

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

9 October 1947

UNITED STATES)

v.)

Hans STAUDINGER, et al.)

Case No. 12-1067

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 25 July - 3 August 1946, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws of War.

Particulars: In that Hans STAUDINGER, Maximilian HERMAN, and Josef HUBER, German civilians, and Lt. Walter KAISER, a member of the armed forces of the then German Reich, did, at or near ECHING, Germany, on or about 31 July 1944, wilfully, deliberately, and wrongfully encourage, aid, abet, and participate in the killing of three members of the United States Army who were then unarmed, surrendered prisoners of war in the custody of the then German Reich, by shooting them with guns.

III. SUMMARY OF EVIDENCE: Two crew members, tentatively identified as Second Lieutenants Robert T. Madison and Michael Rehulich of the United States Army Air Force, on about 31 July 1944 parachuted from a disabled bomber near Eching, Germany, and were taken in custody to a nearby German anti-aircraft position. Accused STAUDINGER, Assistant Kreisleiter of Kreis Freising, Germany, and accused HERMAN and HUBER, members of the SA, left Freising in a car with specific orders from the Kreisleiter to search out and kill any enemy flyers that could be found. These accused found the two flyers at the anti-aircraft position and accused STAUDINGER demanded that they be delivered to him. The demand was refused by the German sergeant in charge, but accused STAUDINGER telephoned to First Lieutenant KAISER, the commanding officer, and from him received permission to take the flyers,

immediately on accused STAUDINGER's order, accused HERMAN took each of the flyers separately behind a barrack and shot them to death as HUBER stood by.

Accused STAUDINGER, HERMAN and HUBER then drove to the scene of the plane crash and there met accused KAISER. He stated that he had another flyer at his command post. Later on the same day at the command post accused KAISER delivered the third flyer over to accused STAUDINGER. This flyer's name was apparently Smith and was evidently a sergeant from the same plane crew as the two flyers who had already been killed. Accused STAUDINGER had the flyer get into the car and with accused HERMAN and HUBER drove to the autobahn not far from Eching. There accused STAUDINGER stopped the car and ordered accused HUBER to shoot the flyer. They all got out of the car. Accused HERMAN led the flyer a short distance along the autobahn where accused HUBER shot the flyer, who fell and rolled down the side of the hill a few meters. Accused HERMAN and HUBER then dragged the body a few meters to a meadow where HUBER fired two or three more shots into the body.

That night the bodies of Madison and Rohulich were buried in a bomb crater beside the autobahn. They were afterward exhumed and removed to an American cemetery. The next day after he was killed the body of Sergeant Smith, having been stripped of clothing by unknown persons, was buried in a grave dug near the place where he had been shot.

Accused STAUDINGER, HERMAN and HUBER, who were convicted, relied entirely upon the defense of superior orders. The accused KAISER was acquitted.

IV. EVIDENCE AND RECOMMENDATIONS:

1. HANS STAUDINGER

Nationality:	German
Age:	44
Civilian Status:	Brewery machinery technician

Party Status:	Kreisamtsleiter
Military Status:	Wehrmacht Sergeant, discharged 1942
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: In his extrajudicial sworn testimony, the accused stated that in late July or the first part of August 1944, the Kreisleiter ordered him to take the two SA men, HERMAN and HUBER, and to find and shoot as many flyers as possible who had that day parachuted from disabled planes near Eching, Germany. After some inquiries, they located three flyers in the custody of a German anti-aircraft position near Eching, but the German sergeant in charge refused to turn the flyers over to them. The accused then telephoned to the unit commander who gave permission for him to take the flyers and shoot them. Accused HERMAN and HUBER then took the flyers and shot them. The accused also stated therein that he and accused HERMAN and HUBER then drove to the crashed planes; that a German lieutenant said there that he had another flyer at his command post; that he and accused HERMAN and HUBER took this flyer in the car to a point on a fill on the autobahn, where the accused stopped the car; that HERMAN, HUBER and the flyer got out and walked a short distance where the flyer was shot by one of the two; and that the three flyers who were killed were either English or American (R 24; P-Ex 1A, pp. 1, 2).

