

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

8 March 1948

UNITED STATES )

v. )

Karl Adam KIRCHNER, et al. )

Case No. 11-96

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 7-16 May 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

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

Particulars: In that Karl Adam KIRCHNER and Hugo WOLF, German nationals, did, on or about 10 June 1944, at or near St. SULPICE SUR RISLE, France, wilfully deliberately and wrongfully encourage, aid, abet, and participate in the killing of a member of the United States Army, believed to be 2nd Lieutenant Daniel P. Loyd, who was then and there a surrendered and unarmed prisoner of war in the custody of the then German Reich.

CHARGE II: Violation of Paragraph 1 (d), Article II, of Control Council Law No. 10.

Particulars: In that the accused, Karl Adam KIRCHNER and Hugo WOLF, German nationals, were members of an organization declared criminal by the International Military Tribunal in Case No. 1, i.e., Die Schutzstaffeln der National Socialistischen Deutschen Arbeitspartie, (commonly known as the SS), after 1 September 1939, with knowledge that the said organization was being used in the commission of acts declared criminal by Article 6 of the Charter of the International Military Tribunal, annexed to the agreement establishing the Tribunal, dated 8 August 1945, or were personally implicated in the commission of such criminal act.

(Charge II and the particulars thereunder were not pressed as to both accused, d 7.)

III. SUMMARY OF EVIDENCE: Sometime before noon, probably between 0800 and 0900 hours on 10 June 1944, an American fighter plane was forced down at Bois-Arnault, near Rugles, both small towns west of Paris in France. The pilot, identified with a degree of probability as being Lieutenant D. T. Loyd, had suffered a wound about the head and was soon after the forced landing taken prisoner by German soldiers.

Later, during the same day, he was turned over to the custody of the accused Sergeant WOLF, who took him to accused Lieutenant KLICHNER. Shortly thereafter, WOLF, upon the order of KLICHNER, shot the captured flyer to death.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Karl Adam KLICHNER

Nationality:	German
Age:	38
Civilian Status:	Mechanical Engineer
Party Status:	Nazi Party Member
Military Status:	SS 2nd Lieutenant
Plea:	NG Charge I
Findings:	G Charge I
Sentence:	Death by hanging

Evidence for Prosecution: This accused, an SS 2nd Lieutenant with a unit of the 12th SS Panzer Division (Hitler Youth Division), was the town commander and headquarters commandant at Rugles, France (R 100; P-Ex 13a, p 2, R 103; P-Ex 14, p 1, R 196). Both he and WOLF were members of the same company (R 100; P-Ex 13a, p 6). On 10 June 1944, he was stationed at the castle of St. Sulpice on the road between Rugles and Laigles (R 100; P-Ex 13, p 3, R 196) about two kilometers from Rugles (R 103; P-Ex 14, p 2, R 54; P-Ex 8, p 2). He also spent considerable time in Rugles at the Fourneau (R 33; P-Ex 2, pp 1, 5), which served as the command post of his unit (R 103; P-Ex 14, p 3).

It was between 0800 and 0900 hours, 10 June 1944, that Alphonsine Freneau noticed that one of several planes then passing overhead appeared to burst into flames, turn about and come down in a forced landing (R 16). Armand Cote testified that this occurred in front of his house in Bois-arnault (R 22). Soon thereafter German soldiers took the pilot captive (R 18, 19, 22). He was wounded about the head (R 19, 22, 30; P-Ex 1, p 1). The flyer appears to have been taken to

an orphanage in Augles where SS troops were stationed (A 33; P-Ex 2, p 2) and from there he was taken on foot to the Fourneau, i.e., the command post (Idem p 1). WOLF was one of the SS men who brought the flyer to this place.

