

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

15 September 1947

UNITED STATES )

v. )

Erwin METZ, et al. )

Case No. 12-1636, etc.

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 3 September to 15 October 1946, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

CHARGE 1: Violation of the Laws of War.

Particulars: In that Erwin METZ, a German national, did, at or near BERGA, Germany, on or about 19 March 1945, wilfully, deliberately and wrongfully kill an unknown member of the United States Army, who was then a surrendered and unarmed prisoner of war, in the custody of the then German Reich, by shooting him with a gun.

CHARGE 2: Violation of the Laws of War.

Particulars: In that Erwin METZ, a German national, did, at or near BERGA, Germany, between February 1945 and 23 April 1945, wrongfully commit assaults upon unknown members of the United States Army, then unarmed surrendered prisoners of war, in the custody of the then German Reich, by beating them about the body and face.

CHARGE 3: Violation of the Laws of War.

Particulars: In that Erwin METZ and Ludwig MERZ, German nationals, did, at or near BERGA, Germany, between February 1945 and 23 April 1945, wilfully, deliberately and wrongfully encourage, aid, abet and participate in mistreating unknown members of the United States Army, then unarmed surrendered prisoners of war under their charge and in their custody on behalf of the then German Reich, by failing to provide adequate food, adequate medical care, and adequate clothing, said failure resulting in the death of several unknown members of the United States Army.

At the opening of the trial that part of the particulars of Charge 2 reading: "wrongfully commit assaults upon unknown members of the United States Army" was amended to read as follows: "wrongfully commit assaults and batteries upon unknown members of the United States Army" (R 9).

During the course of the trial that part of the particulars of Charge 3 reading: "by failing to provide adequate food, adequate medical care, and adequate clothing" was amended to read as follows: "by failing to provide adequate food, adequate drinking water, adequate medical care, adequate clothing, and adequate housing and sanitary facilities" (R 160).

### III. SUMMARY OF EVIDENCE:

1. Prisoner of War Camps: The violations charged occurred in connection with the operation and evacuation of a prisoner of war work camp, known as Arbeit Kommando 625, located at Berga, Thuringia, hereinafter referred to as the "work camp". The parent camp was Stalag IX-C, Bad Sulza, Thuringia (R 24, 537; P-Ex 2, pp. 3,4). Except where otherwise indicated, the word "prisoner" as used herein refers to American prisoners of war.

2. Organization: The Stalag was commanded by Colonel Treffz or Trefz (R 43, 843, 844; P-Ex 3, p. 10). One of the units under his command was the Home Guard Battalion 621, commanded by Major Heinrich Otto, with headquarters at Gera, Thuringia (R 24, 545, 699; P-Ex 2, p 10). The first company of this battalion with headquarters at Geiz, Thuringia, was commanded by accused METZ (R 24, 537; P-Ex 2, p.2). Accused METZ was a member of this company. He served as a detail leader in charge of the American prisoner of war detail from 15 March 1945 until 20 April 1945 (R 14, 24, 603-605, 834; P-Ex 1, p. 2, P-Ex 3, p. 2).

3. Schwalbe 5: The work camp furnished prisoner of war labor to a construction firm known as Schwalbe 5, commanded by the SS, hereinafter referred to as the "construction firm" (R 24, 696, 711). The construction firm was constructing a series of tunnels into a hill adjacent to Berga (R 14, 53, 523; P-Ex 1, p. 12, P-Ex 5, p. 3). It was thought that an underground factory or gasoline plant was being constructed (R 82, 523; P-Ex 26, p. 5).

4. Administration: Under the regulations established by the Wehrmacht in supplying prisoner of war labor, the construction firm

was required to furnish quarters and rations according to specifications laid down by the Stalag. The construction firm supervised the work performed by the prisoners of war and was responsible for their security while at work (R 540-541, 710, 781). However, prisoners of war were at all times in the custody of the Stalag. The Stalag had the primary responsibility to maintain the standards of human treatment prescribed by international law.

5. American Prisoners of War: About 350 American prisoners of war, captured in the Ardennes Counter Offensive in December 1944, were transferred through various prisoner of war camps until they arrived at Berga on approximately the 13th of February 1945 (R 82, 553; P-Ex 26, pp. 2-5). The physical condition of the prisoners upon their arrival at Berga was bad. They suffered from malnutrition (R 48; P-Ex 4, p. 2). Some appeared to be emaciated (R 186). They had been subjected to considerable hardships in the course of the transfer to Berga (R 82, 555; P-Ex 26; pp. 3-5). Within one or two days the prisoners were organized into three shifts and put to work in the underground tunnels at hard labor (R 82; P-Ex 26, p. 5). The prisoners were physically unfit for this type of labor but they were compelled to work in the tunnels until approximately 19 March 1945 (R 562, 563). Between 13 February and 5 April 1945 about thirty-five American prisoners died (R 14; P-Ex 1, p. 20).

The prisoners were first housed in barracks at a place known as the "old camp" (R 545, 546). About 22 March 1945 they were moved to the "new camp" which was nearer the construction project where the prisoners worked (R 578, 823, 845). With the approach of the converging Russian and American armies, all personnel and prisoners including those who were seriously ill were evacuated on 6 April 1945 (R 538). The prisoners were marched southward into Bavaria on a route approximately paralleling the Czechoslovakian border. The column marched as a battalion with Major Otto in charge. Accused MERZ remained in charge of the 1st Company and accused METZ commanded the American prisoners (R 14, 24, 743; P-Ex 1, p. 6, P-Ex 2, p. 10).

The surviving American prisoners were liberated by American forces at Bernreid, Bavaria, on 23 April 1945 (R 176, 607; D-Ex 2). Prisoners of war of other nationalities had been freed by the German military authorities during the course of the evacuation march. The American prisoners were not released as they were regarded as a possible bargaining factor in the anticipated peace negotiations (R 43 P-Ex 3, p. 10). About 30 to 35 American prisoners or more than 10% of those that were evacuated from Berga died along the route (R 14; P-Ex 1, p. 8). Between the time when the 350 Americans arrived at Berga on 13 February 1945 and their liberation about two months later on 22 April 1945, approximately 70 died (R 14; P-Ex 1, pp. 8, 20).

6. Treatment of American Prisoners:

a. Killing. On 19 March 1945, accused METZ took custody of an <sup>escaped</sup> American prisoner of war, Goldstein, who had been recaptured and was being held by the mayor of a nearby town (R 69; P-Ex 20, p. 2). While returning the prisoner to the work camp, accused METZ killed him by firing one shot in his back and another in his head (R 14; P-Ex 1, p. 4). Accused METZ claimed that it was necessary to shoot Goldstein because he tried to escape (R 1013).

b. Beatings. Accused METZ beat the prisoners almost every day and almost every prisoner was beaten by him at one time or another (R 57, 71; P-Ex 15, pp. 1, 2, P-Ex 23, p. 2).

c. Living Conditions.

(1) Food. The diet provided the prisoners was inadequate for physical exertions they were required to perform while working or while marching when the work camp was evacuated (R 718). The prisoners suffered from malnutrition (R 62; P-Ex 18, pp. 2, 5) and malnutrition was a contributing cause to the death of many of the American prisoners (R 57, 278, 520, 718; P-Ex 15, p. 4). Accused METZ withheld food from the prisoners on several occasions (R 48, 59, 70; P-Ex 4, p. 3, P-Ex 16, p. 14, P-Ex 22, p. 10).