Bock, a German national, who was on police duty on 31 July 1944 in the vicinity of Eching, testified that on that day he received an order to search for a flyer along the autobahn; that he found a dead flyer about 50 meters off the autobahn; that the body had been stripped of clothing except underwear; that a bullet had entered the back of the neck and come out in the center of the chest; that he assisted in the burial of the body near the place where he had found it; and that he could not tell the nationality of the victim.

However, he identified a photograph introduced as Prosecution's P-Ex 6 as that of the flyer he found and buried on 31 July 1944 (R 28-31).

In his extrajudicial testimony, Friedel, former chief of police, stated:

"Kreis Staff Leader STAUDINGER of the Kreisleitung NSDAP called me by telephone 31 July 44 towards evening, and informed me that near the autobahn at FURHOLZEN in the bushes was a dead American, and by Eching near a barrack layed two (2) American fliers who were shot". (R 34; P-Ex 7)

Knoll testified that he saw a flyer land in Furholzen on 31 July 1944 (R 55). The flyer was in uniform and was either American or English (R 56). He further testified that a short time later that day he saw an automobile stop on the autobahn and two or three people got out; that the next day at that spot he saw a dead body which appeared to be that of the flyer he had seen the day before; that there was a wound in the back of the neck; and that two days later he saw a grave at the same spot (R 57, 58). Eigenhardt testified that on 31 July 1944 he was the sergeant in charge of a German anti-aircraft position near Eching, Germany; that he saw two men parachute from a plane; that they were taken prisoner by infantry soldiers and then turned over to him; that he took the flyers to his own position and reported their capture by telephone to his commanding officer, First Lieutenant FAISER. He further testified that soon afterwards a car came to his position and that the accused, whom he identified in Court, and two civilians were in the car; that the accused inquired as to whether flyers were there and upon receiving an affirmative answer, said, "We must get hold of these people. We shall take them away"; that he refused to surrender the flyers until he had been ordered by telephone to do so by his superior FAISER; and that he then turned the flyers over to the accused after being so ordered. The witness then testified that very soon after he had turned the flyers over to the accused he heard shooting outside; that he rushed out in time to see the two civilians who had come with the accused shoot the second flyer; and that on that evening the two bodies were taken away on a cart by Andreas Riemensperger (R 107-118).

Kromensperger, a defense witness, testified that he saw two flyers come down by parachute at Eching at about 1230 or 1300 hours on a day in July 1944; that the flyers were uninjured except that one had a scratch on his cheek (R 161-163, 170); that at about 1730 hours in the afternoon of the same day he saw the dead bodies of the same flyers at the nearby anti-aircraft position; and that after dark he, together with the mayor and a farmer, took the two bodies in a cart and buried them in a bomb crater near the autobahn (R 170, 174-178).

The two bodies were later exhumed from the bomb crater and re-buried. They were tentatively identified as the bodies of Second Lieutenants Robert T. Madison and Michael Rebulich of the United States Army (R 118, 146, 147, 148; P-Exs 17-27).

In his extrajudicial sworn testimony, accused HERMAN tells how he killed the two flyers at the anti-aircraft position upon the order of the accused (R 96; P-Ex 13A, pp. 1, 2); also how the third flyer was shot and killed by accused HUBER upon order of the accused (R 96; P-Ex 13A, pp. 2, 3). Accused HUBER in his extrajudicial sworn testimony tells virtually the same story (R 96; P-Ex 13A).

The accused stated in Court that Kreisleiter Villedchner did not have very wide authority, but simply took authority and did what he wanted to do with people (R 206, 207); and that referring to the Kreisleiter the accused stated:

"To that I have to say that he did not bother about laws at all. He repeatedly did things and committed offenses that were against the law". (R 211).

Regarding the shooting of the two flyers at the anti-aircraft position, the accused substantially admitted that he ordered the shooting, and referring to accused HERMAN, said, "I assume that I told him that he could have the fliers" (R 215). The accused also admitted picking up the third flyer, and that it was discussed that this flyer had to be shot too (R 126, 217).