Cecile Marie Gruart, in her sworn statement before a court of inquiry, appointed by Headquarters, Allied Expeditionary Force, testified that she saw this accused arrive at the place where the flyer was being held (A 33; P-Ex 2, p 3). This accused stated that he interrogated the prisoner at that point and then returned to the St. Sulpice Castle (A 100; P-Ex 13a, p 4, A 103; P-Ex 14, pp 3, 4, R 195). Cecile Marie Gruart also told how, during this interim, WOLF came to her house which was opposite the command post and, in the presence of her father, stated, among other things, "There's one more who will not go back to America. Moreover, the English do not make any SS prisoners; therefore the SS will not make any prisoners" (A 33; P-Ex 2, p 5). It further appears from the testimony of this witness that it was intended to kill the flyer at this place. Accordingly, the digging of a grave was begun. Due perhaps to the reaction of her mother and herself the flyer was later taken away in a car accompanied by WOLF (Idem pp 4, 7).

That day two wounded German officers were supposedly killed while traveling in a vehicle on the Laigles-Augles road as a result of what appears to have been an attack by four fighter planes (A 66, 91-92; P-Ex 12, pp 1, 2). This accused testified that he received a report "that an ambulance was burning out there and two wounded persons were dead" (A 193). After this he learned of the captured flyer in Augles who, as was reported to him, had been shooting at vehicles on the road (A 194). He went to Augles with Lieutenant Hildebrand and Sergeant Kohlmeir and, after interrogating the flyer there, the three returned to the castle.

He further testified that upon his return he convened a summary or "quick" court (R 198, 201) consisting of Lieutenant Hildebrand, Sergeant Kohlmeir and himself (R 198). The flyer was then tried for firing at the ambulance (R 200), found guilty and sentenced to death by shooting. This accused stated that he at this point informed WOLF of the decision of the summary court and ordered him to execute the sentence (R 209).

Falkenberg, a former SS Sergeant, both in his extrajudicial sworn statement (R 91-92; P-Ex 12) and in his testimony in court (R 66) described his observation of an attack by four planes upon a target, how he observed a "flash" of fire and the ascending of a cloud of smoke. About 10 minutes later he found a "shot up" command car which he believed to be Italian in make and two German officers, one dead and one alive, lying near this vehicle which was still smoking. This was about one kilometer from Rugles. He also testified that he saw no ambulance and no vehicle with Red Cross markings near the scene (R 66, 68). This witness brought the two bodies, the other officer having died in the meantime, to the castle. He testified that he at no time told anyone that he had removed these bodies from an ambulance or from the vicinity of an ambulance (R 68). While he later qualified this statement to say that he had also seen the chassis of a large vehicle near the scene which might have been an ambulance (R 76) only the smaller car gave signs of having burned on that particular day (R 98). This witness placed the location of this burning car as being about three kilometers from the St. Sulpice Castle (R 71, 72).

Accused WOLF, in his several extrajudicial sworn statements, made no reference to a trial or court proceeding involving the flyer (R 52; P-Ex 7a, R 54; P-Ex 8, R 56; P-Ex 9, R 58; P-Ex 10, R 58; P-Ex 10a). However, in his statement of 1 February 1947 (R 58; P-Ex 10, p 8), he referred to the flyer having been sentenced to death. He does not refer in any of his statements to Sergeant Kohlmeir, named by this accused as the third member of the court, as being present at the time of the

interrogations or at the time the flyer was killed. His first reference to an ambulance appears in his statements made after he had spoken with this accused (R 56; P-Ex 9a, pp 5, 6, R 58; P-Ex 10, pp 5, 6). In these statements he fixed the location of the ambulance as 200 to 300 meters from the castle.

This accused, in his extrajudicial sworn statement of 4 December 1946 at page 9, denied that an order was given to WOLF to shoot the flyer. But, in his testimony in Court, he stated that he informed WOLF that the flyer was to be shot in accordance with a decision of the summary court and that he had ordered this sentence executed (R 208, 209). Dr. Max Buerger, a former judge advocate in the German army, testified as to the nature, formation and purpose of summary courts in the German army (R 114, et seq.). He testified that one who appointed such a court could not also sit as a member (R 114, 121); that an interpreter would be necessary, if the person before the court could not understand German (R 115); and that such a court required three members (R 121). He also testified that while such a court could in emergency cases order its own sentence executed, this applied only to German soldiers (R 124). It is to be noted that there is no evidence that any witnesses were called before the court which this accused testified he convened (R 103, 241; P-Ex 14, p 8).

