

16 January 1948

UNITED STATES)

v.)

Eugen ZIEHMER)

Case No. 000-Flossenburg-18

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, 29 October 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

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

Particulars: In that Eugen ZIEHMER, a German national, did, at or in the vicinity of Flossen- burg, Germany, in or about September 1941, wrong- fully encourage, aid, abet and participate in the killing of approximately five unknown Polish nationals, inmates of Flossenburg Concentration Camp, who were then in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: The accused was an inmate of Flossen- burg Concentration Camp from May 1938 until April 1945. In September 1941, after a Polish inmate had escaped from the camp, the remaining Polish inmates were forced to stand on the roll call square for three days and three nights without any food in the so-called "Polish Action". During this period the accused participated in the beating and mistreatment of the Polish in- mates, using a handle of a sledge hammer to beat inmates who had fallen to the ground. He placed the nozzle of a water hose in the mouths of at least two or three inmates, causing water to run into their bodies until the victims were dead. The accused was an unofficial capo of the construction headquarters detail at that time.

IV. EVIDENCE AND RECOMMENDATIONS:

Eugen ZIEHMER

Nationality:

German

Lgs:

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APRA DATE 3/13/50
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Civilian Status:	Painter
Party Status:	None
Military Status:	None
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused was an inmate of Flossenburg Concentration Camp from May 1938 until April 1945. He was employed as a clerk in the construction main office with the exception of short periods of time in 1943 and 1944 when he worked in an outdetail of the camp (R 16; P-Ex 6A). The accused was an unofficial capo of the construction headquarters detail (R 19, 52). In September 1941 after a Polish inmate had escaped from the camp, all of the Polish inmates of Flossenburg were forced to stand on the roll call square for three days and nights (R 9, 19, 26, 36, 45). During this so-called "Polish action" the Polish inmates were severely beaten and mistreated by the SS and the camp capos (R 19, 20, 21). The capos who participated in this "Polish Action" received orders to do so from the SS, but also received extra rations for their participation (R 13).

Five witnesses testified that during the first night of the "Polish action" the accused beat some of the inmates with the handle of a sledge hammer, kicked them and stood on their bodies (R 9, 19, 20, 26, 29, 33, 37, 45, 46). Three of these witnesses testified that many of the inmates had fallen to the ground from weakness and the accused beat them brutally to force them to get up (R 26, 27, 37, 47, 48). One of these witnesses testified that the victims bled from their faces and mouths (R 27, 29). Another one of the five witnesses testified that some of the victims were beaten to death (R 9), and at least five of the victims were seen being carried to the crematory (R 10). The accused used a rubber hose to pour water over many of the unconscious inmates (R 9). Three of the above witnesses testified that he placed

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nozzle of the hose into the mouths of two or three of the Polish inmates and ran water in until the victims were dead (R 27, 33, 41, 47). One of the witnesses saw the corpse of a victim on the following day, and it appeared bloated like a "water corpse" (R 28). The extrajudicial sworn testimony of another witness (R 78; P-Ex 8a) confirms that the accused placed a water hose in the mouth of one Polish inmate and that the Pole died as a result of this mistreatment. This is corroborated by an unsworn pretrial statement of another witness who saw the accused place the hose into the mouths of some Polish inmates until they died (R 79; P-Ex 94). The accused admitted to two of the prosecution witnesses that he had "set a few rabbits in their place" or "brought some of them round the corner," which expressions the witnesses interpreted to mean that he had killed several of the Polish inmates (R 29, 33, 34, 38).

Evidence for Defense: The accused testified that he was present and participated in the "Polish Action" (R 74), but that he was present only on the first day and only participated in beating the inmates. He denied that he had killed any of the inmates or that he ever put a rubber hose into the mouths of any of them. He merely used the rubber hose to beat his fellow inmates (R 62). He participated in this action because he had been ordered to do so by the Camp Commander. He claimed that he could not have avoided this duty because, had he refused, he himself would have been beaten (R 64). The accused further testified that on the second day of the "Polish Action" he went to work with his work detail and had to attend to the discipline of the inmates only on that second evening (R 74); that on the third day he was present but did not do anything; that he himself was beaten many times while an inmate in concentration camps (R 65); and that he was only a clerk in the construction headquarters and did not wear the insignia of a capo (R 66).

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One witness testified that he had never heard any bad things about the accused in the camp, but the witness admitted that he did not hear everything in camp (R 57). Another witness testified that the accused did not have a good reputation at Riossenburg (R 59), although he admitted that the accused was a quiet inmate in the construction office (R 61).

Sufficiency of Evidence: The Court was warranted from the evidence in concluding that the accused did participate in the beatings and mistreatments of the Polish inmates during the so-called "Polish Action", and that the actions of the accused resulted in the death of some of the inmates.

The Court was warranted in concluding that the accused acted with intense malice towards his fellow inmates in view of the accused's subsequent admissions to other inmates (R 33, 34, 38).