Accused HERMAN stated in Court that there was never any talk of taking the flyer to Moosberg; that the accused said that he had to be

shot (R 296); and that the accused gave him the pistol with which he shot the first flyer (R 288, 331).

Reference is here made to the prosecution's evidence herein against the other two accused for further evidence regarding the participation of this accused in the killings alleged, and not repeated here for the sake of brevity.

Evidence for Defense: The accused stated in Court concerning the orders he received from Kreisleiter Villechner on 31 July 1944:

"He came to me and told me—that Huber and I were to go to Neufahrn and if we saw flyers we would have to shoot them. If we didn't shoot them we would be put against the wall".

Q. "Did you take that threat seriously?"

A. "After all that happened, yes, and I am convinced that he would have carried out the threat" (R 212).

The accused further stated that he told accused HUBER to shoot the third flyer, thinking that he would refuse, and that then the flyer could be taken to the Moosberg prisoner of war camp (R 219).

The accused also stated that on another occasion the Kreisleiter had ordered him to shoot a flyer, but that he evaded the order and that the Kreisleiter said to him,

"You didn't carry out my order. I will have to put you against the wall. If that happens again your last hour has come, you coward". (R 221)

The accused stated that after Kreisleiter Villechner was removed from office, the accused was acting as Kreisleiter and a plane crashed at Freising. He personally went to the crashed plane and had the flyers gathered up, and said, "No hair on the head of the flyers was touched". (R 221, 222).

Again referring to Villechner, the accused said,

"He threatened me that if I didn't carry out his order, what he had told me in case a flyer had come down on the route I was to cover, he would have me shot if I didn't carry out his order". (R 227)

The accused stated that after the killing of the third flyer, it was discussed between himself, accused BERMAN and HUBER that except for the threats made by Villechner such incidents would not happen (R 273).

Reference is here made to the defense evidence herein in favor of the other two accused for further evidence relating to the defense theory of this accused, and not repeated here for the sake of brevity.

Sufficiency of Evidence: The evidence that the three American flyers were killed as alleged upon orders relayed by the accused and as a direct result of his actions and encouragement is clear from the accused's own extrajudicial testimony and from his statements in the trial. Moreover, this evidence by the accused is sufficiently corroborated.

With regard to the evidence offered in support of superior orders, if orders were received, the orders did not require nor were the accused's acts performed in the presence of his superior, and the Court might well have concluded that the accused's desire to cooperate with and please his superiors was more important than other considerations; that the accused did not unwillingly participate; and that the accused did not act under immediate compulsion; and that the accused 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 have been filed.

Petitions for Clemency were filed by Dr. Ludwig Heisinger, Defense Attorney, undated, and by Luise Staudinger, sister of the accused, 30 September 1946, and by Fritz Staudinger and five other brothers and sisters of accused, 26 October 1946.

No other Petitions have been filed.

Recommendation: That the findings and sentence be approved.

2. MAXIMILIAN HERMAN (The surname actually spelled HERMANN, R 279, 280, 96; P-Ex 12)

Nationality:	German
Age:	48
Civilian Status:	Office employee
Party Status:	SA Sturmfuhrer

Military Status:	First Sergeant, discharged 1941
Plea:	MG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: In his extrajudicial sworn testimony, the accused tells the complete story of the killing of the two flyers at the anti-aircraft position who were shot by himself. He stated that accused STAUDINGER ordered him and accused HUBER to shoot the flyers by order of Kreisleiter Villedchner, and said,

"During the time I shot each of the two enemy fliers I don't know where Staudinger was----. I did not see any weapons on any of the two fliers I had shot, also that none of them tried to escape or attack. -----Staudinger did not threaten me----."

The accused also tells therein how the third flyer was picked up, driven to the autobahn, and how he led the flyer along the autobahn while accused HUBER shot him (R 96; P-Ex 12A, pp. 2, 3).

