

DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
WAR CRIMES BRANCH
UNITED STATES FORCES, EUROPEAN THEATER

14 October 1945

UNITED STATES

v

Franz Strasser, an Austrian
National

Case No. 8-27

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused was tried at Dachau, Germany, on 24 August 1945, before a Military Commission appointed by paragraph 1, Special Orders No. 229, Headquarters, Third U.S. Army, 19 August 1945.

2. <u>FINDINGS</u> : The offenses involved were:	<u>Pleas</u>	<u>Findings</u>
CHARGE I: Violation of the Laws and Usages of War.	NG	G
Specification: In that on or about 9 December 1944, FRANZ STRASSER, Kreisleiter of Kreis Kaplitz, an Austrian National, did at or near Kaplitz, Czechoslovakia, wrongfully and unlawfully kill an American airman, whose name, rank and serial number are unknown, by shooting him with a machine pistol.	NG	G
CHARGE II: Violation of the Laws and Usages of War.	NG	G
Specification: In that on or about 9 December 1944, FRANZ STRASSER, Kreisleiter of Kreis Kaplitz, an Austrian National, did at or near Kaplitz, Czechoslovakia, wrongfully and unlawfully shoot an American airman, whose name, rank and serial number are unknown.	NG	G

3. SENTENCE:

The Commission by a two-thirds vote of the members present at the time the vote was taken sentenced the accused to be hanged by the neck until dead. Said sentence was approved by the Reviewing Authority on 21 September 1945. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for final action (Letter, Headquarters, United States Forces, European Theater, AGO 250.4 JAG-AGO, 25 August 1945, subject: "Military Commissions").

4. DATA AS TO ACCUSED: The accused was Kreisleiter of the Nazi Party for the Kaplitz Kreis, with headquarters in Kaplitz, Sudetenland. He is a truck driver by occupation. He is 45 years of age, is married and has three children, and at the trial testified that a fourth child was expected in September.

5. RECOMMENDATION: That the action of the Commission and of the Reviewing Authority be confirmed.

6. EVIDENCE:

(a) On the afternoon of 9 December 1944, an American bomber made a forced landing near Zahdelesdorg, Czechoslovakia. Five American airmen were apprehended and were loaded into a truck for the ostensible purpose of transporting them to Kaplitz. Accused STRASSER preceded the truck in a motor car, and, in the execution of a prearranged plan, stopped the truck near a mountain top. The five American airmen were thereupon killed. Accused STRASSER participated in the slayings, and by his own admission shot one and perhaps two of the airmen. It is the contention of STRASSER that he shot in order to prevent the escape of the airmen.

(b) Further detailed evidence will not be set forth here, but the recapitulation contained in the review of the Staff Judge Advocate, Third U.S. Army, dated 7 September 1945, appended hereto, is adopted in its entirety.

7. JURISDICTION:

(a) The Military Commission which heard this case was properly constituted and had jurisdiction over the subject matter and of the accused. A military commission has jurisdiction over the inhabitants of an occupied enemy country held by the right of conquest (Par. 7, FM 27-10, Rules of Land Warfare; Coleman v. Tennessee (1878), 97 U.S. 509). Military commissions are not restricted in their jurisdiction by territorial limits. (United States v. Hoge et al (1865), 8 Rebellion Records, Series II, 674, 678; 56 Harvard Law Review, 1059, 1065). Thus, an offense against the laws of war committed in a country prior to its occupation may properly be tried by a military commission of the victorious army upon occupation. (Memorandum by the Judge Advocate General (SPJGW 1943/17671 subject: Jurisdiction to Punish War Criminals, 13 December 1943; Dig. Op. JAG, 1912, p 1067; Trial of Henry Wirz (1868), 40th Congress, 2nd Session, House of Representatives, Ex. Doc. No. 23; see also cases cited on pages 207-216 in Universality of Jurisdiction Over War Crimes, reprinted from 33 California Law Review (June 1945)). Civilian nationals of a belligerent

power are bound to recognize lawful enemy combatants and accord them the treatment required under customary and conventional international law (Art. 2 of the Geneva (Prisoners of War) Convention, 27 July 1929; Art. 23, par. (c) of the Annex to the Hague Convention No. IV of 18 October 1907; Change 1, 15 Nov. 1944, par. 345.1, FM 27-10, Rules of Land Warfare.) Both the United States and Germany were signatory powers to the cited conventions. The killing of the unarmed prisoners of war in the instant case was intrinsically so barbarous and inhumane that it can properly be said to violate not only the written law of nations, but also those implied concepts and standards of decency to which the nationals of every belligerent are bound by the unwritten law of nations. The offense closely approximated common law murder. The jurisdiction of the Commission over the offense and over the accused is beyond question.