(2) Medical treatment. The prisoners did not receive the medical attention they needed and prisoners were not

hospitalized when they required such treatment. Sick prisoners, many of whom required hospitalization, were ordered evacuated when the work camp was evacuated. Accused MERZ protested but the order was not changed (R 594, 740, 741). The sick rode in wagons without any medical treatment being provided by German personnel (R 14, 57; P-Ex 1, p. 9, P-Ex 15, p. 2). Some of the many prisoners requiring hospitalization were finally hospitalized (R 59, 70, 352-354, 841; P-Ex 16, p. 8, P-Ex 22, p. 8). The cause of the deaths that occurred on the march was a combination of exhaustion, malnutrition and diarrhea. Adequate medical precautions could have prevented those deaths (R 62; P-Ex 18, p. 13).

(3) Drinking water. Drinking water was insufficient in quantity and poor in quality (R 72, 82; P-Ex 24, p. 4, P-Ex 26, p. 9).

(4) Clothing. Although gloves were badly needed by prisoners who were required to work carrying iron rails in weather so cold that their bare hands stuck to the rails, none were issued (R 14, 53, 574; P-Ex 1, p. 21, P-Ex 5, p. 4).

(5) Housing. The prisoners were required to live in overcrowded conditions at both the new and the old camps (R 43, 194, 548, 549, 840; P-Ex 3, pp. 2,3). The German guards did not sleep under conditions as crowded as did the prisoners (R 14; P-Ex 1, p. 23).

(6) Sanitary facilities. There were almost no sanitary facilities (R 82; P-Ex 26, p. 9) and the latrine facilities were primitive (R 335). The working conditions were unhealthy because of the lack of machinery to clear the dust from the tunnels (R 24, 734; P-Ex 2, p. 14). There was delay in disposing of dead bodies because of the delay in obtaining coffins (R 359).

#### IV. EVIDENCE AND RECOMMENDATIONS:

1. ERWIN METZ

Nationality:	German
Age:	54
Civilian Status:	Manager in food industry

Party Status: None  
Military Status: Sergeant  
Plea: NG, Charges 1, 2 and 3  
Findings: G, Charges 1, 2 and 3  
Sentence: Death by hanging

Evidence for Prosecution: Killing. On about 18 March 1945 an escaped American prisoner of war <sup>named</sup> Goldstein, was recaptured and held by the mayor of a nearby town (R 69, 70; P-Ex 20, p. 1, P-Ex 2, p. 4). Goldstein was one of four prisoners who escaped on 17 March 1945. Seven prisoners had escaped in five days (R 1022). The accused had been criticized because of the numerous escapes (R 14, 215; P-Ex 1, p. 15). When the accused received the report of the capture of Goldstein, he evidenced anger and boasted that Goldstein would not be returned to the camp alive (R 70; P-Ex 22, p. 4). It was unusual for the accused to personally pick up a recaptured prisoner (R 72; P-Ex 24, p. 3). On 19 March 1945 when the accused received custody of Goldstein from the mayor, he told Goldstein "he would beat him up and would shoot him while the other Americans watched." The accused also informed Goldstein that he was starting on his death march (R 69; P-Ex 20, p. 3). The accused admitted he told the mayor that prisoners who ran away should be shot on sight (R 14; P-Ex 1, p. 3). About a kilometer from the work camp, according to the accused, Goldstein sought to escape when the accused stopped to talk to a civilian. The accused asserted he yelled "halt", four times and then fired two shots with his pistol. Goldstein was at least 30 meters away and running at the moment of firing (R 14; P-Ex 1, p. 4). One shot entered the head and the other the back (R 48; P-Ex 4, pp. 2, 3). The accused had never fired a pistol before (R 14; P-Ex 1, p. 5). A passerby observed the body lying by the roadside and noted that the hair about the head wound was burned (R 70; P-Ex 21, p. 1). A guard told a prisoner that the accused had shot Goldstein in cold blood (R 72; P-Ex 24, p. 3).

Beatings. The accused beat American prisoners practically every day using his hands or a stick (R 57; P-Ex 15, pp. 1, 2). Near

Hof during the evacuation march, the accused struck several prisoners with a rifle butt and injured one seriously (R 59; P-Ex 16, pp. 13, 14). A prisoner who had escaped and been recaptured was struck to the ground by the accused and kicked until he became unconscious. Later he died from this and other causes (R 66; P-Ex 19, p. 2). The accused dragged a sick prisoner, Young, from his bed, punched and slapped him until he collapsed. The accused then dashed cold water on his face. A few minutes later the prisoner died (R 71; P-Ex 23, p. 2). Virtually every prisoner at one time or another was slapped or kicked by the accused (R 71; P-Ex 23, p. 2). During the evacuation march, a prisoner protested to the accused that if the prisoners were required to sleep in an open field on the wet ground at least 15 would die. The accused responded by striking the prisoner in the mouth knocking out three teeth and two porcelain jackets (R 773; P-Ex 31, p. 2).

Living Conditions. Food. Relative to food at the work camp, the extrajudicial sworn testimony of two prisoners and one German guard contain evidence that the guards received a larger ration than did the prisoners. A German guard testified that he received sufficient food (R 403). According to the testimony nothing was given the prisoners for breakfast. A liter of soup was given each prisoner at noon and about 400 grams of bread in the evening. Once or twice a week cheese and 30 grams of meat were issued to each prisoner (R 59, 70, 82; P-Ex 16, p. 3, P-Ex 22, pp. 3, 4, P-Ex 26, p. 6). Goldstein said he escaped because the food was insufficient and terrible (R 65; P-Ex 20, p. 2). One prisoner lost 37 pounds during the seven weeks at the work camp (R 82; P-Ex 26, p. 9). The bodies of the exhumed American prisoners were extremely emaciated (R 62; P-Ex 18, p. 5). The accused punished recaptured prisoners by forcing them to stand out of doors all night and sending them to work without sleep or food (R 59; P-Ex 16, p. 14). The accused admitted that he did not consider the prisoners' diet adequate for the type of work they were forced to perform (R 14; P-Ex 1, p. 13). The German camp doctor stated that the prisoners were badly undernourished and should not

have been made to do hard physical labor. As a result many became sick and some died (R 48; P-Ex 4, p. 4). He said that the prisoners did not receive the full contents of the Red Cross packages sent them (R 48; P-Ex 4, p. 3).

During the evacuation march the guards were given about twice the rations provided for the prisoners (R 10; P-Ex 22, p. 7). The guard attributed the death of 30 to 40 prisoners on the march to "nothing to eat, weak, sick, exhausted" (R 57, P-Ex 15, p. 4). At Zedwitz ten prisoners died from exhaustion, malnutrition and dysentery (R 59; P-Ex 16, p. 12). On the evacuation march from Zedwitz to Rehau, a distance of 21 kilometers, on 14 April 1945 no soup was provided and only one loaf of bread was distributed for ten men. Seven men died on this march. Twenty-seven more prisoners died along the route of march (R 59; P-Ex 16, p. 12). Accused MERZ admitted that during the march prisoners received half the prescribed ration for the German civilian (R 24; P-Ex 2, p. 12). The accused stated that the German guards received a larger ration than prisoners (R 14; P-Ex 1, p. 8). He admitted that 30 or 35 prisoners died along the route from weakness (R 14; P-Ex 1, p. 8). As the column passed through towns, the accused tried to prevent German civilians from giving food to the prisoners (R 70; P-Ex 22, p. 10). The rations for the prisoners consisted primarily of potatoes. Examination of the bodies of prisoners who died on the march showed marked weight loss, scaphoid abdomens and drawn features indicating insufficient food consumption for the physical exertion the prisoners were required to perform (R 62; P-Ex 18, p. 10).

