

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

9 January 1947

UNITED STATES )

v. )

Case No. 12-1545

Fritz DIETRICH, et al. )

REVIEW AND RECOMMENDATIONS

I. TRIAL DATE: The accused were tried at Dachau, Germany, during the period 30 June-15 July 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

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

Particulars: In that Fritz DIETRICH, Fritz DINTINGER, Albert ELI, Karl HUNSICKER, Johann KLEIN, Willy STERMLEH, Richard WANDEL, and Otto ZEITZER, German nationals, did, at or near SAARBRUECKEN, Germany, on or about 31 July 1944, deliberately and wrongfully encourage, aid, abet and participate in the killing of members of the United States Army, believed to be First Lieutenant Emil BERRY, ASN O-662430, Second Lieutenant John B. GOOD, ASN O-695053, and Staff Sergeant Lewis E. PULSIFER, ASN 16119118, who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich.

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

Particulars: In that Fritz DIETRICH, Willy STERMLEH, and Karl HUNSICKER, German nationals, did, at or near SAARBRUECKEN, Germany, on or about 25 August 1944, deliberately and wrongfully encourage, aid, abet and participate in the killing of members of the United States Army, believed to be Technical Sergeant Charles E. WILTT, Jr., ASN 38399233, Sergeant Willard E. PATTERHOFF, ASN 35595057, Sergeant Ted ZEMONEK, ASN 35767441, and Private Jack A. MAXWELL, ASN 14056809, who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: This case is concerned with two separate incidents, each of which occurred in the vicinity of Saarbruecken, Germany. The accused DIETRICH, STERMLEH and HUNSICKER were involved in both incidents, while accused DINTINGER, ELI, KLEIN, WANDEL and ZEITZER were only involved in the first incident.

Prior to the alleged killings, the very well known "flyer orders" of Himmler had been received by accused DIETRICH, who had been sent by Himmler to Saarbruecken as police president, and by accused STEINER, who commanded the SS in the Saarbruecken area, through General order by the commanding general of the Third German Military District No. 12 which included the Saarbruecken area.

In the first incident, which occurred on or about 31 July 1944 three American flyers who had parachuted from a disabled bomber were in custody of the police at station referred to as Malstatt, Burbach and Kautzbrunn in the vicinity of Saarbruecken, Germany. At the time accused DIETRICH, who was in command, and STEINER, with other officers were in the air raid command post building. A report came in to DIETRICH about the captured flyers and he immediately ordered STEINER to have the flyers picked up and shot by his SS unit. STEINER called in accused HUNSICKER, DINTINGEL and ZIE and gave them the order to pick up and kill the flyers. These three, with HUNSICKER as sergeant, carried out the order. The first flyer was shot by HUNSICKER, the second by HUNSICKER and DINTINGEL, and the third by HUNSICKER and ZIE, and each left for home in the woods. The third flyer, however, was still alive the next morning, and STEINER, with DIETRICH present, ordered accused SEITZER to kill the wounded flyer by injection. SEITZER gave two injections, but no ill effects resulted, and finally accused ZIE was called back and he killed the flyer by a pistol shot in the back. This incident concerns the first of the will hereditator he referred to as the first incident.

The second incident occurred on or about 21 August 1944. Four American flyers who had parachuted from a disabled plane during an attack on Saarbruecken were in custody of the police at Burbach/in the vicinity of Saarbruecken, Germany, and were reported to accused DIETRICH. DIETRICH had ordered accused STEINER to have the flyers killed, and ordered STEINER to go along. The flyers were picked up and taken to a forest road where they were forced to walk



into the woods, four abreast with arms linked, followed closely by accused STEINLEB and HUNSICKEL with drawn pistols and each of the two accused killed two of the flyers by shooting them from behind. This incident concerns Charge II and will hereinafter be referred to as the second incident.

In each of the cases the flyers' bodies were buried at Soldfriedhof cemetery, and by the cemetery records and other evidence were tentatively identified as the members of the United States Army named in the particulars herein.

Accused KLEIN and WANDER were acquitted. Of the convicted accused, DIETRICH and SEITZEL denied participation in the killings. The other convicted accused admitted participation and relied upon superior orders as their defense.

#### IV. EVIDENCE AND RECOMMENDATIONS:

##### 1. Fritz DIETRICH

Nationality:	Italian-German
Age:	49
Civilian Status:	Police President
Party Status:	Member of Nazi Party since 1936; Lieutenant Colonel, Allgemeine S
Military Status:	Local Wehrmacht Commander
Alibi:	RG Charge I; (although there may have been a typographical error, it appears that the accused was not asked how he plead to Charge II. However, the trial proceeded as though he had pled not guilty and, therefore, no injustice could have resulted (R 14,15.)
Findings:	6 Charge I; 6 Charge II
Sentence:	Death by hanging

Evidence for Prosecution: Concerning the first incident, accused HUNSICKEL in his extrajudicial sworn testimony stated that the accused was present at the office of STEINLEB in Saarbruecken, Germany, on the occasion when STEINLEB reprimanded HUNSICKEL because one enemy flyer who had been captured at Mounkirchen in the vicinity of Saarbruecken, Germany, had not been killed as ordered but only

badly wounded, and that the accused had said "HUNSICKER, how could such a thing have happened?" (R 25; P-Ex.11, p. 5). Accused KLEIN in his extrajudicial sworn testimony stated that the accused was present at STEMMLEH'S office during the discussion of the wounded flyer at Nounkirchen (R 31: 1-Ex. 12B, p. 2).

STEMMLEH in his extrajudicial sworn testimony, and also at the trial, referring to an occasion on or about 31 July 1944 in the air raid command bunker at Saarbruecken, stated that as he was sitting as usual with the accused a message came in and that the accused said to him, "STEMMLEH there is an aviator in Nounkirchen who must be called for and that aviator must be shot while escaping" (R 33; 1-Ex. 13a, p. 1; R 318). In additional extrajudicial sworn testimony and in his testimony at the trial STEMMLEH testified that the accused gave him a direct order to pick up two other flyers and shoot them "while escaping" (R 35; 1-Ex. 130-1, p. 1; R 324), and that in each case he was instructed to make a written report that the flyers had been killed while escaping (R 319, 325). The three flyers who were involved in the first incident were killed in the vicinity of Saarbruecken, Germany, on or about 31 July 1944 (R 394-401).