In his extrajudicial sworn statement of 14 February 1947, this accused stated that he told the flyer he was guilty because he had killed the two officers. He also stated that the execution of the flyer was a matter of revenge (R 103; P-Ex 14).

Zinzmeister made an extrajudicial sworn statement in which he stated that WOLF told him at Dachau that he was ordered to kill the American pilot because the latter had laughed at the bodies of the dead German officers (R 111; P-Ex 15, p 3).

The flyer involved in this incident was identified as an American and with a degree of probability as being Lieutenant D. T. Loyd (R 46; P-Ex 3, p 2, R 47; P-Ex 4, p 3, R 49; P-Ex 5, p 3, R 229; P-Ex 19).

Evidence for Defense: This accused took the stand and testified under oath (R 191). He claimed that at the time of his interrogation at Dacheu, 4 December 1946 (R 100; P-Ex 13) he was threatened and subjected to duress. He further testified that various matters which were of importance to him were not included in the record of his interrogation. In addition to these things he was nervous and excited, as a result some of the statements contained in the interrogation are not true (R 222). He also claimed that his statement was not read to him before he signed it (R 215).

He testified that on the morning of the day of the incident he observed and heard from the St. Sulpice Castle that a low flying plane was making an attack (R 192). A little later he received a report that an ambulance was burning; that it was in the direction of Rugles; and that two wounded persons were dead (R 193). After this he was informed that two dead German officers had been brought to the park which adjoined the castle (R 193). Next came the report that a captured American flyer, who had allegedly been shooting at vehicles along the road, was being held by the SS in Rugles (R 194). With Lieutenant Hildebrand and Sergeant Kohlmeier this accused went to Rugles and interrogated the prisoner (R 195). They then returned to the castle with the flyer (R 196).

At this point, this accused by virtue of authority previously vested in him (R 198, 214, 215) convened a summary court consisting of Lieutenant Hildebrand, Sergeant Kohlmeier and himself (R 198). The flyer was tried, convicted (R 202-207) and sentenced to death (R 208). He was taken into the garden of the castle where WOLF shot him to death pursuant to the order given him (R 209). This accused further testified that three days later he made a report of these occurrences through channels (R 211).

Dr. Buerger testified that in his opinion a summary court would have authority to try and to punish one who participated in an attack on an ambulance (R 117, 118). Zinzmeister in his extrajudicial sworn statement (R 111; P-Ex 15, p 2) stated that he heard from comrades,

while at the front in June, that the flyer who was executed had reputedly shot at an ambulance.

This accused identified Prosecution Exhibit P-Ex 19 as being a photograph of the executed flyer's grave. He stated that the name appearing on the cross was put there at his direction. The name appearing thereon was that given by the flyer during the interrogation which he conducted at Ruglès (R 229).

Sufficiency of Evidence: The evidence in this case is clearly sufficient to support the Court's findings of guilty. A careful examination of the testimony of the witnesses in Court, together with the various pertinent extrajudicial sworn statements offered in evidence, shows that there is nothing to support even an inference that an ambulance was fired upon along the Laigles-Ruglès road that day or that a court, legal or otherwise, was convened to try the victim. Much less is there any evidence that this dead flyer was guilty of the act charged against him by the defense in this case.

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

Petitions: .. Petition for Review was filed by defense counsel, William A. McIlwaine and Captain Frank E. Morse, 23 May 1947. Petitions for Clemency were filed by Mrs. ... Schwemmer, undated; Dr. Ernst Trinol, 5 December 1947; Fritz Kraemer, 19 December 1947; Hubert Meyer, 6 January 1948; the accused, 19 December 1947 and 28 December 1947; Dr. Ernst Brindel, 5 December 1947; Karl-Heinz Garich, 28 January 1948.

Recommendations: That the findings and sentence be approved.

