DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
WAR CRIMES BRANCH
UNITED STATES FORCES, EUROPEAN THEATER

16 January 1946

U N I T E D S T A T E S	)	
	)	
v	)	Case No. 12-793
	)	
Heinrich FLAUAUS	)	Review and Recommendations
and	)	
Nikolaus FACHINGER,	)	
German Civilians	)	

1. TRIAL: The accused were tried at a joint trial at Munich, Germany, on 3 August 1945, before a Military Commission appointed by paragraph 1, Special Orders No. 209, Headquarters, Third U.S. Army, 30 July 1945.

2. FINDINGS: The offense involved was: Pleas Findings

(As to both accused)

CHARGE: Violation of the Laws and Usages of War — NG G

Specification: In that Heinrich Flauaus, a German National, and Nikolaus Fachinger, a German National, and then Chief of Police for the town of Gross-Gerau, Kreis Gross-Gerau, Germany, each did on 29 August 1944, at said Gross-Gerau, wrongfully and unlawfully kill two airmen, members of the Allied Armed Forces, names, ranks, and serial numbers unknown, by beating them with an iron bar. — NG G

3. SENTENCE:

The Commission, by at least a two-thirds vote of the members present at the time the vote was taken, convicted both accused and sentenced them to be hanged by the neck until dead. Said sentences were approved by the Reviewing Authority on 31 October 1945. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for final action (Letter, Headquarters, United States Forces, European Theater, AG 250.4 JAG-AGO, 25 August 1945, subject: "Military Commissions").

4. DATA AS TO ACCUSED:

(a) Heinrich Flauaus. The accused Flauaus is a German civilian, resident in the town of Gross-Gerau, Germany. He is 24 years of age. No additional personal data is contained in the record of trial.

(b) Nikolaus Fachinger. The accused Fachinger, a resident of Russelsheim, Germany, was Chief of the Security Police in the town of Gross-Gerau, Germany, a position he had held for about one month prior to the commission of the offense. He had been a policeman for 21 years. He is 40 years of age, married, and has eight children.

5. RECOMMENDATION: That the action of the Commission and of the Reviewing Authority, as to each accused, be confirmed.

6. EVIDENCE:

(a) On the afternoon of 29 August 1944, two unknown, surrendered Allied airmen (R 9), presumably Americans (R 24), were taken in a car from Trebur, Germany, to the town of Gross-Gerau, Germany, by unknown German civilians (R 6, 9, 10). They were there attacked by a large crowd (R 9, 11, 32) and beaten with fists, sticks, and other objects (Pros. Ex. D. See also record of trial in the case against Heinrich Daubert, et al, tried by Military Commission at Munich, Germany, 15 August 1945, and resulting in sentence of confinement against four accused). Accused Fachinger, Chief of the local Security Police, arrived while the beatings were taking place (R 6, 12). Upon being told by a subordinate that the two prisoners should be taken into custody by the police, Fachinger said: "Why haven't they been beaten to death?" (R 6). He then went to where the prisoners were being beaten by the crowd (R 9, 12, 16), took one of them by the arm and led him into the court

yard of the city hall (R 18, 32; Pros. Ex. B). The second prisoner either followed or was forcibly led along behind (R 32, 39; Pros. Ex. B). En route to the city hall accused Flauaus, a civilian, struck the prisoner who was being led by Fachinger four or five times with his hand on the face, head, and upper part of the body (R 18, 19, 20, 39; Pros. Ex. D). Fachinger permitted Flauaus and an unknown German soldier (R 10, 17; Pros. Ex. D), both of whom were strangers to him, to enter the court yard with the prisoners (R 10, 32, 38; Pros. Ex. D). Immediately after entrance into the court yard Flauaus again beat one of the prisoners, one of whom was bleeding profusely (R 20). The unknown German soldier had asked to be admitted to the court yard in order that he might participate in the beating of the prisoners (R 10). Fachinger barred all other persons from the court yard, including his own policemen (R 10, 12, 16, 20; Pros. Ex. D), and ordered all the doors and windows opening on the yard to be closed (Pros. Ex. D). He forbade entrance by a civilian woman, saying: "You stay outside. This is nothing for you. We can only use strong men". He ordered a fireman to leave the court yard and to enter an adjoining garage and there locked him in for about twenty minutes (R 16). He ordered one policeman out of the court yard and into a "Guard-room" in the adjoining city hall (R 12). According to Flauaus, Fachinger then ordered Flauaus and the unknown German soldier to beat the prisoners to death (Pros. Ex. D), and found an iron bar which he gave to Flauaus to use as a weapon (Pros. Ex. B, D). According to Flauaus, the unknown German soldier found a similar weapon for himself (Pros. Ex. D). Fachinger then entered the city hall and at the point of a gun ordered person who were watching from windows overlooking the court yard to quit their