Regarding the second incident, accused STEMMLEH stated in his extrajudicial sworn testimony that in August 1944 in Saarbruecken, Germany, the accused gave him an order to pick up four enemy flyers and shoot them, and that the accused said that for this he did not need a summary court. STEMMLEH stated that "first of all" he was obeying the orders of the accused in killing the flyers as it was the accused who gave the direct order, and that after the flyers had been killed he made a report to the accused, "I wrote, 'According to orders, the 4 fliers have been executed'" (R 34; 1-Ex. 13B-1 P1. 1, 2, 4). At the trial STEMMLEH repeated substantially the same testimony (R 326-330).

Accused KLEIN testified, "All powers as regarding the bunker was in the hands of Doctor Dietrich" (R 244). Accused STEMMLEH testified that the accused had the authority to give him orders to kill



Flyers (A 317). In his extrajudicial sworn testimony, STENLILL stated that the accused was the complete master in Saarbruecken, and that General Stroop, his commanding officer, had ordered him to be at the disposition of the accused (A 33; I-Ex. 13A, p. 4). STENLILL further testified that on a later date he was ordered by the accused to pick up and kill 10 flyers, but that this order was not carried out (A 339). On four separate occasions he received orders from the accused to shoot flyers (A 346), and that on every occasion in the command post bunker the accused stated, "I am the master here. I give the orders. Nobody else has anything to say" (A 347). Neumann testified that sometime after the first incident in which the flyer captured at Neunkirchen had been killed, he overheard a conversation between the accused and accused WANDERL in which the accused stated to WANDERL that all captured flyers must be turned over to the police for revenge, and would be shot (A 53, 55-57). The witness identified the accused in Court (A 50).

Testifying in his own behalf, the accused admitted that "-- in the final analysis --" he was responsible for the coordination of all the organizations represented in the air raid command post bunker (A 502). The accused also admitted that at Saarbruecken in 1944 he had "both Nazi activities", i.e., German and Italian (A 483).

For further evidence concerning the participation of the accused in the alleged offenses, reference is made to prosecutive evidence in connection with the other accused in this case, which for the sake of brevity is not repeated here.

Evidence for Defense: Accused WANDERL testified that the testimony of the witness Peter Neumann concerning a conversation between WANDERL and the accused is not true (A 281). Accused HUNSICKEL testified that he may have been mistaken in the statements he made in his extrajudicial sworn testimony regarding the presence of the accused during the discussion of the flyer captured at Neunkirchen (A 398, 420, 421, 441). Colonel Niel Niemann, commander of the uniformed police in the former Military District No. 12, stated in

his unsworn pretrial statement that the police president could not possibly have had any command over the employment of the protective police (I. 503; D-Ex. 84, pp. 2, 3).

The accused testified <sup>(R 459)</sup> that STEINLER was the leader of the All-gemeine SS and that he had no authority or command over the All-gemeine SS; that as air raid commander he directed all organizations, but could not give them orders; and that he could only make requests and depend on their good will (R 463, 464, 485). He testified that General Stropf was not his superior officer (R 467, 490). He denied that he had any duty in connection with captured enemy flyers (R 470), and denied that he gave any orders to STEINLER at the air raid bunker in July or August 1944. He insisted that he had no authority to give orders to STEINLER and he especially denied that he ever at any time gave STEINLER orders to shoot flyers (R 476, 489, 490). The accused further denied that in the summer of 1944 he ever received any reports about the shooting of enemy flyers, or that he ever went to regimental headquarters in connection with any such report (R 477). He denied that there was ever any meeting at regimental headquarters attended by him concerning Allied flyers, and testified that he never heard about the case of the flyer captured at Neunkirchen, first incident, until he was a prisoner at Camp Dachau in 1946 (R 478, 490, 499). He further denied that he ever gave an order that captured enemy flyers should be brought in to him or be reported to him (R 498). The accused testified that he never received any orders from General Stropf that flyers should be killed; that he never heard anything about enemy flyers having been killed in Saarbruecken in July or August 1944 (R 499); that he never discussed crash landed flyers with STEINLER; and that he never gave STEINLER any orders to shoot flyers (R 501).

The accused testified that he is an Italian national, and that at the time of the trial he "is not of German nationality anymore" (R 459).



Sufficiency of Evidence: The evidence to establish that the accused ordered, aided and encouraged the killing of the seven American flyers as alleged under the two charges in this case, first and second incidents, comes mostly from co-accused who seek to base a defense of superior orders thereon. However, there is corroborating evidence from the testimony of the disinterested witness Neumann. It was the prerogative of the Court with the witnesses before it to evaluate the testimony, and there was sufficient evidence before the Court upon which to base its findings.

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

Petitions: No Petitions for Review were filed. Petitions for Clemency were filed by the accused, 12 October 1947; Dr. Eugen Schiefer, 14 September 1947; Fritz Banner, 4 October 1947; Hermann Gottschalk, 2 October 1947; Joh. Klein, 25 September 1947; Alva Sarter, 22 September 1947; Ludwig Flirsch, 19 September 1947; Richard Binder, 24 September 1947; Gaenter Niemann, 28 August 1947; Friedrich Schluss, 23 September 1947; Alfred Wundenberg, 27 September 1947; by Chief Defense Counsel, 25 August 1947; by the accused in person, 12 October 1947; 27 October 1947, and 15 December 1947; by Ludwig Hofmann, 1 December 1947; and by Luise Dietrich, 3 December 1947.

Recommendation: That the findings and sentence be approved.

## 2. Fritz DISTLINGER

Nationality:	German
Age:	49
Civilian Status:	Auto Mechanic; Electrician
Party Status:	Member of Nazi Party since 1936; Sergeant, Allgemeine SS
Military Status:	None shown
Place:	NG Charge I
Findings:	G Charge I
Sentence:	Life imprisonment

Evidence for Prosecution: This accused is involved only in Charge I, first incident.

In his extrajudicial sworn testimony the accused admitted that in the summer of 1944 in the vicinity of Saarbruecken, Germany, he participated, together with accused HUNSICKER and ELI at the direction of accused STEMLER, in killing three American flyers and admitted that he personally shot one of the flyers (R 22; P-Ex. 94). Accused ELI in his extrajudicial sworn testimony tells of the participation of the accused in killing the three flyers (R 24; P-Ex. 10B-1). In his extrajudicial sworn testimony accused HUNSICKER said of the accused, "He accepted the order without saying a word", and further stated:

"I saw that Fritz DINTINGER fired on the aviator from behind, from the car. He fired about four or five times. ---I noted that the aviator was dead" (R 25; P-Ex. 11, pp. 2, 3).

