

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

5 November 1946

SUBJECT: Review of Proceedings of a Military Commission in the Case
of the United States versus Hans Saur Case No: 12-1370

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 Hans Saur 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 recommendations and reasons therefor, as required by paragraph 14b, War Crimes Memorandum Number 3, cs.

2. Synopsis of Charges, Findings and Sentence

The accused, Hans Saur, a German national, was tried by a military commission at Salzburg, Austria on 19-22 June 1946 on the following charge and specification:

Charge: Violation of the Laws of War.

Specification: In that Hans Saur, a German national, did, at or near Gusen, Austria, on or about 25 July 1944, wilfully, deliberately, and wrongfully encourage, aid, abet and participate in the killings of three unknown members of the United States Army, who were then and there in the act of surrendering as prisoners of war.

The commission in closed session and upon secret written ballot found the accused guilty of the charge and guilty of the specification, except the words "three unknown members", substituting therefor the words "one unknown member", except the word "were", substituting therefor the word "was", and except the word "prisoners", substituting therefor the words "a prisoner".

The commission sentenced the accused to be hanged by the neck until dead.

3. Evidence for the Prosecution

On or about 25 July 1944 shortly before noon, a flight of American bombers flew directly over the concentration camp at Gusen, Austria (R 6, 38, 68, 74). At least one of the planes was disabled by flak and the crew members thereof parachuted to earth (R 68, 74). One of the fliers descended at a point near the main entrance to the camp (R 7, 49, 75). While still in the air and several hundred meters above the ground, the flyer raised his arms above his head in token of surrender. (R 6, 14, 20, 60). One of the SS guards of the camp, Unterscharfuhrer Hans Saur, approached the place where the flyer was descending and fired a series of shots at him with an automatic weapon (R 235, 40, 55, 58, 60, 64, 69). The flyer was still about 100 meters in the air at the time this happened (R 7,

40, 35, 60, 68). Immediately after Saur fired the shots, the flier was seen to drop his arms and his head fell on his chest, and he crumpled up and appeared to hang lifeless in his parachute (R 7, 15, 20, 35, 64, 68). The body of the American flyer landed on the ground within the camp area near the main gate (R 34, 57, 62, 66, 69). A little later it was removed to the camp hospital, where the flier was found to have a gunshot wound in the abdomen (R 22, 37). An emergency operation was performed by Dr. Goscinski, a Polish inmate of the camp, to remove part of the shattered hip bone and to repair the intestine (R 22). At about five o'clock the next morning, the flier died in the hospital (R 23). The surgeon testified that the flier died of heart embolism resulting from the gunshot wound (R 31).

The following witnesses were called by the prosecutions as eye-witnesses to the shooting: Powelski (R 6), Morv (R 31), Orlowski (R 37, 104), Kurdek (R 46), Bukowski (R 55), Ladwik (R 60), Pokrzyka (R 63), Zbigniew (R 67) and Wychocki (R 46). They testified in substance that they saw the American flier descending by parachute over the camp, that Saur fired a burst of shots at him with an automatic weapon when he was at varying distances above the ground, that before Saur fired the flier had his arms upraised in token of surrender, that after Saur fired the flier crumpled up and appeared lifeless, that subsequently the flier was taken to the camp hospital where he died. The prosecution also called as witnesses Dr. Goscinski (R 21 and Pieta (R 51), his assistant, who testified that the flier died from a gunshot wound.

The commission called two witnesses. One, Wirth, (R 114), testified that he was a work supervisor at the Steyr factory adjoining the camp, but disclaimed knowledge of the shooting. The other witness for the commission, Schindler, (R 123 - 130) gave important testimony corroborating that of the eye witnesses to the shooting. Schindler, an Austrian, testified that he was a barber in one of the blocks, and that at about five o'clock on the afternoon of the 25th of July, 1944, Saur came to the block, and in his presence told one Ziesler that he, Saur, had just killed an American flier. Schindler stated that he then quietly made the remark to Ziesler that it was "no heroism to kill one that is lying on the ground" (R 125), whereupon, Saur, hearing this, became enraged, and struck Schindler a vicious blow in the mouth.

4. Evidence for the Defense

The only witness called by the Defense was the accused, Hans Saur, who testified under oath in his own behalf. He denied that he was armed with an automatic weapon or that he fired any shots at the American flyer (R 75). He stated that during the air-raid alarm, he was at his customary place of duty in and around an air-raid shelter, when he saw an American airman descending by parachute over the camp (R 74). He further stated that the airman drifted down near the quarry in another part of the camp, and that he was not able to see him land because of the distance (R 75). He said that later he heard from comrades that two officers and one Unterscharfuhrer fired at the flier (R 75). He denied having gone to the hospital after the shooting in the company of the camp commander, Ziernis, to look at the flier (R 104).

