

DEPUTY JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
EUROPEAN COMMAND
APO 207-1

WCT Report
444

14 July 1947

UNITED STATES)

v.)

Hermann TUNTKE)

Case No. 000-Mautnausen-21

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Dachau, Germany, on 21 May 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

CHARGE I: Violation of the Laws and Usages of War.

PARTICULARS: In that Hermann TUNTKE, a German national, did at or in the vicinity of Wiener-Neudorf, Austria, in or about November 1943, wrongfully encourage, aid, abet and participate in the killing of an unknown citizen of Yugoslavia and two unknown citizens of the Soviet Union, inmates of the Wiener-Neudorf Concentration Camp, who were then in the custody of the then German Reich.

CHARGE II: Violation of the Laws and Usages of War.

PARTICULARS: In that Hermann TUNTKE, a German national, did at or in the vicinity of Wiener-Neudorf, Austria, in or about August 1943, wrongfully encourage, aid, abet and participate in the killing of an unknown citizen of the Soviet Union, an inmate of Wiener-Neudorf Concentration Camp, who was then in the custody of the then German Reich.

CHARGE III: Violation of the Laws and Usages of War.

PARTICULARS: In that Hermann TUNTKE, a German national, did at or in the vicinity of Haidfeld, Austria, in or about April 1945, wrongfully encourage, aid, abet and participate in the killing of an unknown citizen of Holland, an inmate of Wien-Haidfeld Concentration Camp, who was then in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: Accused TUNTKE, while a member of the Waffe SS, served in several concentration camps, including Camp Wiener-Neudorf in 1943-1944 and Camp Haidfeld in 1945 (both camps being located in Austria). During his tour of duty at Camp Wiener-Neudorf, on two occasions he beat prisoners with such severity that they died. At

Haidfeld, in compliance with directions from his camp commander, he ordered the killing of a Dutch national by injection of poison, insuring the death of the latter by a personally fired shot through the heart.

IV. EVIDENCE AND RECOMMENDATIONS:

HERMANN TUNTKE

Nationality:	German
Age:	40
Civilian Status:	Tile Layer
Party Status:	Unknown
Military Status:	Waffen SS, Sergeant equivalent
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: On an evening in the fall of 1943, a labor detail of approximately one hundred men from Hall 11, returning from working in an aircraft parts factory to roll call square in Camp Wiener-Neudorf, an outcamp of Mauthausen Concentration Camp, was ordered by accused TUNTKE to exercise on the square (R 21, 22). Three prisoners who were weak and lagged in the exercise were "finished off" by the accused (R 22). One, a Yugoslavian inmate, collapsed, and, while other inmates were compelled to march in a circle around them, accused beat severely on this exhausted inmate's back, belly and head (R 23, 25) for approximately fifteen minutes with a club about 75 centimeters long and five centimeters thick (R 23), standing "on his chest and on his throat" (R 23). When accused ceased his beating, the victim lay there motionless (R 24), his skull and face out (R 25). Within five minutes (R 24) TUNTKE commenced thrashing two Russians with his club; one named Peter (R 24) fell to the ground as accused beat him with all his might (R 25) and, as a sequel thereto, accused stood on his chest and choked him (R 25, 26). Peter's head was cut in two places, above his ears, and his face lacerated (R 25). Peter had lasted about seven minutes (R 25). His countryman, name unknown, unable to walk any more, received blows c

his head, hands, or wherever they might fall (R 25), administered with accused's full strength, eventually falling to the ground and remaining motionless to the end (R 25). None of the victims moved after the beatings by accused (R 25, 26). Their bodies were left on roll call square and remained there through roll call that evening (R 26) but were visible and identifiable in their coffins next morning at the camp mortuary (R 27, 28) from where they were carried away in a car, never to be seen again (R 28).