In his extrajudicial sworn testimony Lemmen stated that HUNSICKER, accompanied by the accused, picked up one of the flyers at the police station of Walstatt (R 44; P-Ex. 244).

The accused admitted in his testimony that in June, July or August 1944 (R 142) he, together with HUNSICKER and ELI, received orders from STEMLER to pick up two captured flyers in Saarbruecken suburbs and kill them (R 144, 145): that first they picked up a flyer at Walstatt, took him to "Seven Oaks" forest, and HUNSICKER shot him where they left the body; that then they picked up the second flyer at Burbach police station, took him to a forest road called "Black Way", and the accused admitted that he took part in shooting that flyer, whose body they also left where it had fallen. They then returned to regimental headquarters and STEMLER again sent them out to get another flyer at Nounkirchen, also in the Saarbruecken area (R 145-148). This flyer was picked up and on the road back to Saarbruecken they stopped in a forest and this flyer was shot by HUNSICKER and ELI (R 149). Accused HUNSICKER also testified that the accused shot the flyer that they had picked up at Burbach (R 395).



For further testimony concerning the participation of the accused in the killings, reference is made to prosecution evidence set out in connection with the other accused herein and for the sake of brevity not repeated here.

Evidence for Defense: The accused testified that he was called into the flyer incident by his Allgömeine SS superior, accused HUNSICKER; that he together with HUNSICKER and accused EMI reported to their regimental commander, accused STEMLER (R 142, 143); and that STEMLER informed them of an order "from superior headquarters" that all captured enemy flyers were to be killed. STEMLER reminded them of their oath to the Fuehrer and said that anyone who refused to obey the order would be tried by an SS court, and said further, "----and this will have repercussions on the members of the family" (R 144). They were then ordered by STEMLER to pick up flyers at Kalstatt and Burbach (R 145). The accused testified that his presence at the three killings and his shooting of the second flyer (R 146, 148, 149) was,

"Because we had got the order from Standartenführer Stempler and I said to myself 'If this is the order' ---- in spite of that I hesitated---- 'then the same thing would happen to me if I refused'---- what happened to the flier" (R 150).

Accused STEMLER in his testimony at the trial admitted that he gave the order to HUNSICKER to pick up the flyers and shoot them and told HUNSICKER that it was total war and that, if any person refused to obey any kind of an order, he would be shot together with members of his family, and he further told HUNSICKER to take someone along with him, "and these orders naturally go also for these men" (R 317, 318).

For further testimony regarding the defense of superior orders relied upon by this accused reference is made to defense evidence set out in connection with the other accused herein and not repeated here for the sake of brevity.

Sufficiency of Evidence: The accused admitted that he shot one flyer and that he was present and had participated in the shooting

of two others involved in the first incident, and his admissions are sufficiently corroborated.

With regard to the evidence offered in support of superior orders, though the accused's immediate superior was present at the time he shot the one flyer and during his participation in the killing of the other two flyers involved in the first incident, he relied upon the order given to him by his regimental commander who at the time was at a distant point. The Court might well have concluded from the evidence that the accused willingly participated; that his desire to please his superiors was stronger than other considerations; that he did not act under immediate compulsion; and that he failed to meet the burden of proof required by pertinent authorities discussed in Section V, post. However, it is evident that the Court in all probability, out of an abundance of caution, did consider that there may have been a possibility that the actions of the accused at the time were in some degree influenced by the orders and threats of his commanding officer, and that it was for this reason that the Court did not impose the death penalty.

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

Petitions: No Petitions for Review were filed. Petitions for Clemency were filed by Mrs. Erna Dintinger, wife of the accused, and Fred Thiel, Police Sergeant, 20 August 1947; Gell, Vicar, 7 August 1947; and Albert Lichius and other persons, 23 July 1947.

Recommendation: That the findings and sentence be approved.

3. Albert ELI

Nationality:	German
Age:	38
Civilian Status:	Metal Worker
Party Status:	Member of Nazi Party since 1937; Corporal, Allgemeine SS
Military Status:	None shown



Plea:	NG Charge I
Findings:	G. Charge I
Sentence:	Life imprisonment

Evidence for Prosecution: This accused is involved only in Charge I, first incident.

Accused DINTINGER in his extrajudicial sworn testimony stated that in the summer of 1944 in the vicinity of Saarbruecken, Germany, the accused participated in the shooting of three American flyers, first incident, and said that the accused personally shot one of them (R 22; P-Ex. 9., p. 3). Accused HUMSICKER stated in his extrajudicial sworn testimony that the accused shot the flyer who was picked up at Neunkirchen; that the flyer was left for dead but was later found still alive; and that the next day the accused shot and killed the flyer (R 25; P-Ex. 11, pp. 4, 6, 7). Jeanrood testified that in July or August 1944 in Saarbruecken, Germany (R 66, 67), he was ordered by accused STEMLER to shoot a wounded flyer, but that he refused (R 70); and that then accused HUMSICKER said that he had a man in the car who would take care of it (R 71). HUMSICKER went to his car and returned with the accused who got into a police vehicle in which the wounded flyer was lying (R 72). Jeanrood further testified that only the accused, the driver, and the wounded flyer were in the police vehicle when it drove away, and that he and HUMSICKER followed in his car to a rifle range in the vicinity of Saarbruecken where the police vehicle was driven about 300 meters inside the range and the witness heard a shot fired (R 74, see also R 80, 81). Zimmermann, in his testimony, identified the accused as the civilian who shot and killed the wounded flyer in the police vehicle driven by the witness at a rifle range in the vicinity of Saarbruecken (R 113-116). He testified that this happened about the "end of July" 1944 (R 122). The witness saw the flyer move when the shot was fired, and testified that "after the deadly shot was fired, the flier turned to the side with his head" (L 124).