offices (R 18, 20, 32). During his absence (R 33) Flauaus and the German soldier beat the victims to death with the iron bars, Flauaus striking one of them five or six blows on the neck and the soldier beating both of them (Pros. Ex. B, D; R 13). Some time later, apparently prior to returning to the court yard and at the appropriate time that the victims were being killed (R 13), Fachinger ordered a policeman to summon a doctor (R 13, 33). During the time he was in the city hall and apparently just prior to summoning a doctor, Fachinger was heard to say, with apparent reference to the sirmon, "Now that is finished". The record is not clear as to the sequence of events upon the return of Fachinger to the court yard. Evidently Flauaus and the German soldier were still there (R 38; Pros. Ex. D). When the doctor arrived, Fachinger led him to the bodies of the victims and I told him that he should certify as to the deaths (R 22). Fachinger himself, testified that he did not know that the victims had been beaten or killed until he was so informed by the doctor (R 33, 38). One victim had a deep "lashing" wound on the back of the head; the other had blood and deep wounds on his face. Both were dead (R 22). Fachinger was visibly excited and said, in substance, to the doctor, "I only did my duty", or "I acted according to orders", or "I did what is right" (R 22, 33). Although the doctor was required to make a report of the deaths, Fachinger told him that he need not make a written statement (R 22). Fachinger then sprayed the bodies with water from a hose (R 33; Pros. Ex. D). After participating in the murders, the unknown German soldier, in order to conceal his identity as a soldier, changed into a pair of trousers borrowed from a member of the fire department, and departed in a car (Pros. Ex. D). Flauaus returned to the office of the N.S.K.K. (Pros. Ex. D). Although

Fachinger testified that he asked for information on the scene as to the names of those who had beaten the victims to death (R 33), he did not question or detain either Flauaus or the German soldier (R 35, Pros. Ex. D). And although Fachinger testified that he searched the bodies for identification marks (R 33) and wrote the names in a report which he later submitted to the Gendarmerie Kreisleiter and also in a personal note book (R 35, 36), it was stipulated at the trial that the note book, which was available at the trial, did not contain such information (R 37). According to Flauaus, the following day Fachinger called Flauaus into the police station, asked for his name, and told him that he would arrest anyone who said that he (Flauaus) had beaten somebody to death (Pros. Ex. D).

(b) Part of the prosecution's evidence consisted of the affidavit of one Johannes I. Neumann, written by his own hand on 14 April 1945, and subscribed and sworn to before an investigating officer of the United States Army (Pros. Ex. A). In the affidavit, which is very brief, Neumann stated that he saw the accused Fachinger fetch two iron bars, and give them to unknown persons, who then killed the two allied soldiers. The affidavit does not say where the affiant was at the time he witnessed these actions, or what part, if any, he took therein. No other witness remembers seeing Neumann at or near the scene of the homicide. No personal data as to Neumann is contained in the record of trial, except that he lived in Gross-Gerau, was a book printer, and was 44 years of age (Pros. Ex. A). He committed suicide two or three weeks after the occupation of Gross-Gerau by Allied forces (R 24).

(c) The accused Fachinger testified that he had taken the prisoners into the court yard to protect them from the

mob (R 32); that he chased his own policemen away because he had no confidence in them (R 35, 40) and was afraid they might beat the prisoners (R 32, 40); that he did not lock the fireman in the garage, but only chased him from the court yard (R 32, 41). He testified that he picked up a piece of iron with which to bar the door in the back of the yard, but discovered that the door opened to the outside and could not be bolted (R 32). He did not remember what he did with the iron bar, or whether he gave it to Flauaus (R 34, 41), but said that it was "possible" that he did so (R 35). He admitted chasing the people from the windows overlooking the court yard (R 32), but offered no reasons for so doing. He denied saying, "Why haven't they been beaten to death" (R 41), or telling Flauaus and the German soldier to beat the airmen (R 34). Fachinger explained his failure to arrest Flauaus by saying that since Flauaus lived in Gross-Gerau it was a matter for the criminal police (R 35). He also testified that when he told the doctor that he had done his duty he meant that he had done everything he could to save the fliers (R 36). Fachinger was not questioned about his failure to apprehend the unknown German soldier. The accused Flauaus did not testify at the trial. His pre-trial confession, which implicated the accused Fachinger, was admitted in evidence against both accused.

