

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

UNITED STATES)

6 February 1946

v)

Case No. 12-1155

August Kobus, a German
National)

REVIEW AND RECOMMENDATIONS OF
THE DEPUTY THEATER JUDGE ADVOCATE

1. TRIAL: The accused was tried at Ludwigsburg, Germany, on 13 and 14 November, 1945, before a General Military Court appointed by paragraph 5, Special Orders No. 311, Headquarters, Seventh U. S. Army, Western Military District, 7 November 1945.

2. <u>FINDINGS</u> : The offense involved was:	<u>Pleas</u>	<u>Findings</u>
CHARGE. Violation of the Laws of War	NG	G

Particulars: In that August Kobus then Burgomeister and Ortsgruppenleiter of Freilassing, Germany, did, at or near Freilassing, Germany, on or about 16 April 1945, wrongfully and unlawfully kill an officer of the United States Army, then a prisoner of war of the German Reich, namely Captain Chester E. Coggeshall

NG G

3. SENTENCE: The Court, by at least a two-thirds vote of the members present at the time the vote was taken, convicted the accused and sentenced him to be shot to death by a firing squad. Said sentence was upheld on review by the Reviewing Authority on 14 January, 1946. The record of trial has been forwarded to the Commanding General, United States Forces, European Theater, for final action (paragraph 5 e, Letter, Headquarters, United States Forces, European Theater, AG 000-5-2 GAP, 16 July 1945, subject: Trial of War Crimes and Related Cases"; Article VII, Ordinance No. 2, Military Government Courts, contained in Handbook, "Military Government Germany, Technical Manual for Legal and Prison Officers, 2nd Edition," p 30).

4. DATA AS TO ACCUSED: The accused, a German civilian, was burgomeister and ortsgruppenleiter of Freilassing, in Kreis Laufen, upper Bavaria, Germany. He was burgomeister four and one-half years prior to the date of trial and a member of the Nazi Party since 1931. He served in the German army from 1913 to 1918, suffering a head

age (R 1) and married (R 2).

5. RECOMMENDATIONS: That the action of the Military Court and of the Reviewing Authority be confirmed , but that the method of execution be changed to hanging.

6. EVIDENCE:

(a) On 16 April, 1945, an American fighter plane was shot down and crash landed at Sillersdorf, a small village about five kilometers from Freilassing, Germany (Pros. Ex. 5). The pilot, Captain Chester E. Coggeshall, 343rd Fighter Squadron, 55th Fighter Group, U. S. Army (Pros. Ex. 6, 7, 8), was slightly wounded (Pros. Ex. 5). He was almost immediately captured by members of the local gendarmerie and by German military personnel, put on a stretcher, and taken in an armored car to Freilassing (Pros. Ex. 5). There the accused Kobus refused to permit entrance of the injured prisoner into a dispensary where he could have been given first aid treatment (R 8, 9, 13; Pros. Ex. 1, 2). The accused then told the German officers present that he, the accused Kobus, had received orders from one Bernhard Stredede, the Kreisleiter from Berchtesgaden, to "finish" the pilot (R 4, 13, 14; Pros. Ex. 1). The accused then rode off on a bicycle, followed by the armored car, manned by German soldiers and containing the wounded captive (R 4, 13, 14, 15, 16, 17). The party went into the woods near Freilassing where the accused killed the victim with two shots in the head (R 4, 18, 23; Pros. Ex. 3, 4, 5). Between the two shots the victim was heard to scream and moan (R 18; Pros. Ex. 4, 5). Autopsy of the deceased by a U. S. Army pathologist (not included in the record of trial but attached thereto as an unused portion of the report of investigation) disclosed that the cause of death was a perforating wound of the brain, presumably due to a gun shot wound caused by a 32 caliber bullet. The victim was positively identified by Army acquaintances by means of pictures of the disinterred body (R 26, 27; Pros. Ex. 6, 7, 8). A written confession of the accused, in substance admitting the facts outlined

similar testimony in court (R 2-5, 27-31).

(b) As a defense, the accused contended that one Bernhard Stredle, Kreisleiter of Berchtesgaden, had ordered that all captured allied airmen were to be killed (R 4; Def. Ex. 1; Pros. Ex. 5), and that on the date in question Stredle had specifically ordered him by telephone to kill the captured airman under threat of severe disciplinary action (R 3, 4, 29, 30). The accused further testified that "he had not the strength to resist the order of the Kreisleiter" because of lack of sleep, excitement, and the "pressure" of work resulting from the strafing air attacks (R 30).

(c) Further detailed evidence will not be set forth here, but the recapitulation contained in the review of the Staff Judge Advocate, Seventh United States Army, appended hereto, is adopted in its entirety.

7. JURISDICTION:

The Military Court which heard this case was properly constituted and had jurisdiction over the subject matter and of the accused (Letter, Headquarters, United States Forces, European Theater, AG 000.5-2 GAP, 16 July 1945, subject: "Trial of War Crimes and Related Cases"). "Offenses against the laws and usages of war" committed prior to occupation are properly cognizable by such specially appointed military courts (Letter, Headquarters, United States Forces, European Theater, supra). Such courts are tribunals constituted under the common law of war with jurisdiction analogous to that of military commissions. They are, in fact, military commissions except in name. They have, therefore, under international law, jurisdiction of offenses against the international laws of war committed prior to or during belligerent occupation (SPJGW 1943/17671) and over individual perpetrators thereof (Articles 2 and 3 of the Geneva (prisoners of war) Convention, 27 July 1929; Article 23, par (c) of the Annex to the Hague Convention No. IV of 18 October 1907; Change 1, 15 November 1944, par. 345.1, FM 27-10, Rules

of Land Warfare). It is beyond question that the offense in the instant case -- the deliberate murder by a civilian of a surrendered unarmed enemy soldier -- was a violation of the laws of war properly triable by a military court having custody of the offender.

