

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

28 January 1948

UNITED STATES)

v.

Case No. 000-Mauthausen-1

Eduard ERB

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, during the period 25 March - 2 April 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

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

Particulars: In that Eduard ERB, a German National, did, at or near Mauthausen, Austria, in or about January 1945, wrongfully encourage, aid, abet and participate in the killing of Waclovo NIKOLEWSKI, a Yugoslav inmate of Mauthausen Concentration Camp, who was then in the custody of the then German Reich.

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

Particulars: In that Eduard ERB, a German National, did, at or near Schwechat, Austria, in or about June 1944, wrongfully encourage, aid, abet and participate in the killing of an unknown citizen of the Soviet Union, an inmate of Schwechat Concentration Camp, who was then in the custody of the then German Reich.

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

Particulars: In that Eduard ERB, a German National, did, at or near St. Valentin, Austria, in or about January 1945, wrongfully encourage, aid, abet and participate in the killings of about twelve (12) non-German nationals, the exact names and numbers of such persons being unknown, inmates of St. Valentin Concentration Camp, who were then in the custody of the then German Reich.

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

Particulars: In that Eduard ERB, a German National, did, at or near St. Valentin, Austria, in or about December 1944, wrongfully encourage, aid, abet and participate in the killing of one KUPFERMAN, first name being unknown, a Polish inmate of St. Valentin Concentration Camp, who was then in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: In May or June of 1944 three Russian inmates escaped from Schwechat Concentration Camp near Vienna, Austria. During

the afternoon of the day of the escape they were recaptured. One of them was dead, another wounded, and the third, a young inmate, was apparently uninjured. (This inmate is hereinafter called the "young Russian inmate".) They were exposed to the view of other inmates on roll call square that evening. The wounded inmate died. On the morning of the first day after the recapture the accused hanged the young Russian inmate in the doorway of a washroom in the camp. (However, two witnesses testified that the hanging of the young Russian inmate occurred about the third day after the recapture.) At that time the accused was a block leader in Schwechat Concentration Camp. The accused denied hanging the young Russian inmate and asserted that he was told that this inmate committed "suicide". Inasmuch as the Court found the accused not guilty of Charges I, III, and IV and the particulars thereunder, evidence pertaining to these charges is not discussed herein.

IV. EVIDENCE AND RECOGNITIONS:

Eduard ERB

Nationality:	German
Age:	46
Civilian Status:	Locksmith
Party Status:	Unknown
Military Status:	Waffen SS, Sergeant
Plea:	NG Charge I; NG Charge II; NG Charge III; and NG Charge IV
Findings:	NG Charge I; G Charge II; NG Charge III; NG Charge IV
Sentence:	Life imprisonment

Evidence for Prosecution: In May or June 1944 (R 41, 45, 80, 81, 102) three Russian inmates (R 41, 73, 81, 82, 101) escaped from Schwechat Concentration Camp near Vienna, Austria (R 45, 47, 81, 82, 101, 106, 115, 154). These inmates were recaptured and returned to the camp the day of their escape (R 47, 81, 106). One of them was dead (R 81). Another was wounded in the leg. Blood showed near his knee (R 81, 88, 89). The third, the young Russian inmate, (R 75) was uninjured (R 81, 89).

At roll call that evening the three Russian inmates were exposed to the view of the other inmates of the camp on the roll call square (R 41, 48, 82, 101, 109). The dead inmate was in a coffin (R 41, 47, 81, 88, 101, 102, 110, 112, 155). The wounded inmate was sitting on the coffin (R 88). The young Russian inmate was standing nearby with a sign around his neck which read in effect that "I am back again" (R 41, 45, 81, 88, 101, 102, 167). In addition, he was repeating in Russian "Away and back again" and "Don't go away or else the same thing that happened to me will happen to you" or words to that effect (R 47, 82). The accused, a block leader (R 40, 84, 101, 102), was present at this formation and beat the young Russian inmate, giving him "25" lashes (R 42, 75, 82, 84, 97, 102, 103, 155, 167). Two witnesses testified that they were on the roll call place; and that after the beating, as the young Russian inmate was being removed from the roll call square, the accused said, loud enough for them to hear, "I'll hang this dog anyway tonight" or similar words, referring to the young Russian inmate (R 74, 76, 102, 104, 113). This is corroborated by another witness who testified that he was told by an inmate that the accused threatened to hang the young Russian inmate on this occasion (R 82).

