

HEADQUARTERS
UNITED STATES FORCES IN AUSTRIA

Office of the Judge Advocate

War Crimes Branch

APO 777, U.S. Army

1 June 1947

Subject: Review of Proceeding as a Military Commission in the case of
the United States versus Oswald RATH and Franz HOFBAUER.
Case Number 5-144

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

1. The record of the proceedings of the Military Commission appointed by this Headquarters for the trial of Oswald RATH and Franz HOFBAUER having been referred to me for review under the provisions of paragraph 14a, War Crimes Memorandum Number 3, this Headquarters, 23 April 1946, I submit herewith my review, with opinion and recommendation and reasons therefor.

2. Trial:

The accused, Oswald RATH and Franz HOFBAUER, Austrian nationals, were tried at Salzburg, Austria from 29 January to 30 January 1947 by a Military Commission, appointed by special orders No. 304, Paragraph 2, dated 31 December 1946, Headquarters, United States Forces in Austria.

3. Findings:

The accused were tried upon the following charge and particulars:

Charge: Violation of the laws of war

Particulars: In that Oswald RATH and Franz HOFBAUER, Austrian nationals, did, at or near Schuetzen-am-Gebirge, Kreis Eisenstadt, Austria, on or about 13 February 1945 and 14 February 1945, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of four unknown members of the United States Army who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

The Commission, in closed session, upon secret written ballot and with the concurrence of at least two-thirds of its members present at the time of voting in each finding of guilty, found:

a) Oswald RATH guilty of the charge and of the particulars, except for the words "and 14 February 1945" and "four unknown members of the United States Army who were then unarmed, surrendered prisoners of war in the custody of the then German Reich", substituting for the latter the words "an unknown member of the United States Army who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich." Of the excepted words he was found not guilty and of the substituted words he was found guilty.

b) Franz HOFBAUER guilty of the charge and of the particulars except for the words "13 February 1945" and "four unknown members of the United States Army who were then unarmed, surrendered prisoners of war in the custody of the then German Reich" substituting for the latter the words "an unknown member of the United States Army who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich." Of the excepted words he was found not guilty and of the substituted words he was found guilty.

4. Sentences:

The Commission, in closed session and upon secret written ballot, at least two-thirds of the members present at the time the vote was taken concurring, sentenced both of the accused to be confined at hard labor for 25 years.

5. Evidence for the Prosecution:

On or about 13 February 1945, at approximately 1200 hours, an American airplane was shot down in the vicinity of Schuetzen-am-Gebirge, Kreis Eisenstadt, Austria (R 6, 14, 22). Before it crashed several American airmen parachuted to the earth and four of them landed safely near a local Reichs Labor Service Camp (RAD Reichsarbeitsdienst) (R 6). Three of them were captured at different times during the afternoon and evening of that day and taken to that camp where they were interrogated and confined (R 6, 14, 48). During the late afternoon (R 33) four guards of the camp, Reisinger, Steinmueller, Blaunsteiner, and the accused RATH, were ordered, by the deputy commander of the camp, Krone, to march two of the flyers (the third and fourth had not yet been captured) in the direction of Eisenstadt, a nearby town, and to shoot them under the pretense that they were trying to escape (Pros. Ex. 1, R 33, R 15, Pros. Ex. 4). This order was complied with, one of the flyers being marched away by Reisinger and Blaunsteiner, who were in the lead, and the other by Steinmueller and RATH who followed shortly thereafter (R 7, R 34, Pros. Ex. 4). After the flyers had been marched along the road to Eisenstadt for a distance of approximately two kilometres (R 15) they were shot to death (R 16, 20). One of them was shot on the left hand side of the road and one of the right hand side (R 13). The one on the left hand side of the road had two bullet holes in his back (R 16). It was this flyer that had been in the custody of Steinmueller and the accused RATH (R 37). The bodies were then loaded on a wagon and deposited in the morgue of the church in Schuetzen (R 15). After they were loaded on the wagon but before they were driven to Schuetzen the accused RATH took a ring and a watch from one of the dead bodies (R 9, 38). The bodies were buried about 2 days later in the cemetery of Schuetzen (R 24).

The third flyer was captured later in the evening of that day and shot the next morning by Reisinger and Blaunsteiner (Pros. Ex. 4, R 43). Neither of these men have been apprehended and they were, consequently, not among the accused.