The accused stated in Court that he did not see the Kreisleiter at all on the day of the killings (R 282). He admitted that he shot the two flyers at the anti-aircraft position (R 289, 290), and also told how he led the third flyer along the autobahn and of the shooting by HUBER at STAUDINGER's direction (R 298); the accused also said that his extrajudicial sworn testimony was true (R 325).

Accused HUBER stated in Court that he heard the first shot and saw the accused appear with a pistol in his hand, and then saw the accused shoot the second flyer at the anti-aircraft position (R 348).

For corroborating evidence see the prosecution's evidence herein against the other two accused, which is not repeated here for the sake of brevity.

Evidence for Defense: The accused stated in Court that "Staudinger said the following: By order of the Kreisleiter we had to go to Echling because a plane had crashed there", and the accused denied that anything was said to the effect that the flyers were to be shot (R 284). After accused STAUDINGER had talked by telephone to the commanding officer of the anti-aircraft position he said that the

flyers would be released and had to be shot by order of the Kreisleiter, which was the first the accused knew of such order (R 287).

The accused stated,

"I told Staudinger that I had no pistol. He gave me a pistol and when I heard the words 'by order of the Kreisleiter' I was without any will because I knew what would happen to me if I did not observe an order of the Kreisleiter" (R 288).

The accused further stated in Court that he did not dare refuse an order of the Kreisleiter; that the Kreisleiter had previously threatened four times to shoot the accused (R 291, 292); and that previously he had heard the Kreisleiter say that he had received authority to have enemy flyers shot, and had authority from the Gauleiter to shoot anyone who refused to obey the order (R 305, 319).

Accused HUBER stated in Court that at the scene of the plane crash immediately after the first killings the accused was crying and said that, if he had not shot the two flyers, he would have been shot himself (R 353).

Reference is made to the defense evidence on behalf of the other two accused for additional evidence in support of the defense theory which, for the sake of brevity, is not repeated here.

Sufficiency of Evidence: The evidence that the accused shot and killed two of the flyers and aided and participated in killing the third is clear and uncontradicted.

With regard to the evidence offered in support of superior orders, the evidence indicates that the first two flyers were not killed in the presence of any superior of the accused; that the orders relied upon by the accused were those of the Kreisleiter at a distant point; that the accused willingly participated; that his desire to please was stronger than other considerations; that he did not act under immediate compulsion; 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: No Petition for Review was filed. A Petition for Clemency was filed by Dr. Max Buerger, German defense counsel, 7 August 1946.

Recommendation: That the findings and sentence be approved.

3. JOSEF HUBER

Nationality:	German
Age:	39
Civilian Status:	Coppersmith and locksmith
Party Status:	SA Truppfuhrer
Military Status:	None shown
Plea:	NG
Findings:	G
Sentence:	Imprisonment for life

Evidence for Prosecution: Accused HERMAN in his extrajudicial sworn testimony details how this accused killed a flyer by the autobahn:

"Huber, who had followed the prisoner and me, fired the shot. —During this time Huber fired two more shots at the body of the allegedly dead prisoner".
(R 95; P-Ex 12A, p. 3)

At the trial accused HERMAN affirmed these facts (R 302, 303), as did also accused STAUDINGER (R 269).

The accused stated in Court that what he wrote in his extrajudicial sworn testimony (R 97; P-Ex 13) is true (R 358). He further stated that when the car stopped on the autobahn accused STAUDINGER told him that by order of the Kreisleiter he had been designated to shoot the flyer; and that he did not receive any order directly from the Kreisleiter (R 359). The accused admitted in Court that he shot the flyer from a distance of 20 or 30 meters; that the flyer was killed by the first shot; but that after he had pulled the body onto the meadow, he fired two more shots into the flyer's body; and that he made no examination but that he thinks the last shots also hit the body (R 366-369). Regarding his fear of the Kreisleiter the accused stated:

Question. (By Prosecution on cross-examination)
"I ask you again, How did you know what the Kreisleiter would do to you if you didn't shoot the flyer?"

Answer. (By the accused) "I didn't know it but I could well think it".