(d) Further detailed evidence will not be set forth here, but the recapitulation contained in the review of the Staff Judge Advocate, Third U.S. Army, appended hereto, is adopted in its entirety.

7. JURISDICTION:

It is beyond question that the offense - the murder by German civilians of surrendered and unarmed enemy soldiers - was a violation of the laws of war properly triable by a

military commission having custody of the accused. A general discussion of the jurisdiction of military commissions, with appropriate citations to authorities, is contained in prior reviews of confirmation cases written by this Branch and need not be repeated. No additional jurisdictional question is involved in the instant case.

8. DISCUSSION:

(a) As to Flaunus.

The evidence established conclusively that the accused Flaunus, a German civilian, unlawfully killed a captured Allied airman by beating him with an iron bar. He was seen by different witnesses beating one or the other of the prisoners, both outside and inside the court yard. He admittedly, according to his written confession, beat one of the victims to death "with five or six blows on the neck". He did not testify at the trial and his confession stands uncontradicted by him. He offered no defense at the trial, other than the suggestion contained in his confession that he was acting under superior orders. Certainly, under the facts in this case, the defense of superior orders should not be accepted as legal justification or in mitigation of the offense. The order to kill the victims was so palpably illegal that Flaunus should have refused to obey, and having obeyed, cannot escape liability for a murder committed in pursuance thereto. The guilt of the accused Flaunus is so clearly established that an extended discussion of the sufficiency of the evidence as to him is considered unnecessary.

(b) As to Fachinger.

Considered in its entirety, the record leaves no doubt that the proof as to the accused Fachinger was such as to exclude any fair and rational hypothesis except that of

guilt. The opinion of the Staff Judge Advocate, Third U.S. Army, adopted herewith, accurately summarizes the evidence against Fachinger. The comments therein upon the evidence as to Fachinger's guilt and the conclusions drawn therefrom are herewith expressly adopted as those of the writer. The following additional comments are pertinent:

(1) The direct testimony against Fachinger - the sworn confession of Flauaus and the sworn affidavit of Neumann - tend to establish that Fachinger ordered the killings. Flauaus stated that Fachinger handed him an iron bar and told him to beat the prisoners to death. Neumann swore that Fachinger handed Flauaus and an unknown person iron bars immediately prior to the murders. Such unequivocal testimony is entitled to considerable weight when coupled with other facts and circumstances tending to prove the guilt of Fachinger. The fact that Fachinger was a co-accused and may possible have been motivated by a desire to shift part of the blame to Fachinger is, of course, a circumstance going to the weight to be given this statement, but one which does not necessarily destroy all its probative value. With background information adduced as to Neumann's identity, and the statement itself gives no information as to where Neumann was when he observed the murders, but the statement has probative value and is entitled to be considered in conjunction with all the other facts and circumstances. It is suggested, in this connection, that the very fact that Flauaus and the unknown German soldier, both strangers to the accused Fachinger, had the opportunity to, and did beat to death, two prisoners who were in the immediate custody of Fachinger, the chief of police, tends to corroborate the statements of Flauaus and Neumann. It is highly improbable that Flauaus and the soldier would do so

unless Fachinger affirmatively ordered, arranged for, or tacitly authorized the killings.

(2) In addition to the direct testimony that Fachinger ordered the commission of the murders, there was compelling circumstential evidence tending to corroborate the direct testimony and indicating that <u>at least</u> Fachinger tacitly authorized the killings. His actions prior to the homicides all tend to confirm this. Fachinger permitted entrance into the court yard of only two persons, one of whom he had previously seen beating one of the prisoners (R 39), and the other of whom asked to be admitted for the express purpose of beating them (R 10). He chased others from the court yard and from the windows overlooking the scene. He excluded his own policemen. He may have been attempting thus to protect the victims, but it is difficult to understand why he did not protect them with members of his own force instead of strangers who had already beaten or who wanted to beat them, and why he considered it necessary for their protection to prevent anyone in the building from seeing what occurred in the yard. It is submitted that it is plausible to conclude that Fachinger preferred that strangers perform the unlawful acts, and that as few persons as possible witness the performance. Fachinger notably did not testify that he affirmatively ordered Flaunus and the soldier to protect the prisoners. Fachinger was a policeman with 21 years of experience. If he had intended to protect the victims from further molestation he would reasonably have caused them to be locked in a cell or room where they could not be reached, or he would have specifically delegated members of his own department, or other responsible persons, to guard them. He did neither. On the contrary, he locked a fireman in a garage adjoining the court yard, a garage in which the prisoners would probably have been safe; he ordered

