

HEADQUARTERS  
UNITED STATES FORCES IN AUSTRIA  
Office of the Judge Advocate  
APO 777, U.S. Army

4 November 1946

SUBJECT: Review of Staff Judge Advocate  
Case No. 5-66 and 12-2256

TO : Commanding General  
United States Forces in Austria  
APO 777, U.S. Army

1. The record of trial by Military Commission of the following named accused having been referred to me under the provisions of paragraph 14a, War Crimes Memorandum No 3, Headquarters, United States Forces in Austria, dated 23 April 1946, before action there on by the reviewing authority, I submit herewith my review, with opinion and recommendation and reasons therefor.

2. Synopsis of the record and of the opinion in the case of:

a. Markus Max Karl Lienhart, German National, Untersturmfuehrer, Waffen SS.

Age : 24 years

Previous Convictions : Unknown

| <u>Charges and Specifications</u> | <u>Gist of Offense</u>                                                                                                                | <u>Pleas</u> | <u>Findings</u> | <u>Legally Sustained</u> |
|-----------------------------------|---------------------------------------------------------------------------------------------------------------------------------------|--------------|-----------------|--------------------------|
| CH                                | Violation of Laws of war                                                                                                              | NG           | G               | Yes                      |
| Sp                                | Willful, deliberate, wrongful aid and participation in the killing of three members of United States Army by shooting them with a gun | NG           | G               | Yes                      |

Sentence: To be hanged by the neck until dead.

Maximum Punishment: Death.

b. Franz Lienhart, German National, farmer.

Age : 59 years

Previous Convictions : Unknown

| <u>Charges and Specifications</u> | <u>Gist of Offense</u>                                                         | <u>Pleas</u> | <u>Findings</u> | <u>Legally Sustained</u> |
|-----------------------------------|--------------------------------------------------------------------------------|--------------|-----------------|--------------------------|
| CH                                | Violation of Laws of war                                                       | NG           | G               | Yes                      |
|                                   | Wrongful assault on member of United States Army by striking him with his fist | NG           | G               | Yes                      |

### 3. EVIDENCE

#### a. Marcus Lienhart.

(1) For the Prosecution: On 4 March 1945 three U. S. Air Force members parachuted to earth near Strassgang, Austria, and were captured and disarmed by police officials of the German Reich (R 6, 14, 21, 23, 27, 30, 38, 43, 54, 59, 63). While two of the American prisoners were being held near the spot of their capture, an SS Major Schweitzer, who was present with a group of his men, ordered policeman Einspieler to kill the prisoners (R 6, 9, 11, 14, 15, 20). Einspieler put his pistol back in the holster upon hearing this command, but the accused stepped forward from the crowd and shot the prisoner guarded by policeman Einspieler, then walked over and shot the prisoner guarded by policeman Luley (R 7, 8, 11, 14, 22, 25, 27, 59, 63, 65, 68, 76; Pros Exh B, p 1). A short while later the third American prisoner had been shot and still lay (R 33, 36, 39, 41, 60, 67, 68; Pros Exh 6, p 1). There the accused, after brandishing his pistol (R 34), shot the third American prisoner (R 39, 41). SS Major Schweitzer had one officer and several enlisted men of his organization with him when he ordered the two American prisoners shot (R 7, 9, 25, 64) and he ordered an SS Oberscharfuhrer to kill the third American prisoner (R 60, 67, 71, 77). The accused was not a member of Schweitzer's organization at this time, but was home on sick furlough from the SS regiment "Hohenstaufen" (R 8, 11, 16, 60, 61, 63, 74). Accused was familiar with paragraph 47 of the Strafgesetzbuch (German Military Book) which states, "If the execution of an order in the course of service violates a criminal law, the superior issuing the order is alone responsible for it, however, the obeying subordinate will be punished as an accessory, (1) if he exceeds the order given, or (2) if it was known to him that the order of the superior concerned an act which aimed at a general or military crime or offense. If the crime of the subordinate is minor, the punishment can be remitted" (R 70). He stated, however, that "this law was changed by order of the fuhrer dated 23 December 1944." He had been instructed as to agreements between nations with respect to treatment of prisoners (R 73, 74, 75, 76). The accused told Schweitzer that he, Schweitzer, would be responsible for the order to kill the fliers (R 60, 75). Accused had knowledge of an order from high headquarters that "Terror fliers" should be sentenced on the spot of landing (R 65, 74, 76), but had never seen the order (R 66). The three American prisoners died from the wounds inflicted by the accused (R 8, 22, 27, 45, 46, 60, 68, 76, 77; Pros Exh 3, p 1; Exh 4, p 1, Exh 6, p 1).

