25A). In June 1944 the accused was notified that a flyer had landed near Ebersmuenster and had been captured and taken to Muttersholtz to the gendarmerie office (R 224, 793; P-Ex 25A). The accused went to Muttersholtz and was asked what to do with the flyer (R 224; P-Ex 25A). The accused and MUTSCHLER testified that accused HAAK told them to kill the flyer (R 224, 226, 794, 848, 849, 861, 812; P-Exs 25A, 28A, 39 p. 3). Accused MUTSCHLER and the accused returned to Muttersholtz where they picked up the flyer and Cullmann (R 224, 795; P-Ex 25A). They drove to the woods where the flyer had been captured (R 202, 224, 226, 795, 852; P-Exs 25A, 28A). The accused had told Cullmann that accused MUTSCHLER was going to kill the flyer (R 199). After arriving at the woods Cullmann and the flyer walked into the woods followed by MUTSCHLER (R 203, 224, 226; P-Exs 25A, 28A). The accused was some distance behind them (R 205, 853, 861; P-Ex 39). After proceeding about 90 meters into the woods accused MUTSCHLER shot and killed the flyer (R 204-207, 226, 853, 854, 861; P-Exs 28A, 39 pp. 4, 5). The flyer was later buried in the Muttersholtz cemetery (R 210, 226, 227, 228, 229; P-Exs 28A, 29A, 30A, 31A). The accused prior to this time had passed on the order to his subordinates that accused HAAK had given him in regard to the killing of enemy flyers (R 805, 806).

Evidence for Defense: The accused stated in Court that he had received orders from the Kreisleitung to turn flyers over to them to be shot (R 786); that prior to this incident he had kept five flyers from being turned over to them (R 785-789). He said that when accused HAAK

ordered this flyer to be killed that he refused to do it. The accused said he thought the flyer might escape, if they took him into the woods (R 794). In his extrajudicial sworn statement the accused stated that MUTSCHLER agreed to shoot the flyer (R 224; P-Ex 25A). The accused admitted going to the woods where the flyer was killed (R 224; P-Ex 25A). It is not clear that the accused was near MUTSCHLER at the exact time of the shooting (R 205, 224, 796, 853, 861; P-Exs 25A, 39).

Sufficiency of Evidence: The guilt of the accused is satisfactorily established. He admitted his participation in his extrajudicial sworn statement and in his testimony in Court. Although the accused did not affirmatively rely upon the defense of superior orders, the issue was presented by the evidence introduced by the prosecution. However, from the evidence the Court might well have concluded that the accused willingly participated; that the orders he had received were those of his commanding officer who was at a point distant from the scene of action; that he did not act under any immediate compulsion; that his desire to cooperate with and to please his superiors was greater than other considerations; and that the evidence in regard to superior orders wholly failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: No Petitions for Review were filed. A Petition for Clemency was filed by Therese Philipp, the wife of the accused, 9 December 1947.

Recommendations: That the findings and sentence be approved.

5. Friedrich MUTSCHLER

Nationality:	German
Age:	43
Civilian Status:	Gendarme
Party Status:	Nazi party since 1937
Military Status:	None

Findings:

G Charge I; of the particulars of the first charge: guilty, except that the word "or" be substituted for the word "and" appearing once in line 4, twice in line 6, and once in line 9.  
G Charge II.

Sentence:

Life imprisonment

Evidence for Prosecution: The accused was a member of the gendarmerie at Schlettstadt (R 844, 845). He was subordinate to accused HAAK (R 828). In June 1944 the accused was notified by accused HAAK that a flyer had landed near Ebersmuenster (R 226, 672, 709, 845, 846, 861; P-Exs 28A, 39, D-Ex 13A p. 4). The accused and accused HAAK drove to the scene (R 672, 847, 861; P-Ex 39). Shortly thereafter they were notified that the flyer was captured and had been taken to the gendarmerie station in Mittersholtz (R 677, 794, 848). Both this accused and accused PHILIPP stated in their extrajudicial sworn statements and testified that accused HAAK told them that the flyer had to be killed and ordered them to shoot him (R 224, 226, 794, 848-50, 861; P-Exs 25A, 28A, 39 p. 3). The accused and accused PHILIPP drove to Mittersholtz and picked up the flyer and Cullmann (R 224, 226, 850-852; P-Exs 25A, 28A). The accused and Cullmann both testified and the accused stated in his extrajudicial sworn statement that they took the flyer into the woods about 90 meters, where the accused shot and killed the flyer (R 204-207, 226, 853, 854, 861; P-Exs 28A, 39 pp. 3,4,5).

