

697.

DEPUTY JUDGE ADVOCATE'S OFFICE  
7708 WAR CRIMES GROUP  
EUROPEAN COMMAND  
APO 407

19 September 1947

UNITED STATES )

v. )

Rudolf BRUST )

Case No. 000-Mauthausen-7

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused was tried at Lachau, Germany, during the period 29 April - 6 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 Rudolf BRUST, a German national, did, at or in the vicinity of Mauthausen, Austria, in or about December 1941, wrongfully encourage, aid, abet and participate in the killing of about sixty-five non-German nationals, the exact names and numbers of such persons being unknown, inmates of Gusen I 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 Rudolf BRUST, a German national, did at or in the vicinity of Mauthausen, Austria, in or about May 1941, wrongfully encourage, aid, abet and participate in the killing of about forty non-German nationals, the exact names and numbers of such persons being unknown, inmates of Gusen I Concentration Camp, who were then in the custody of the then German Reich.

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

PARTICULARS: In that Rudolf BRUST, a German national, did, at or in the vicinity of Mauthausen, Austria, in or about March 1942, wrongfully encourage, aid, abet and participate in the killing of a non-German national, an inmate of Gusen I Concentration Camp, who was then in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: On a morning in early December 1941, accused BRUST, roll call leader in Camp Gusen I (an outcamp of Mauthausen Concentration Camp), called 60 to 65 ill inmates from their blocks for a bath. BRUST entered the bath house and emerged approximately an hour later with water on his jacket. As a

consequence of the bathing and the treatment received during the course thereof, many of the inmates died. The Court found BRUST not guilty of participating in the beating of 40 inmates to death in May 1941, Charge II. It also found him not guilty of participating in the killing of an ill inmate in March 1942, Charge III.

IV. EVIDENCE AND RECOMMENDATIONS:

RUDOLF BRUST

Nationality:	German
Age:	35
Civilian Status:	Photographer
Party Status:	Unknown
Military Status:	Waffen SS, Sergeant Major
Plea:	NG Charge I; NG Charge II; NG Charge III
Findings:	G Charge I; NG Charge II NG Charge III
Sentence:	Death by hanging.

Evidence for Prosecution: One witness testified that, around nine or ten o'clock on a morning in early December 1941 (R 10, 17, 25), he observed the accused, roll call leader in Camp Gusen I (an outcamp of Mauthausen Concentration Camp) (R 93, 94), standing outside the window of his studio and heard him call approximately 60 to 65 ill inmates (R 10, 11, 14, 28), probably Poles, Spaniards, or Russians (R 17, 28) presumably from blocks 31 and 32 (R 11). The accused who was wearing a leather jacket (R 25), apparently followed the naked inmates (R 15) to the bath house, however, the bath house was about eight to nine meters away from the witness' studio in the same building and the witness was not afforded a view of the door leading to the bath house (R 13, 18). Because of its construction, water falling from overhead valves could accumulate on the sloped concrete floor to a depth estimated at 30 to 60 centimeters (R 19, 70). The blocking of the outlet drain by the SS men (R 19), who willingly participated in the bathing (R 21, 22), aided the collection of water. On this occasion the witness heard screams

and groans for about one hour, but "gradually the wailing died down" (R 13, 14). The accused emerged from the bath house approximately an hour later (P-Ex 2, 2A, R 14, 21, 26, 117, 118) with water on his leather jacket (R 14, 15). A prisoner who had survived the bath appeared in view from the witness' window and thereupon the accused poured buckets of cold water on him until he collapsed. Then the accused placed his foot on the man's neck until the body stopped twitching (R 14, 28). While the actions of the accused inside the bath house were not visible to the witness, and though other SS men participated (R 18, 38, 39, 71), it was common camp knowledge that "BRUST participated in this liquidation drive by bathing" (R 21, 27, 38, 39). If prisoners would not lie down in the water, or were not overcome by the cold water, he would beat and kick them or stand on them (R 39). Any inmate who was ordered to bathe and who attempted to escape from the bath house was clubbed back into it by the SS men present (R 71). It was said to be standard policy that "everybody who entered the bath had to die". Those, whom they were not able to drown, they beat to death (R 71). As shown under evidence for the defense herein the accused testified he never at any time had anything to do with these so-called baths (R 96, 97). However, a rebuttal witness called by the prosecution testified as to another bathing incident in November 1941, in which the accused was involved. (R 110, 113).