a policeman to leave the court yard and go to a guard room in the city hall, a guard room in which the prisoners could have been safely locked; and then left the prisoners alone in the hands of two strangers whom he knew had previously beaten or offered to beat them. Less effective protective measure can scarcely be conceived. Fachinger's testimony that it was "possible" that he gave the iron bar to Flauaus is tantamount to an admission that he did. His whole testimony, in fact, about his reason for having possession of the iron bar is feeble and unconvincing: "Then I went to the iron door in the back and I looked out to the Steinstrasse to see if any one was coming from there. I wanted to close the door but couldn't. Then I went to the place, a storage place there, and got a piece of iron. I wanted to bar the door with it. I couldn't, however, because the door opens to the outside. I was holding that piece of iron in my hand and went to the door again to see if any one was coming and ran back into the yard..." (R 32). It appears from this testimony that Fachinger first opened the door - or, if it was already open, tried to close it - without noticing that it opened to the outside and before getting the iron bar and returning with it to the door. Fachinger's explanation of his possession of the iron bar is weak indeed when contrasted with the sworn affidavit of Flauaus that Fachinger hunted for the bar and gave it to him with instructions to kill the prisoners, and the sworn affidavit of Neumann that he saw Fachinger give iron bars to both Flauaus and the German soldier. All the actions of Fachinger, in fact, prior to the murders, portray a man who was planning and surreptitiously aiding in the commission of illegal acts which, because of his official position, he could not himself or publicly approve.

(3) The actions of Fachinger subsequent to the murders

are even more corroborative of the direct evidence as to his guilty participation. When he returned to the court yard, Flauaus and the German soldier were still there. The victims were dead from deep and bloody head and face wounds. And yet Fachinger testified that he did not notice that they were dead or badly beaten until so informed by the doctor. If Fachinger's testimony is to be believed, he thereby exhibited either an amazing lack of interest in the welfare of the prisoners he was purportedly protecting, or an intentional disregard of their condition. The doctor's testimony that Fachinger led him to the bodies and told him that he should certify as to the death of the two prisoners indicates, on the other hand, that Fachinger did know that the victims had been beaten to death, and that his testimony on the point is false. In either case, his actions were not those of a man sincerely trying to protect the captured airmen. Fachinger, furthermore, witnessed the German soldier change his trousers in an effort to hide his identity as a member of the German army and, presumably, saw him leave, without obtaining his name or making any effort to detain him. Nor did he question or detain Flauaus, who, the record shows, left the scene subsequently to the time that the doctor informed Fachinger that the victims were dead (R 33; Pros. Ex. D). Those are not the actions of an honest and experienced police official intent upon performing his duty.

(4) The utterances of Fachinger, as well, all tend to corroborate the direct testimony that he ordered the commission of the murders. His question to his subordinate, "Why haven't they been beaten to death", and his statement in forbidding entrance of a woman to the court yard, "This is nothing for you. We can only use strong men", are indicative of an already formed or forming intent to kill the airmen. His

statement to a policeman in the city hall at about the time that the victims were being killed, "Now that is finished," may be reasonably construed to mean that he had completed preparations for the murders. In view of the fact that he had left the prisoners in the court yard with strangers who evinced every desire and intent to harm them, it certainly did not mean that he had secured the safety of the prisoners. In fact, the policeman to whom the remark was made assumed that Fachinger meant that he had placed the prisoners in a cell - which would have been the only sensible procedure if he had intended to secure their safety. His words to Flaunus on the following day (if the confession of Flaunus is to be believed) that he would arrest any person who accused Flaunus of beating anyone to death, are particularly damaging, as tending to prove that Fachinger, at the very least, was an accessory after the fact to the murders. There is, in fact, no evidence, other than Fachinger's own testimony, contained in the record of trial as to any utterances - or acts - by Fachinger, either at the time or subsequently, indicating that he attempted to protect the victims. True, he caused them to be taken from the mob and into the court yard, but his motives in doing so, in view of his remarks above, are at least questionable. Perhaps he believed that, as chief of police, he was required to make a public demonstration of his zealousness in enforcing the law, while privately intending unlawfully to kill the prisoners. Perhaps - and this is more plausible but also speculative - his motives, due to the excitement of the moment, were mixed and confused. He may very well have had no clear intent in taking the victims to the court yard, and may not have decided to kill them until he found the men and the weapons were available.