With regard to the evidence offered in support of superior orders, the Court might well have concluded that the accused's desire to cooperate with and please his superiors was stronger than other considerations; that he did not act unwillingly or under immediate compulsion; that no order was in fact received; 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 Mr. George Aronson, defense counsel, 7 November 1947. Petitions for Clemency were filed by accused's fiancée, Frieda Langer, 29 December 1947; Walter Noye, 16 November 1947; Gustav Latzke, 19 November 1947; Edmund Wissmann, 26 November 1947; Kurt Schreiber, 27 December 1947; Alois Jakobith, 27 November 1947; Christian Mohr, 30 November 1947; Joseph Bergmüller, 14 December 1947; Anton Stinglwagner, 16 December 1947; Johann Kubat, 27 November 1947; Karl Mayer, 14 December 1947; Anton Bichlmair, Höfer, and B. Brou, 26 November 1947; and Gerhard Giesecke, 27 November 1947.

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Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: A question of law implicit in the charge and particulars but not raised during the trial or by the Petition for Review is whether the Court had jurisdiction over an offense committed prior to the entry of the United States into the war. The acts alleged in the instant case occurred in September 1941, three months before a state of war existed between the United States and Germany.

A validly constituted court of an independent state derives its powers from the State; and the State is independent of every other in the exercise of its judicial power. This power of a sovereign State extends "to the punishment of piracy and other offenses against the common law of nations, by whomsoever and where-soever committed." (Wheaton's International Law, Sixth Edition, Volume I, p. 269). Recognition of this sovereign power is contained in the provision of the Constitution of the United States which confers upon Congress the power "to define and punish offenses against the law of nations." (Winthrop, "Military Laws and Precedents", Second Edition, Reprint 1920, at page 831).

It is clear that the laws and customs of war comprise a part of the law of nations. An offense against the former is a violation of the latter. The judicial power of an independent State, embracing the latter, includes trial and punishment of offenders against the laws and usages of war; and jurisdiction to try war criminals is an incident of the sovereign power of an independent State (Memorandum for the Joint Intelligence Committee, The Joint Chiefs of Staff, file SPJGW, 1943/17671, 13 December 1943, by the Judge Advocate General, at page 3). Such power is full and complete except where restricted by the body of principles comprising the law of nations (S.S. Lotus, France v. Turkey, 2 Hudson World Court Reports 23.) The power of an independent State

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in connection with the trial of war criminals is not limited to the trial and punishment of war criminals for offenses committed subsequent to its entry into a war. Nor does a logical analysis of the character of judicial power of a sovereign State compel such restriction.

It is axiomatic that a sovereign State adhering to the laws and usages of war is a fortiori interested in their preservation and hence their enforcement. The power to try and to punish violators thereof is a necessary incident of this interest. Any war crime, whenever committed, constitutes an invasion of the interest of the sovereign.

Whether such power will be exercised in a particular case is a matter resting within the discretion of the sovereign. In this instance, the United States has elected to try the accused.

To avoid vain and empty processes by the sovereign and to assure the enforcement of its sentences, physical custody of the person of a war criminal is a primary requisite. The United States has custody of the accused.

While the existence of a state of war is a necessary condition precedent to the existence of a "war crime", it is not a sine qua non of jurisdiction of an independent State to try and to punish an offense against the laws and customs of war. That power stems from the sovereign character of an independent State. Therefore, it rests on a basis apart from actual participation in warfare as a belligerent. That is is not a belligerent is logically unimportant to the jurisdiction of a sovereign State. By the same token, a neutral nation, securing physical custody of a war criminal, would have jurisdiction to try and to punish him for the commission of a war crime. Time of entry of the sovereign State into warfare is immaterial to judicial power of the State over the offense. Furthermore, providing the offense charged is a war crime, the time of commission of the offense is neither causative nor determinative of the existence of the jurisd

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of a sovereign State's validly constituted courts over either the offense or the offender. The fact that the accused has committed the offense prior to the entry of the United States into war with Germany does not bar the United States from jurisdiction to try and to punish the accused for the offense charged. Time of commission is inconsequential to the judicial power of the United States over the offense.

Participation in warfare accentuates the primary interest of the independent State in the enforcement of the laws and customs of war and does, in most instances, strongly induce the State to exercise its jurisdiction. The present case is an example.

Co-belligerency with another independent State against which nationals of the enemy have committed earlier a war crime enhances the interest of the sovereign, which later joins, in the prosecution of the offender against the laws and customs of war. However, co-belligerency does not of itself confer upon the sovereign State the judicial power to try war criminals for the offenses which they have committed against the ally prior to the entry of the sovereign into warfare. That power existed prior to the creation of the co-belligerent status and on a basis wholly apart from that status. These conclusions are equally applicable to the present case. Though the accused has committed the offense against another nation, later an ally, prior to the entry of the United States into the war, this Court of the United States had jurisdiction over the offense charged.

Writers on international law have not expressed views in conflict with the antecedently expressed point of view of universality of jurisdiction of the properly constituted courts of a sovereign State over war crimes, irrespective of the time of commission of the crimes. An article by one writer lends some support. After stating that each civilized State has a very real interest in the punishment of war crimes, he asserts that "

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independent state has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or place where the offense was committed" (underlining supplied). (See "Universality of Jurisdiction Over War Crimes", by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp. 177-218.)

The Court had jurisdiction of the person of the accused and of the subject matter.

Superior Orders: The accused 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; Llandoverry Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJMAG, December 1945; and United States v. Klein, et al., (Hadamar Murder Factory Case), opinion DJMAG, 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 ~~which his sentence should be mitigated depends upon the char~~

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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. Beck, et al., opinion DJAWC, 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 sentence be approved.

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

EMANUEL LEWIS
Capt. Inf
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

NARA Date 3/18/50
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