Medical Care. At the work camp, sick prisoners who could still walk, as well as the mildly sick, were forced to work (R 57, 82; P-Ex 15, p. 2, P-Ex 26, p. 7). The accused required several sick and weak prisoners to work resulting in their deaths (R 72; P-Ex 2A p. 3). The guards dragged dying prisoners out of bed and threw them outside to die (R 825; D-Ex 15). Americans were carried from the tunnels almost every day from exhaustion. When a prisoner collapsed



going to or coming from work, the accused ordered a helmet full of water thrown on the man to determine whether he was feigning illness (R 70; P-Ex 22, p. 11). Seven to ten men per day collapsed. They were kicked and beaten to make certain that they were not faking (R 59; P-Ex 16, p. 4).

There was no medical aid at all (R 825; D-Ex 14, p. 2). No medical attention or supplies were furnished although repeated requests were addressed to the accused (R 82; P-Ex 26, pp. 6,7). A prisoner contracted gangrene and died because of the lack of medical attention. The accused prevented the doctor from taking care of this case (R 59; P-Ex 16, pp. 7,8). A prisoner died of diphtheria and except for some medicine for gargling provided by the accused, no other care was furnished (R 59; P-Ex 16, p. 9). Another prisoner who did not receive proper care died from an infection (R 59; P-Ex 16, p. 10). The accused interfered to prevent proper medical treatment (R 59; P-Ex 16, p. 5). <sup>could</sup> Cases/have been affected in many cases had they been hospitalized. The accused allowed only 17 to be hospitalized and 2 of these died en route to the hospital (R 59; P-Ex 16, p. 8). Of the 350 prisoners, 300 had dysentery at one time (R 59; P-Ex 16, p. 5). The doctor only visited the camp once a week (R 59; P-Ex 16, p. 5).

Concerning medical care during the evacuation march, most of the prisoners suffered from diarrhea when they left the work camp. During the evacuation march they became progressively weaker (R 70; P-Ex 22, p. 10). An average of 30 to 40 sick prisoners rode in wagons. No medical treatment was provided them by German personnel (R 57; P-Ex 15, pp. 2,3). The accused admitted that he compelled sick prisoners to get off the wagons and walk (R 14; P-Ex 1, p. 8). As prisoners collapsed on the march from exhaustion they were piled into a wagon. One prisoner at the bottom suffocated (R 66; P-Ex 13, p. 2). The accused stated he did not obtain any medical care for the prisoners or take any of them to a hospital (R 14; P-Ex 1, p.9). The accused did not place the sick in a hospital because an order was necessary to commit them to a hospital. No such order was issued during

the march (R 14; P-Ex 1, p. 9). At one point during the march a mayor and several citizens forced the accused to hospitalize 31 sick prisoners who were riding in the wagons (R 62, 70; P-Ex 18, p. 12, P-Ex 22, p. 8). Thirty bodies of prisoners who died on the march were located and exhumed. Seven other bodies were not located. Death was caused by a combination of exhaustion, malnutrition and diarrhea. Adequate medical precautions could have prevented these deaths (R 62; P-Ex 18, p. 13). At one point on the march the bodies of four prisoners were sent to a nearby cemetery for burial. It was discovered that one prisoner was still alive. No medical attention was furnished. This prisoner died and was buried with the others (R 62, 88; P-Ex 18, p. 11, P-Ex 28-A).

**Drinking Water.** At the work camp, the only drinking water obtainable the prisoners had to boil by themselves because cholera was present. There was no source of fresh water for any prisoner (R 82; P-Ex 26, p. 9). The camp doctor assumed the prisoners drank from the river (R 43; P-Ex 3, p. 3). The only water available when working in the tunnels was from the Elster River (R 72; P-Ex 24, p. 4). On the evacuation march the prisoners received no water, except as they happened to pass a stream (R 773; P-Ex 31, p. 2).

**Clothing.** Prisoners were required to lift coils in freezing weather, although they were issued no gloves. When they took a loose hold to avoid having their hands stick to the rails they were beaten with a stick (R 53; P-Ex 5, p. 4). The accused admitted that no clothing was provided for the prisoners. Gloves and caps were requested but none were ever issued (R 574). Those who did not have gloves when they arrived at the work camp worked without them (R 14, P-Ex 1, p. 21). The prisoners were not permitted to take their blankets with them on the evacuation march (R 24; P-Ex 2, p. 13).

**Housing.** The accused, in his extrajudicial sworn testimony admitted that all the American prisoners were confined in one barrack 40 meters long by 10 meters wide. Six men slept in three tiered bunks, two meters long by 1.5 meters wide. The accused added that the guards did not sleep in such crowded conditions (R 14; P-Ex 1, p. 23). Two prisoners slept in each bunk (R 224, 225). An expert

witness testified that for the group as a whole the sleeping space was insufficient (R 517). When shown a photo of this barrack (R 56; P-Ex 11) a defense witness stated that he did not think it possible to house 350 prisoners in it (R 140, 141).

Sanitary Facilities. There were virtually no sanitary facilities at the work camp (R 82; P-Ex 26, p. 9). At first there was only one latrine for 350 prisoners (R 59; P-Ex 16, p. 2). Toilet facilities were primitive (R 335). Buckets were used at both the old and the new camps (R 335, 338). The latrines at the new camp had not been finished and could not be used (R 580). Buckets were used as substitutes, eight along the front of the barracks and about six in the rear (R 581). This method of disposal was dangerous and unsanitary (R 509-510). Likewise, the washroom had not been completed. The water supply and toilet facilities were the worst problems at the new camp (R 580). Dead bodies were left in the open alongside the barracks for two or three days before burial (R 57; P-Ex 15, pp. 2,3). Modern health protection and safety equipment were not used in constructing the tunnels. The tunnels at the construction site were very dusty and very bad for the lungs. There were no machines to clear the air and remove the dust which caused the high rate of pneumonia deaths (R 24, 33, 734; P-Ex 2, p. 14, P-Ex 3, p. 4). The civilian workers and the guards in the tunnels wore masks but not the prisoners (R 53, 82; P-Ex 15, p. 4, P-Ex 26, p. 6). Clothing became very dusty (R 387).

Evidence for Defense: Killing. The accused asserted that when Goldstein was recaptured there were no other guards available and it was necessary for him to return Goldstein to the work camp (R 998, 999). In discussing the many escapes that occurred, the accused explained to the inquisitive mayor that prisoners who attempted to escape in the daytime "walk the way of death" (R 1005). The accused maintained that this expression was a frequently quoted phrase from Goethe merely indicating the risk a prisoner assumes who tries to escape in broad daylight (R 1098). The accused asserted that the mayor was a simple-minded country farmer who could not be expected to know the scene in which he used the remark and therefore understood him to imply that he was going to shoot Goldstein (R 1001). As the

accused approached the camp with Goldstein, he stopped to converse with a civilian (R 1010,1011). Goldstein continued walking. When the victim was about 30 meters away, the accused called to him to slow up, but Goldstein ran into the edge of the woods (R 1013). The accused yelled "halt" three or four times and then drew his pistol. The pistol missed fire on the first attempt because it was not loaded. After firing one shot Goldstein did not stop so the accused fired again (R 1013, 1102). The accused then met a guard and posted him by the dead body (R 1013, 1014). The accused denied, therefore, that any stranger could have observed the body and any burned hair as stated in the prosecution's evidence (R 70, 1105; P-Ex 21, p. 5).