Evidence for Defense: The accused testified that he received a direct order from accused HAAK to kill the flyer (R 848, 849); that accused HAAK also instructed him and accused PHILIPP to take the flyer and look for a suitcase of the flyer's (R 850); that he tried to explain to the flyer what they were looking for (R 852); that while going through the woods the flyer jumped to one side; that he called to him to stop, which direction was not obeyed; and that he then shot the flyer (R 853). He thought the flyer was dead but Cullmann insisted that he was alive and told the accused to shoot him again. The accused protested but shot the flyer again (R 854). The accused further testified that he made a report stating that the flyer was shot while trying to escape (R 855). The accused's testimony parallels

his extrajudicial sworn statement (R 226; P-Ex 28A). In his extrajudicial sworn statement introduced by the prosecution, the accused stated that his superior, accused HAAK, ordered him to shoot the flyer, that he protested and that HAAK told him that such an order existed and that he would carry it out. He stated that HAAK was known as a reckless and brutal man, and that he thought that he was bound to carry out the order. He further stated that his acts were because of the orders of HAAK; that he did not act out of hate; and that it never occurred to him that he could refuse the order (R 226; P-Ex 28A, pp. 1, 2).

Sufficiency of Evidence: The guilt of this accused was satisfactorily established. He admitted his guilt in his extrajudicial sworn statement and in his testimony in Court. By his compliance with the illegal orders to kill the unarmed and surrendered flyer he took part in the common plan and design to violate the laws of war. His guilt under both Charge I and Charge II is clear. In regard to the defense of superior orders, the Court might well have concluded from the evidence that the accused willingly killed the flyer; that though a superior was present, the orders relied upon were those of a superior at a distant point; that he did not act under any immediate compulsion; that his desire to cooperate with and to please his superiors was stronger than other considerations; and that he failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by defense counsel, Frank E. Morse, 5 November 1947.

Recommendations: That the findings and sentence be approved.

#### V. QUESTIONS OF LAW:

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

Motions: At the close of the prosecution's case, the defense made a motion for a finding of not guilty as to accused PHILIPP on all charges



with which he was charged for the reason that the prosecution had failed to prove his guilt beyond a reasonable doubt. This motion was denied. The evidence presented by the prosecution together with the inferences flowing therefrom was sufficient to prove a *prima facie* case. It is never error for a war crimes tribunal to overrule a motion for a findings of not guilty made at the close of the case for the prosecution, if it believes there is sufficient evidence to support the charge and that the accused should be required to answer it (Section 5-327.2, Title 5 "Legal and Penal Administration" of "Military Government Regulations", published by Office of Military Government for Germany (US), 27 March 1947, and Section 501, page 409, "Manual for Trial of War Crimes and Related Cases", 15 July 1948). A similar practice is followed in Courts Martials (Paragraph 71, d., "Manual for Courts-Martial, U.S. Army", 20 April 1943).

Superior Orders: There is evidence that each of the convicted accused had received orders from superiors to kill the flyer. Compliance with superior orders does not constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 812; Vol. II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 706; United States v. Thomas, opinion DLANC, December 1945; and United States v. Klein, et al., (Hadamar Murder Factory Case), opinion DLANC, February 1946; and French Republic v. Wagner, et al., Court of Appeals (France), July 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 How. 115, and "Manual for Courts-Martial, U.S. Army", 1928, paragraph 148).

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior in fact, directing that he commit the wrongful act, (b) that he did not know or, as a reasonably

prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; FM 27-10, War Department, U. S. Army, "Rules of Land Warfare", paragraph 345.1, Change No. 1, 15 November 1944; Oppenheim, "International Law", supra, and the Llandoverly Castle Case cited therein; "Manual for Courts-Martial", supra; "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of Our Enemies", found in footnote, page 53, "Military Occupation and the Rules of the Law", by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945, United States v. Thomas, supra; and United States v. Bock, et al., opinion DJAWC, December 1946.)

Proceedings When Less Than Five Court Members Present: Colonel Albert R.S. Barden was excused as a member of the Court by the appointing authority, leaving five members on the Court (R 70). Lieutenant Colonel James T. Ryan was temporarily excused from the Court for the afternoon session, 21 October 1947 and all of 22 October 1947, leaving a four man Court. The defense counsel for all of the accused and the prosecution agreed to continue with the trial (R 692). The record shows that Lieutenant Colonel Ryan read the record of the proceedings for the time he was absent (R 899). No objection was made by the defense to the four man Court.

Subparagraph 6d. of the applicable directive set forth in Section 120, "Manual for Trial of War Crimes and Related Cases", 15 July 1946, provides that General Military Government Courts specially appointed for the trial of war crimes cases will consist of not less than five members. Subparagraph 7a. of the same directive provides as follows:

"If after the trial has begun a new member is appointed or a member, on account of unavoidable absence during a trial misses part of the proceedings,

the president will cause such member to read the record of the proceedings had prior to his being appointed or during absence, as the case may be."

The Court consisted of the prescribed number of members. No applicable regulation prohibited the Court from continuing with the trial of the case during the temporary absence of one of the prescribed members. Inasmuch as the record affirmatively shows that the absent member read the record of the proceedings had during his absence, it does not appear that any injustice resulted to the accused.

Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused.

VI. CONCLUSIONS:

1. It is recommended that the findings and the sentences be approved.
2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

*Floyd M. Lundberg*  
FLOYD M. LUNDBERG  
Major JAGD  
Post Trial Branch

Having examined the record of trial, I concur, this 16th day of

February 1948.

*C. E. Straight*  
C. E. STRAIGHT  
Lieutenant Colonel, JAGD  
Deputy Judge Advocate  
for War Crimes