5. Proceedings

The Military Commission was appointed pursuant to authority delegated by the Commanding General, European Theater of Operations, to the Commanding General, United States Forces in Austria, by letter,

Headquarters, United States Forces, European Theater, AG 250.4 GAP-AGO, 10 October 1945, subject: "Authority to Appoint Military Commissions". The commission was appointed by paragraph 5, Special Order Number 115, Headquarters, United States Forces in Austria, 17 May 1946, and amended by paragraphs 1 - 4, Special Order Number 138, Headquarters, United States Forces in Austria, 14 June 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 trial. The accused was represented by a Major and a Captain, 1 of whom were experienced attorneys. The accused stated at the trial that he was satisfied with counsel. A fair and impartial trial was had. Four competent interpreters were sworn, and the entire proceedings were interpreted in the German language for the benefit of the accused.

6. Jurisdiction

That a military commission has the power to try an enemy national for an offense against the laws of war is settled. There is no question but that the commission had jurisdiction over the accused and the offense charged.

7. 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, this headquarters, 23 April 1946, which provides that Military Commissions will have regard for, without being bound by, such rules.

No irregularities of importance or prejudicial to the substantial rights of the accused were noted. The law member of the commission ruled on interlocutory questions and the admissability of evidence, and in no instance was exception taken.

It appears from the record that there was some animosity between opposing counsel, which was always promptly terminated by ruling of the law member before it could mar the dignity of the commission. For example, the trial judge advocate once offered to stipulate that other witnesses, if called, would testify substantially as had a preceding witness (R 28). The defense counsel agreed to so stipulate, provided it was further stipulated that the preceding witness had lied. The law member promptly, and quite rightly, ruled that the commission would permit no such stipulation to be entered into.

8. Sufficiency

The rule of law relative to the offense charged in this case is stated in JAGS Text Number 7, Law of Land Warfare, page 34, as follows: "Enemy personnel descending in parachutes from aircraft which is disabled or out of control may not on general principle be shot if the descent is over ground held by forces hostile to the parachutist." This is based on the recognized principle that the lawful right of combatants to kill members of

the hostile armed forces is not unlimited.

"The right to kill and wound armed enemies is subordinated to the condition that those enemies shall be able and willing to continue their resistance. It is unnecessary to kill men who are ready to surrender as prisoners." (Hall, Treatise on International Law, 8th Ed., Sec., 129).

This general principle has been commented upon by one authority in specific reference to parachutists in the following terms:

"One cannot say that there is any definite rule of war upon the point, but it may at least be affirmed that to attack a parachutist in circumstances in which he is certain in any case to be captured would be contrary to the principles of international law." (Spaight, Air Power and War Rights, 2d Ed., 1933, page 140).

From these statements it becomes apparent that there are two conditions to be considered in these cases: (a) whether the parachutist is able and willing to continue resistance, and (b) whether he is certain in any case to be captured. Thus, if the parachutist is an armed paratrooper, he must be presumed to be both "able and willing" to resist, it being his mission to do so. There is nothing in the simple circumstances of such a case to indicate a desire for quarter or cessation of the fight. On the other hand, when a crew member bails out of a disabled bombing plane, he ordinarily does so only to save his life and for no other purpose, and by common experience he is not able and willing to resist the armed forces of the hostile power. The second condition relates to the certainty of capture in any event. To shoot at a parachutist certain of capture amounts to a refusal of quarter.

Combining these principles, it is concluded that if the descent is only for the obvious purpose of escape from the disabled aircraft and under circumstances in which the parachutist is certain in any case to be captured, it is illegal to fire upon such parachutist during such descent.

Applying this rule to the present case, it is readily apparent that it was a violation of the rules of war for Saur to fire at the American parachutist. Several of the witnesses testified that they observed the American plane to be disabled, that it left a trail of flames behind it, and that it crashed. The fliers who parachuted from this plane to land in a camp containing over a thousand SS soldiers were certain to be captured.

If this were not enough, it appears further that the flier, at whom Saur was seen to fire, had his arms upraised in token of surrender during his descent. To shoot and kill him under such circumstances is definitely a violation of the laws of war.