The accused in his extrajudicial sworn testimony admitted that he killed a wounded American flyer with a shot in the temple as the flyer lay on a stretcher, and he then delivered the body to "Waldfrucht" cemetery in Burbach-Saarbruecken (R 24; P-Ex. 10A). He admitted his participation in the killing of three American flyers during the summer of 1944 in the vicinity of Saarbruecken, first incident (R 24; P-Ex. 10B-1). In his testimony, the accused admitted being present with accused HUNSICKER and DINTINGEL and admitted receiving the order from accused STEMMER to pick up the three flyers. He testified that he was present when the three flyers were picked up at Malstatt, Burbach and Neunkirchen and when each of them was shot, but denied that he at that time shot the flyer picked up at Neunkirchen. He, however, admitted that he finally killed this flyer with a shot in the head as the flyer lay wounded on a stretcher in a police vehicle at a rifle range near Saarbruecken the next day, and that the body was then driven to the cemetery (R 163-176). Of the actual shooting the accused testified, "and he (HUNSICKER) nodded to me to shoot----Then I mounted the steps so that I could shoot the man" (R 174). HUNSICKER was at the time standing by his own car 30 or 40 meters away. HUNSICKER did not have a pistol in his hand (R 176). Accused HUNSICKER testified that under his direction the accused shot the flyer when they had picked up at Neunkirchen in execution of STEMMER'S order (R 396), and further that after it was recovered the next day that this flyer had only been badly wounded and that the accused, with the same pistol he had used the day before shot and killed the flyer as he lay in a police vehicle. HUNSICKER testified that during this shooting he, together with witness Jeanroed, remained on the main road (R 400, 401).

For further testimony regarding the participation of the accused in the killings, reference is made to prosecution evidence set out in connection with the other accused herein, and not here repeated for the sake of brevity.



Evidence for Defense: The accused testified that in about August 1944 (R 161) at Saarbrücken at the direction of accused HUNSICKER, his immediate superior, he went with HUNSICKER and accused BINTINGER to the office of their commander, accused STEINER; that STEINER told them that there was an order "from above" that all enemy flyers had to be shot, and that STEINER said, "Who would not comply with his order would meet the same destiny as this flyer", and told them that there were two flyers, one at Burbach and one in Wittlich that they must pick up and shoot (R 162, 163). After these two flyers had been killed by HUNSICKER and BINTINGER they all went back to headquarters and were again ordered by BINTINGER to pick up another flyer at Neunkirchen (R 168). The accused denied that he shot this flyer in the forest, but that he said to HUNSICKER, "Yes, I cannot shoot", so that HUNSICKER then shot the flyer several times (R 170, 171). The accused further testified that the next day HUNSICKER told him that the flyer was not dead and said, "that is a terrible thing, STEINER wants to shoot us all dead" (R 173). HUNSICKER then ordered him to shoot the flyer and said to him, "If you do not shoot now, I cannot guarantee for nothing" (R 177).

For further testimony supporting the defense of superior orders of this accused, reference is here made to defense evidence set forth regarding other accused herein and not here reported for the sake of brevity.

Sufficiency of Evidence: The evidence, as given in admissions by the accused and corroborating testimony, is amply sufficient to show that the accused shot and killed one of the flyers as alleged and participated in the killing of the other two, first incident.

With regard to the evidence offered in support of superior orders, though his immediate superior was in the vicinity at the time the accused shot and killed the one flyer and during his participation in the killing of the other two flyers, he relied upon the order given to him by his regimental commander who at the time was at a distant point. The Court might well have concluded from the evidence



that the accused willingly participated; that his desire to please his superiors was stronger than other considerations; that he did not act under immediate compulsion; and that he failed to meet the burden of proof required by pertinent authorities discussed in Scobie V. post. However, it is evident that the Court in all probability, out of an abundance of caution, did consider that there may have been a possibility that the actions of the accused at the time were in some degree influenced by the orders and threats of his commanding officer, and that it was for this reason that the Court did not impose the death penalty.

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

Petitions: No Petitions for Review were filed. A Petition for Clemency was filed by Marta Eli, wife of the accused, 6 August 1947.

Recommendation: That the findings and sentence be approved.

4. Karl HUMSICKEL

Nationality:	German
Age:	39
Civilian Status:	Merchant
Party Status:	Member Nazi Party since 1935; Second Lieutenant, Allgemeine SS
Military Status:	None
Plea:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	Death by hanging

Evidence for Prosecution: Concerning the first incident, accused DINTINGER in his extrajudicial sworn testimony described how the accused took the leading part in the killing of three American flyers in the vicinity of Saarbruecken, Germany, in the summer of 1944, and stated that the accused was the commanding officer of a local Allgemeine SS unit in Saarbruecken, Germany (k 22; P-Ex. 94). Accused ELI in his extrajudicial sworn testimony stated that he attended a meeting of SS Standarte 85 in Saarbruecken in 1944 at which



the accused in a speech said, "When these flyers are picked up by SS men they are not supposed to reach their destination alive". ELI also stated therein that he killed a wounded American flyer upon direct order of the accused (R 24; P-Ex. 10A, pp. 1-3), and told her the accused participated in the shooting of three American flyers in the summer of 1944 in the vicinity of Scarbrun, ten, first incident (R 24; P-Ex. 10B-1). In his extrajudicial sworn testimony and in his testimony at the trial accused STEWART told how he ordered the accused to pick up and shoot the three flyers in the vicinity of Scarbrun in about July 1944, and that in each case the accused later reported back to him that the order had been carried out (R 33; P-Ex. 12A, p. 2; P-Ex. 130-1, p. 1; R 318, 322-325).

In his extrajudicial sworn testimony, Womack, a former policeman, stated that in July or August 1944 the accused accompanied by accused DUNLAP, picked up a flyer at the police station of Malsstätt-Scarbrun (R 44; P-Ex. 24A). A former police official named Beltes in his extrajudicial sworn testimony stated that he saw a receipt for a flyer signed by the accused in a book at the police station in Womackirch (R 49; P-Ex. 29A). A former policeman named Brand in his extrajudicial sworn testimony stated that one morning in the summer of 1944 he picked up a flyer named Emil Berry, Jr. and took him to police station 5 in Burbach; that the flyer seemed injured; that in the afternoon the accused dressed in SS uniform accompanied by a man in civilian clothes called for the flyer orders of the Kommandeur of the Schulpolizei; that the flyer was dressed in an American uniform with metal insignia on the collar; that later on the same evening a call came to the police station that two flyers had been found dead in the vicinity; that he found the body of an American flyer in the woods called "Seven Oaks" with a bullet hole in the head; and that the next morning he found the body of Emil Berry, Jr., in the woods on a path called "Black Way" (R 46; P-Ex. 26A, pp. 1,2).