(c) Attached to the record of trial is a "Recommenda-

tion for Clemency", signed by a member of the Commission and by the defense counsel, recommending that the conviction as to Fachinger be disapproved because, in their opinion, there was, first, insufficient evidence adduced to sustain the conviction against Fachinger and, second, the confession of Flaucus and the statement of Neumann were inadmissible as not having probative value to a reasonable man. The "Recommendation for Clemency" was considered by the Reviewing Authority and the legal questions therein adequately discussed in the review of the Army Judge Advocate. The following additional comments are pertinent:

(1) The evidence in this case is not to be tested by the requirements for admission which are applicable to courts-martial and Anglo-American domestic courts. By the order appointing the Commission any testimony which, in the opinion of the Commission, has probative value to a reasonable man, is admissible. Hearsay testimony is thus admissible if it has probative value. Such a test of admissibility - admittedly vague and subjective - conforms more nearly to the continental (including German) than to the Anglo-American procedure. The fact that the testimony is hearsay affects its probative weight but not its admissibility. There can, of course, be no legal definition of "probative value". Any evidence which reasonable men, in the light of all the circumstances and considering its source and relevancy, would reasonably consider and weigh in the conduct of their affairs may be said to have probative value. The evidence in question - the confession of Flaucus and the statement of Neumann - certainly met this very vague test, and its consideration by the Commission was proper and in accord with the general principle that exclusionary rules in the trial of war criminals should be few. How much weight should be given it was, of course, a matter for the Commission.

(2) The real basis for the "Petition for Clemency" was the contention that the guilt of the accused Fachinger was not established beyond a reasonable doubt, i.e., that although the confession of Flaucus and the statement of Neumann may technically have been admissible in evidence, yet there were of so little probative value, that considered in conjunction with all the other proof, they do not sufficiently establish his guilt. In the opinion of the writer, both the confession of Flaucus and the statement of Neumann, are entitled to considerable credence. The confession was written in the handwriting of Flaucus on 20 July 1945, sworn to before an officer of the United States Army,

and admitted in evidence against Flaunus without objection on his part. Flaunus does not therein minimize his own part in the atrocities. He could not have reasonably believed that by falsely asserting that Fachinger gave him the weapon and ordered him to kill the prisoners that he was thereby lessening the degree of his own guilt or the severity of his punishment. Fachinger was not the superior of Flaunus, and the latter was under no compulsion to obey any order from him. In passing, it is noted that the accused Flaunus elected not to testify at the trial and the commission did not require him to do so, as they could have done. Presumably, both the Commission and the accused Flaunus were satisfied with the accuracy and completeness of the confession. The statement of Neumann is equally credible testimony. It was written in his own handwriting on 14 April 1945, and sworn to before an officer of the United States Army. Nothing is disclosed in the record of trial as to why Neumann committed suicide, from what point of vantage he witnessed the atrocities, or what, if anything, he had to do with them. However, the testimony contained in the statement is not contradicted by any evidence on behalf of the accused Fachinger, and is corroborated in general by the confession of Flaunus and the circumstances above related. Such direct evidence from Flaunus and Neumann, coupled with all the other circumstances indicating active participation on the part of Fachinger, form a chain of circumstances pointing toward the guilt of Fachinger, and negativing every reasonable hypothesis, except that of his guilt.

(d) As a corrollary to the argument contained in the "Petition for Clemency" that there was not sufficient evidence of the guilt of Fachinger to justify a conviction, it is also there contended that the weight of the evidence was not sufficient to justify a death sentence because new evidence "might be uncovered in the not too distant future which would absolutely establish the innocence of Fachinger of the offense charged", and that therefore the sentence should be commuted. If the accused was not proved guilty beyond any reasonable doubt the conviction, of course, should be disapproved. If he was proved guilty beyond any reasonable doubt, the sentence should be confirmed, unless it is to be commuted for reasons having nothing to do with his guilt or innocence. The suggestion that a sentence should be commuted to a penitentiary sentence instead of disapproved, because of the

insufficiency of the evidence and the ultimate possibility of proving the innocence of the accused by newly discovered evidence, is both novel and specious. There is, moreover, nothing in the record of trial indicating that additional evidence is likely to be discovered. Nor does the "Petition for Clemency" suggest what the newly discovered evidence might be. The German soldier who participated in the murders has not been apprehended so far as is known, and the possibility of his capture at this late date would appear to be remote. It is concluded, therefore, that the contention is without merit.