8. DISCUSSION:

(a) The evidence established conclusively that five American soldiers were killed at the time and place alleged in the specifications of the two Charges. The death of the five American soldiers was not denied by accused STRASSER. The specification under Charge I alleges that accused unlawfully killed an unknown American airman. The specification under Charge II alleges that accused unlawfully shot an American airman. From the evidence it appears that STRASSER shot two airmen and that the specification of Charge I refers, in point of time, to the second airman whom STRASSER shot and that the specification of Charge II refers to the first airman whom STRASSER shot. Since it was properly established that all five of the American airmen were killed, it would have been preferable to have alleged in one specification that the accused STRASSER, acting in concert with other unapprehended accused, participated in the unlawful killing of all five American airmen. To support such a specification there was ample evidence to establish that the participants were acting in concert in carrying out a previously conceived plan. The fact that accused STRASSER was charged only with the killing of one American airman and with the shooting of a second American airman was obviously not prejudicial to him, since the shooting and death of each, and the participation of STRASSER therein,

(b) STRASSER bases his defense on the contention that he shot in order to prevent the escape of the prisoners. The overwhelming weight of the evidence refutes this contention, as an analysis of the facts will indicate. The evidence shows that accused STRASSER, together with NELBOCK and WOLFF (neither of whom has been apprehended), left the rendezvous where the prisoners were being temporarily held, in an automobile. STRASSER's car was followed by a truck driven by PUSCH, which contained the five airmen. The third vehicle in the convoy was the car containing Captain LINDEMAYER (whom, it was stipulated subsequently committed suicide), and which vehicle was driven by REICHL. It is undisputed that the car containing STRASSER was stopped near the summit of a high elevation on the road to Kaplitz. Accused STRASSER got out of his car and started to walk back towards the truck driven by PUSCH (R 8). When STRASSER got close to the truck, shots were fired. Accused STRASSER admittedly shot at one or more of the airmen (R 41). The testimony as to some of the events which occurred immediately before and at the time of the killings is conflicting. STRASSER testified that as he walked towards the truck he heard a call that sounded like "Halt" and the firing of shots (R 40). According to STRASSER, two of the airmen, one on each side of the truck, walked swiftly towards him. STRASSER admitted that he shot at the airman who was on the left side of the truck. He contended that WOLFF also shot. STRASSER was not sure whether or not he shot at the second airman, inasmuch as the entire action lasted only for a minute (R 41, 42). STRASSER contended that he did not know that the airmen were unarmed and that he was not present when they were searched. He admittedly did not call "Halt" before commencing to fire (R 45).

(c) The testimony of PUSCH corroborates the contention that some shots were fired before STRASSER arrived at the truck. However, PUSCH testified that an airman was standing to the left of PUSCH and that STRASSER called out to PUSCH "Go away", and then shot this airman (R 8). Another airman then came up to the cab of the truck and was permitted to enter by PUSCH (R 8). Accused STRASSER threatened PUSCH, stating "Pusch, go away or you will be dead, too" (R 8). Upon STRASSER's order the airman left the cab, ran towards the back of the truck, and fell near the left rear wheel (R 8). Captain LINDEMAYER came up

at this point and stated that he had no more ammunition (R 9). Thereupon, accused STRASSER fired one shot at the prostrate airman and thereafter raked the airman from head to foot with his machine pistol (R 9). These facts effectively refute STRASSER's contention that he shot to prevent the escape of the prisoners. LINDEMEYER and STRASSER then pointed out to each other which of the victims they had each shot. LINDEMEYER claimed three and STRASSER two. Some further shots were fired later by either STRASSER or WOLFF into the prostrate body of the first airman, who had been shot by STRASSER, and who apparently was still living (R 9, 10).

(d) Since the essential facts as to the death of the five American airmen are not in dispute, it remains only necessary to discuss the defense relied upon by the accused, viz, that the shooting was justifiable because it was necessary to prevent the escape of the prisoners. Reasonable means, including shooting, can be used to prevent the escape of prisoners of war (JAG Text No. 7, Law of Land Warfare, p 104). The evidence is overwhelming that there was no attempt on the part of the airmen to escape, and that the killing of the five airmen was due to a preconceived course of action. It will be recalled that after the airmen had been searched (at which time STRASSER was not present) they were loaded in the truck driven by PUSCH. Kreisleiter STRASSER, together with NELBOCK and WOLFF, held a conversation with Captain LINDEMEYER, during the course of which LINDEMEYER stated the airmen were to be killed. STRASSER protested, saying that the Gauleiter would make a "big fuss", and "the devil only knows what would happen afterwards". Captain LINDEMEYER reassured STRASSER, stating: "I will take care of it. Let me do it" (R 8).

The convoy ostensibly started for Kaplitz for the purpose of delivering the prisoners there. STRASSER contended that upon reaching the top of the mountain he stopped his car in order to ascertain what had happened to the truck which contained the prisoners and which was supposed to have been following him. STRASSER testified that because the condition of the road was so bad, and the mountains so steep, he believed that the truck may have had difficulty in negotiating the hill. However, from the fact that LINDEMEYER, after a discussi

with STRASSER and the others, told the driver of the truck to stop upon a prearranged signal, it may reasonably be inferred that the stopping of the truck was part of the preconceived plan. As a matter of fact, PUSCH testified that STRASSER and NELBOCK signaled to him to stop the truck (R 8). This contention was, of course, denied by STRASSER. From the fact that there is no contention that the truck actually was forced to stop due to the road condition STRASSER's claim that he had stopped his automobile in order to walk back to see what happened to the truck is highly unreasonable. The normal and expected course of conduct would have been for STRASSER to remain in his vehicle for a period of time sufficient to enable the truck to catch up to him. It appears that logically the testimony of PUSCH is sound and that the testimony of accused STRASSER is false. The testimony of REICHL was somewhat confused, but the testimony of PUSCH is clear and convincing.

