

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

20 February 1948

UNITED STATES )

v. )

Case No. 000-Buchenwald-50

Werner Alfred BERGER, et al. )

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 25 November to 3 December 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

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

Particulars: In that Werner Alfred BERGER, Helmuth Friedrich BERGT, Josef BRESSER, Horst DITTRICH, Wiegand HILBERGER and Herbert Guenther MOECKEL and diverse other persons, German nationals or persons acting with German nationals, between the 1st of January 1940 and the 30th of June 1943, at or in the vicinity of Weimar, Germany, acting in pursuance of a common design to commit the acts hereinafter alleged, did wrongfully encourage, aid, abet and participate in a Buchenwald Concentration Camp operation, commonly known as "Kommando 99", which operation included the wrongful killing of approximately 800 unknown non-German nationals, who were then and there in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE:

Evidence for Prosecution: The general evidence set forth in this section applies alike to each of the accused and, for sake of brevity, is not repeated under the evidence pertaining to each accused individually, but is considered therewith.

Beginning in November 1941 and continuing until the middle of 1943, Russian prisoners of war were executed in a horse stable in the Buchenwald Concentration Camp near Weimar, Germany (R 16, 38, 52). The stable had been remodeled and partitioned to have the appearance of a dispensary or medical examination rooms. The method of execution had been recommended by "Oranienburg", apparently meaning not Oranienburg Concentration Camp but the SS Economic and Administrative Department of the Reich Security Head Office, which was also housed in the same facilities as that camp.

performed by SS sergeants, men ranging in age from 33 to 46 years, from the headquarters staff of Buchenwald. This operation was variously called "Kommando 99" or "detail 99", the number "99" being taken from the telephone number of the horse stable (R 15, 42, 46, 49, 78, 84, 92, 107; P-Ex 13, p. 1. P-Ex 20A). This facility was modeled after a similar installation at Oranienburg (R 42, 187, 214), headquarters for the entire concentration camp system in Germany. Prosecution's Exhibit P-Ex 11 is a drawing of the remodeled horse stable indicating the various rooms and subdivisions of this installation (R 77).

Transports of Russian prisoners of war to be executed in the horse stable came to Buchenwald at varying intervals. These transports, consisting of from 10 to 50 Russians, came to Weimar by train escorted by either the Wehrmacht or the "police" where they were picked up by trucks from Buchenwald (R 23, 42, 43, 55, 85, 166). Hermann Helbig, the former chief executioner of Buchenwald during the period in question in his capacity as an SS master sergeant, testified in this trial that the individuals executed at the horse stable were "commissars" and "political people" and were brought to the horse stable by the "political police" (State Secret Police, commonly known as the Gestapo). A portion of his testimony is as follows:

"Q. What did the order say?"

"A. That was a document from the main office of the National Security Service. In the letter head on the left side on the top there was the word 'secret' printed there in black. Underneath that stood the 'National Office for National Security, Berlin', and the official mark for the letter, and to the right, the date, and the text is as follows: The following Russian political commissars whose names are mentioned below are to be executed as soon as the transport arrives. Receipt of execution asked for. And then the names of the commissaries were mentioned--listed: the first name, date of birth, and below a signature. I can't remember the signature any more."

Helbig's primary duties involved supervision of the crematory (R 43, 45). Helbig was sentenced to death in the parent Buchenwald Case on 14 August 1947, United States v. Waldeck, et al., Case No. 000-50-9, opinion

room at one end of the building where they were ordered to undress (R 16, 17, 36, 42). They were then taken individually under guard from the dressing room to a room called the "consulting room" at the opposite end of the horse stable (R 17, 46, 47). In this room were several SS men wearing white coats similar to those worn by physicians. There were medical charts on the wall (R 17, 30, 46, 47, 169, 178). The SS men ostensibly performed a perfunctory medical examination, including such routine matters as requiring the individual to open his mouth or raise his arm to determine the presence of lice, after which one of the SS men led him to an adjoining room, on one wall of which height measurements were marked (R 17, 19, 47, 73, 179, 217). In the center of this measurement chart at approximately the neck level there was a rectangular slit in the wall. An SS man armed with a pistol and wearing a cellophane mask was stationed behind this measurement chart in a small darkened chamber called the "riflemen's chamber" (R 35, 54). The SS man leading the prospective victim placed him with his back against the measurement chart. When the victim was in position, the attendant kicked on the wall, which was the signal for the hidden rifleman to fire a pistol shot into the victim's neck through the slit in the wall (R 20, 47, 48, 183). In the event this shot was not fatal, a mercy shot was administered, or sometimes a dagger was used to complete the killing (R 21, 39, 48, 57).