Evidence for Defense: Accused BRUST testified at the trial, "I never led any prisoners to take a bath or to give them a bath or neither have I ordered them to do that" (R 96, 97, 104), stating he was away from camp most of the month of December 1941. He stated that he had beaten prisoners with a stick as official punishment directed from Berlin (R 107, 108) and that he had slapped prisoners to save them from greater punishment (R 107). When he returned from an illness in January 1942, he was arrested on charges of "supporting" prisoners in that he bought additional food for them,

and groans for about one hour, but "gradually the wailing died down" (R 13, 14). The accused emerged from the bath house approximately an hour later (P-Ex 2, 24, R 14, 21, 26, 117, 118) with water on his leather jacket (R 14, 15). A prisoner who had survived the bath appeared in view from the witness' window and thereupon the accused poured buckets of cold water on him until he collapsed. Then the accused placed his foot on the man's neck until the body stopped twitching (R 14, 28). While the actions of the accused inside the bath house were not visible to the witness, and though other SS men participated (R 18, 38, 39, 71), it was common camp knowledge that "BRUST participated in this liquidation drive by bathing" (R 21, 27, 38, 39). If prisoners would not lie down in the water, or were not overcome by the cold water, he would beat and kick them or stand on them (R 39). Any inmate who was ordered to bathe and who attempted to escape from the bath house was clubbed back into it by the SS men present (R 71). It was said to be standard policy that "everybody who entered the bath had to die". Those, whom they were not able to drown, they beat to death (R 71). As shown under evidence for the defense herein the accused testified he never at any time had anything to do with these so-called baths (R 96, 97). However, a rebuttal witness called by the prosecution testified as to another bathing incident in November 1941, in which the accused was involved. (R 110, 113).

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brought into camp forbidden newspapers for them, and failed to process punishment against prisoners and personally protected three or four Jews (R 94, 95, 102, 103, 105) and excused an inmate who was a witness in this case on his behalf, from wearing a yellow star or dot on his uniform (R 108).

This last witness, a member of a prisoners' observation and protection group in the camp which checked camp authorities and their actions as well as hiding their prospective victims (R 66, 67, 79), stated that the organization knew everyone who got a bath or an injection in the camp (R 67) and had no knowledge of BRUST taking a prisoner to a bath (R 68). Furthermore, BRUST did not wear a leather coat (R 72). He verified accused's claim to proper treatment of prisoners and his being jailed for being "too good to prisoners" (R 76), his failure to report infractions of camp regulations, for example, prisoners eating forbidden potatoes (R 77, 78). "I have to say quite frankly that I am an enemy of the SS because they mistreated us for such a long time. But, frankly and objectively speaking, I never witnessed BRUST slap a man's face". (R 75). Although he admitted it as possible, a German Jehovah's Witness, a former inmate of the camp, testified that he didn't hear of the drowning of 60 to 65 prisoners in December 1941 (R 87).

Sufficiency of Evidence: The findings of guilty are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by accused's German defense counsel, Dr. Karl Gick, 15 May 1947, accompanied by a written argument in support.

Recommendation That the findings and sentence be approved.

V. QUESTIONS OF LAW: Examination of the entire record fails to disclose any error or omission which resulted in injustice to the accused.



A question, not raised at any stage of the trial but implicit in the facts, warrants discussion. Inasmuch as the particulars contained no allegation that the offense was committed subsequent to the date the United States entered the war against Germany (11 December 1941), had the court jurisdiction of the offense covered by Charge I? The evidence does not clearly establish that the offense was committed after that date.

The court had jurisdiction of the offense charged.

A validly constituted court of an independent state derives its powers from the state; and a state is independent of every other state in the exercise of its judicial power. This power of a sovereign state extends "to the punishment of piracy and other offenses against the common law of nations, by whomsoever and where-soever committed." (Wheaton's International Law, Sixth Edition, Volume I, p 269). Recognition of this sovereign power is contained in the provision of the Constitution of the United States which confers upon Congress the power "to define and punish offenses against the law of nations". (Winthrop, "Military Laws and Precedents", Second Edition, Reprint 1920, at page 831).

It is clear that the laws and customs of war comprise a part of the law of nations. An offense against the former is a violation of the latter. The judicial power of an independent state, embracing the latter, includes trial and punishment of offenders against the laws and usages of war. The jurisdiction to try war criminals is an incident of the sovereign power of an independent state (Memorandum for the Joint Intelligence Committee, The Joint Chiefs of Staff, file SPJGW, 1943/17671, 13 December 1943, by The Judge Advocate General, at page 3). Such power is full and complete except where restricted by the body of principles comprising the law of nations (S. S. Lotus, France v. Turkey, 2 Hudson World Court Reports 23). The power of an independent state in connection with the

trial of war criminals is not limited to the trial and punishment of war criminals for offenses committed subsequent to its entry into a war. Nor does a logical analysis of the character of judicial power of a sovereign state compel such restriction.

It is axiomatic that a sovereign state adhering to the laws and usages of war is a fortiori interested in their preservation and hence their enforcement. The power to try and to punish violators thereof is a necessary incident of this interest. Any war crime, whenever committed, constitutes an invasion of the interest of the sovereign.

Whether such power will be exercised in a particular case is a matter resting within the discretion of the sovereign. In this instance, the United States has elected to try the accused.

To avoid vain and empty processes by the sovereign and to assure the enforcement of its sentences, physical custody of the person of a war criminal is a primary requisite. The United States has custody of the accused.