Jeanraud and Blumermann, in their testimony at the trial, corroborated the testimony of accused ELI that he shot the wounded flyer at the Saarbruecken rifle range upon orders of the accused (R 70-74, 80, 81, 113-115). Accused DINTINGEL and ELI testified that the accused shot the first flyer at "Seven Oaks" (R 146, 153, 165), and the second one at "Black Way" (R 148, 157, 165). Schreiner testified that the accused was the SS man who he saw pick up the captured flyer at the police station in Neunkirchen (R 62, 63). ELI testified that he killed the flyer from Neunkirchen at the rifle range in Saarbruecken on direct orders of the accused (R 173, 174).

Concerning the first incident, the accused testified that in July 1944 he was called to regimental headquarters in Saarbruecken and ordered by accused STEMMER to pick up three flyers at three different police stations and shoot them (R 393); and that he took Fritz Gross and accused DINTINGEL to assist him and he relayed the orders to them (R 394). He immediately ordered the shootings in each case. The first flyer was shot by Fritz Gross, the second by DINTINGEL and the third by ELI. The third flyer was only wounded and was finally killed by ELI the following day (R 394-401). On cross-examination the accused admitted that he ordered the three flyers killed when STEMMER was not present and that he was the superior officer to each of the other persons present (R 439). He further admitted that at the time of the shooting of the first three flyers he doubted if these execution orders by STEMMER were not quite correct (R 447).

It was shown that the three flyers involved in the first incident were buried at Welfriedhof cemetery (R 25; P-Ex. 11, p. 8) and that they were afterward disinterred and were tentatively identified as the bodies of Second Lieutenant John B. Good O-695053, First Lieutenant Emil Berry, Jr., O-662430, and Staff Sergeant Louis E. Pulsipher 16119118, all of the United States Army. Death in each case had been caused by bullet wounds (R 41, 42; P-Exs. 17-20).



Concerning the second incident, accused STEMMLEK in his extrajudicial sworn testimony described the killing of four flyers in August 1944 in the vicinity of Saarbruecken, Germany, as follows:

"With this car we then drove in the direction of KLAHENTAL and in the woods there shot the 4 fliers - I myself 2, and HUNSICKER 2. -- The four dead fliers with a 5th drowned flier, were then taken to the cemetery in BURBACH and buried there. -- It must have been in August -- I don't remember the date. -- As far as I remember, I gave the first and second (fliers) two shots each and HUNSICKER gave the others two or three shots each" (R. 34; P-Ex. 13B-1, II. 2,3).

and at the trial STEMMLEK testified that the accused shot two of the four flyers in the second incident who were killed near Burbach about three weeks after the killing of the first three flyers involved in the first incident (R. 329).

Duchene testified that he drove the police patrol car in which the four flyers involved in the second incident were transported; that he followed STEMMLEK and the accused in another car; that the cars were halted in a woods (R. 88); that the flyers were ordered to dismount by the accused and STEMMLEK and marched into the woods followed by the accused and STEMMLEK; and that five to eight minutes later he heard shooting in the direction in which they had gone. After the shooting the accused returned and said, "What do you say? They wanted to escape. So we shot them down". On the order of the accused, witness backed the patrol car into the woods where he saw the dead bodies of the four flyers. He loaded the bodies on the vehicle and took them to the cemetery (R. 89). Duchene further testified that he heard 10 to 15 shots (R. 90), and that both the accused and STEMMLEK had Weiser police pistols at the time (R. 93). He was certain that more than seven shots were fired in one to two minutes (R. 99). Mohr heard approximately ten shots (R. 108).

On the way to the cemetery the body of the fifth flyer, who had fallen into the Saar river and drowned, was loaded into the vehicle with the four who had been shot (R. 42; P-Ex. 22A, p. 3; R. 89). Caretaker Flage at Waldfriedhof (Forest Cemetery) in his extrajudicial testimony tells of receiving the flyers' bodies at the cemetery and

gives their names and position in the common grave from entries made by himself in the cemetery burial book under date of 26 August 1944 (H 42; P-Ex. 21.). The bodies were later disinterred and examined and four were shown to have died as a result of bullet wounds. The fifth was listed as "cause of death unknown" and was evidently the body of the drowned flyer. The four who had been shot were tentatively identified as being the bodies of Technic Sergeant Charles E. Wyatt, Jr., ASN 38399233, Sergeant Willard L. Fatterhoff, ASN 36595057, Sergeant Ted Zdenek, ASN 35767441 and Private Jack A. Maxwell, ASN 14056809 of the United States Army (H 42; P-Ex. 15-20).

Reference is here made to prosecution's evidence herein against the other accused for further evidence regarding the participation of this accused in the killings alleged, and not repeated here for the sake of brevity.

Evidence for Defense: Concerning the first incident, accused STEMMER testified that he gave the accused the order to pick up the flyer at Neunkirchen and to shoot him and that at the time he reminded the accused that it was an order from higher up and that it was total war and that there was an order that anybody who should refuse to obey any kind of an order would be killed by the SS together with the members of his family (H 317, 318).

The accused testified that he argued with STEMMER and tried to get excused from the order to pick up and shoot the three flyers in July 1944, first incident; that STEMMER told him that the flyers had forfeited their rights to be treated according to the usages of war and deserved death; and that STEMMER told him that he could obey the order or shoot himself (H 394). He "considered obedience of prime importance, above human feelings and human considerations" and was sure that STEMMER would carry out his threats. At the time he was thinking of his comrades who had shot themselves on STEMMER's order and that the population was enraged and would not consider the enemy as a human being. STEMMER was very strict and had a vile temper (H 403). The accused further testified that he shot the flyers



because he had been instructed that they were not prisoners of war, but men who shot at helpless people and also because he "trusted in the sincerity of the order of STEMMLEH" (R 404). Concerning the second incident, the accused denied shooting any one of the four flyers killed in August and testified that STEMMLEH shot them and that he refused to take part in the shooting (R 404-407). About 14 days after the incident in August he was again ordered by STEMMLEH to pick up ten flyers at a local air field and shoot them, but that he managed to avoid executing the order (R 406, 407, 438). He denied that he himself ever fired a shot at a flyer (R 407). He denied that at the scene of the killing in August 1944, he made such remarks as "They wanted to get away, We just bumped them off" (R 429) and said that witness Duchene stated an untruth (R 430).