The body was then removed to another room by a detail of inmates (R 20, 127). Loud music was played over an amplifying system to smother the sound of the shots during the execution (R 31, 32, 48, 125, 126). The activities in the horse stable customarily took place in the late afternoon or at night and were secret (R 43, 55, 56, 123). After the evening's executions were completed, during which from 10 to 50 Russians were killed, the corpses were loaded on a truck, which had a special body to prevent blood from dripping out, and the bodies were taken to the camp crematory where they were secretly burned (R 21, 26, 55, 124, 147, 184, 185).

From the end of 1941 to the middle of 1943 from 3,000 to 3,000 Russians were executed in the horse stable at Buchenwald by this method (R 52, 53).

extra rations of alcohol, cigarettes, bread and sausage. Some of them were awarded the decoration of the German Iron Cross, 2nd Class (R 32, 49, 84, 128, 180). The victims were Russians and wore the uniform of the Russian army (R 16, 43, 166, 167).

Each transport was accompanied by a member of the Gestapo, who carried an order from the Reich Security Head Office listing the names of the victims and their prisoner of war numbers (R 32, 129, 181, 260; P-Ex 21A p. 1). Such orders only indicated that the Russians were to be given "special treatment". The orders did not purport to be from a court sentencing the Russians to death for specified acts. The orders were not read to the Russians, nor does it appear that the victims were aware that they were about to be killed (R 32, 98, 129; P-Ex 19 p. 3).

A former inmate of Buchenwald testified in the Parent Buchenwald Concentration Camp Case that he worked as a plumber in the horse stable on several occasions. While cleaning out a drainage pipe outside the horse stable in February or March 1942, he found blood and identification tags in the pipe. He further stated that on some of the 30 to 50 identification tags was inscribed the word "Stalag" and a number. On some tags was inscribed "Hattarshaem on the Main." Some of the individual's names entered on the tags are common in Russia and Poland (R 78; P-Ex 13 pp. 1-3). Another former inmate testified that sometime after November 1941 he saw Russian uniforms in the laundry at Buchenwald and that he was told they came from the horse stable (R 86, 87). A former commander of the Buchenwald Concentration Camp stated in an extrajudicial sworn statement that the Russians were selected from prisoner of war enclosures by a method in effect since 1941, although in his opinion they were not prisoners of war. The method of execution by "special treatment" such as that used in the horse stable was modelled after a similar method at Oranienburg and was recommended by Berlin (R 42, 98, 187; P-Ex 19 pp. 2, 4).

Prosecution's Exhibit, P-14A, is a letter dated 9 November 1941 from the chief of the Security Police and Security Service directing commanders of prisoner of war enclosures not to send Russians to concentration camps

for execution unless they were in sufficiently good physical condition to survive the transport (R 80).

Herrmann Pieter, Camp Commander of Buchenwald from January 1942 to April 1945, sentenced to death for his participation in the Buchenwald Concentration Camp mass atrocity, stated in an extrajudicial sworn statement, dated 16 July 1945, that when he took over the command of Buchenwald he was told by SS Captain Florstedt that the victims of the shootings in the horse stable were Russian prisoners of war who were selected from prisoner of war camps by a special commission appointed by the Reich Security Head Office; that all these prisoners of war had to be executed; and that the executions were to be treated as a "Secret State matter". All concentration camps were directed to cite the decree by the Reichsführer SS as authority for the execution of Russian prisoners of war delivered by the Gestapo. When a transport of these Russians arrived, the transport commander furnished a list showing their names, date of birth, and prisoner of war tag number. No reason was given as to why they were to be executed. After the completion of the executions, the lists were forwarded to the Reich Security Head Office through the Amtgruppe D, and the decree above mentioned was referred to as authority for the executions. Pieter further stated that about 120 to 150 Russians were executed in this manner during the period he was commanding Buchenwald (R 260; P-Ex 21A). ✓

In a second extrajudicial sworn statement dated 28 November 1947, subsequent to his conviction for participating in the Buchenwald mass atrocity, Pieter stated that he assumed that the Russians executed in the horse stable were not prisoners of war, but were "kommissars and political leaders"; that he assumed the victims were interrogated at prisoner of war enclosures by representatives of the Reich Security Head Office in connection with crimes; that these findings were forwarded to the Reich Security Head Office; and that after an administrative determination of their guilt, the Russians were released by the army and turned over as civilians to the Reich Security Head Office.

The prospective Russian victims were delivered to Buchenwald by Gestapo officials who brought a list issued by the Reich Security Head Office, giving the names of the persons to be executed and a statement to the effect that they were to be given the "special treatment" (R 98; P-Ex 19).