Earlier, during an evening in July or August 1943 (R 13), accused had badly beaten a Russian prisoner, a member of a work detail which was just returning from work, on roll call square, raining hard blows on the latter's head, back and at random (R 14), with a stick one meter long and five to six centimeters in diameter (R 13). TUNTKE kicked him. The Russian remained motionless on roll call square through evening roll call. Next morning his body, with face black and blue and smeared with dried blood (R 15), a long gash and several cuts and bruises on the head (R 17), was seen in the ante-room of a washroom of the camp (R 14). He was dead (R 15, 16).

As roll call leader at outdetail Haidfeld of outcamp Wien-Hinterbruehl (P-Ex 2, p. 1, R 10), accused TUNTKE was given "rather full power * * * in regard to the administration of the outdetail" (P-Ex 2, p. 2, R 10). Having received orders shortly before Easter 1945 from Streiwieser, camp commander of outcamp Hinterbruehl, to evacuate camp in a hurry and to put all sick prisoners out of the way and bury them, accused ordered poison administered by injection to an ill prisoner, a Dutch national, at the suggestion of a prisoner medic (P-Ex 2, p. 2, R 10). Another injection was ordered by accused who stated both before and at the trial, "But since I don't know anything about it" (referring to the poison) "I can't see how this works and I was not convinced it would, so, in order to be entirely sure, I went over to him and shot him through the heart with my pistol. He was then buried in camp proper." (R 36, 37, P-Ex 2, p. 2, R 10).

Evidence for Defense: Accused, duly sworn, testified that, while he had administered with an ox-whip validly ordered punishment (R 32, 42), he had not beaten prisoners, denied any knowledge of these incidents of beatings, and argued the impossibility of occurrence of such events under the reporting and disciplinary systems of the camp (R 32, 33). He asserted he ordered the incurably ill Dutch prisoner poisoned by injection and shot him when he couldn't imagine that poison had in fact killed the man (R 36, 37, P-Ex 2, p.2, R 10) - all this in obedience to his instructions from his superior officer (R 38, 40, 41) and without any feeling of committing a murder (R 38).

Sufficiency of Evidence: With regard to the evidence offered in support of superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty were warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed on behalf of the accused by defense counsel, Major L. F. Benson, the document being dated 29 May 1947.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Superior Orders: Accused TUNTKE, as shown in Section IV, paragraph 1, supra, sought to justify his actions by offering evidence to show that he was acting in compliance with "superior orders." Compliance with superior orders does not constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 812; Vol. II, Sixth Edition, Oppenheim, "International Law," paragraph 253, page 453. Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Dominikus Thomas, December 1945; and United States v. Alfons Klein, et al., (Hedamar Murder Factory Case), February 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 How. 115, and "Manual for Courts-Martial, U.S. Army," 1928, paragraph 148).

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior directing that he commit the wrongful act, (b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; FM 27-10, War Department, U.S. Army, "Rules of Land Warfare," paragraph 345.1, Change No. 1, 15 November 1944; Oppenheim, "International Law," supra, and the Llandovery Castle Case cited therein; "Manual for Courts-Martial," supra; "Report to the President of United States," 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of Our Enemies," found in footnote, page 53, "Military Occupation and the Rule of the Law," by Ernst Fraenkel; and opinions of the Deputy Theater Judge Advocate for War Crimes in U.S. v. Albert Bury and Wilhelm Hofner, September 1945, U.S. v. Dominikus Thomas, December 1945, and U.S. v. Gerd Beck and Otto Weinreich, December 1946).

Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused.

The Court had jurisdiction of the persons of the accused and of the subject matter.

II. CONCLUSIONS:

1. It is recommended that the findings and the sentence be approved.
2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

/s/ Richard C. Hagan
RICHARD C. HAGAN
Major JAGD
Attorney
Post Trial Branch

Having examined the record of trial, I concur.