8. DISCUSSION:

(a) The evidence established conclusively that the accused, a civilian, deliberately shot and killed the deceased, who was a captured, unarmed, and wounded combatant. The accused admits every element essential to establish a war crime. He offers as a defense a purported order received over the telephone from his Nazi political supervisor to kill the captured airman under penalty of severe disciplinary action. Such a contention amounts to a plea of obedience to superior orders, coupled with a plea of acting under compulsion, or coercion. It is noteworthy, in connection with this defense that although in his testimony before the Court the accused testified that he had received a specific order just prior to the killing from Kreisleiter Stredle to kill this particular prisoner (R 4); in his pre-trial confession the accused mentioned only a prior general order from Stredle to several Ortsgruppenleiter within the county to kill all captured Allied airmen. Whether the victim was killed in compliance with a specific order to kill this particular airman, or in compliance with a standing order to kill all captured airmen, it is believed that the defense of superior orders, under the facts in this case, should not be accepted either as legal justification or in mitigation of the offense. 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 (Change 1, 15 November 1944, par. 345.1, FM 27-10, Rules of Land Warfare)", it is believed that the order was so palpably illegal and so "manifestly and undisputably contrary to international law" that the accused should have refused to obey and, having obeyed, can not escape liability for an illegal act committed

in pursuance thereto (Oppenheim, International Law, Vol II, Sixth Edition, p 453, footnote 2, citing the Llandovery Castle case (Annual Digest, 1923-1924, Case No. 235; (1921) Cmd. p 45).

Logically it may be argued that obedience to an order from a Nazi Party superior, who was neither an official of the German government, nor a member of the military, is not an act done "pursuant to order of a superior or government sanction", and not within the purview of the somewhat ambiguous provision of the Field Manual above quoted. Certainly a Nazi party member should not be permitted successfully to contend before a military court of the United States that he is not guilty, or is less guilty, because he killed at the order of another Nazi, any more than a member of a criminal "gang" leader or a political "boss". However, the defense of superior orders may be rejected here on the broader and less technical ground mentioned above, to-wit, that the order to murder was, and was known by the accused to be, so patently illegal and so flagrantly cruel and inhumane that obedience to superior orders can neither palliate nor justify the killing.

As to the plan that the accused acted under compulsion or coercion, it should be noted that the accused does not state specifically what punishment he expected to receive if he disobeyed the purported order, except to say that he was threatened with punishment "in a very severe way (R 30)". Bearing in mind that the order originated with a political (Nazi Party) and not a military superior, that it was transmitted by telephone, and that the accused was himself both burgomeister and the highest ranking Nazi official in the community, it is not plausible to believe that there was such immediate physical danger to the accused, if he refused to obey, as to justify a plea of compulsion. It has been stated that an act "may be innocent if the crime is committed by a number of offenders, and that if the act is done only because, during the whole time in which it is being done, the person who does it is compelled to do it by threats on the part of the offenders

instantly to kill him or do him grievous bodily harm, if he refuses, but threats of future injury do not excuse any offense" (Stephen, A Digest of Criminal Law (1877) Art. 31, cited by Glueck, War Criminals: Their Prosecution and Punishment (1944), p 242.) (Underscoring supplied). "The threatened grievous injury to the actor must be immediately present and the fear must be well founded" (Glueck, op. cit. p 242). Actually the evidence tends to establish that the accused was not only free from danger of immediate bodily harm if he disobeyed but that he willingly acquiesced in the order and exercised discretion in its execution. He contended that he "argued" with the Kreisleiter over the telephone but agreed to carry out the order on the Kreisleiter's "own responsibility" (R 4). From then on he gave the orders himself. He prevented entrance of the wounded prisoner into a dispensary by physically blocking the way (R 9, 13), saying, "This pig needs no aid" (Pres. Ex. 2), and in so doing defied the authority of a German army sergeant who had ordered that the injured be taken into the building to receive first-aid treatment (R 13). The accused execution should be changed to death by hanging.

(c) From an examination of the entire record it appears that no error or omission, technical or otherwise, by the Court resulted in injustice to the accused. The proceedings satisfied all the requirements of a fair trial. There was substantial compliance with the requirements of the Technical Manual above referred to and with the general principles of international law recognized as applicable to the trial of such cases.

9. CLEMENCY:

It is believed that no valid reasons for the exercise of clemency are contained in the record of trial or accompanying papers. No petition for clemency on behalf of the accused has been received. The killing of the helpless and wounded prisoner of war was wanton and merciless and no extenuating circumstances are disclosed in the record. It is concluded that the sentence of the Court and the

action of the Reviewing Authority were just and commensurate with the nature of the offense.

10. CONCLUSION:

It is accordingly believed that the sentence of the court should be confirmed, but that the method of execution should be changes to death by hanging. A form of action prepared to accomplish this result is attached hereto.

/s/ James D. Murphy
/t/ JAMES D. MURPHY
Captain, JAGD.

Having examined the record of trial,
I concur.

/s/ Guy M. Kinsman.
/t/ GUY M. KINSMAN,
Colonel, JAGD,
Acting Deputy Theater Judge Advocate

9 February, 1946

HEADQUARTERS
UNITED STATES FORCES, EUROPEAN THEATER

21 February 1946

In the foregoing case of AUGUST KOBUS, a German National, the sentence is confirmed, and will be executed by hanging. The Commanding General, Seventh United States Army, will issue appropriate orders promulgating the sentence as confirmed, and will carry the sentence into execution at a time and place to be determined by him.

/s/ Joseph T. McNarney
/t/ JOSEPH T. McNARNEY
Commanding General, US Forces
European Theater