Evidence for Defense: The SS men who attended the activities in the horse stable or who were members of the execution detail were not volunteers, but were assigned to the detail by order of the commanding officer of Buchenwald, his executive officer or the adjutant (R 116-119, 141, 159, 173, 180, 198, 199, 205). It was said that there was a secret written order from Berlin directing the method of execution and that it was in the personal possession of the commanding officer of Buchenwald (R 117, 118, 123, 142, 157, 174). Camp Commander Pister stated in his July 1945 extrajudicial sworn statement that he burned his copy of the decree shortly before leaving Buchenwald pursuant to instructions (R 98; P-Ex 19). Each transport of Russians was accompanied by a member of the Gestapo who brought an order from the Reich Security Head Office, usually signed by SS General Mueller [Chief of the Gestapo], which order stated that the Russians whose names were mentioned in the attached list were to be executed (R 107, 118, 129, 140, 141; P-Ex 20 pp. 6, 7). This order was given to the leader of the execution detail who read it aloud to the SS men taking part, or on other occasions the SS men were shown the order and read it to themselves (R 45, 118, 129, 173, 199). Among other functions, there was vested in the Reich Security Head Office the highest Reich level police authority in Germany and also highest Reich level authority concerning concentration camps (R 59, 98, 119, 141; P-Ex 19 p. 8). Refusal by an SS man to participate after having been ordered to report for duty on this detail would have resulted in court-martial (R 59, 98, 118, 142, 221, 230, 235, 256; P-Ex 19 p. 9).

According to Helbig and Schober, the latter also having been sentenced to death in the Parent Buchenwald Case, supra, the Russians executed in the horse stable at Buchenwald were "commissars and politruks", i.e., personnel attached to the Russian army for the purpose of assuring that party policies were carried out and also to instruct as to party

policies] (R 42, 124). It was generally understood that the Russians had committed illegal acts at the front such as killing wounded German soldiers or inciting other Russian soldiers to commit such acts (R 51, 165, 213, 230, 231). According to statements made by the police and members of the Wehrmacht who brought the transports to Buchenwald, the Russians were commissars who had been concealing their identity in Russian prisoner of war camps, but who had been exposed as commissars by other Russian prisoners of war in the camps (R 44, 45, 98, 143; P-Ex 19 pp. 7, 8). Inasmuch as prisoners of war were under the General Staff of the Army, the Russians must have been commissars and not prisoners of war, or the army would not have turned them over to the control of the Reich Security Head Office (R 98, 145; P-Ex 19 p. 6). According to an extrajudicial sworn statement by the camp commander made in 1947, the Chief of the Reich Security Head Office told him that a permanent "court" was in session in his office and passed sentences on the Russians (R 98; P-Ex 19 p. 7).

In view of the fact that the execution orders originated from the highest Reich office, and many superior officers were present at the executions, there was no reason to doubt the legality of the executions. The protective custody camp leader, a camp physician and the adjutant, who was also the legal officer, were usually present, and the commanding officer of Buchenwald frequently attended (R 33, 37, 38, 62, 143, 152, 168, 173, 213, 220, 225/<sup>226</sup>/239). However, Pister, commanding officer of Buchenwald from January 1942 to April 1945, stated in his extrajudicial sworn statement that he attended the executions only one time during his tour of duty. Nothing is mentioned in his statement regarding the presence of a camp physician, adjutant or legal officer during these executions (R 260; P-Ex 21A). The SS men, including each of the accused, who were ordered to take part in the executions at the horse stable were told that the Russians had been sentenced to death by a "court", that there was an execution order from the Reich Security Head Office in Berlin and for these reasons they were of the belief the execu-

by a Gestapo member who carried the execution orders (R 32, 129, 181, 260; P-Ex 21A p. 1).

It was customary for participants in executions in Germany to be issued special rations. The issuance of a special ration was ordered by Berlin in the middle of 1942, and this order applied to all executions, even those of condemned SS personnel (R 98, 128, 130, 131; P-Ex 19 p. 8). The white coats worn by the participants in the activities at the horse stable were impregnated protective coats worn by order of the camp physician as a protection against typhus (R 98, 120, 125; P-Ex 19 p. 5).

#### IV. EVIDENCE AND RECOMMENDATIONS:

##### 1. Werner Alfred BERGER

Nationality:	German
Age:	46
Civilian Status:	Bank Employee
Party Status:	Nazi Party member
Military Status:	Waffen SS Sergeant
Flea:	NG
Findings:	G
Sentence:	Life imprisonment

Evidence for Prosecution: The accused testified and also stated in an extrajudicial sworn statement that he was an SS sergeant in the finance section of the administration department of headquarters staff at Buchenwald Concentration Camp from January 1941 to April 1945, in charge of money taken from inmates. He further stated that he was a member of the Waffen SS following April 1940 (R 95, 213-215, 222; P-Ex 16A p. 1).

A former Polish inmate testified that he first saw the accused in the horse stable in April 1942 (R 23); that he saw the accused in the "riflemen's chamber" six or seven times dressed in a white coat and wearing a cellophane mask on his face; that on each occasion 30 to 35 persons were shot; that he could see the accused in the "riflemen's chamber" through the slit in the wall when he, the witness, entered the room to



carry out the corpses and also when the accused left the "rifleman's chamber" after being relieved by another member of the detail (R 20, 23, 24); that he also saw the accused in the "consulting room" (R 18); and that he saw the accused in and about the horse stable from April 1942 to May 1943 (R 25).