/s/ C. E. Straight
C. E. STRAIGHT
Lieutenant Colonel, JAGD
Deputy Judge Advocate
for War Crimes

LEGAL FORM NO. 16
HEADQUARTERS
EUROPEAN COMMAND

AG 383 JAG

APO 757
10 Sept 1947

SUBJECT: Execution of Sentence in the Case of the United States vs.
Hermann TUNTKE (Case No. 000-Mautnausen-21)

TO : Commanding General
First Military District
APO 1, U.S. Army

Reference is made to letter, Hq. USFET, file AG 383 JAG-AGO,
subject: "Designation of Prisons for War Criminals," 26 February 1947
and to the inclosed copies of the Order on Review in the above entitle
case as to accused Hermann TUNTKE.

Upon compliance with the Order on Review the certificate be-
low will be completed and returned to the Deputy Judge Advocate for
War Crimes, 7708 War Crimes Group, APO 207-1, U.S. Army.

BY COMMAND OF GENERAL CLAY:

/s/ Wm. E. Bergin
Wm. E. BERGIN
Brigadier General, USA
Adjutant General

1 Incl:
1 Form No. 13 (in dup)

Frankfurt 7175

CERTIFICATE OF COMPLIANCE

The sentence covered by the above described Order on Review
was carried into execution at War Criminal Prison No. 1, Landsberg,
Germany, on 19 September 1947, at 1037.
(Date) (Hour)

/s/ L. H. Johnson, Jr.
(Signature and Rank)
L. H. JOHNSON JR, Maj. Hqs.
First Military District
(Organization)

/s/ Lloyd A. Wilson
(Countersignature and Rank of
Witnessing Officer)
LLOYD A. WILSON, Capt. CMP

LEGAL FORM NO. 13
MILITARY GOVERNMENT COURT
MILITÄRGERICHT

Order on Review
Verfügung nach Überprüfung

Case No. 000-Mauthausen-21
Strafsache Nr. 000-Mauthausen-21

Order No. _____
Verfügung Nr. _____

Whereas one Hermann TUNTKE
(Name of Accused) (Name des (der) Angeklagten)
was convicted of the offence of participation in killing of concentra-
tion camp inmates
wegen der folgenden strafbaren Handlung Teilnahme an der Tötung von
Konzentrationslager Haeftlingen
by the ~~XXXXXX~~ Military Court
*General at Dachau, Germany
*~~XXXXXX~~ in Dachau, Deutschland
vom ~~XXXXXX~~ Militärgerichte (Address of Court)
*Oberen (Anschrift des Gerichts)

and sentenced to death by hanging
schuldig erkannt und zu Tod durch den Strang verurteilt

by Judgment dated the 21 May 1947
durch Urteil vom 21 Mai 1947 and
(date)
(Datum)

Whereas the case has now come before me by way of review and
Diese Strafsache ist mir zur Überprüfung vorgelegt worden un

after due consideration and in exercise of the powers conferred upon
nach entsprechendem Studium des Sachverhaltes und in Ausübung der mir

me, I hereby order:

Übertragenen Befugnisse verfüge ich:

That the findings and sentence are approved. The Commanding
General, First Military District, will carry the sentence into executi-
on at War Criminal Prison No. 1, Landsberg, Germany, at a time to be
determined by him.

Dass der Befund und das Urteil bestätigt werden. Der Kommandier-
ende General, vom Militärbezirk I, wird die Vollstreckung des Urteils
im Kriegsverbrechergefängnis Nr. 1, Landsberg, Deutschland, zu einer
von ihm festgesetzten Zeit, veranlassen.

Dated this
Gegeben am 5 September 1947

CERTIFIED A TRUE COPY:
/s/ Wade M. Fleischer
WADE M. FLEISCHER
Lt. Col. AC

/s/ Lucius D. Clay
(Signature of Reviewing Authority
(Unterschrift der nachprüfenden Behörde
LUCIUS D. CLAY
General USA
Commander-in-Chief

*Strike out words not applicable.

*Nichtzutreffendes ist zu durchstreichen.

(Title)

(Titel)