Accused MERZ investigated the killing and determined that the shooting was necessary (R 24; P-Ex 2, pp.3,4). A pathologist who examined the bodies of American prisoners of war at Berga found one corresponding to the description of Goldstein with a bullet wound in the head and in the back. He stated that the bullets were fired "from rather a distance" (R 62, 516, 517; P-Ex 18, p. 3). A ballistic expert stated that the bullets found in the body were fired from a distance greater than 50 feet (R 522; D-Ex 19, p.2).

Beatings. Although three prisoners describe the death of Young only one stated that the accused struck Young (R 50, 71, 72; P-Ex 16, pp. 6,7, P-Ex 23, p. 2, P-Ex 24, p.2). The German camp doctor stated that he never treated any prisoner suffering from beatings (R 48, 65, P-Ex 14, p. 3, P-Ex 18, p. 4). The pathologist who exhumed and examined many of the bodies of American prisoners did not state that he found any evidence of external injuries (R 65; P-Ex 18). A civilian worker saw only one prisoner pushed and never even heard of any shootings or beatings at the work camp (R 492; D-Ex 9). A wife of a guard living near the camp never heard that any American prisoner was ever beaten (R 493; D-Ex 10, p. 1). An engineer on the construction project stated that he never witnessed or heard about the beating or shooting of any prisoner (R 523). Accused MERZ never heard of any beatings that occurred in details which the accused METZ supervised prior to the time that this accused was assigned to the work camp (R

679). While at the work camp, the accused reported to accused 10R2 a mistreatment of American prisoners by civilians (R 677). The accused characterizes the statement by the guard (R 57; P-Ex 15, pp. 1,2) that he beat the prisoners every day as pure fabrication and an act of revenge by the guard (R 961,962). The accused brands the statements about the death of Young as outright lies. He pointed out the discrepancies as to time in the prosecution evidence about this incident. He attacked the testimony of the two witnesses who stated that it happened in February 1945 on the ground that he was not assigned to this detail until 15 March 1945. On the other date named, 17 March 1945, Colonel Treffz inspected the camp and, although Colonel Treffz talked to two of those who gave extrajudicial sworn testimony and all of the sick, he stated that no complaints of any kind were made (R 940, 941). The accused asserted that this testimony was also motivated by revenge against him (R 941, 942). The accused stated that he never kicked or slapped an American prisoner but on the contrary he always took the part of the prisoners and treated them humanely (R 948, 949).

Living Conditions. Food. The defense sought to show that the food situation in Germany was critical. The Court took judicial notice of the fact that the German nation from February 1945 was having "plenty of difficulties furnishing food" (R 124). The prisoners received the civilian ration authorized for the heaviest labor (R 484, 531, 563, 564; D-Ex 5). The rations varied in quantity because of the food conditions generally obtaining (R 332). Rations were plentiful in the beginning but decreased later (R 334). Air attacks had disrupted transportation and consequently, the food situation in the area surrounding the work camp was very bad in March and April 1945 (R 211, 292). Wheat, potatoes, and vegetables, which comprised 67% to 70% of the caloric content of the ration, could not be brought to Thuringia at this time, necessitating an almost 50% reduction in the authorized rations (R 292, 294). Instead of 3800 to 4200 calories daily, the heaviest workers received only 2700 to 2800 calories daily (R 292). The guards received the civilian rations because they did

not perform heavy labor. The prisoners, therefore, received a larger ration than the guards (R 191, 331, 568). A guard testified that the prisoners received sufficient food. He attributed the constant loss of weight to the fact that they were sick when they arrived at the work camp (R 456). He admitted, however, that he never actually saw what the prisoners received (R 457). A guard stated he ate the same food as that provided American prisoners and that it was very bad and insufficient in quantity (R 488; D-Ex 7). At the end of March and the beginning of April, it became impossible to maintain the prescribed ration. No potatoes could be obtained anywhere despite efforts to locate a source of supply. The peasants could not even furnish turnips as a substitute (R 564, 565). It was known to the Staging that the prisoners could not work under these conditions (R 565). Near Easter a general reduction in rations was effected throughout Germany which affected the rations of both prisoners and guards (R 568, 851). The accused sent somebody to the kitchen to protest after the prisoners complained about the thinness of the soup (R 14; P-Ex 1, p. 13). The prisoners also complained about the preparation of the food. The accused tried constantly to arrange for a separate kitchen for the Americans staffed by American prisoners. The necessary equipment was never forthcoming (R 191, 589, 590). The accused inspected the food at least three or four times a week. The accused asserted that the food received by the guards was about the same as the food received by the prisoners (R 894). The accused reported information about the inadequacy of the food to the construction firm, but was told that the prisoners were being furnished the full authorized ration (R 14; P-Ex 1, p. 13). The accused persuaded the construction firm to substitute Russian prisoners for the Americans on the heavy work in the tunnels. On 23 March 1945, the Americans ceased heavy work and did light work outside the tunnels (R 853). They continued to receive the ration for heavy work (R 891). The accused persuaded the construction firm to continue providing the same ration for sick prisoners and those employed in the work camp itself (R 890).

During the evacuation march, because the prisoners were no longer working, they received the same ration as the guards. This was the ration authorized for German troops at home (R 368, 609). A guard testified that the food was good throughout the march (R 368). The construction firm supplied the rations for the first three days of the march (R 610). After the march was under way, a plentiful supply of rations, except bread, was drawn from a supply depot (R 613). Bread, 1500 loaves, was brought along from Greiz and an additional 2000 loaves were delivered at Zedwitz on 8 April 1945. This made possible the distribution of 500 grams to each prisoner per day, which was reduced to 400 grams and then increased to 500 grams when the prisoners other than the Americans, were released (R 613-615). Except for potatoes, nothing could be bought, except perhaps peas or bread occasionally (R 617).

Medical Care. The accused stated in Court that when he took command of the American detail on 15 March 1945, approximately 50 to 54 prisoners were reporting for sick call daily (R 839, 840). The number rose to 60 and 70 patients daily (R 850). The accused reported the state of health of the prisoners to the Stalag (R 840). He requested additional doctors (R 561). Medical supplies were obtained at a drugstore in Berga (R 569). Repeated efforts were made to obtain additional medical supplies from the Stalag (R 569, 570). The accused conferred with the doctor who agreed to certify that the sick prisoners needed hospitalization. Twenty-six were sent to hospitals. Ten additional prisoners were taken to a hospital but had to be returned because the hospital was being evacuated, (R 841). Only the Stalag could authorize hospitalization in each individual case (R 842, 843). All prisoners who required hospitalization could not be accommodated because of the crowded conditions (R 194, 573). A guard said 30 to 35 prisoners were hospitalized (R 328). According to accused MERZ, from 22 to 25 prisoners were sent to hospitals from the work camp, although efforts were made to send at least twice that number (R 573). Ten to twelve prisoners died at the work camp while the accused was in charge. The other 8 or 9 deaths occurred previously (R 901,902). Accused

MERZ sought to have Russian prisoners used for tunnel work because it was too strenuous for the Americans (R 713). The accused took action to have Russian prisoners substituted for the Americans. This was accomplished on 23 March 1945 shortly after the accused was put in charge of the American detail (R 853). The guards had the same doctor and the same medical treatment as the American prisoners (R 258). The American pathologist investigating this case concluded, from an on the spot inquiry including a talk with the former German camp doctor that within the limited facilities available, the German civilian and Army personnel endeavored to and did furnish the American prisoners with adequate medical treatment at the work camp (R 62; P-Ex 18, pp. 4,5). However, he concluded that, on the evacuation march, the prisoners were not furnished adequate medical treatment and that such lack of adequate medical care contributed materially to the deaths of many of the prisoners (R 62; P-Ex 18, p. 13).