2. Hugo WOLF

Nationality:	Austrian
Age:	41
Civilian Status:	Baker
Party Status:	Not shown
Military Status:	SS Sergeant
Flea:	NG Charge I
Findings:	G Charge I
Sentence:	Death by hanging

Evidence for Prosecution: Attention is directed to evidence herein-  
above set forth as to accused KIRCHNER. This accused, a sergeant with  
the 12th SS Panzer Division, during the morning of 10 June 1944 was  
ordered by a superior in his organization to deliver a captured American  
flyer to accused Lieutenant KIRCHNER at the command post (R 54; P-Ex 8,  
p. 2). He carried out this order and delivered the flyer to Lieutenant  
KIRCHNER (R 54; P-Ex 8).

Cecile Marie Gruart stated that this accused brought the captured  
flyer to the command post which was opposite her house (R 33; P-Ex 2,  
p 2). Later, she saw Lieutenant KIRCHNER arrive there (R 33; P-Ex 2,  
p 3). After this accused had taken the prisoner to the command post he  
came to the house of the witness and showed her a wallet, a watch, a  
signet ring and the silver insignia from a flying suit (R 33; P-Ex 2,  
p 2). This accused told the witness and her father that he was going  
to shoot the flyer (R 33; P-Ex 2, pp 3, 4). He also said, "There's one  
more who will not go back to America", and, "Moreover, the English do not  
make any SS prisoners; therefore the SS will not make any prisoners"  
(R 33; P-Ex 2, p 4). In the afternoon of the same day, about 1700  
hours, this accused came to the witness's house a second time. He placed  
his submachine gun on the table and said, according to the witness, "It  
is with this that I killed him" (R 33; P-Ex 2, p 4).

Marthe Franchini, in her testimony before the court of inquiry,  
which was held in Regles 7 November 1944, stated that this accused had



been billeted at her home from April to 12 June. She stated that during the evening of 10 June 1944 this accused came to her house bringing with him a flyer's uniform which he placed on an article of furniture in the hall of her house. He forgot to take it with him when he left (R 47; P-Ex 4, p 2). On this occasion this accused had in his possession two photographs which he showed to the witness and other members of her family (R 47; P-Ex 4). On one of the photographs was written the name "D. T. Loyd". On the flyer's uniform also appeared the name D. T. Loyd (Idem p 3).

Ines Franchini and Antoine Franchini testified before the court of inquiry referred to above (R 49, 51; P-Exs 5, 6). The testimony of these witnesses is substantially to the same effect as that of Marthe Franchini. It places this accused in their home at Rugles on the evening of 10 June 1944 and covers the conversation which then took place. All these witnesses state that this accused brought the flyer's uniform, with the name D. T. Loyd written on it, to their house and that he exhibited to them photographs upon at least one of which was written the name D. T. Loyd.

Eugene Euchon, a barber at Rugles, testified that he saw the captured flyer as he was being taken to the orphanage in Rugles at about 1130 hours on 10 June 1944 (R 34). The following day this accused came to Euchon's barber shop for a haircut. While he was there, he showed the witness a small photograph on one side of which was written "M. D. Loyd, 21 years of age."

Cecile Marie Cruart stated (R 33; P-Ex 2, p 7) that WOLF left the command post opposite her house with the captured flyer. This accused, in his testimony in Court (R 148), stated that after the flyer was turned over to him he took him to Lieutenant KIRCHNER at the St. Sulpice Castle in an automobile (R 149). He claimed that it was the first occasion on that day that he saw Lieutenant KIRCHNER (R 151, 152). He also testified that at the castle he saw, in addition to Lieutenant KIRCHNER, Lieutenant Hildebrand and a third person whom he did not know

(R 153). While this accused waited outside the castle, the three of them and the flyer spent about one half hour together in the building (R 154). Thereafter, the group left the castle grounds for a short while, returned, viewed the bodies of two German officers lying in the castle yard and again entered the building (R 154, 155). After this the group emerged from the building and it was at this point that Lieutenant KIRCHNER gave this accused the order to shoot the flyer (R 155, 156). Lieutenant KIRCHNER was this accused's superior (R 153). In shooting the flyer this accused claimed that he understood he was carrying out the sentence of the court (R 156).