A witness, a former inmate of Block 1 of Schwechat Concentration Camp and, at the time of the trial, a member of the Polish guard company at Dachau, Germany (R 38), testified that at about 0500 hours the day after the three Russian inmates were displayed on the roll call square (R 41, 42) he saw the accused, the young Russian inmate, and two other inmates in the washroom between Blocks 1 and 2 of Schwechat Concentration Camp (R 42, 43, 45). This witness testified further that he saw the two other inmates lift the young Russian inmate; that he saw the accused place a rope around the neck of the young Russian inmate; that the rope was tied to a beam over the doorway; that when the rope was tied around the neck of this inmate the accused pulled down on his legs; that this inmate resisted, kicked with his feet two or three times, and died within about five minutes; and that this inmate saw the hanging through cracks in a partition in the washroom (R 43, 44, 50, 51, 52,

Another witness, a former German criminal inmate (R 95, 96) of Schwochat Concentration Camp (R 79, 80), testified that he worked in the inmate kitchen (R 81); that between 0545 and 0600 hours on the morning after the three Russian inmates were recaptured he carried coffee into the hospital (R 82-84). This witness testified further that in the hall of the hospital he passed within about one-half meter of the body of the young Russian inmate; that the face of the corpse was blue and swollen, the eyes were protruding from the sockets, and the tongue was hanging out of the mouth; and that he was told by two camp policemen who came by the kitchen where this witness worked that the accused had hanged the young Russian inmate (R 83, 84, 85, 97, 99, 100). It was well known in the camp that the penalty for escape was death by shooting or hanging (R 77).

Two witnesses testified that the hanging of the young Russian inmate occurred about the third day after the recapture (R 179, 180, 238, 239, 241, 244). In order to establish a course of general conduct of the accused contrary to that stated by the accused on the witness stand (R 295), the prosecution introduced two extrajudicial sworn statements concerning the accused. One of these statements contains evidence that in February 1945, in St. Valentin, the accused beat two inmates to death in the washroom because they did not pass his inspection for cleanliness (R 303; P-Ex 1). The other statement contains evidence that in January and February 1945, in St. Valentin, the accused ordered punitive physical exercise for inmates; that when the inmates did not perform the exercise in a manner pleasing to the accused, he kicked them; and that on one occasion an inmate was carried away, dead, after being kicked by the accused (R 303; P-Ex 2A).

Evidence for Defense: Defense witnesses confirmed the escape, recapture and the display of the three Russian inmates on roll call square, but asserted that roll call leader Schiller actually participated instead of the accused (R 175-179, 190, 194, 204, 238, 239, 242, 243, 253, 254). It was reported in the camp that the wounded Russian inmate was shot while attempting to escape on the day following his

inmate committed "suicide" on the morning of the third day after his recapture (R 180, 181, 185, 192, 194, 240, 246, 248, 255). Suicide after recapture was not an unusual procedure in the Schweschat Concentration Camp (R 180, 186). Defense witness Von Posern testified that he never heard of the accused killing any inmates, although the accused was suppliant to authority (R 229). According to him, the accused was "the only mitigating influence which was present in the camp" (R 215). Defense witness Emmet testified that, according to report, the victim had been hanged, "by force" by block eldest Franz Pawela, a kitchen capo Karl Roll, and the camp eldest (R 248). He stated that he did not hear the accused say anything at roll call square at the time the three Russian inmates were on display (R 248) and that the accused would never hang anyone of his own volition (R 249). The accused was one of the most decent block leaders despite the fact that he beat inmates (R 215, 249). One defense witness testified that he saw the body of the young Russian inmate; that he knew by the looks of it that the cause of death was strangulation (R 257, 258); that although the camp rumor was that the block leaders, especially the accused, had hanged the young Russian inmate (R 256) no one had said that he had seen the accused participating in the hanging (R 258). The accused denied participating in the hanging of the young Russian inmate (R 267, 269, 294). He denied beating this Russian inmate on the roll call square (R 269), or threatening to hang him (R 269), asserting that he was not present on the roll call square at the evening roll call on the day of the recapture of the three escaped Russian inmates (R 265, 268, 269, 280). The accused denied knowing of the hanging of the Russian (R 267, 269) until he heard about the incident a few days later (R 292). The accused testified that he was told by one of his comrades that the young Russian inmate had committed suicide (R 292).

Sufficiency of Evidence: The legal significance of the admission in evidence of the evidence as to acts committed prior to the time specified in the particulars is 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 the accused, 16 November 1947.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: The jurisdiction of the Court to try the accused was questioned by the defense, apparently on the following grounds: (1) the accused was a civilian; (2) the offense charged occurred in Austria and in the Russian Zone of Austria; and (3) there was a failure to comply with Section 4, Article III, Control Council Law No. 10 (R 3-9).

The Court was not deprived of jurisdiction because the accused was a civilian. It is stated in Volume I, Law Reports, United Nations War Crimes Commission, in notes on the Zyklon B Case, at page 103 that:

"The decision of the Military Court in the present case is a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of state and other public authorities, but to anybody who is in a position to assist in their violation.