The fourth flyer was not captured until the afternoon of the day of following the capture of the other three (R 23, 49). Two guards had been sent out to search for the flyer in a game reserve near Schuetzen where he had been reported as having been seen (R 49). When the two did not return the accused HOFBAUER was sent out to look for them. He met them at the edge of the reserve (R 49). They had captured and disarmed the flyer and had him in their custody (R 49). They asked HOFBAUER what they should do with the flyer and he told they should bring him back to the camp (R 49). This was done and the flyer was placed in the guard room (R 50). Some time later, the Commanding Officer of the camp, Seidel, ordered the guards Reisinger and Blaunsteiner to take the flyer to the game reserve under the pretense of allowing him to look for some of his equipment that he had buried there but, in fact, to shoot him (Pros. Ex. 4) (R 50). Seidel then ordered HOFBAUER to accompany them "for safety" (Pros. Ex. 4). This HOFBAUER did, following a short distance behind the other two and the American. HOFBAUER was a Haupttruppfuehrer in the RAD (R 45) and the highest ranking man among the three. His regular position was that of ordinance officer in charge of issuing weapons to the other members of the group when needed (R 47). As they approached the forest the flyer suddenly made a quick turn, probably he slipped, as the ground was wet

Pros. Ex. 4) from two bullet wounds (R 51). The next day Krone dictated a report which stated that this flyer was shot to death while attempting to take a rifle away from one of his captors (R 26). The body of the flyer was buried about one day later in the cemetery of Schuetzen (R 24).

6. Evidence of the Defense:

Both of the accused, having been properly warned of their rights, elected to take the stand in their own defense.

RATH testified that, on the day of the killing, Steinmueller, Blauensteiner, Reisinger and himself received an order from Krone "to lead the flyer in the direction of Eisenstadt and to kill him on the way in this direction" (R 33). He said that he did not protest against this order "because I knew Krone and I knew it could not be done. They did not permit talking back" (R 33). After receiving the order he and Steinmueller took one of the flyers in the direction of Eisenstadt. Reisinger and Blauensteiner, with the other flyer, preceded them by about 3 or 4 minutes (R 34). They walked the flyer in the direction of Eisenstadt. Suddenly Steinmueller "raised his rifle and shot" and "I noticed that the flyer must have been hit in the head because he fell down immediately" (R 34). The accused then "also raised my rifle to the cheek and fired." But he did not aim. He knew "that my shot must have gone about two metres high" (R 34). He stated that "I had heard or better I know that there was an order from Hitler that flyers had to be shot, but my conscience denied it and I had made up my mind to let Steinmueller do it" (R 35). He also said "I did not have any feeling of being guilty since I was aware of the fact that I did not shoot him, and even if I had hit him, it was not I who killed him. I recall exactly the fact that the flyer had fallen down before I shot" (R 36). He believed that Krone was immediately in back of him all the way (R 36). He was only 17 years old on the day of the shooting (R 33).

HOFBAUER also testified that he accompanied the fourth flyer to the game reserve reluctantly and only because he was ordered to do so (R 50). He stated that Seidel cursed him and reprimanded him for bringing the flyer back to camp and then ordered him to accompany Reisinger and Blauensteiner "for punishment" (R 50). After twice refusing he finally obeyed the order because he was "so much terrified and disturbed" (R 50). He said that "I did not dare to refuse any more because of fear of the consequences" (R 50). Knowing that they had been ordered to shoot the flyer (R 50, 51), he hung back and deliberately followed some distance behind the other two guards (R 51). "When we were about 30 metres from the game reserve, all of a sudden, the flyer either tumbled or took one or two steps to the side, I cannot state this exactly. Upon that Vormann Reisinger and Blauensteiner raised their rifles, the whole thing going as quickly as lightning, and shot" (R 51). He denied that he gave an order to Reisinger or Blauensteiner to shoot (R 51). He then returned to the camp and reported to Seidel "order performed". He did not mean that he "personally had assisted in performing that order but just that the order which had been given out to Blauensteiner had been performed" (R 52).

It was also brought out in HOFBAUER's defense, that he has a wife and three children and that one of his uncles died in an insane asylum after having been confined there for many years (R 53).