When the order came to evacuate the work camp, the accused protested moving the sick prisoners but was ordered to do so by accused MERZ (R 907). Gasoline was unavailable (R 480-482); consequently, the sick prisoners usually rode in horse drawn vehicles (R 14, 908, 909; P-Ex 1, p. 8). Accused MERZ said this accused endeavored to secure doctors and decided to try everywhere to get the Americans into hospitals (R 689, 690). The accused testified concerning the specific efforts he made to obtain doctors and to hospitalize the sick (R 904-906, 912, 914). Thirty-one prisoners were finally hospitalized (R 352-354, 690). The accused ordered sick prisoners off the wagon because other sick prisoners were more in need of transportation (R 907).

Drinking Water. At the old camp, water was brought in daily in a water wagon containing from 1000 to 1500 liters (R 318, 342, 548, 549). At the new camp, drinking water was brought from the kitchen in buckets and pitchers (R 341, 342, 584, 713). This water was from the municipal water main of the town of Berga (R 713). Hot or boiled drinking water was furnished the sick prisoners (R 341). It was not necessary for prisoners to drink the river water (R 217). Prisoners



ate wild vegetables which combined with the water probably caused diarrhea. The prisoners did not heed sufficiently the warnings not to eat those vegetables (R 340). The accused asserted that enough water was furnished the prisoners during the evacuation march, except that at the beginning he refused to supply water because of the widespread diarrhea among the prisoners (R 14; P-Ex 1, p. 8).

**Clothing.** The accused secured 450 Red Cross packages from the Stalag containing 25 pairs of new shoes and distributed the same to the prisoners (R 244, 245, 247). The clothing of the American prisoners was in very good condition. They were better clothed than the guards (R 574).

**Housing.** When the accused took over the American detail at the new camp he objected in writing concerning the small barrack into which the Americans were crowded (R 840).

**Sanitary Facilities.** When the accused took command at the "new camp", he protested about the latrine facilities and the "untenable hygienic conditions generally speaking" (R 840). Dead bodies laid about for two or three days because of the delay in obtaining coffins (R 359). During the evacuation march, the prisoners could fall out any time they needed to relieve themselves (R 14; P-Ex 1, p. 7).

**Sufficiency of Evidence:** The Court might well have concluded that the accused killed an American prisoner of war during a simulated escape planned by the accused in order to give the killing a color of legality; and that the accused committed assaults upon prisoners. It might well have also concluded that the accused, in his capacity as leader of the work detail to which the prisoners were assigned and in his capacity as commander of the section of the evacuation march column in which the prisoners were placed, materially failed to meet the responsibility imposed upon him by international law, i. e., the responsibility to assure that the prisoners of war under his charge were furnished adequate food, medical care and hospitalization, potable drinking water, clothes to perform assigned labor, and sanitary facilities; that he occasionally took affirmative steps to withhold food from prisoners; that he withheld water from the

prisoners during a portion of the evacuation march; and that these failures to meet his responsibilities resulted in the ill health and deaths of many prisoners. Notwithstanding the conditions to which the American prisoners of war were subjected, the evidence shows that adequate provisions were made for the German soldiers under the command of the accused. The reports made by the accused to his superiors fell far short of discharging his responsibilities.

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

Petitions: A Petition for Review was filed by American Defense Counsel, Mr. Richard A. Ruppert, dated 14 April 1947. A Petition for Clemency dated 18 November 1946 was filed by two members of the Court which tried the accused and sentenced him to death by hanging. A Petition for Clemency was filed by Martha Metz, wife of the accused, dated 26 October 1946 and by the accused, dated 30 October 1946.

American Defense Counsel, subsequent to the trial of these accused, personally interviewed in the United States several Americans who were formerly prisoners of war in the work camp. He has submitted for consideration a sworn statement by Stanley Cohen, 30 June 1947, and one by Paul Arthur Horne, 19 June 1947, amplifying their extrajudicial sworn testimony, Prosecution Exhibits 24 and 27. There has also been submitted a sworn statement by Milton Stolon, 30 June 1947. In the main, this new evidence is cumulative of the evidence before the Court.

Recommendation: That the findings and sentence be approved.

2. LUDWIG MERZ

Nationality:	German
Age:	58
Civilian Status:	Elementary School Teacher
Party Status:	NSDAP since 1 May 1933
Military Status:	Captain
Floor:	NG, charge 3
Findings:	G, charge 3
Sentence:	Death by hanging

Evidence for Prosecution: The evidence against the accused concerning the living and working conditions, etc., at the work camp and on the evacuation march is in most pertinent respects the same as that against accused METZ. The accused admitted visiting the work camp two or three times a week (R 705). He saw the American prisoners daily during the evacuation march except for about four days, i. e. he was with the march 15 days (R 744). The additional evidence that applies to the accused exclusively and which was not included in the evidence against accused METZ is set forth immediately below.

Living Conditions. Food. The accused admitted knowing that the prisoners were not getting enough to eat, that they were dying and that they were forced to continue heavy work. He asserted that his only responsibility was to report these conditions to his superiors (R 718). The accused claimed he had no authority to remove prisoners from work details except in case of sick prisoners (R 43, 716, 717; P-Ex 3, p. 7). The record reflects that he did consider malnutrition, weakness and diarrhea, illnesses which would justify the exercise of his authority to remove prisoners from work (R 43; P-Ex 3, p. 7). A pathologist stated that, in his opinion, malnutrition was a contributing cause of the death of many prisoners (R 520). The accused admitted that the rations provided the prisoners during the evacuation march did not suffice for prisoners who were already undernourished (R 616).

Medical Care. When the American prisoners arrived at the work camp their state of health was not good. They were suffering from malnutrition and loss of weight (R 48; P-Ex 4, p. 2). With only a day or two of rest (R 704), the prisoners were forced to perform heavy labor consisting of carrying blasted rock from the tunnels and holding compressor drills (R 48; P-Ex 4, p. 3). The doctor did not make a general physical examination to determine whether a prisoner could do heavy work, light work, or was unfit for work (R 704, 810, 811). The prisoners were unfit to do the type of work required because of the state of their health (R 838, 839). They should not have been required to perform heavy labor (R 53; P-Ex 5, p. 4). The accused in

his extrajudicial sworn testimony stated that the doctor never told him that the prisoners were undernourished to such an extent that they should not have been required to do hard labor (R 43, P-Ex 3, p. 4). The accused stated just the opposite in Court, however, and said that the doctor gave him a written report that the prisoners under no circumstances could be used for hard labor (R 560). The accused admitted that the one doctor available was not sufficient to treat all the prisoners (R 43; P-Ex 3, p. 5). Neither the doctors nor the medical supplies that were requested ever arrived at the work camp (R 43 P-Ex 3, p. 8).