(e) The evidence clearly established that Kreisleiter STRASSER, who had supreme command in the Kreis (R 16), led the convoy to the place where the airmen were to be executed. The first airman who was shot by STRASSER was not attempting to escape, but was instead immediately adjacent to the left of PUSCH. The second airman shot by STRASSER was seeking refuge in the cab of the truck on invitation of PUSCH when he was ordered out, and then shot by STRASSER. The evidence establishes that STRASSER fired several shots from his machine pistol into the prostrate body of this second airman (R 8, 9). This testimony absolutely refutes the contention of STRASSER that he shot to prevent the escape of the prisoners. After the shooting, STRASSER, in talking to LINDEMAYER, claimed credit for killing two of the dead airmen, while LINDEMAYER claimed credit for killing three of the airmen.

(f) Even on the basis of STRASSER's own testimony, viz, that he shot an airman, or perhaps two airmen, who were attempting to escape (R 42), STRASSER is undoubtedly guilty of the commission of the offenses with which he is charged. While STRASSER was not present at the time the prisoners were searched and disarmed, nevertheless as a reasonable man, he would certainly have known that such customary procedure would be followed. STRASSER admitted that he did not call to the prisoners to "Halt" (R 44). STRASSER did not contend that the prisoners

were armed. There is not a scintilla of evidence to support STRASSER's contention that he shot the prisoners to prevent their escape. The statement made by LINDEMEYER to REICHL, to the effect that one of the airmen wanted to get away, is obviously a self-serving declaration made by one of the participants in the crime. There was no claim that shooting was a reasonable method to use to prevent the alleged escape. Even on the basis of his own testimony, STRASSER was guilty of the commission of the offenses with which he is charged.

(g) The identity of the airmen as American soldiers was clearly established. Their identity as individuals was not an essential element of proof under the charges and specifications as drawn, and was not established. All other necessary links in the chain of evidence against the accused were clearly established and were not disputed by the accused.

(h) The accused contended at the trial that a pre-trial statement was obtained from him by force. He testified that he was beaten and that a tooth was knocked out. He also stated that he was threatened with a pistol. The statements made by STRASSER prior to the trial closely approximated his testimony at the trial. Obviously he was not under compulsion at the time of the trial, nor was it contended that the pre-trial statements were inaccurate. As a matter of fact, his pre-trial statements were offered in evidence by the defense for the stated purpose of establishing that STRASSER had always been consistent in his statements as to the facts in this case (R 35).

(i) The accused was represented by able military counsel. It appears from the record of trial and accompanying papers that Captain LINDEMEYER, who participated in the murders, committed suicide prior to the trial, and that WOLFF and NELBOCK, who also participated in the murders, have not yet been apprehended. There is no indication that accused was prejudiced by the absence of his associates and, obviously, it was not incumbent upon the prosecution to produce WOLFF and NELBOCK at the trial.

(j) All evidence received by the Commission was admissible under the rules of procedure established in the order creating the Commission. The essential facts were established by the direct testimony of eye-witnesses.

The Commission was properly constituted and had jurisdiction over the subject matter and of the accused, and was authorized to impose the death penalty. Both findings and sentence were approved by a two-thirds vote of the members of the Commission present. There were no irregularities in the proceedings or trial which prejudiced any of the substantial rights of the accused. Accused was given a fair trial, consistent with Anglo-Saxon conceptions, and there is no doubt whatsoever as to his guilt.

9. CLEMENCY:

Accused was found guilty of the commission of a war crime. All war crimes are subject to the death penalty, although a lesser penalty may be imposed (par. 357, FM 27-10, Rules of Land Warfare). The offense in this case was particularly heinous because it involved the cold-blooded murder of absolutely defenseless prisoners of war. No mercy whatsoever was exhibited by the accused. The offense closely approximated common law murder. Murder is the unlawful killing of a human being with malice aforethought. The usual penalty among civilized peoples for murder is life imprisonment or death. There are no extenuating circumstances in the instant case to warrant changing the penalty of death imposed by the Commission. The evidence is overwhelming that the offenses were committed by STRASSER in accordance with a preconceived plan to murder the five American airmen. The sentence of the Commission and the action of the Reviewing Authority thereon are just, and commensurate with the nature of the offense committed by the accused.

10. CONCLUSION:

It is accordingly recommended that the sentence of the Commission be confirmed. A form of action prepared to accomplish this result is attached hereto.

FORD R. SARGENT,
Major, JAGD

17 October 1945

I concur.

C. B. MICKELMAYR
Colonel, JAGD
Deputy Theater Judge Advocate