(e) The accused were each charged in one specification with the unlawful killing of two members of the Allied armed forces. The evidence established that the accused Flauaus physically participated in the slaying of only one, and that the accused Fachinger ordered the killing of both, but did not physically participate therein. The common design on the part of the accused to perpetrate the murders, however, was adequately established. Legally, therefore, both accused are principals and, in contemplation of law, the acts of one are the acts of the other. There was, therefore, no variance between the proof and the allegations in the specification. Each accused was properly charged with, and convicted of, the commission of both murders.

(f) Both accused were represented by the same regularly appointed defense counsel and assistant defense counsel. The record establishes that they affirmatively indicated their desire to be so represented. They did not have civilian counsel of their own choosing. Having in mind that Flauaus implicated Fachinger in the perpetration of the murders and that Fachinger denied any participation, there would appear to be such a conflict of interests between the two accused that

a single defense counsel might be hampered and embarrassed in properly defending both accused in a joint trial. This is particularly true where, as here, there is serious question as to the sufficiency of the evidence against one of the accused. A careful examination of the record, however, does not disclose any action by counsel injuriously affecting the substantial rights of either accused. It is possible that the decision of counsel that Flaunus should not testify deprived Fachinger of evidence favorable to him. It is equally possible that the decision benefited Fachinger by excluding evidence detrimental to him. The Commission itself could, if it had so desired, have required Flaunus to testify. The defense in all other respects was competently and thoroughly conducted, and there is no reason to assume that counsel exercised poor judgment in this one instance. It is not the perogative of the reviewer to substitute his judgment for that of the Commission or the defense counsel in matters of trial tactics. His function is to pass upon the sufficiency of the evidence and the fairness of the trial. Here he is completly unjustified in presuming, first, that both the commission and the defense counsel erred in not causing Flaunus to testify because additional testimony favorable to Fachinger might be thus adduced, and that Fachinger was necessarily prejudiced thereby. To so reason, is to pile one presumption upon another. Counsel for the accused, in the "Petition for Clemency" does not assert that he was hampered or embarrassed in defending both accused, or that prejudice to either accused resulted. It is concluded that the substantial rights of the accused were not prejudiced by the failure to provide separate defense counsel.

(5) The proceedings in this case satisfied the require-

ments of a full and fair trial, and no error or omission on the part of the Commission resulted in injustice to the accused. The accused were represented by competent military counsel; a two-thirds vote of the members present was required for both conviction and sentence; competent interpreters were used, and all evidence considered by the Commission met the test of admissibility, i.e., that it should have probative value to a reasonable man. The record of trial could have been made more specific as to certain details (for instance, the length of time Fachinger was away from the scene; at what time, with reference to the murders, he summoned a doctor; personal data as to Neumann, and the facts surrounding the taking of Neumann's statement), but these deficiencies did not result in less than a full and fair trial for both accused. For the reasons stated, the writer is of the opinion that the record is legally sufficient to support the findings of guilty as to both accused, and to warrant confirmation of the sentences.

9. CLEMENCY:

It is believed that no valid reasons for the exercise of clemency are disclosed in the record of trial. The killings amounted to murder, for which the death penalty is lawful upon conviction. No extenuating circumstances are disclosed at the trial on behalf of either accused. They acted jointly in the performance of a common intent to kill the victims. They exhibited neither mercy nor remorse, but only a complete disregard for human life and civilized conduct.

10. CONCLUSION:

It is accordingly believed that the sentence of the Commission as to each accused be confirmed. Forms of action to accomplish this result are attached hereto.

JAMES D. MURPHY
Captain, JAGD

HEADQUARTERS
UNITED STATES FORCES EUROPEAN THEATER

Office of the Theater Judge Advocate

11 February 1946

UNITED STATES	)	
	)	
	)	RECOMMENDATION
v	)	
	)	of
	)	
Heinrich Flauaus	)	
and	)	THE THEATER JUDGE ADVOCATE
Nikolaus Fachinger,	)	
German Nationals		

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I have examined the record of trial, and I concur in the review of the Deputy Theater Judge Advocate and in his recommendation that the sentence as to each of the accused be confirmed.

s/Fred C. Betts
FRED C. BETTS,
Brigadier General, U.S.A.,
Theater Judge Advocate.

I concur:

s/W. G. White
Deputy Chief of Staff.

I concur:

s/H. R. Bull
Chief of Staff.