Drinking water. The accused admitted prisoners contracted diarrhea from the unpotable drinking water (R 43; P-Ex 3, p. 7).

Housing. He admitted that the buildings at the "old camp" were insufficient to house all the prisoners. The prisoners were crowded into the barrack (R 43; P-Ex 3, pp. 2,3). The barrack was crowded to the extent that the prisoners could scarcely move about when they left their bunks. There was no stove or means of heating the barrack (R 82; P-Ex 26, p. 6). The barrack was divided into six sections, 60 men to a section. A section was about the size of a two car garage (R 825; D-Ex 14, p. 2).

Evidence for Defense: The evidence for defense of this accused concerning living and working conditions, etc., at the work camp and on the evacuation march is the same in most pertinent respects as that for accused METZ. Additional evidence in the accused's defense is set forth immediately below.

Living Conditions. Food. The accused stated that at first the rations were sufficient for the type of work the prisoners performed but not later (R 713, 714). The accused made personal efforts to obtain food directly from the peasants to maintain the prescribed ration but was not successful (R 564, 565). The accused reported to his superior that the rations were not sufficient and that the prisoners could not work under these conditions and might have to be removed. He had no authority to remove the prisoners from work (R 565). The accused inspected the kitchen to assure that the prisoners were being provided with whatever was available (R 568). He tried to

arrange for a separate kitchen for the American prisoners but the equipment was never provided (R 191, 529, 590). He asserted that the food was supplied by the construction firm and, therefore, as company commander he had no responsibility for the food furnished the prisoners (R 564).

Medical care. The prisoners were to be put to work immediately upon their arrival. The accused attempted to obtain five to ten days rest for them following their arrival. After long quarrels and negotiations with the construction firm, two days rest was granted (R 55). The accused forwarded to the Stalag the doctor's report that under no circumstances were the prisoners to be required to perform hard labor (R 560). At least 70 prisoners were not assigned to work details because they were physically unfit for work (R 323).

About 14 days after their arrival, dysentery broke out among the prisoners. The number of sick averaged 20, 30 or 40 daily (R 561). A doctor from the Stalag inspected the camp and found that the hygienic conditions were satisfactory as emergency measures. He told the accused that the prisoners were suffering from dysentery which was not infectious (R 591). A German civilian doctor visited the camp daily (R 326, 327, 562, 652). This doctor attended, in addition to the 350 Americans, the sick among the 650 Russian and Czech prisoners and the town of Berga which had a population between 6,000 and 7,000 (R 706). The accused made repeated requests to the Stalag for American doctors and medical supplies without any results (R 43; P-Ex 3, pp. 5, 8). The accused testified that despite the acute shortage of medical personnel, the sick American prisoners saw the doctor every day (R 706).

When the accused was ordered to evacuate all personnel from the work camp, including sick prisoners, he protested to the Stalag but the order was not changed (R 594). The sick were not supposed to be taken to a hospital. Contrary to this order the accused intended to hospitalize them as soon as possible (R 740). The accused tried to find beds for the sick in hospitals along the route of the march but even guards were unable to gain admission (R 207). Accused METZ succeeded in hospitalizing 30 to 35 prisoners (R 690). About 13 April 1945, the accused refused to carry out his orders to continue the

march because of all the sick prisoners and the deaths (R 598). The accused followed behind the column and then was separated from it for several days (R 599, 601). While separated from the column, the accused sent METZ an order to requisition vehicles and load all prisoners in them to expedite the march. Accused METZ never received the order (R 602). When the accused rejoined the column on 20 April, he requisitioned 17 vehicles and loaded all the Americans on them. Three days later the prisoners were liberated by American troops (R 604, 606, 607).

**Housing.** The accused refused to accept the "old camp" from the construction firm as suitable for housing 350 prisoners. The prisoners would have been too crowded (R 548, 549). In spite of the accused's objections, the representative of the Stalag, however, accepted the camp as a temporary emergency measure (R 551). Although the "new camp" was larger than the old one, the quarters there were also inadequate and caused overcrowding (R 194, 578). The accused requested additional billets and a separate kitchen for the Americans (R 211). According to the accused, the quarters at the "new camp" comprised three barracks which were joined to make one building 60 meters long and a little more than nine meters wide. It was divided into five rooms, consisting of a workshop, dispensary, supply room, orderly room and living quarters for the prisoners. Some prisoners lived in the dispensary and some in the workshop (R 578). There was a bunk for each prisoner. The single bunks were 75 centimeters wide and the double bunks were 1.5 meters wide (R 579, 580).

**Sufficiency of Evidence:** There is an abundance of evidence indicating that the accused was fully aware of the deplorable conditions existing at the work camp and on the evacuation march including malnutrition, misery, sickness, and death suffered by the prisoners. The Court might well have concluded that the lack of proper housing, food, medical care and hospitalization, potable water, and sanitary facilities resulted in the ill health and death of many prisoners. The accused as a Captain in the German Army was directly responsible for the treatment of the prisoners and could have avoided

any ill treatment had he sufficiently desired so to do. He manifested utter disregard for the welfare of the prisoners on the evacuation march. The Court was justified in concluding that he did not fulfill his responsibilities by merely reporting some or all of the bad conditions to his superiors, while at the same time the soldiers under his command were adequately fed and otherwise received proper care.

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

Petitions: Petitions for Review were filed by German attorney, Dr. E. Aheimer, 17 October 1946; and supplementary petition, 12 December 1946; by American attorney, 14 April 1947; and by German attorney Dr. R. C. Galler, 5 August 1947. Petitions for Clemency were filed by two members of the Court which tried the accused, 18 November 1946; by the accused's wife, Luise Merz, 28 November 1946; by former members of the company the accused commanded, N. Kraft, 12 November 1946; Friedrich Losch, 15 November 1946; Kurt Lemcke, 17 November 1946; Paul Rasch, 17 November 1946; Herbert Schuler, 23 November 1946; by members of the clergy, Deacon Wilhelm Alexander, 29 October 1946, 3 May 1947 and 25 March 1947; Deacon Karl Zoller, 29 October 1946 and 1 May 1947; Deacon Otto Lischer, 31 October 1946; Pastor Lic. Behringer, 6 February 1947 and 21 April 1947; Julius Krebs, Pastor La Frentz and Nikolaus Simon, 7 May 1947; by public officials August Zinkgraf, Deputy of Haardt, 30 October 1946; Wilhelm Bokenkruger, President of the Palatinate Regional Labor Office, 14 November 1946; Ludwig Moses, Head of Denazification Board, 6 March 1947; by parents of former pupils of the accused; Valentin Glaab, 31 October 1946, petition containing 43 signatures, undated; by a friend, August Heim, 30 October 1946; and by former pupils of the accused, Alfred Aron, 25 March 1947; Carola Aron, 29 March 1947; Hedwig Schlafer, 16 April 1947.