(2) For the Defense: The accused, on temporary status with the organization of Major Schweitzer (R 59, 61, 62, 74; Pros Exh 6, p 1), was ordered by Major Schweitzer to kill the two American prisoners (R 59, 64, 74), and he so did (R 59, 65, 72, 76). The order of Major Schweitzer was a legal order (R 68) and the accused would have been liable to immediate punishment for failure to obey it (R 59, 60, 68). The American prisoners had received a Field Emergency Court Trial by Major Schweitzer (R 65, 66).

The accused did not shoot the third American prisoner (R 60, 71, 72, 77) but accompanied the SS Oberscharfuhrer back to the spot where he had shot the first two American flyers and watched the Oberscharfuhrer shoot the third American (R 60, 67, 68, 77).

#### b. Franz Lienhart.

(1) For the Prosecution: A U. S. Army Air Force man parachuted to safety near Strassgang, Austria, on 4 March 1945 (R 30, 42, 54) and was disarmed (R 37) and captured by officials of the German Reich (R 30, 31, 38, 42). While being escorted to the Police Station at Strassgang by these officials (R 30, 38, 43) the American prisoner was attacked by the accused, a civilian, who beat him upon the head, back,

with such statements as "Oh you scoundrel" (R 37), "Give me a bayonet! I will kill the dog" (R 38, 43). "You dog. You are throwing bombs on children and women" (R 43). Schergan attempted to stop the accused and was struck by him (R 39, 44, 55). The policeman Kircher pulled the accused away from the prisoner, but the accused resumed the beating (R 30, 43, 48, 47). No one else struck the accused (R 37). The beating administered to the American prisoner by accused was severe (R 39, 43, 48).

(2) For the Defense: Accused rushed to the spot where the U.S. Air Force men parachuted so that he might capture him. However, he found him already arrested (R 54). Accused waited until the prisoner was escorted up the road. He stood where a barracks had been bombed and eleven people killed and six or seven wound (R 54). He had helped rescue them and thinking about the dead, he was excited and ran to the flier and started striking him. He hit the flier with his open hand (R 54, 55). He struck Schergna, then ran back and struck the American prisoner again (R 55). The accused knows of no one who was killed during the air-raid on 4 March 1945 (R 56, 57).

#### 4. COMMENT

##### a. Elements of the Offenses and Sufficiency of the Evidence.

Merkus Lienhart: Evidence establishes beyond a reasonable doubt that:

(1) The U. S. Army Air Force personnel were captured by and in the custody of officials of the German Reich (R 6, 14, 21, 23, 27, 30, 38, 43, 54, 63).

(2) They had committed no breach of the laws of war or of any other criminal or penal laws.

(3) They offered no resistance nor did they attempt to escape (R 6, 21, 30, 32).

(4) They were killed summarily without benefit of trial or judgment (R 6, 9, 11, 14, 15, 20).

(5) The accused deliberately and wrongfully encouraged, aided, abetted and participated in the killing of the three American prisoners (R 7, 8, 11, 14, 22, 25, 27, 39, 41, 59, 63, 65, 68, 76; Pres Exh 6, p 1).