Gols testified that, when he got into trouble with the SS for interference in behalf of some foreign workers, the accused took his part and prevented his being punished and that the accused was friendly to foreign workers (R 455, 456). Boecking stated in an unsworn pretrial statement that the accused prevented his being sent to a concentration camp when he made some remarks about Hitler (R 457; D-Ex. 6A). Pastor Reichard stated in an unsworn pretrial statement that in the community where he resided the accused is known as a "decent and devoted man, with a clean mind" (R 458; D-Ex. 7A).

Reference is here made to defense evidence set out in connection with other accused herein regarding the defense of superior orders as the same may relate to this accused and not repeated here for the sake of brevity.

Sufficiency of Evidence: The accused admitted that he personally directed and gave the immediate orders for the three killings alleged under Charge I, first incident. The testimony of two co-accused indicates that he alone shot the first victim and was the first to fire upon each of the other two. As to the killings alleged under Charge II, second incident, accused STEMMLEH testified that the accused shot two of the victims, and this testimony is strongly

corroborated by the fact that the accused, when he must have known that the flyers were to be immediately killed, followed them into the woods with a drawn pistol. The above testimony is further corroborated by the fact that a number of shots were heard at that time by witnesses, and by the accused's res gestae statement that, "We shot them down".

With regard to the evidence offered in support of superior orders, the evidence shows that the first three flyers were not killed in the presence of any superior of the accused, and that the orders relied upon by the accused were those of the regimental commander who was at a distant point. The Court might well have concluded from the evidence on the part of the prosecution as well as from the accused's own testimony that in each of the incidents the accused willingly participated; that his desire to please his superiors was stronger than other considerations; that he did not act under immediate compulsion; and that he failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

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

Petitions: No Petitions for review were filed. Petitions for Clemency were filed by Elm and Schmidt, 29 August 1947; Anton Bordin and August Dietsch, undated; Franz Jankovsk, 24 August 1947 and 20 September 1947; and Gerla Hussicker, wife of the accused, 29 July 1947; by the accused in person 14 July 1947, 10 August 1947, 15 August 1947, 15 August 1947, 28 September 1947; by Hans Vols, Lawyer, 14 November 1947; and by two persons whose signatures are illegible, 3 August 1947 and 7 November 1947, and by Oswald Bloss, 11 August 1947.

Recommendation: That the findings and sentence be approved.

5. Johann KLEIN

This accused was acquitted (R 546).



6. Willy SYE and ELI

Nationality:	German
Age:	48
Civilian Status:	Merchant
Party Status:	Member Nazi Party since 1928; Colonel, Allgemoine SS
Military Status:	None shown
Plea:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	Death by hanging

Evidence for Prosecution: Concerning the first incident, accused DINTINGER, ELI and HUNSICKER in their extrajudicial sworn testimony tell of being called to the office of the accused in Saarbruecken, Germany, in the summer of 1944 and ordered to pick up three American flyers at the police stations of Malstatt, Burbach and Neunkirchen and that they were ordered by the accused to shoot the flyers and to say that they had been killed while escaping (R 22; P-Ex. 94, p. 3; R 24; P-Ex. 10B-1, pp. 1-5; R 25; P-Ex. 11, pp. 1,4). Jeanroad identified the accused in Court (R 67) and testified that the accused called him to his office in July or August 1944 and that the accused said that, in accordance with an order by Himmler, all crash landed flyers were to be shot; that the accused said that a flyer had been shot but only wounded and ordered witness to go out and kill the flyer. This witness refused to do (R 67-79, 82). Accused DINTINGER and ELI at the trial gave substantially the same testimony as in their extrajudicial sworn testimony and testified that the accused ordered them, together with HUNSICKER, to kill the three flyers and that the accused said "Who would not comply with the order would meet the same destiny as the flyer" (R 144, 163).

The accused admitted in his testimony that in June or July 1944 and before the flyers mentioned in this case were killed, he received an oral order from his superior General Stroop that all captured flyers must be shot (R 314). He further admitted that when a flyer

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was shot down in Neunkirchen he received an order at the command bunker from accused Police President DIETRICH that he must call for the flyer and have him shot. DIETRICH was his superior only in that General Stroop had ordered him to be in the police bunker (R 316). He admitted that he ordered HUNSICKER to kill the flyer held at Neunkirchen (R 317), and that he explained to HUNSICKER the consequences of disobeying an order from higher authority (R 318). He admitted that he ordered accused ZBITZEK to put the flyer "to sleep completely" and that later he sent Jeanroad along with HUNSICKER to see that the flyer was shot (R 320-323, 374). He also admitted that he ordered HUNSICKER to shoot the two flyers held at the police stations of Walstatt and Burbach, first incident (R 324). Accused HUNSICKER testified at the trial that in July 1944 the accused gave him a direct order to pick up three flyers at the three police stations in the vicinity of Saarbruecken, Germany, and that he had to shoot them in accordance with an order from Wiesbaden, and that the accused told him that the flyers did not deserve to be treated as prisoners of war and that he must either shoot the flyers or shoot himself (R 393, 394). The three flyers involved in the first incident were killed in the vicinity of Saarbruecken, Germany, on or about 31 July 1944 (R 394-401).

Concerning the second incident, the accused testified that about three weeks after the three flyers, above mentioned, were killed he received an order from DIETRICH to pick up four flyers at Burbach; that he took HUNSICKER and Sergeant Mehr and drove to Burbach and that in the public square they found a flyer in a vehicle with two policemen. He admitted that he jerked the flyer out and allowed a woman to slap his face; that three other flyers were picked up and that the four flyers were taken to a road in the forest in the vicinity of Saarbruecken where they were forced to dismount and walk into the woods followed by the accused and HUNSICKER. The accused admitted that he shot two of the flyers and testified that HUNSICKER who was under his orders shot the other two. He said that the bodies



were loaded onto a police vehicle and taken to the cemetery (R 326-329). This evidence is substantially corroborated by the extrajudicial sworn testimony of the accused (R 34; P-Ex. 13B-1), the extrajudicial sworn testimony of accused HUNSICKER (R 25; P-Ex. 11, pp. 8-11), and the extrajudicial sworn testimony of Friedrich Gross (R 43; P-Ex. 22A). Duchene, who was the assigned driver for the accused at the time of the second incident, testified that the four flyers involved in the second incident were picked up at Burbach under orders of the accused; that they were placed in a police patrol car driven by the witness; that they followed the accused, who was in his own car accompanied by HUNSICKER, to the place where the flyers were taken out; that the flyers were marched into the woods followed by the accused and HUNSICKER, each with a drawn pistol; and that after a few minutes 10 to 15 shots were heard. The witness then backed the car into the woods to where the accused was standing by the bodies which were loaded into the patrol car and taken to the cemetery (R 86-90, 97). The witness testified that after the shooting the accused required him to take an oath to keep silent about the affair (R 104).