The attorney for accused MERZ has submitted new evidence in the form of unsworn statements from the following witnesses: Herbert Schueler, 12 May 1947 and 19 June 1947; Kurt Lemcke, 15 July 1947 and 17 November 1946; Martin Buchheim, 16 July 1947; Dr. Rudolf Mieth, 1 November 1946 and 10 July 1947; Friedrich Bauch, 1 March 1947 and

13 July 1947; and Johann Oehler, 21 July 1947. In the main, this new evidence is cumulative of evidence before the Court.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

1. Jurisdiction: This case was referred for trial by a General Military Government Court appointed by paragraph 3, Special Orders Number 238, Headquarters, US Forces, European Theater, 26 August 1946, as amended by paragraph 25, Special Orders Number 242, Headquarters, US Forces, European Theater, 30 August 1946. However, it was in fact tried by a General Military Government Court appointed by paragraph 2, Special Orders Number 238, Headquarters, US Forces, European Theater, 26 August 1946, as amended by paragraph 24, Special Orders Number 242, Headquarters, US Forces, European Theater, 30 August 1946. It is clear that both of these General Military Government Courts were properly constituted and that either could have been directed to hear the case and under such circumstances would have had jurisdiction of the subject matter and of the accused. The error is technical in nature and did not result in any injustice to the accused. The reviewing authority may appropriately ratify the action of the Court which heard the case, by approving the findings and the sentences as hereinafter recommended (United States v. Ernst Mueller, DJAWO, July 1946). In the Review and Recommendations in the Mueller case, it was stated:

"It is settled military law that the reviewing authority may ratify the action of a court which, although a case has not been correctly referred to it for trial, has nevertheless proceeded to trial of the case, when such court was in other respects qualified to try it. (CM 198108, Dig. Op. JAG 1912-40, Sec 397 (5) (AM 40), p. 243; Bull. SAG Vol III, No. 2, February 1944, p. 54, CM ETO 393 (1943))."



2. Geneva (Prisoners of War) Convention of 27 July 1929: The Convention which is set forth in TM 27-251, War Department, U.S. Army. "Treaties Governing Land Warfare", 7 January 1944, provides in pertinent part as follows:

"ARTICLE 10. Prisoners of war shall be lodged in buildings or in barracks affording all possible guarantees of hygiene and healthfulness.

"The quarters must be fully protected from dampness, sufficiently heated and lighted. All precautions must be taken against danger of fire.

"With regard to dormitories--the total surface, minimum cubic amount of air, arrangement and material of bedding--the conditions shall be the same as for the troops at base camps of the detaining Power."

"ARTICLE 11. The food ration of prisoners of war shall be equal in quantity and quality to that of troops at base camps.

"Furthermore, prisoners shall receive facilities for preparing themselves, additional food which they might have.

"A sufficiency of potable water shall be furnished them. The use of tobacco shall be permitted. Prisoners may be employed in the kitchens.

"All collective disciplinary measures affecting the food are prohibited.

"ARTICLE 12. Clothing, linen and footwear shall be furnished prisoners of war by the detaining Power. Replacement and repairing of these effects must be assured regularly. In addition, laborers must receive work clothes wherever the nature of the work requires it.

"Canteens shall be installed in all camps where prisoners may obtain, at the local market price, food products and ordinary objects."

"ARTICLE 13. Belligerents shall be bound to take all sanitary measures necessary to assure the cleanliness and healthfulness of camps and to prevent epidemics.

"Prisoners of war shall have at their disposal, day and night, installations conforming to sanitary rules and constantly maintained in a state of cleanliness.

"Furthermore, and without prejudice to baths and showers with which the camp shall be as well provided as possible, prisoners shall be furnished a sufficient quantity of water for the care of their own bodily cleanliness.

"It shall be possible for them to take physical exercise and enjoy the open air."

"ARTICLE 14. Every camp shall have an infirmary, where prisoners of war shall receive every kind of attention they need. If necessary, isolated quarters shall be reserved for the sick affected with contagious diseases..

....."  
"Prisoners affected with serious illness or whose condition necessitates an important surgical operation, must be admitted, at the expense of the detaining Power, to any military or civil medical unit qualified to treat them."

"ARTICLE 15. Medical inspections of prisoners of war shall be arranged at least once a month. . . . "

"ARTICLE 29. No prisoner of war may be employed at labors for which he is physically unfit."

"ARTICLE 32. It is forbidden to use prisoners of war at unhealthful or dangerous work. . . ."

"ARTICLE 33. The system of labor detachments must be similar to that of prisoners-of-war camps, particularly with regard to sanitary conditions, food, attention in case of accident or sickness, correspondence and the receipt of packages.

"Every labor detachment shall be dependent on a prisoners' camp. The commander of this camp shall be responsible for the observation, in the labor detachment, of the provisions of the present Convention."

These above-quoted provisions are clear and unambiguous.

3. Availability of Witnesses: In the Petition for Clemency by two members of the Court, it was suggested that an injustice may have resulted to the accused by virtue of admitting into evidence the extrajudicial sworn testimony of witnesses who were not available at the trial and present in Court. Similarly, the American defense counsel appears to stress the same point in his Petition for Review. It is well settled that in the trial of accused war criminals Military Government Courts may admit any evidence which they deem to have probative value, i.e., helpful in arriving at a true finding (In re Yamashita, 66 Supreme Court Reporter 340; and Section 270, "Manual for Trial of War Crimes and Related Cases," 30 July 1946).

Concerning the other aspect of the problem, the alleged injustice to the accused because the witnesses were not personally present in Court, the defense should have been able to anticipate the prosecution's entire case inasmuch as copies of the extrajudicial sworn testimony, upon which the prosecution to a great extent based its case were furnished the defense prior to trial.

No request was made for American witnesses until the prosecution had completed most of its proof. The concern that the defense now exhibits regarding the absence of witnesses from the United States is not reflected in the record of trial. Efforts by the defense were directed primarily at procuring witnesses who were in Europe (R 74-80 94-96). Only when the Court prodded the defense does it appear that a formal request was made for procuring the testimony of witnesses in the United States (R 74, 75, 78, 98, 99). Although the defense now

asserts that the physical presence of these witnesses at the trial was essential to prevent a miscarriage of justice, it is to be noted that the record of trial indicates that the defense merely requested that more extrajudicial sworn testimony be obtained (R 98, 99). Only in one instance was a specific request made of the Court for the procurement of a witness, Norman Martin, from the United States (R 59). The reason stated by the defense for bringing this witness from the United States was to determine whether the witness would confirm on the witness stand what he had already stated in his extrajudicial sworn testimony (R 59). It does not appear that a proper and timely request was made to the administrative authorities for the procurement of this witness. In the absence of strong reasons to question his extrajudicial sworn testimony, such movement of the witness could not be justified.

No specific ground is stated in the record of trial, the Petition for Review, or in the Petition for Clemency, referred to above to support the general statements about the possible miscarriage of justice because the witnesses were not present in Court. The Court found accused METZ guilty of Charge 1. No American witness is alleged to have seen METZ shoot Goldstein or to be in possession of any testimony material to this issue. On this charge alone the sentence of METZ could be sustained. Concerning Charges 2 and 3, the impression created by the Petition for Review is that the extrajudicial sworn testimony of former American prisoners at the work camp was the exclusive proof of conditions at that camp. Actually, the prosecution used the extrajudicial sworn testimony of 16 witnesses, only six of whom were former American prisoners at the work camp. Moreover, at least four witnesses who were thoroughly familiar with the conditions that prevailed at the work camp and on the evacuation march were present in Court.