7. Proceedings:

The Military Commission which tried this case was appointed pursuant to authority delegated by the Commanding General, United States Forces in Austria, by letter, Headquarters, United States Forces European Theater, AG 250. 4 G.P. 490. 10 October 1945, subject: Authority to

Appoint Military Commission". The Commission was appointed by paragraph 2, Special Orders Number 304, Headquarters, United States Forces in Austria, 31 December 1946. The provisions of paragraph 3d, War Crimes Memorandum Number 3, Headquarters United States Forces in Austria 23 April 1946, were complied with in that the commission was composed of more than three commissioned officers, and that a Trial Judge Advocate and Defense Counsel and assistants for each were appointed. The charges were properly sworn to, and were referred by proper indorsement to the Trial Judge Advocate for trial. The charges were served on the accused more than five days prior to the date of the trial. The accused were represented by two United States civilian attorneys and the accused HOFBAUER was also represented by Dr. Felix Freund, an Austrian civilian attorney of his own choice.

8. Jurisdiction:

That a Military Commission has the power to try enemy nationals for offenses against the laws and usages of war is settled. Such a Commission is a tribunal created under the common law of war and has, under international law, jurisdiction of offenses against the laws of war (SPJGW 1943/17671) and over individual perpetrators thereof (Articles 2 and 3 of the Geneva (prisoners of war) Convention, 27 July 1929; Article 23, paragraph (c) of the annex to the Hague Convention Number IV of 18 October 1907; Change 1, 15 November 1944, paragraph 345.1, FM 27-10, Rules of Land Warfare). It is beyond question that the offense in this case - the murder of unarmed, surrendered prisoners of war - was a violation of the laws of war properly triable by a military commission having custody of the offenders against those laws.

9. Procedure:

The proceedings of the commission were, in general, conducted in accordance with the rules of procedure prescribed for general courts-martial, which is in accord with paragraph 4, War Crimes Memorandum Number 3, cs, which provides that Military Commission will have regard for, without being bound by, such rules.

The accused were arraigned at the beginning of the trial in the usual manner and both of them pleaded not guilty to the specification and not guilty to the charge. The trial was held with impartiality and a full opportunity was given to each accused to present any matter in his defense which he might desire to. The Commission explained fully to the accused their right to remain silent, to testify as a witness, or to make an unsworn statement (R 32).

The record reveals no errors or irregularities of importance or prejudicial to the substantial rights of the accused. Prior to the introduction of any other evidence the Commission admitted into evidence the confessions of the accused. Defense counsel objected to this on the ground that evidence of the corpus delicti, other than by the confession itself, should be introduced prior to the introduction of the confession. This is, however, a question which is solely within the discretion of the Commission. The rule is stated in the Manual of Courts Martial (1928), Section 114, page 115, as follows:

"Usually such evidence is introduced before evidence of the confession; but a court may, in its discretion, admit the confession in evidence upon condition that it will be stricken out and disregarded in the event that the above requirements as to evidence of the corpus delicti (that there must be evidence of the corpus delicti in the record other than the confession itself) is not met later". (Phrase in parenthesis supplied).

The defense also objected (R 27) to the admission of a sworn statement by Blauensteiner, one of the participants in the killing of the fourth flyer in the game reserve, under the general rule that a confession or admission of one conspirator is inadmissible against another (See MCM 1928, Section 114c, page 117). This statement, however, would appear to be clearly admissible under paragraph 5 War Crimes Memorandum Number 3, as, which imposes only the condition, that, in the opinion of the President of the Commission, it has probative value to a reasonable man. The same rule is applicable in several other instances where the commission admitted hearsay evidence.

10. Sufficiency:

It is believed that there is sufficient evidence in the record to sustain the conviction of the accused, both of whom admitted their participation in the offense in signed confessions (Pros. Ex. 1, 2 & 3) and in their testimony on the witness stand.

RATH's defense was based on two grounds (1) that he did not actually shoot and kill the American but that he shot over his head after he had already been hit by Steinmueller and (2) that he acted reluctantly and only because he was ordered to do so by his superior Krone. Conceding, for the sake of argument, that the court believed the testimony presented by the defense on both of these points it was nevertheless amply justified in finding as it did. In regard to the first point, the evidence is uncontradicted, and the accused himself admits, that he knew the flyer was to be shot, that he made no protest, that he joined with Steinmueller in marching the victim to the spot where he was killed, and that he took the flyer's watch and ring after he was shot. There can be no question but that this makes him a party to the murder. The rule has been stated as follows: "One who actually commits the offense or some act which forms a part thereof, or assists in the commission thereof, or counsels or procures another to commit the offense or any part thereof, or aids and assists the one who has committed such an offense is a party thereto." (Miller, Criminal Law, page 225). (Underlining supplied). Rath, having assisted Steinmueller in marching the American flyer to his death with full knowledge that he was to be killed cannot now escape responsibility by claiming that he, himself, did not shoot the bullet that actually killed the flyer. Also, there is competent evidence in the file from which the court might well have concluded that Rath, as well as Steinmueller, shot and hit the flyer. The witness Minke testified (R 16) that there were two bullet holes in the back of one of the flyers and RATH has conceded that that flyer was the one shot by them and that only two shots were fired, one by Steinmueller and one by himself.