"The activities with which the accused in the present case were charged were commercial transactions conducted by civilians. The Military Court acted on the principle that any civilian who is an accessory to a violation of the laws and customs of war is himself also liable as a war criminal."

The Court was not deprived of jurisdiction because the offense was committed in the Russian Zone of Austria.

War criminals, brigands, and pirates are the common enemies of all mankind and all nations have an equal interest in their apprehension and punishment for their violations of international law. Concerning this question, it is stated in "Wheaton's International Law," Volume I, Sixth Edition, at page 269, that every independent state has the judicial power to punish "piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed." Military Government Courts have jurisdiction over the nationals of any country who are in the United States Zone of Occupation, except as to certain classes of American and other nationals, e.g., military personnel, which

are not pertinent to the jurisdictional question here involved. Concerning jurisdiction over war crimes, no limitation is imposed. (See Sections 5-300.2 and 5-300.3, Title 5, "Legal and Penal Administration" of "Military Government Regulations," published by Headquarters, US Forces, European Theater, 30 November 1945.) Concerning the general question of universality of jurisdiction over war crimes see "Universality of Jurisdiction over War Crimes," by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp. 177-218.

The defense also attacked the jurisdiction of the Court on the ground that the accused could not be tried in the United States Zone of Occupation unless certain administrative steps were taken as provided by Section 4, Article III, Control Council Law No. 10, which provides:

" 4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section I (b) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned."

The defense failed to establish a lack of adherence to the provisions in question. In any event, the provisions are merely administrative and not jurisdictional. Failure to strictly comply therewith would not have affected the jurisdiction of the Court. Section 2 of the same article of that law provides:

" 2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedures thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945."

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

Evidence as to Independent Illegal Acts: The defense objected to the admission of evidence of specific acts not covered in the charge and particulars thereunder. Thus the question is raised as to the legal significance of the admission of evidence as to the commission by the

accused of such independent illegal acts.

Section 5-354.4, Title 5, "Legal and Penal Administration" of "Military Government Regulations," published by Office of Military Government for Germany (US), 27 March 1947, provides that "all evidence which will aid in determining the truth will be admitted." Subparagraph a, Section 270, "Manual for Trial of War Crimes and Related Cases," 15 July 1946, as amended, provides that a war crimes tribunal may admit any evidence which in its opinion has probative value. Subparagraph c(2) of said Section 270 provides that a war crimes tribunal may admit any evidence believed to be of probative value or, to apply a similar test, evidence which would be helpful in arriving at a true finding.

The Staff Judge Advocate, Headquarters, United States Forces in Austria, in his review of a war crimes case, United States v. Karolyi, et al., Case No. 5-100, September 1946, tried by a military commission appointed by that headquarters, stated with regard to evidence concerning independent crimes committed by the accused, that it could be disregarded only in the event that there is sufficient admissible evidence to sustain the findings as to the crime charged. He further stated that the sentences involved in that case should not be disapproved merely because of the admission of evidence relating to separate independent crimes, if there is sufficient evidence, exclusive of that relating to such independent crimes, to sustain the findings as to the crime charged. The Judge Advocate cited in his review, in support of his position, paragraph 87b, page 74, "Manual for Courts-Martial, U.S. Army," 1928, which paragraph is based upon Article of War 37.

A like rule is contained in the regulations specifically applicable to Military Government Courts:

"The proceedings shall not be invalidated, nor any finding or sentence disapproved, for any error or omission, technical or otherwise occurring (sic) in such proceedings, unless in the opinion of the Reviewing Authority, after an examination of the entire record, it shall appear that the error or omission has resulted in injustice to the accused."

(Section 5-338, Title 5, supra.)

CLASSIFICATION CANCELLED  
By authority of JAG ltr  
dtd 4 Aug 1950.



In view of the foregoing, the admission of the evidence as to the separate independent crimes does not, in and of itself, constitute grounds for disapproving the actions of the Court.

Motion for Findings of Not Guilty: A motion by the defense for a finding of not guilty as to Charge IV and its particulars at the close of the prosecution's case (R-151, 152) was properly denied. It is not error for a war crimes tribunal to overrule a motion for findings of not guilty made at the close of the case for the prosecution if it believes that there is sufficient evidence to support the charge and that the accused should be required to answer it (Section 5-327.2, Title 5, supra, and Section 501, page 409, "Manual for Trial of War Crimes and Related Cases"). A similar practice is followed in courts-martial (paragraph 71, d, "Manual for Courts-Martial, U.S. Army", 1928).

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 sentences be approved.
2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

RICHARD C. HAGAN  
Major, JAGD  
Post Trial Branch

Having examined the record of trial, I concur, this \_\_\_\_\_  
day of \_\_\_\_\_ 1948.

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