A second witness, a former SS warrant officer who frequently attended the executions in the horse stable, testified that on at least one occasion in the latter half of 1942 he was present when the accused shot 14 Russians. Both the witness and the accused were simultaneously in the "rifleman's chamber" on that occasion (R 42, 52, 53, 64).

A former German inmate of Buchenwald testified that the accused received extra rations of food which had been prepared for members of "detail 99" (R 83, 84). This occurred in 1942 (R 87). He further testified that from the window of the kitchen where he worked he saw the accused and other SS men walking in the direction of the horse stable one afternoon, and on the same occasion he saw closed trucks going in that direction. He heard later that Russian prisoners had been shot to death in the horse stable (R 84-86, 89, 90).

The accused testified and stated in an extrajudicial sworn statement that in December 1942 he received a call over the camp loud speaker system to report to SS Master Sergeant Thalmann at the headquarters; that at the headquarters he was ordered to go to the railway station at Weimar with two trucks to pick up a transport of Russians; and that he picked up 70 to 80 Russians and their police escort and took them to the horse stable where he left them. On a second occasion, about two weeks later, he was ordered to bring from 30 to 40 Russians from the railway station to the horse stable. On this occasion he was given a white impregnated coat to wear and ordered to stand guard inside the stable. He stood guard outside the door to the dressing room. A radio played loud music. He did not hear any shots. Three or four weeks later he was ordered to the stable by SS Master Sergeant Thalmann. At the stable he was given a white coat and cellophane mask and ordered to the "rifleman's chamber." He was

He shot 12 to 14 persons through the slit in the wall (R 95, 212, 213; P-Ex 16A pp. 1-4). This was in January or February 1943, and the persons who were shot, as far as the accused knew, were prisoners of war (R 226, 227). The accused admitted he did not see or hear about an order being read to the Russians to the effect that they had been sentenced to death (R 231). He saw SS men in white coats in the "consulting room" conducting what appeared to be mock physical examinations (R 217).

Evidence for Defense: The accused testified that he first heard about executions in the horse stable in December 1942 (R 211). On the occasion when he was ordered to serve in the "rifleman's chamber", SS Master Sergeant Thalmann had a paper in his hand and announced to the accused and others present that by order of the Reich Security Head Office the Russians were to be executed for having committed crimes at the front or for having killed wounded German soldiers for which they had been sentenced by court-martial (R 95, 213, 230, 231; P-Ex 16A p. 5). He was further told that the method of execution had been ordered by Berlin in accordance with the system used at Oranienburg (R 214). The accused did not have any doubt of the legality of the executions because of the presence of the legal officer, protective custody camp leader, and the acting first sergeant of the SS. He did not consider that he had the right to question the manner of execution. The accused further testified that if he had refused to carry out this order he would have been brought before the SS police court (R 221, 230).

Sufficiency of Evidence: The Court was warranted from the evidence in its findings of guilty. The accused failed to meet his burden of going forward with the evidence to show that he acted under the immediate compulsion of superior orders to any degree; that the executions were legal; that he did not know or, as a reasonably prudent person, would not have known that the executions were illegal, in accordance with the principles set forth in pertinent authorities discussed in Section V, post. The sentence is not excessive.

Petitions: No Petitions for Review nor Petitions for Clemency

were filed.

Recommendation: That the findings and sentence be approved.

2. Helmut Friedrich BERGT

This accused was acquitted (R 266).

3. Josef BRESSER

Nationality:	German
Age:	46
Civilian Status:	Mechanic
Party Status:	None
Military Status:	Waffen SS Sergeant
Plea:	NG
Findings:	G
Sentence:	15 years, commencing 8 May 1945

Evidence for Prosecution: The accused testified that he worked in the motor pool of the Buchenwald Concentration Camp from February 1942 to April 1945, first as a driver, and from November or December 1943 as chief of the motor pool (R 197, 207). The accused was a member of the Waffen SS (R 9; P-Ex 7).

A former Polish inmate testified that he saw the accused in the "consulting room" at the horse stable where the Russian prisoners of war were examined; that the accused wore a white coat over his SS uniform (R 15, 18, 25); that he saw the accused on duty in the room behind the height scale (riflesman's chamber) between April 1942 and 1943; and that he saw the accused shoot some of the Russians. The witness saw the accused through a slit in the wall when the witness entered the room to drag out the bodies and he saw the accused when he left the room after being relieved, at which time he was still wearing a cellophane mask (R 20, 26, 27). The accused also drove a truck which removed the bodies of the victims from the horse stable to the crematory. This truck had a special zinc body to prevent blood from dripping out (R 26, 39).

A second witness, a former SS warrant officer who attended about 40 executions in the horse stable, testified that the accused usually drove the truck with the corpses, although he could not recall the exact date.

was wearing a white coat (R 45, 53, 54). The witness never saw the accused in the "riflesman's chamber", although he saw other accused there (R 64).