Reference is here made to prosecution's evidence herein against the other accused for further evidence regarding the participation of this accused in the killings alleged, and not repeated here for the sake of brevity.

Evidence for Defense: The accused testified that he never permitted to anyone the order of General Streep to shoot immediately captured Allied flyers (R 314). He denied that he slapped the flyer at Burbach (R 327). He testified that he was forced into the SS and tried all the time to resign from the SS and from the Party (R 332); that he wanted to retain his civilian employment (R 333); that the flyers in both incidents were shot on a direct order of Police President DIETRICH, who had authority to issue orders to him (R 314-318, 324, 326); that in each case he was ordered by DIETRICH to make a written report that the flyers had been killed while escaping (R 319,

325); and that he did make his reports direct to DIETRICH (R 330). On four occasions he received direct orders from DIETRICH to shoot Allied flyers (R 346) and on each occasion in the police bunker DIETRICH would shout "I am the master here. I give the orders. Nobody else has anything to say" (R 347).

Zimmermann testified that he was driver for the accused from September 1944 to the end of the war and made many trips with the accused about the country and that he never heard the accused order any flyers to be shot and never heard any remarks of the accused to the effect that flyers should be shot (R 384).

Reference is here made to defense evidence set out in connection with other accused herein regarding the defense of superior orders and the same may relate to this accused and not reported here for the sake of brevity.

Sufficiency of Evidence: That the accused actively encouraged, aided, abetted, and participated in the killing of the seven American flyers as alleged under the two charges in this case and referred to as first and second incidents, and that he personally killed at least two of them is clear from his own admissions and from independent and corroborating evidence.

With regard to the evidence offered in support of superior orders, if orders were received, the orders did not require nor were the accused's acts performed in the presence of his superiors, and the Court might well have concluded that the accused's desire to cooperate with and please his superiors was more important than other considerations; that the accused did not unwillingly participate; that the accused did not act under immediate compulsion; and that the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

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



Petitions: No Petitions for Review were filed. Petitions for Clemency were filed by the accused, 21 July 1947; and Sefio Butalrach 29 July 1947.

Recommendation: That the findings and sentence be approved.

7. Richard WANDEL

This accused was acquitted (R 546).

8. Otto ZEITZER

Nationality:	German
Age:	39
Civilian Status:	Doctor of Medicine
Party Status:	Sergeant, Allgemeine SS
Military Status:	None
Plea:	NG Charge I
Findings:	G Charge I
Sentence:	4 years, commencing 28 November 1944

Evidence for Prosecution: This accused is involved in the first incident only. Accused STEMLER testified that through accused HUNSICKER, he sent an order to the accused to give the wounded flyer who had been picked up at Neunkirchen police station an injection of "That the man with the serious injury would be put to sleep completely" (R 320). He further testified that when the accused returned he said "I have given him two shots. Two very strong shots, but in spite of it, it didn't help at all, but it is possible he will die in a minute" (R 369, 374, 379). The incident involving this flyer occurred on or about 31 July 1944 in the vicinity of Saarbruecken, Germany (R 320). Evidence concerning participation of the accused in the first incident is given by accused HUNSICKER in his extrajudicial sworn testimony (R 25; P-Ex. 11, pp. 5, 6) and by accused KLE in his extrajudicial sworn testimony (R 31, 32; P-Exs. 12B, 12C-1, pp. 2-4).

Holtz in his extrajudicial sworn testimony stated that he saw a doctor give an injection to the wounded flyer and that the doctor

stated he had given a double dose and was surprised that there was no change in the "wounded man's position" (R 45; F-Ex. 25A, p. 2). Neumann testified that he overheard policeman Boltas report to accused WANDEL that he had seen a doctor give an injection to the wounded flyer and that the doctor said "In about a quarter of an hour the whole thing would be over" (R 58, 59). Teanread identified the accused in Court (R 67) and testified that accused STEMLER told him in the presence of the accused that the accused "had attempted before to do away with the man by way of injection, but that he had not succeeded in it" (R 70, 76). Zimmermann identified the accused in Court (R 111) and testified that he saw the accused give the wounded flyer an injection (R 112).

Evidence for Defense: - Prosecution witness Zimmermann who drove the vehicle used to transport the wounded flyer from the place where he had been given the injections by the accused, testified that the accused cautioned him to drive carefully, "He said I should drive carefully because the road was very bad". The witness assumed that the reason for such orders was because the flyer was badly injured (R 117).

The accused testified that he never received an order to kill the flyer by injections (R 184, 193, 194, 201, 202, 206). He described the condition of the wounded flyer and the treatment given and why it was impossible because of the flyer's condition to give any additional medical treatment (R 185-190). The accused testified that he reported the condition of the wounded flyer to STEMLER at headquarters and that the flyer could only be treated at a hospital. STEMLER replied that he would do what was necessary to get the flyer there (R 190, 191). He stayed with the wounded flyer as long as there was anything that he could do for him (R 192). The amount of drugs given to the wounded flyer and the treatment was proper (R 196-197). The accused further testified that he did everything for the wounded flyer that was necessary and within his power of reason. (R 199).



Accused KLEIN testified that he heard a discussion between the accused and STEWALEK regarding something about taking the wounded flyer to a hospital (R 231) and said that there was no discussion as to the effect of the morphine injection (R 232). Accused WANDEL testified that policeman Boltes reported to him immediately after the incident that a doctor had given the wounded flyer a shot to calm him down (R 273). Expert witness doctor Gue rmath, in answer to hypothetical questions, testified that the treatment claimed to have been given by the accused was proper (R 299-303, 304). The witness further testified that he knew of no drug which could have been administered to the flyer in a deadly dose without causing the flyer's death in less than two and one-half or three hours (R 305). Accused STEWALEK testified that he gave the order to kill the flyer to the accused through HUNSICKEK (R 320) and that he only spoke briefly to the accused and only said something to the effect "All right, take care of this" or "Put this in order" (R 321, 308). Accused HUNSICKEK in his testimony at the trial denied that when he gave STEWALEK'S order to the accused he told the accused anything about the shooting on the day before or anything that had happened and insisted under cross-examination that he only told the accused that he would have to go to a severely wounded soldier in Neunkirch and did not tell the accused to kill the flyer (R 443, 444).