KIRCHNER, in his extrajudicial sworn statement of 4 December 1946 (R 100; P-Ex 13a, p 4), stated that he proceeded to Rugles where he first interrogated the flyer. He also stated that, when speaking to this accused in Rugles, he asked, "Now where can we bring that person?" This accused answered, "Nonsense, he will be shot".

Evidence for Defense: This accused took the stand and testified in his own defense (R 146). He denied that he spoke to any of the French inhabitants of Rugles after the flyer was shot on 10 June 1944. He stated that on the evening of that day he went to Rugles in a vehicle for the purpose of securing some toilet articles from his billet (R 157). The vehicle in which he went there was the same in which he had transported the flyer earlier that day and in it was the flyer's uniform. He denied that he took the flyer's uniform into the Franchini home, but he believed that his driver did (R 158). He denied that he, at any time, had in his possession a photograph or any personal effects of the flyer (R 159). He attributed the testimony of the various French witnesses, who appeared against him before the court of inquiry held at Rugles on 7 November 1944 and who appeared in this trial, to the fact that these people disliked him because he had had orders to billet troops in their homes (R 159). He denied that he said anything about killing the flyer before he was ordered to carry out the sentence of the court (R 159-160).

When questioned concerning his failure to mention in his pre-trial statements that there was a third person in addition to Lieutenant KIRCHNER and Lieutenant Hildebrand at the St. Sulpice Castle when the flyer was executed, he stated that no one had asked him about this (R 163). He also claimed that, at the time he made that statement (R 53: P-Ex 7), he mentioned the summary court, but was told to leave it out of the statement. He denied and qualified the various incriminating portions of his extrajudicial sworn statements (R 178, et seq.)

Sufficiency of Evidence: Austria was a co-belligerent of Germany. The evidence establishes that this accused acted willingly in carrying out the order to execute the flyer. Moreover, there is strong evidence showing that the order conformed to a previously expressed desire of the accused. The pretrial statements of both accused, together with the other pertinent evidence in this case, clearly establishes that no summary court was convened.

The Court was justified in inferring from the evidence that the accused was a willing participant in the shooting of the flyer and that, with regard to the evidence offered in support of superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

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

Petitions: A Petition for Review was filed by defense counsel, William A. Mollwaine and Captain Frank E. Morse, 23 May 1947. Petitions for Clemency were filed by Ele Wolf, wife of accused, 6 June 1947 and 31 October 1947; Maria Wolf, mother of accused, 6 June 1947; Johann Grieser, 2 June 1947; Joh. Kuprian, 2 June 1947; R. Schatz, 25 September 1947; Dr. Max Rau, 14 November 1947; Paul Busch, 1 December 1947; Dr. Ernst Trinol, 5 December 1947; Fritz Kraemer, 19 December 1947; accused Hugo WOLF, 19 November 1947, and 21 December 1947; Dr. Ernst Drindel, 5 December 1947; Karl-Heinz Gauch, 28 January 1948.

Recommendations: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: The jurisdiction of the Court to try the accused was questioned on behalf of the defense on the ground that the incident occurred within the territory of the Republic of France and that under the various declarations entered into by the Allied powers, the Government of the United States was bound to return the accused to French territory for trial by the French Government (R 8-13).

A validly constituted court of an independent state derives its power from the state. A state is independent of all other states in the exercise of its judicial power, except where restricted by the law of nations (S.S. Lotus, France v. Turkey, 2 Hudson World Court Reports 23). Concerning punishment for a crime of the type involved in the instant case, it has been stated that the sovereign power of a state extends "to the punishment of piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed" (Heaton's "International Law", Sixth Edition, Volume I, page 269). Recognition of this sovereign power is contained in the provision of the Constitution of the United States which confers upon Congress power "to define and punish offenses against the law of nations" (Winthrop, "Military Laws and Precedents", Second Edition, Reprint 1920, page 831).