A third witness, a former German inmate, testified that he issued to the accused extra rations which were prepared for members of "detail 99", (R 83, 84, 86); that he saw the accused walking to and from the direction of the horse stable; that on these occasions he saw closed trucks going in the same direction; and that he heard that Russian prisoners had been killed in the horse stable (R 84-86, 89, 90).

A fourth witness, a former SS technical sergeant from Buchenwald, testified that he was in the horse stable once and saw the accused there at that time but did not know what function he performed (R 139, 146).

Evidence for Defense: The accused testified that he first heard of the activities in the horse stable in November 1942 when he received a call to report to the adjutant with a truck and upon reporting was ordered to drive to the horse stable (R 197-200). At headquarters the accused was shown an order from the Reich Security Head Office containing the statement that the Russians listed therein were to be executed (R 199). The accused further testified that he drove to the horse stable; that inmates loaded his truck with corpses; and that he and an unknown lieutenant from the Gestapo drove to the crematory (R 199, 203-205). The second occasion when he drove a truck to the horse stable and crematory was also by order of the adjutant (R 205). On both occasions the accused was duty driver and drove an ordinary truck, not one with a special body (R 198, 204).

Accused BERGER testified that he saw the accused once outside the horse stable but never saw him inside (R 95, 230; P-Ex 16A p. 3).

Three accused and two other witnesses testified that from the room in which the height gauge was situated it was impossible to identify a person standing in the "riflesman's chamber." The slit in the wall was too small, smaller than indicated in Prosecution's Exhibit, P-12, and the "riflesman's chamber" was not lighted (R 61, 77, 117, 118, 159, 163, 164, 175, 189, 192, 223, 224).

Sufficiency of Evidence: The Court was warranted from the evidence in its findings of guilty. The accused failed to meet his burden of going forward with the evidence to show that he acted under the immediate compulsion of superior orders to any degree; that the executions were legal; that he did not know or, as a reasonably prudent person, would not have known that the executions were illegal, in accordance with the principles set forth in pertinent authorities discussed in Section V, post. The sentence is not excessive.

Petitions: No Petition for Review was filed. A Petition for Clemency was filed by accused, 12 February 1948.

Recommendation: That the findings and sentence be approved.

4. Horst DITTRICH

Nationality:	German
Age:	36
Civilian Status:	Locksmith
Party Status:	Nazi Party member
Military Status:	Waffen SS Master Sergeant
Plea:	NG
Findings:	G
Sentence:	Life imprisonment

Evidence for Prosecution: The accused testified and stated in an extrajudicial sworn statement that he was an armorer artificer with the rank of SS master sergeant at Buchenwald Concentration Camp from July 1938 to December 1942 (R 94, 171, 175; P-Ex 15A pp. 1, 2).

A former Polish inmate testified that he saw the accused in and about the horse stable every time a transport arrived during the period November 1941 to February 1942 (R 15, 28); that he saw the accused in the "rifleman's chamber" through the slit in the wall when the witness entered the room to drag out the corpses; that he saw the accused when he left the "rifleman's chamber" after being relieved by another member of the detail (R 20, 28); that he saw the accused leading one Russian to the height gauge; that he saw him give mercy shots (R 24, 30);

and that he sometimes saw the accused in the "consulting room" where the victims were examined by the SS. On these occasions the accused wore a white coat and had a cellophane mask on his forehead (R 18, 28).

A second witness, a former SS warrant officer, testified that he saw the accused participate in the shooting on one, two or three occasions; that once he was in the "rifleman's chamber" with the accused when he, the accused, fired 14 shots at victims (R 50, 51); and that the accused belonged to "kommando 99" for quite some time during his assignment to Buchenwald (R 50).

A third witness, a former German inmate, testified that, from the window of the kitchen where he worked, he saw the accused and other SS men walking in the direction of the horse stable on several occasions; that on these occasions he saw closed trucks going in the same direction; and that he heard later that Russians had been shot in the horse stable (R 83-86, 89, 90).

A fourth witness, an inmate who worked in the bath house, testified that the accused was a member of "kommando 99". Members of this detail, among them the accused, took baths after the executions, at which time they discussed the executions among themselves and boasted about how many they had killed (R 91-93).

The accused testified and stated in an extrajudicial sworn statement that he shot Russians in the horse stable on three different nights; that on the first night he shot about eight, the second night 16, and the third night, between 14 and 16 (R 94, 178, 184; P-Ex 15A 3-5); and that on these occasions he was on duty at least part of the time in the "consulting room" (R 94, 172, 173, 178; P-Ex 15A pp. 5, 6). The accused stated in his extrajudicial sworn statement that he received extra rations of cigarettes and liquor and was also decorated while at Buchenwald (R 94; P-Ex 15A pp. 3, 5, 7).