In regard to the second point, i.e. his defense of superior orders, although "the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment (Charge 1, 15 November 1944 par. 345.1, FM 27-10, Rules of Land Warfare)" it is necessarily implied that the Commission need not have done so. The order here was so palpably illegal and so "manifestly and undisputably contrary to international law" that the accused should have refused to obey and, having obeyed, cannot escape liability for an illegal act committed pursuant thereto. Oppenheim: International Law, p 453 has stated the rule as follows: "Members of the armed forces are bound to obey lawful orders only and they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity". The murder of unarmed, surrendered prisoners of war unquestionably violates both the unchallenged rules of warfare and the general sentiment of humanity.

HOFBAUER, like RATH, relied for his defense on "superior orders" and his testimony that the actual shooting was done by Blauensteiner and Reisinger, and not by him. Both of these defenses must be rejected for the same reasons as stated above.

Since he knew the purpose of this detail, since he was in charge of it, and since he actually accompanied it he is responsible for the crime committed by its members, even though the commission may have believed his testimony that he went along reluctantly and only because he was ordered to do so. Needless to say, the court might have chosen to believe, not him, but the statement of Blauensteiner (Pros.Ex.4) that the accused gave the actual command to "shoot".

At the end of the prosecutions case, and before the defense presented any evidence, defense counsel moved for a finding of not guilty as to both accused on the ground that there was no evidence in the record to establish the corpus delicti except for the confessions of the accused and that a person cannot be convicted legally upon his unsupported confession. Although there may be some doubt as to whether this rather technical rule of American jurisprudence is applicable to cases of this nature (See Wharton's Criminal Law, Vol I, Section 358, page 465, in which the English rule is discussed) it is not necessary to decide that question here. There is, and was at the close of the prosecutions case, sufficient evidence in the record outside of the confessions to establish the corpus delicti as to each accused. The rule of law applicable to questions of this nature is stated in MCM 1928, Section 114a, page 115, as follows:

"This evidence of the corpus delicti need not be sufficient of itself to convince beyond reasonable doubt that the offense charged has been committed, or to cover every element of the charge, or to connect the accused with the offense. Examples: If unlawful homicide is charged, evidence of the death of the person alleged to have been killed coupled with evidence of circumstances indicating the probability that he was unlawfully killed, will satisfy the rule and authorize consideration of the confession if otherwise admissible."

The following evidence of the corpus delicti, not including the confession, was submitted by the prosecution in this case:

a) As to the accused RATH: (1) testimony of Kopl that he saw RATH and the other guards march the two flyers away (R 7); that the message came back that the flyers had been shot (R 8); that the dead flyers were picked up by the wagon of the battalion and allegedly brought to the morgue (R 8); and that Blauensteiner "told me that Oberfeldmeister Krone had told him: 'Blauensteiner you know what you will have to do with this flyer' (R 8). (2) Testimony of Minke that he had received an order from Krone to kill the flyers which he refused (R 15); that later RATH among others was ordered to report to Krone (R 15); and that the flyers were dead (R 20); (3) Testimony of Hasiob that RATH said he was "very sorry for having done that" (R 23); and that she saw the bodies of the flyers buried (R 24).

b) As to the accused HOFBAUER: (1) testimony of Hasiob that the fourth flyer was marched to the game reserve by HOFBAUER among others (R 23); that she saw the bodies of the flyers buried (R 23); and that Seidel dictated a report to her that the fourth flyer was shot when he tried to take his rifle away from HOFBAUER (R 26). (2) Statement of Blauensteiner that he and Reisinger were ordered to shoot the flyer by Seidel; that HOFBAUER was ordered to accompany them "for safety"; that HOFBAUER shouted "shoot" whereupon they shot; and that the flyer was shot to death (Pros.Ex 4).

It is believed that this evidence fully satisfies the above cited rule in that it established, as to each accused, evidence of the death of the person alleged to have been killed and that it indicates the probability that he was unlawfully killed. It is concluded, therefore, that the Commission was correct in denying the motion of the defense for a finding of not guilty at the close of the prosecution's case.