The defense introduced no evidence contradicting the allegation as to the shooting of two prisoners by the accused, and the accused admitted that he shot them, thus affirming his prior written statement to that effect. The defense did attempt to show that the accused did not actually shoot the third prisoner. The testimony of an eye-witness to this shooting, coupled with all the facts and circumstances surrounding it, however, refuted this contention. In any event, the issue is not whether accused shot the prisoner but whether or not he encouraged, aided, abetted and participated in the shooting of the flyers, and the record sufficiently establishes such acts.

The defense relied upon superior orders in a two-fold aspect: firstly, as the execution of a judgment of a competent court, and secondly, as the execution of a superior order through fear of immediate punishment, possibly death, if the order was not obeyed. As to the first point, the evasive testimony on this subject by the accused (R 65, 66, 74, 65) indicates that he knew SS Major Schweitzer had no authority summarily to judge and sentence a prisoner of war to death without a trial or conviction of an offense against the laws of war. His testimony concerning his knowledge of the rules of Land Warfare, and treatment of prisoners, and his own rights as a

"emergency field court" as he termed it, shows that he was sufficiently versed in the warfare rules and in regulations concerning prisoners of war to be chargeable with knowledge that the killing of the fliers was not authorized (R 65, 66, 69, 70, 71, 73, 74, 75, 76).

Paragraph 356, FM 27-10 reads: "No individual should be punished for an offense against the laws of war unless pursuant to a sentence imposed after trial and conviction by a military court or commission or some other tribunal of competent jurisdiction designated by the belligerent." The principle there enunciated is basic in international law. Article 30, Hague Regulation; Act 228, Treaty of Versailles; AW 81, 82; Par 449, Ch 14, British Manual of Military Law. The "Kriegsbruch im Landkriege" states "the death penalty (for a spy) will not be enforced without being preceded by a judgment." Article 54 of the Geneva Convention of 1929, and made part of the Hague Regulation, reads in part "Arrest is the most severe summary punishment which may be imposed on a prisoner of war."

There is no evidence that the executed fliers were guilty of any offense against the laws of war. They were unarmed, surrendered prisoners of war, and as such were entitled to protection under Article 23 of the Hague Convention which forbids combatants "To kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion."

The accused is chargeable on this basis with knowledge that enemy soldiers who surrender may not be killed, and further that enemy soldiers, even when charged with violation of the laws of war or any other law, must be given a fair and impartial trial before execution. He is further charged with knowledge that a summary order to kill prisoners of war is not a competent trial and judgment of such prisoners, and the commission was furnished ample proof that such knowledge was his, by his own testimony.

As to the second of the two aspects of superior orders relied upon by the accused, the defense of superior orders though available to the accused as a matter of extenuation, is not a valid defense. Moreover, the evidence establishes that:

(1) The order to kill the first two fliers was not directed to the accused (R 6, 9, 11, 14, 15, 20) but to Einspieler, and that an Oberscharfuhrer was ordered to kill the third flyer (R 60, 67, 71, 77).

(2) The accused more or less voluntarily stepped forward and shot the flyers (R 7, 8, 11, 14, 22, 25, 27, 59, 63, 65, 68, 76; Pros Exh 6, p 1) and remained at the scene and shot the third flyer (R 39, 41).

(3) The accused was not a member of Schweitzer's organization (R 8, 11, 16, 60, 61, 63, 74) and members of the major's battalion were present (R 7, 9, 25, 64).

(4) Einspieler received no punishment for failure to obey the order to kill the prisoners.

(5) The accused knew what treatment should be accorded prisoners of war, and he knew, or should have known, that the order to kill the prisoners was illegal and criminal (R 65, 66, 68, 69, 70, 71, 73, 74, 75, 76).

Franz Lienhart:

The evidence establishes beyond a reasonable doubt that:

(2) The accused beat him upon the head, back and chest with his fists (R 30, 39, 43).

(3) He resisted efforts to stop him from beating the prisoner (R 30, 39, 43, 44, 47, 48, 55).

The state of excitement of the accused, which he testified was the basis of his action, does not constitute a defense.

#### b. Irregularities.

The following irregularities, none of which affected the substantial rights of the accused are noted.