Evidence for Defense: The accused testified and stated in an extrajudicial sworn statement that in June 1942 he received a telephone call from the adjutant at Buchenwald to hold himself in readiness for the evening and that later the same night he was ordered to the horse stable for the first

shown an order from the Reich Security Head Office which stated that Russian prisoners of war listed therein were to be disposed of according to orders issued previously. On three occasions the accused saw such an order (R 94, 173, 181; P-Ex 15A pp. 4, 5). The accused further testified that he was told that directives from Berlin described in detail the manner in which the executions had to be carried out (R 174, 187); that he was always ordered to report for duty at the horse stable; and that he was ordered into the "rifleman's chamber" on the occasions when he shot prisoners (R 94, 180, 182, 187, 191; P-Ex 15A pp. 4, 6).

Sufficiency of Evidence: The Court was warranted from the evidence in its findings of guilty. The accused failed to meet his burden of going forward with the evidence to show that he acted under the immediate compulsion of superior orders to any degree; that the executions were legal; that he did not know or, as a reasonably prudent person, would not have known that the executions were illegal, in accordance with the principles set forth in pertinent authorities discussed in Section V, post. The sentence is not excessive.

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

5. Wiegand HILBERGER

Nationality:	German
Age:	39
Civilian Status:	Tailor
Party Status:	Member of Nazi Party
Military Status:	Waffen SS
Plea:	NG
Findings:	G
Sentence:	20 years, commencing 8 June 1945

Evidence for Prosecution: The accused testified that he was a non-commissioned officer on the headquarters staff of the Buchenwald Concentration Camp from 1939 to December 1942 (R 156, 157).

A former Polish inmate testified that the accused was in and about the horse stable from November 1941 until February or March 1942 (R 15, 29); that he saw the accused behind the wall where the height gauge was located; that he saw the accused shoot prisoners there; and that he, the witness, carried the bodies away (R 20, 28, 29). He also saw the accused in the "consulting room" dressed in a white coat as were all the other SS men present (R 28, 29). A second witness, a former SS warrant officer who attended about 40 executions, testified that he saw the accused at the horse stable, but not often because the accused was often sick. He never saw the accused in the "rifleman's chamber" (R 42, 51, 52, 64, 70).

A third witness, a former German inmate, testified that he saw the accused and other SS men on several occasions walking in the direction of the horse stable; that on these occasions he saw closed trucks going in the same direction; and that he heard later that Russian prisoners were shot to death in the horse stable (R 84-86, 89, 90). A fourth witness, an inmate who worked in the bath house, testified that the accused was among the group of SS men who came to the bath house after executions and boasted about how many Russians they had killed (R 91-93). Accused DITRICH testified he saw the accused in the "consulting room" on one occasion and believes he was wearing a white coat (R 180).

The accused both testified and stated in an extrajudicial sworn statement that he was on duty at the horse stable on four occasions; that he was never on duty in the "consulting room"; that he was on guard outside the stable twice; that once he was in charge of the inmate detail that removed the bodies; and that once he was a guard at the door of the "dressing room" (R 96, 158-160; P- x 17A pp. 2-6). The accused admitted receiving extra rations of food and cigarettes (R 164, 170).

Evidence for Defense: The accused testified that once when he asked why the executions were carried out as they were he was told it was so ordered by Berlin (R 168); that on one occasion he heard an SS officer read something to the prisoners in a foreign language from a paper in his hand; and that he assumed this was an execution order (R 168, 169). The accused stated in an



extrajudicial sworn statement that the commander of one of the prisoner of war transports told him that the Russians had been sentenced to death by a court-martial for committing acts against German soldiers (R 96; P-Ex 17A p.3).

The accused both testified and stated in an extrajudicial sworn statement that the first time he was ordered to duty with this detail he asked the adjutant why the Russians were not executed where they had been sentenced, whereupon the lieutenant shouted at him that it was none of his business, and that he had been picked by the camp commander who had ordered that anyone who refused or showed weakness would be punished in the same manner (R 96; 256; P-Ex 17A p. 2).

The accused further testified that the inmate corpse bearers were only in the room (apparently the execution room) a moment to get the body, and after the corpse was removed, the door was closed. It was impossible for a member of this detail to identify anyone in the "riflemen's chamber" (R 159). Two of the accused and two other witnesses gave corroborating testimony that from the room in which the height gauge was located it was impossible to identify a person standing in the "riflemen's chamber". The slit in the wall was too small, smaller than indicated in Prosecution's Exhibit P-12, and the "riflemen's chamber" was not lighted (R 61, 77, 117, 118, 175, 189, 192, 223, 224).

Sufficiency of Evidence: The Court was warranted from the evidence in its findings of guilty. The accused failed to meet his burden of going forward with the evidence to show that he acted under the immediate compulsion of superior orders to any degree; that the executions were legal; that he did not know or, as a reasonably prudent person, would not have known that the executions were illegal, in accordance with the principles set forth in pertinent authorities discussed in Section V, post. The sentence is not excessive.