While the existence of a state of war is a necessary condition precedent to the existence of a "war crime", it is not a sine qua non of jurisdiction of an independent state to try and to punish an offense against the laws and customs of war. That power stems from the sovereign character of an independent state. Therefore, it rests on a basis apart from actual participation in warfare as a belligerent. That it is not a belligerent is logically unimportant to the jurisdiction of a sovereign state. By the same token, a neutral nation, securing physical custody of a war criminal, would have jurisdiction to try and to punish him for the commission of a war crime. Time of entry of the sovereign state into warfare is immaterial to judicial power of the state over the offense. Furthermore, providing the offense charged is a war crime, the time of commission of the offense is neither causative nor determinative

of the existence of the jurisdiction of a sovereign state's validly constituted courts over either the offense or the offender. The fact that the accused may have committed the offense prior to the entry of the United States into war with Germany does not bar the United States from jurisdiction to try and to punish the accused for the offense charged. Time of commission is inconsequential to the judicial power of the United States over the offense.

Participation in warfare accentuates the primary interest of the independent state in the enforcement of the laws and customs of war and does, in most instances, strongly induce the state to exercise its jurisdiction. The present case is an example.

Co-belligerency with another independent state against which nationals of the enemy may have committed earlier a war crime enhances the interest of the sovereign, which later joins, in the prosecution of the offender against the laws and customs of war. However, co-belligerency does not of itself confer upon the sovereign state the judicial power to try war criminals for the offenses which they have committed against the ally prior to the entry of the sovereign into warfare. That power existed prior to the creation of the co-belligerent status and on a basis wholly apart from that status. These conclusions are equally applicable to the present case. Though the accused may have committed the offense against another nation, later an ally, prior to the entry of the United States into the war, this Court of the United States had jurisdiction over the offense charged.

Writers on international law have not expressed views in conflict with the antecedently expressed point of view of universality of jurisdiction of the properly constituted courts of a sovereign state over war crimes, irrespective of the time or place of commission of the crimes. An article by one writer lends some support. After stating that each civilized state has a very real interest in the punishment of war crimes, he asserts that "every



independent state has jurisdiction to punish war criminals in its custody regardless of the nationality of the victim, the time it entered the war, or place where the offense was committed" (under-scoring supplied). (See, "Universality of Jurisdiction Over War Crimes", by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp 177-218).

It is clear that the Court had jurisdiction of the person of the accused and of the subject matter.

VI. 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  
/t/ RICHARD C. HAGAN  
Major JAGD  
Attorney  
Post Trial Branch

Having examined the record of trial, I concur,  
this \_\_\_\_\_ day of \_\_\_\_\_ 1947.

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

MILITARY GOVERNMENT COURT  
MILITÄRGERICHT

Order on Review  
Verfügung nach Überprüfung

Case No. 000-Mauthausen-7  
Strafsache Nr. 000-Mauthausen-7

Order No.  
Verfügung Nr.

Whereas one

Radolf BEUST

(Name of Accused) (Name des (der) Angeklagten)

was convicted of the offence of wrongfully killing concentration camp inmates  
wegen der folgenden strafbaren Handlung rechtswidriger Tötung von Konzentrationslager Häftlingen

by the ~~XXXXXX~~ Military Court

\*General

at Dachau, Germany

~~XXXXXX~~

in Dachau, Deutschland

from ~~XXXXXX~~ Militärgerichte

\*Oberen

(Address of Court)  
(Anschrift des Gerichts)

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

by judgment dated the 6 May 1947  
durch Urteil vom 6 Mai

(date)  
(Datum)

1947 and

Whereas the case has now come before me by way of review and after due consideration and in  
Diese Strafsache ist mir zur Überprüfung vorgelegt worden und nach entsprechendem Studium des Sach-  
exercise of the powers conferred upon me, I hereby order:  
verhaltes und in Ausübung der mir übertragenen Befugnisse verfüge ich:

That the findings and sentence are approved. The Commanding General,  
First Military District, will carry the sentence into execution 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 Kommandierende  
General, vom Militärbezirk I, wird die Vollstreckung des Urteils im Kriegs-  
verbrechergefängnis Nr. 1, Landsberg, Deutschland, zu einer von ihm fest-  
gesetzten Zeit, vorsehen lassen.

Dated this  
Gegeben am

5 January 1948

(Signature of Reviewing Authority)  
(Unterschrift der nachprüfenden Behörde)

LUCIUS D. CLAY

General (Third US Army)

(Title)  
Commander-in-Chief

\*Strike out words not applicable.

\*Nichtzutreffendes ist zu durchstreichen.

697  
12 November 1947

SUBJECT : US vs. Rudolf ERNST (Case No. 000-Mauthausen-7)

MEMORANDUM TO: Colonel Harbaugh

1. An examination of the records of trial in the subject case reveals the following data:

- a. A copy of the charges was served on the accused on 11 April 1947.
- b. The case was referred for trial on 28 April 1947.
- c. The personnel of the prosecution and the defense were appointed on 16 April 1947.
- d. Trial was had between 29 April and 6 May 1947.

*Howard V. Bremer*  
HOWARD V. BREMER  
Colonel AGO  
Chairman, War Crimes Board of Review

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