11. Sentence:

According to the provisions of paragraph 13a, War Crimes Memorandum Number 3, cs, the Commission could adjudge any type of punishment referred to in paragraph 45 War Department Field Manual 27-5, subject: Military Government and Civil Affairs", dated 22 December 1943, up to and including the death penalty. This is in accordance with the general principle of international law that all war crimes are subject to the death penalty, although a lesser penalty may be imposed (see paragraph 357, FM 27-10, Rules of Land Warfare, page 89).

Both of the accused were sentenced to confinement at hard labor for a period of twenty-five years. In view of the fact that they were convicted of murder these sentences may be considered as comparatively light. However the Commission undoubtedly felt that, since both of the accused were acting under the orders of men whose guilt was greater than theirs, and since the accused RATH was only seventeen years old at the time of the offense, the maximum penalty was not warranted. No fault can be found with this reasoning. On the other hand it is believed that any further reduction in the sentence should be made. The mother of the accused RATH has presented a petition for clemency which has been appended to the record of trial based upon his age and the fact that he was acting upon orders. Both of these factors were before the Commission at the time sentence was adjudged and appear to have been given adequate consideration by it. No petition for clemency has been filed on behalf of HOFBAUER. It is concluded therefore that the sentences of the Commission were fair and commensurate with the degree of guilt of both accused.

12. Opinion:

It is my opinion that:

- (a) The Military Commission was legally constituted.
- (b) The Military Commission had jurisdiction over the offenses and the persons charged.
- (c) The record of trial is legally sufficient to support the finding of guilty and the sentences.
- (d) No errors injuriously affecting the substantial rights of the accused were committed during the trial.

13. Recommendations:

It is accordingly recommended that the sentences of Oswald RATH and Franz HOFBAUER be approved. No confirmation of the sentences is required where the Commanding General, United States Forces in Austria is the appointing authority, as is the case here (paragraph 3h War Crime Memorandum Number 3, cs). Accordingly actions designed to carry the foregoing recommendations into effect, should they meet with your approval, are submitted herewith.

/s/ Robert W. Mapes
/t/ ROBERT W. MAPES
Review Attorney
War Crimes Branch

I have read the record in trial in this case and concur in the above review

/s/ C.R. Bard
/t/ C.R. BARD
Col. JAGC

HEADQUARTERS
UNITED STATES FORCES IN AUSTRIA
APO 777, U.S. ARMY

MILITARY COMMISSION)
:)
ORDERS NUMBER 4)

9 June 1947

Before a Military Commission which convened at Salzburg, Austria, pursuant to paragraph 2, Special Orders Number 304, Headquarters, United States Forces in Austria, 31 December 1946, as amended by paragraph 2, Special Orders Number 20, same Headquarters, 23 January 1947, were arraigned and tried:

Oswald Rath and Franz Hofbauer, Austrian Nationals.

CHARGE: Violation of the Laws of War.

Particulars: In that Oswald Rath and Franz Hofbauer, Austrian nationals, did, at or near Schutzen-am-Gebirge, Kreis Eisenstadt, Austria, on or about 13 February 1945 and 14 February 1945, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of four unknown members of the United States Army who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

PLEAS

Oswald Rath:

To the particulars of the Charge : Not Guilty
To the Charge : Not Guilty

Franz Hofbauer:

To the Particulars of the Charge : Not Guilty
To the Charge : Not Guilty

FINDINGS

Oswald Rath:

Of the Particulars of the Charge : Guilty, except
the words "and 14 February 1945" and "four unknown
members of the United States Army who were then un-
armed, surrendered prisoners of war in the custody of
the then German Reich", substituting for the latter
the words "an unknown member of the United States Army
who was then an unarmed, surrendered prisoner of war
in the custody of the then German Reich". Of the ex-
cepted words Not Guilty, of the substituted words Guilty
Of the Charge : Guilty

Franz Hofbauer:

Of the Particulars of the Charge : Guilty, except
the words "13 February 1945 and" and "four unknown
members of the United States Army who were then un-
armed, surrendered prisoners of war in the custody
of the then German Reich", substituting for the latter
the words "an unknown member of the United States Army
who was then an unarmed, surrendered prisoner of war
in the custody of the then German Reich". Of the ex-
cepted words Not Guilty, of the substituted words Guilty
Of the Charge : Guilty