(1) Prosecution offered into evidence, without objection from defense, a photograph of a monument erected by the people of Strassgang at the scene of the killing in memory of the dead pilots (R 12). The photograph is prejudicial in itself since the inscription on the monument, without mentioning names, states that a "Nazi-fascist" here killed three American pilots. However, testimony had been received that accused had killed two flyers, and later testimony established the fact the accused killed the third flyer. Therefore, the prejudicial effect of the photograph was erased by substantial, concrete evidence of the material facts which it portrays. It was properly admitted to show that the flyers died from wounds inflicted by someone on 4 March 1945 at that spot, and that the killings were common knowledge in the community.

(2) Prosecution questioned both accused relative to a celebration held on the night of 4 March 1945 at Schwarz's Gasthaus, and either in the questions or in answer to defense objections, sought to show that both accused were feted in honor of their actions against the American pilots on 4 March 1945 (R 56, 72). This, while possibly relevant and material to show intent and to rebut defense testimony, was also highly prejudicial. The upholding this line of questioning to the extent of substantially prejudicing the rights of either accused.

(3) Prosecution, also by question, attempted to introduce prejudicial matter before the court by linking accused Markus Lienhart with Himmler and the killing of innocent people (R 71). This was properly overruled and the question alone is hardly prejudicial.

#### c. Clemency.

In the case of Markus Lienhart the great weight of the evidence indicates that in killing the American fliers he acted as a volunteer, and there is no substantial showing of justification. The record discloses no grounds for clemency as to him.

Franz Lienhart, on the other hand, was charged with the more mild offense of striking one of the fliers with his fist. The evidence is conflicting as to the severity of the assault, various witnesses testifying (a) that Franz Lienhart hit the flier with his open hand (b) that the assault was of medium severity and (c) that a severe beating was administered (R 30, 32, 39, 43). He testified that he hit the flier with his open hand while in an excited state, brought on by a recent experience in which he helped rescue a number of dead and wounded persons from a bombed building. He is 60 years of age and has now been in confinement nearly one and one half years (since 16 May 1945) for this offense. During his confinement he has been in an accident, being struck by an automobile while working as a prisoner, for which he was hospitalized for several weeks. He has become a cripple, according to his testimony, during his confinement (R 58). According to the

petition for clemency filed by his wife, he is the father of eight sons, has been a respectable farmer, a conservative citizen, a member of welfare organizations and esteemed by the population. Seven of the sons served in the war and only two returned, including the son Markus who stands sentenced to death by the court which tried the father.

d. Sentence.

The Military Commission is empowered under paragraph 13a, War Crimes Memorandum No 3, Headquarters, United States Forces in Austria, dated 23 April 1946, to adjudge fines, imprisonment at hard labor, and death (Par 45b, FM 27-5). The sentence in this case as to Markus Lienhart is not excessive. He stands convicted of shooting in cold blood three unarmed, defenseless, passive, American prisoner of war. The accused Franz Lienhart is found guilty of a contemptible and cowardly assault upon an unarmed, defenseless American prisoner of war, but for the reasons stated in subparagraph c above, it is believed that the sentence should be reduced to confinement at hard labor for three years.

5. OPINION

It is my opinion that:

a. The Military Commission was properly constituted (Ltr Hq USFET, AG 250.4 GAP-AGO, 10 Oct 45, subject "Authority to Appoint Military Commissions," and par 3, War Crimes Memorandum No 3, Hq USFA, 23 Apr 46).

b. The Military Commission had jurisdiction over the offenses and persons charged.

c. The findings are sustained by the evidence.

d. There are no substantial impairments of the rights of the accused.

e. The sentences are legal.

6. RECOMMENDATION

I recommend that the sentence of Markus Lienhart be approved and ordered executed, but that the sentence of Franz Lienhart be reduced to confinement at hard labor for three years.

7. ACTION

Actions designed to carry the above recommendation into effect, should it meet with your approval, are submitted herewith.

/s/ David S. McLean  
/t/ DAVID S. McLEAN  
Colonel, JAGD  
Judge Advocate