Question. "Do you know of any instance where the Kreisleiter had punished anyone for disobedience of his order?"

Answer. "No, I didn't know of any instance".

accused KAISER stated in Court that the flyer brought to his command post, i.e., the flyer who was shot by the accused, was named "Smith" (R 407). A Sergeant John J. Smith, Jr. is shown "MIA", missing in action, on the same "Missing Air Crew Report" as Second Lieutenants Robert T. Madison and Michael Rohulich (R 146; P-Ex 18).

For further corroborating evidence regarding the participation of the accused in the killings alleged reference is made to the prosecution evidence herein against the other two accused, such evidence for the sake of brevity not being repeated here.

Evidence for Defense: The accused stated in Court that he knew nothing of an order to kill flyers when he left Training with accused STAUDINGER and HERMAN; and that he understood that they only wanted him to go along to the crashed plane (R 337). The accused related his family and educational background as being one of hardship and little schooling, and said that he had been blind in one eye since infancy (R 339, 340). The accused had always worked for someone else and always took orders (R 345). The accused further stated that he was surprised by the first shooting (R 352); that, on the trip from the anti-aircraft position to the crashed plane and then to the command post, he rode in back and did not understand the talk between accused STAUDINGER and HERMAN and know nothing of the intention to pick up the third flyer (R 356); and that he did not know that the third flyer was to be shot until the car stopped and accused STAUDINGER directed him to shoot the flyer by order of the Kreisleiter, and to, "Take this pistol and shoot them" (R 358, 359, 362). The accused stated that he objected to shooting the flyer, and that accused

STAEDINGER said, "When you have to take the consequences", and that he understood this to mean, from what had been said before, that he would be shot, if he did not shoot the American, and that then he was thinking of his family, and, "-----my mind just stopped" (R 363). The accused further stated in Court that he did not intend to hit the flyer when he fired the shot, and said, "I never hit anything----. When we had to shoot in the SA I was never able to hit anything" (R 365). He simply raised his hand and pulled the trigger (R 366).

Selzwein testified that the accused is a simple, ordinary, solid worker, and was known in the neighborhood as a decent, solid person (R 471). He further testified that the accused would not willingly shoot a prisoner, but would not dare to disobey a superior officer (R 475).

For further testimony generally in support of this accused reference is made to the evidence in support of the other two accused, which for the sake of brevity is not repeated.

Sufficiency of Evidence: The evidence is clear, conclusive and uncontradicted that the accused shot and killed one of the American flyers as alleged. It is evident that the Court in imposing a life sentence as to this accused must to some extent have taken into consideration the background and training of the accused and have concluded that perhaps he may have at the time been under the influence of the two co-accused to some extent.

With regard to the evidence offered in support of superior orders, the Court may well have concluded that although the accused killed the third flyer at a point distant from the Kreisleiter that he was to a small degree influenced by the other two accused present and that the sentence should not be death even though the accused failed to prove that he acted under immediate compulsion as required by the pertinent authorities discussed in Section V, post.

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

4. WALTER FAISER

This accused was acquitted (R 476).

V. QUESTIONS OF LAW:

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

Superior Orders: Each of the accused who were convicted in this case as shown in Section IV, paragraphs 1, 2 and 3, supra, sought to justify his actions by offering evidence to show that he was acting in compliance with "superior orders". 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 708; United States v. Dominikus Thomas, December 1945; and United States v. Alfons Flein, et al., (Hadamar Murder Factory Case), February 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 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 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 Llandovery Castle Case cited therein; "Manual for Courts-Martial", supra; "Report to the President of the 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 Rule of the Law", by Ernst Fraenkel; and opinions of the Deputy Theater Judge Advocate for War Crimes in U.S. v. Albert Bury and Wilhelm Horner, September 1945, U.S. v. Dominikus Thomas, December 1945, and U.S. v. Gard Back and Otto Weirauch, December 1946).

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.

/s/ V. E. McClintock
V. E. McCLINTOCK
Attorney
Post Trial Branch

Having examined the record of trial, I concur,
this 27th day of October 1947.

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