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

6. Herbert Guenther MOECKEL

Nationality:	German
Age:	32
Civilian Status:	Glass Cutter
Party Status:	Nazi Party Member
Military Status:	Waffen SS Technical Sergeant
Flee:	NO
Findings:	G
Sentence:	20 years, commencing 8 May 1945

Evidence for Prosecution: The accused testified and stated in an extrajudicial sworn statement that he was a block leader and instructor at the Buchenwald Concentration Camp from November 1938 to March 1942, and that he was a member of the Waffen SS from 1935 and became a technical sergeant (R 97, 239, 244; P-Ex 18A p. 1).

One witness, a former Polish inmate, testified that the accused was in and about the horse stable from November 1941 to January or February 1942 (R 15, 29); that he saw the accused behind the wall where the height gauge was located; that he saw the accused shoot prisoners of war there; that he, the witness, carried the bodies away (R 20, 29); and that he also saw the accused in the "consulting room" dressed in a white coat (R 29).

A second witness, a former SS warrant officer who attended about 40 executions, testified that he saw the accused in the horse stable, perhaps five or six times; that the accused wore a white coat there; but that he never saw him in the "rifleman's chamber" (R 54, 64). A third witness, an inmate who worked in the bath house, testified the accused was among the group of SS men who came to the bath house after executions and boasted about how many Russians they had killed (R 91-93).

The accused both testified and stated in an extrajudicial sworn statement that he was assigned to duty at the horse stable twice, once as a guard outside the stable, and on another occasion at the dressing room door after a transport of Russians arrived and had been taken inside (R 97, 236, 237, 246; P-Ex 18A p. 2).

Evidence for Defense: The accused testified that he did not know about the executions in the horse stable before the first time he was ordered there on guard duty, at which time he was told the Russians had been sentenced to death (R 237, 242, 244, 245); that the prosecution witness who testified he had seen the accused in the "rifleman's chamber" had stated previously at the line-up that the accused did not shoot in the horse stable (R 234); that he was ordered to duty at the horse stable by the roll call leader and would have been sentenced to death if he had refused to go (R 235, 243); and that he was never on duty in the "consulting room," nor did he wear a white coat (R 239, 243).

Sufficiency of Evidence: The Court was warranted from the evidence in its findings of guilty. The accused failed to meet his burden of going forward with the evidence to show that he acted under the immediate compulsion of superior orders to any degree; that the executions were legal; that he did not know or, as a reasonably prudent person, would not have known that the executions were illegal, in accordance with the principles set forth in pertinent authorities discussed in Section V, post. The sentence is not excessive.

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

#### V. QUESTIONS OF LAW:

Jurisdiction: At the outset of the trial the defense attacked the jurisdiction of the Court, apparently on the ground that the Court did not have jurisdiction inasmuch as the charge and particulars alleged a common design as a separate substantive offense (R 11, 12). In support of its position, the defense relied upon an order by Military Tribunal III, Nurnberg, Germany.

The order referred to is a ruling on the defendants' motion against Count I of the indictment in Case No. 3, Military Tribunal III, Nurnberg, Germany, The United States of America v. Josef Altstoetter, et al. The pertinent part of this order reads as follows:

"Count I of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, wilfully and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article 2. It is charged that the alleged crime was committed between January 1933 and April, 1945.

"It is the ruling of this Tribunal, that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense."

Without conceding that the jurisdiction of Military Government Courts is limited to the trial of those war crimes cases contemplated by Control Council Law No. 10, it is clear that this order has no application to the instant case because the charges and particulars thereunder do not allege a common design to commit a war crime as a "separate substantive crime." They allege that the accused "acting in pursuance of a common design to commit the acts hereinafter alleged, did wrongfully encourage, aid, abet and participate in a \*\*\* operation \*\*\* which operation included the wrongful killing of ..... [certain persons] ..... non-German nationals \*\*\*." Thus, the particulars in this case charge as an offense the execution of a common design to commit described unlawful acts. They do not allege common design as a "separate substantive crime."

The import of the ruling relied upon by the defense is amplified by the next to the last paragraph of the order which provides:

"Count I of the indictment, in addition to the separate charge of conspiracy, also alleges unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of Count I from the indictment, but, insofar as Count I charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the tribunal will disregard that charge."

The Court properly overruled the objection of the defense (R 13).

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

Administrative Determination of Guilt: All of the accused contended that the killings or executions were legal. However, little evidence other

than their own expressions of belief was offered. The testimony by two sergeants convicted in the parent Bucherwald case, who were not vitally connected with "Kommando 99", and the July 1945 extrajudicial sworn statement by the camp commander establish that the killings were effected after administrative determination of guilt by the Reich Security Head Office and that this fact was quite commonly known in the camp, even by those not closely associated with the "Kommando 99" operation. More particularly, the evidence establishes that these executions were a part of a vast program carried on under the control of the Gestapo at most concentration camps for the purpose of liquidating Russian prisoners adhering to unpopular political beliefs. The evidence also establishes that it was most unusual for any of the camp authorities to be present at the killings and that such orders or directives as the accused may have seen in connection with the killings were the directives accompanying the shipments prescribing that the individuals listed be killed. The operation appears to have been in conformity with the "Night and Fog Decree", issued by Hitler, 7 December 1941, and discussed by the "International Military Tribunal, Nuremberg", Volume I, pages 232, 233, whereby administrative punishment power was vested in the Gestapo. Under the procedure therein prescribed, punishment orders were issued after receipt of files and reports from local Gestapo agents.