Sufficiency of Evidence: Taking only into consideration the evidence offered by the prosecution and in the most unfavorable view to the accused, the Court might have concluded that the accused received an order from the SS regimental commander to kill a wounded flyer by means of injections; and that he went to the wounded flyer and did give him two hypodermic injections. But, there is no evidence that the injections/<sup>given</sup> contained a fatal dose of drug or poison or that such injections were in any way injurious or harmful to the wounded flyer, or that the injections were intended by the accused to be fatal, injurious or harmful, except for evidence of criminal intent which may be inferred from certain statements of the accused. (R 450)

made afterward.

All the testimony regarding the possibility of giving medical treatment or aid to the wounded flyer was irrelevant and immaterial under the charge and particulars, except in so far as the same might show the intent or state of mind of the accused herein. To sustain a finding of guilty under the charge and particulars there must have been some proof that the accused actively encouraged, aided, abetted or participated in bringing about the death of the flyer. There is no such proof in the record.

The most reasonable conclusions to be drawn from the evidence is that the accused did receive an order to kill the flyer; that as a medical man dealing with laymen he could and did go through the motions of obeying the order without actually doing any harm to the flyer and quite possibly giving aid to the flyer in so far as the circumstances permitted; and that by so doing he avoided complying with the order to kill the flyer and at the same time avoided any punishment or embarrassment to himself because of his refusal to comply with the order.

The findings of guilty are not warranted by the evidence.

Petitions: Petitions for review were filed by Chief Defense Counsel, Mr. Frank L. Walters and German defense counsel, Dr. Karl Cook, 10 September 1947, 5 December 1947 and 19 December 1947.

Recommendation: That the findings and sentence be disapproved.

QUESTIONS OF LAW:

Jurisdiction: The jurisdiction of the Court to try the offense alleged was questioned on behalf of the defense by motion on the ground that the place where the alleged offenses were committed is outside the American Zone of Occupation and "in territory which is in the French Republic" (R 14). Also, the jurisdiction of the Court to try accused Fritz DIETRICH was questioned on behalf of the defense on the ground that he was an Italian national and as such not subject to the jurisdiction of the Court (R 14). The accused DIETRICH admitted at the trial that at the time of the alleged offenses he was



a German national, and though when arraigned he claimed that he was no longer a German national, he failed to show when or how his German nationality terminated. This, however, is immaterial.

War criminals, brigands, and pirates are the common enemies of all mankind and all nations have an equal interest in their apprehension and punishment for their violation of international law. Concerning this question, it is stated in "Wheaton's International Law", Volume I, Sixth Edition, at page 269, that every independent state has the judicial power to punish "piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed." Even nationals of other United Nations were sentenced, which sentences have been approved and carried into execution, in the Mauthausen Concentration Camp case (United States v. Aitfuldich et al., February 1947), and in the Belsen Concentration Camp case, British Army of the Rhine, December 1945. Apparently, all concerned with the reviews and approvals in these cases considered the universality of jurisdiction over war crimes to be so well recognized that discussion was not necessary. A fortiori, the Court had jurisdiction of the person of accused DIETRICH even if he is an Italian national. Military Government Courts have jurisdiction over the nationals of any country who are in the United States Zone of Occupation, except as to certain classes of American and other nationals, e.g., military personnel, which are not pertinent to the jurisdictional question here involved. Concerning jurisdiction over war crimes, no limitation is imposed. (See Sections 5-300.2 and 5-300.3, Title 5, "Legal and Penal Administration", of "Military Government Regulations" published by Office of Military Government for Germany, 27 March 1947.) Concerning the general question of universality of jurisdiction over war crimes see "Universality of Jurisdiction Over War Crimes", by Cowles, California Law Review, Volume XXXIII, June 1945 No. 2, pp. 177-218. Both motions were properly overruled (H 14, 15).

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

Severance: The Court did not abuse its discretion in denying the motion by the defense for severance of Charge I and Particulars from Charge II and Particulars, and for separate trial of the two alleged incidents (R 17, 18, 20, 21). The two incidents were closely related as to time and place and much of the testimony of individual witnesses related to both incidents. Three of the accused were involved in both of the incidents, and a severance of the charges would have required an unwarranted additional expense, services of Court personnel and inconvenience to witnesses. Severance is not a right or a privilege of accused. The applicable rule is that such a motion is addressed to the sound discretion of the Court. Under the procedure applicable to the trial of war crimes, the test is whether an injustice would result to accused and not whether purported substantial rights of accused would be violated, if the motion were overruled, because accused have no right in this connection (United States v. Altfuldisch, et al., opinion D&K&C, February 1947). The applicable rule is that any number of charges may be contained in the same charge sheet (Section 5-323, Title 5, "Legal and Penal Administration", of "Military Government Regulations", published by Office of Military Government for Germany, 27 March 1947).

Superior Orders: Accused DINTINGER, ELI. HUNSICKER, and STEAMLER as shown in Section IV, paragraphs 2, 3, 4 and 6 respectively, supra, 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 a 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. Thomas, opinion D&K&C, December 1945; United States v. Klein, et al., (Hadamar Murder Factory Case), opinion D&K&C, February 1946; and French Republic v. Wagner, et al., Court of Appeals, 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; Vol 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 Coobbold's "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 DJAGC, September 1945; United States v. Thomas, supra; and United States v. Beck, et al., opinion DJAGC, December 1946.)

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

#### VI. CONCLUSIONS:

1. It is recommended that the findings and sentences as to accused DIETRICH, DELBRIGER, ELI, HUNSICKER and STEWLER be approved and that the findings and sentence as to accused BRITANN be disapproved.

2. Legal Forms Nos. 13 and 16 to accomplish this result are attached hereto, should it meet with approval.

V. H. McCLINTOCK  
Attorney  
Post Trial Branch

Having examined the record of trial, I concur, this \_\_\_\_\_ day of \_\_\_\_\_ 1948.

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