More specifically in connection with Charge 2, the witness Ritterman, a German guard, saw accused METZ beat American prisoners on many occasions (R 57; P-Ex 15, p. 1). Another German guard placed accused METZ present when a guard was beating an American prisoner (R 70;

P-Ex 22, p. 9). With regard to Charge 3, there is a wealth of proof concerning the conditions that prevailed at the work camp and on the evacuation march in addition to the extrajudicial sworn testimony of the six former American prisoners.

These American witnesses were not readily available and were at an extremely distant point. There is no indication in the record of trial that the Court gave the extrajudicial sworn testimony of the six witnesses in question any more credence than it merited. The Court has shown a careful consideration for those elements of the case that rested upon the extrajudicial sworn testimony. It cannot be said that an injustice resulted to the accused by the admission of this evidence or because all the witnesses were not present in Court; nor can it be said, in view of all the evidence in the record of trial, that the findings of the Court and the sentences imposed were not based upon solid creditable evidence establishing the guilt of both perpetrators beyond a reasonable doubt.

4. Rights of the Accused: In the course of argument regarding objections raised by the defense to Prosecution's Exhibits 1 and 2, the Court stated that the accused "have no rights under the Constitution of the United States. The accused have rights under the regulations governing these trials" (R 39). The remark by the Court was clearly obiter dicta and was probably made for the obvious purpose of causing the defense to give more regard to the rules applicable to war crimes trials and not for the purpose assigned by the defense. Although the defense considers the Court's gratuitous remark probably the gravest error in the record, he fails to show that an examination of the entire record reveals that any injustice resulted to the accused. Instead, the defense states in the Petition for Review, "the defense counsel does not know nor intimate this, but perhaps - perhaps - some of the causes for the numerous errors in this case may be found in the court's lack of knowledge concerning the rights of the accused enemy aliens under the U.S. Constitution." Even if the Court's free remark were material to the question whether injustice resulted to the accused, it is not clear that the Court's remark is

as erroneous as the defense contends. The Supreme Court in the Yamashita case, supra, scrupulously avoids any express declaration concerning the rights of enemy alien war criminals under the Constitution.

5. Motions: The defense moved to strike those portions of prosecution's Exhibits 1 and 2 which relate to the killing of an American prisoner of war other than the victim involved in the particulars under Charge 1 on the ground that its only purpose could be to prove bad character, which admission was untimely because the accused had introduced no evidence as to his own good character. The defense relied upon the provisions of paragraph c, Section 5-329, Title 5, "Legal and Penal Administration," of "Military Government Regulations," published by US Forces, European Theater, 30 November 1945 (R 36). The Court overruled the motion to strike on the ground that the defense should have made its motion prior to the time that the exhibits were received in evidence (R 39, 40). There is no indication that the Court gave the evidence in question any weight in so far as the character of the accused is concerned (R 42). Thus, it does not appear that an error was committed in refusing to strike the evidence and, in any event, the defense has not demonstrated that an examination of the entire record reveals that an injustice resulted to the accused.

At the close of the prosecution's case, the defense moved for an acquittal as to both of the accused. After argument, the president of the Court answered that "the Court in secret written ballot has voted to not allow the motion of the defense" (R 94). The defense contends that the Court erred because it did not in fact vote and that in any event a two-thirds vote of the members present concurring was necessary to sustain the president's ruling. This was an interlocutory question. Interlocutory questions are determined by a majority vote of the members present at the time the vote is taken (Section 260, "Manual for Trial of War Crimes and Related Cases", 15 July 1946). Moreover, it is sufficient answer that a war crimes tribunal may overrule a motion for a finding of not guilty made at the close of the

case for the prosecution, if it believes there is sufficient evidence to support the charge and that the accused should be required to answer it (Section 3-327.2, Title 5, "Legal and Penal Administration", of "Military Government Regulations", published by Headquarters, US Forces, European Theater, 30 November 1945, and Section 501, page 409 "Manual for Trial of War Crimes and Related Cases", 15 July 1946.) A similar practice is followed in Courts-Martials (Paragraph 71, d., "Manual for Courts-Martial, U.S. Army", 20 April 1943.) Thus, it does not appear that injustice resulted to the accused.

6. Judicial Notice: It is the position of the defense that the Court, by taking judicial notice of the then general scarcity of food in Germany, in effect acquitted the accused of Charge 3. It is obvious that, if the Court did take such judicial notice, no error was committed (Section 310, "Manual for Trial of War Crimes and Related Cases", 15 July 1946). The Court could appropriately take judicial notice of all matters of common knowledge in the territory wherein it was sitting. It does not appear that the findings of the Court are inconsistent in its recognition of the difficulties that obtained in procuring food. The American prisoners of war were entitled to the same ration as German troops, i.e., their guards and other German troops in the area. The defense ignores the evidence that the guards in fact received more than the prisoners. There is no indication that the German guards or German civilians were dying because of malnutrition. Yet the Court would have been warranted in concluding from evidence that malnutrition was a contributing factor to the death of many of the American prisoners. If food, however difficult to obtain, was sufficient to keep Germans alive, the Court had ample grounds for finding that enough food existed to keep American prisoners alive had it been given to them and such findings are not inconsistent with its recognition of the then existing conditions in Germany. Aside from the observations made above, it should be noted that Charge 3 is not restricted to failure to provide adequate food, but includes failure to provide adequate drinking water, medical care, clothing, housing and sanitary facilities as well.

7. Conduct of Trial: The defense objected to the introduction of prosecution Exhibit 1 on several grounds (R 13, 14). It was clearly admissible (In re Yamashita, 66 Supreme Court Reporter 340; and Section 270, "Manual for Trial of War Crimes and Related Cases", 15 July 1946). Thereafter, as the exhibit was read, the defense repeatedly interposed additional objections to specific portions of the exhibit. At first the Court condoned the irregular procedure of attacking the exhibit already in evidence (R 17, 20). The same procedure was followed concerning prosecution Exhibit 2 until the Court curtailed the constant interruptions and ruled that the defense withhold further objections until the exhibit was read in its entirety (R 27, 35). This procedure was adhered to concerning subsequent exhibits, enabling the defense counsel to object to the admission of the exhibits and also to make additional objections after each exhibit had been read (R 51). Although the legally trained member of the Court reminded the defense that normal trial procedure required that all objections be stated in the first instance, the Court continued to permit the defense wide latitude in voicing objections to exhibits already admitted in evidence (R 40). Many objections were voiced concerning the statements of accused METZ and MERZ, prosecution Exhibits 1, 2 and 3. These objections concerned for the most part alleged inaccuracies as to facts and were properly overruled.

The record of trial abundantly reflects that the Court afforded the defense wide latitude in raising objections, which latitude was fully utilized. The Court's patient and diligent effort to provide the accused with a full and fair opportunity to make a defense characterizes the entire record. The contention by the defense that the Court committed "enormous" legal errors by permitting various prosecution exhibits to go unchallenged and uncorrected is not supported by the record.

The defense sought to apply meticulous, technical, lawyer-like methods in raising objections to the record in the case. It is well recognized that in war crimes trials Military Government Courts are not bound by the strict and highly technical rules of our domestic courts.

VI. CONCLUSIONS:

1. An examination of the entire record of trial fails to disclose any error or omission which resulted in injustice to the accused. Accordingly, it is recommended that the findings and the sentences of the Court be approved and ordered executed.

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

THOMAS C. MARMON  
Major Cav  
Post Trial Branch

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

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