At the beginning of the trial it was stated by the defense counsel that "one of the primary if not the key issue will be that of the identification of the accused." (R 5). Each witness was asked to identify the accused, and apparently did so without any hesitancy. The witnesses who testified that they saw the accused fire at the flier were all inmates of the concentration camp. They all knew the accused very well by sight, because he was a member

of the SS guard at the camp. They were all interrogated by the defense in regard to the details of the accused's attire at the time of the incident and, with remarkable uniformity, they gave similar descriptions. Their identification of the accused as the person whom they saw shoot at the descending airman was complete beyond any reasonable doubt.

The defense also raised the question with a number of the witnesses as to whether they were in a position at the time of the incident to see what they claimed they saw. The witness Powelski said he was on the third floor of the stone crusher, and about 350 to 400 meters from the place where the flier came down, and that he could observe the entire incident very well. The witness Norwicki stated that he observed Saur fire the shots at the flier from a distance of about 100 meters. The witness Orlowski stated that at the time of the incident he was lying in a ditch, and that he saw Saur at a distance of 150-200 meters from him fire the shots at the flier. The witness Kurdek testified that he was standing near the camp barber shop at the time and that the flier came down about 200-250 meters from him. The witness Ladwik was apparently the farthest away from the scene, because he testified that he observed Saur at a distance of 300-350 meters, at the time of the incident. These, and the other witnesses who testified that they observed the shooting, were given maps of the concentration camp by the defense counsel and were required to mark on the map their exact location, as well as that of the accused and the victim. Each witness was interrogated at length as to his ability to observe the incident from his particular post at the time. The defense made the point in its closing argument that the witnesses were not in a position where they could accurately observe the shooting as they claimed (R 132). This was a question of fact for the commission to decide.

The point was raised by the defense counsel that only hostile witnesses were presented by the prosecution. It is true that all of the witnesses were former inmates of the camp and, with the exception of Schindler, an Austrian, all of them were Polish. It is to be expected that inmates of a concentration camp will have no love for the SS guards who were often brutal to them. Each witness was questioned as to whether his hatred for the SS or for Saur affected his testimony. Each stated that he disliked the SS, but denied any personal animosity against the accused, and further denied that his dislike for the SS in any way influenced his telling the truth about the incident in question. In fact, with the exception of Schindler, each witness denied ever having any special personal contact with Saur, and said that he was merely known to them as one of the guards. The credibility of such witnesses was a matter for the commission to determine as it saw fit. It appears from the record that their stories were relatively uniform and free from any major inconsistencies. It is to be presumed that if it had been possible to find witnesses from among the SS personnel of the camp, either the defense or the prosecution would have produced them at the trial.

The findings of guilty are sustained by evidence which was competent within the meaning and intent of paragraph 5a, War Crimes Memorandum Number 3, namely, that it had probative value to a reasonable man. There are no errors or irregularities affecting the fairness and impartiality of the trial or which are prejudicial to the substantial rights of the accused in proceedings such as these.

9. Sentence

According to the provisions of paragraph 13a, War Crimes Memorandum Number 3, this headquarters, 23 April 1946, 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, which includes the death penalty. It is further stated in paragraph 13a, cs, that commissions may be guided by, but are not limited to, the penalties authorized by the Manual for Courts-Martial, the laws of the United States, and of the territory in which the offense was committed or the trial is held. The offense of the accused in this case is equivalent to the offense of murder denounced in Article of War 92, for which death or life imprisonment are the mandatory penalties.

The provisions of paragraph 3e, War Crimes Memorandum Number 3, cs, were complied with in that there was concurrence of at least two-thirds of the members of the commission present in the findings and the sentence.

No basis for clemency appears. A petition for mercy has been submitted by the mother of the accused and is incorporated in the record of trial. The petition is predicated upon the former good character of her son and attacking the veracity of the witness Schindler. These being matters for the consideration of the court, and having been resolved by the finding of guilty, it is believed that the petition warrants no consideration in the light of the offense committed.

10. Opinion

It is my opinion that:

- a. The military commission was legally constituted.
- b. The military commission had jurisdiction over the offense and the person charged.
- c. The record of trial is legally sufficient to support the findings of guilty and the sentence.
- d. No errors injuriously affecting the substantial rights of the accused were committed during the trial.

11. Recommendation

I recommend that the findings and sentence be approved.

12. Action

No confirmation of a sentence of death is required where the Commanding General, United States Forces in Austria, is the appointing authority, as is the case here. (Paragraph 3h, War Crimes Memorandum Number 3, this headquarters, 23 April 1946). Accordingly, an action designed to order the sentence executed, should it meet with your approval, is submitted herewith.

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