While under international law a person who has been found guilty of acting as a spy or of having committed a war crime may be legally executed, the execution must be preceded by a proper trial and sentence by a legally constituted court. Moreover, the Geneva Convention specifically prohibits measures of reprisal against prisoners of war (Volume II, Oppenheim, "International Law", Sixth Edition, pages 331, 456, 457; Article 30, Annex to Hague Convention No. IV of 18 October 1907 and Article 2 of the Geneva (Prisoners of War) Convention of 27 July 1929, both set forth in TM 27-251, War Department, U. S. Army, "Treaties Governing Land Warfare", 7 January 1944; Volume 2, Wheaton's "International Law", Seventh Edition, pages 220, 240; and Volume I, page 31, "Law Reports of Trials of War Criminals", by the United Nations War Crimes Commission, hereinafter

referred to as "Law Reports". The United Nations War Crimes Commission in commenting upon the British Almelo Case stated as follows:

"The rule of law on which the decision of the Military Court is based is, therefore, the rule that it is a war crime to kill a captured member of the opposing armed forces or a civilian inhabitant of occupied territory, suspect of espionage or war treason, unless their guilt has been established by a court of law" (Law Reports, Volume I, page 44).

It is irrelevant that the executions may have been legitimate in the eyes of German jurists and that no violation of domestic law resulted (Law Reports, Volume I, page 54). Similarly, it is stated in "International Military Tribunal, Nuremberg", Volume I, page 223:

"On the other hand the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the state if the state in authorizing action moves outside its competence under international law."

Regardless of the preceding considerations, the defence failed to meet its burden of going forward with the evidence to establish that the killings were justifiable. While not applicable as such to war crimes trials, the rule as to affirmative defenses in homicide cases in American municipal criminal law has been stated as follows:

"Generally, in criminal cases as in civil cases the burden of proving affirmative defenses rests upon the defendant at all times. Accordingly, after the state has made out its case by evidence, in a prosecution for homicide, the accused must assume the burden of establishing circumstances of justification, excuse, or mitigation. The prosecution being entitled to the benefit of the presumption of an intent to take life, where a person has been killed by the infliction of a wound or by some other means calculated to produce death, the accused must assume the burden of proving that there was no intent to take life or that the killing was justifiable or excusable, or, at least, of raising a reasonable doubt in his favor. In order for the accused to overcome the inference or presumption of malice arising from proof of the intentional use of a deadly weapon in committing a homicide, he must prove circumstances of extenuation or excuse, unless such facts appear in the evidence produced by the prosecution. It is generally agreed that the accused is not under any obligation to introduce evidence to show mitigation, justification, or excuse if the proof on the part of the prosecution shows it" (26 American Jurisprudence 352).

All of the accused were of very mature years and none could have believed that the killings were legal, in view of the circumstances including the manner in which the killings under the control of the Gestapo were

effected and the number thereof. It was apparent to them that the entire operation was contrary to universally accepted standards of human conduct. Under such circumstances it is all the more appropriate that the burden be on the defense to go forward with the evidence to establish that the killings in general or in particular were justifiable.

Thus it appears (1) that the killings following administrative determination of guilt were illegal; (2) that the defense failed to meet its burden of going forward with the evidence to establish that such killings were legal; and (3) that none of the accused believed they were legal.

Superior Orders: The accused sought to justify their actions by offering evidence to show that they were 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; Volume II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJAWC, December 1945; United States v. Klein, et al. (Hadamar Murder Factory Case), opinion DJAWC, February 1946; and French Republic v. Wagner, et al., Court of Appeals (France), July 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 Rules of the Law", by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945; United States v. Thomas, supra; United States v. Beck, et al., opinion DJAWC, December 1946; United States v. Becker, et al. (Flossenburg Concentration Camp Case), opinion DJAWC, May 1947; United States v. Stroop, et al. (Superior Orders Case), opinion DJAWC, September 1947; and United States v. zu Waldeck, et al., supra).

VI. CONCLUSIONS:

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

*Joseph L. Haefele*  
JOSEPH L. HAEFELE  
Major, CMP *DAF*  
Post Trial Branch

Having examined the record of trial, I concur, this 27<sup>th</sup>  
day of April 1948.

*E. H. Straight*  
E. H. STRAIGHT  
Lieutenant Colonel, JAGD  
Deputy Judge Advocate  
for War Crimes