Any violation of the law of nations encroaches upon and injures the interests of all sovereign states. Whether the power to punish for such crimes will be exercised in a particular case is a matter resting within the discretion of a state. However, it is axiomatic that a state, adhering to the law of war which forms a part of the law of nations, is interested in the preservation and the enforcement thereof. This is true, irrespective of when or where the crime was committed, the belligerency or non-belligerency status of the punishing power, or the nationality of the victims.

("Universality of Jurisdiction Over War Crimes", by Cowles, California Law Review, Volume XXXIII, June 1945, No. 3, pages 177-218; "Law Reports of Trials of War Criminals", by the United Nations War Crimes Commission, 1947, hereinafter referred to as "Law Reports" Volume I, pages 41, 42, 43, 103,

United States v. Klein, et al., (Hadamar Murder Factory Case), opinion DJAWC, February 1946; United States v. Weiss, et al., (Dachau Concentration Camp Case), opinion DJAWC, March 1946; United States v. Becker, et al., (Flossenburg Concentration Camp Case), opinion DJAWC, May 1947; United States v. Brust, opinion DJAWC, September 1947; and United States v. Otto, opinion DJAWC, July 1947.) A British court sitting in Singapore tried Tomono Shimio of the Japanese army and sentenced him to death by hanging for illegally killing American prisoners of war at Saigon, French Indo-China (Law Reports, Volume II, page 128).

It may be that the defense intended to attack the jurisdiction of the Court on the ground that the accused could not be tried in the United States Zone of Occupation unless certain administrative steps were taken as provided by Section 4, Article III, Control Council Law No. 10, which provides:

" 4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 1 (b) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned."

The defense failed to establish a lack of adherence to the provisions in question. In any event, the provisions are merely administrative and not jurisdictional. Failure to comply strictly therewith would not have affected the jurisdiction of the Court. Section 2 of the same article of that law provides:

" 2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedures thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945."

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

Administrative Determination of Guilt: The evidence did not establish that a court, however informal, was convened for the purpose of imposing punishment upon the flyer. In any event, under international law a person who has been found guilty of acting as a spy or of having committed a war crime may be legally executed, only if the execution is preceded by a proper trial and sentence by a legally constituted court. Moreover, the Geneva Convention specifically prohibits measures of reprisal against prisoners of war (Volume II, Oppenheim, "International Law", Sixth Edition, pages 331, 456, 457; Article 30, Annex to Hague Convention No. IV of 18 October 1907 and Article 2 of the Geneva (Prisoners of War) Convention of 27 July 1929, both set forth in TM 27-251, War Department, U.S. Army, "Treaties Governing Land Warfare", 7 January 1944; Volume 2, Wheaton's "International Law", Seventh Edition, pages 220, 240; and Law reports, Volume I, page 31). The United Nations War Crimes Commission in commenting upon the British Almelo Case stated as follows:

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

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

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

While not applicable as such to war crimes trials, the rule as to affirmative defenses in homicide cases in American municipal criminal law has been stated as follows:

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

Regardless of all other considerations, the defense failed to meet its burden of going forward with the evidence to establish that the killings were justifiable.

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

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior directing that he commit the wrongful act; (b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct; and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; FM 27-10, War Department, U.S. Army, "Rules of Land Warfare", paragraph 345.1, Change No. 1, 15 November 1944; Oppenheim's "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 Hebbels' "The Air Terror of Our Enemies", found in footnote, page 53, "Military Occupation and the Rules of the Law",



by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945; United States v. Thomas, supra; United States v. Beck, et al., opinion DJAWC, December 1946; Flossenburg Concentration Camp Case, supra; and United States v. Stroop, et al., (Superior Orders Case), opinion DJAWC, September 1947.)

Composition of Court : No injustice to the accused resulted from the fact that the designated president of the Court and the designated legally trained officer thereof were excused by the appointing authority. The senior officer of the remaining members properly assumed the duties of president of the Court and one member of the Court was an officer with legal training (R 2).

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

*Anthony J. Albert*  
ANTHONY J. ALBERT  
Attorney *est*  
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