

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

2 March 1948

U N I T E D S T A T E S )

v. )

Waldemar BAUMEK, et al. )

Case No. 000-50-5-17

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 29 August to 9 September 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Waldemar BAUMEK, Franz FLASCHING, Ferdinand GEISLER, Ludwig GINTERS, Wilhelm HOCHWITZ, Viktor RUBEK, Jakob SOENS, Willi UEBENEK and Emil HUB, German nationals or persons acting with German nationals, acting in pursuance of a common design to subject the persons hereinafter described to killings, beatings, tortures, starvation, abuses, and indignities, did, at or in the vicinity of the Mauthausen Concentration Camp, at Castle Hartheim, and at or in the vicinity of the Mauthausen Sub-Camps, including but not limited to Ebensee, Gross-Weiding, Gunskirchen, Gusen, Hinterbruehl, Lambach, Linz, Loiblpass, Melk, Schwechat, St. Georgen, St. Lambrecht, St. Valentin, Steyr, Vienna, Wiener-Neudorf, all in Austria, at various and sundry times between January 1, 1942 and May 5, 1945, wrongfully encourage, aid, abet, and participate in the subjection of Poles, Frenchmen, Greeks, Yugoslavs, Citizens of the Soviet Union, Norwegians, Danes, Belgians, Citizens of the Netherlands, Citizens of the Grand Duchy of Luxembourg, Turks, British Subjects, stateless persons, Czechs, Chinese, Citizens of the United States of America, and other non-German nationals who were then and there in the custody of the then German Reich, and members of the armed forces of nations then at war with the then German Reich who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, to killings, beatings, tortures, starvation, abuses and indignities, the exact names and numbers of such persons being unknown, but aggregating thousands.

(Surname of GEISLER actually spelled GEISLER, R 92; P-Ex 8).

III. SUMMARY OF EVIDENCE:

One of the convicted accused, BAUMEK, was an inmate<sup>of</sup> and the other convicted accused were members of the SS assigned to Mauthausen Concentration Camp and its subcamps for considerable periods of time between the dates alleged and were shown to have participated in the Mauthausen



concentration camp mass atrocity. Prosecution's P-Ex 2 (R 43) is a certified copy of the charge, particulars, findings and sentences in the parent Mauthausen Concentration Camp Case, (United States v. Altfuldisch, et al, 000-30-5, opinion DdAWU, February 1947, hereinafter referred to as the "Parent Case"; see Section V, post).

Unless otherwise indicated an item referred to as a "Statement" is in the form of extrajudicial sworn statement.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Waldemar BARNER

Nationality:	German
Age:	34
Civilian Status:	Butcher
Party Status:	None
Military Status:	Unknown
Plea:	NG
Findings:	G
Sentence:	15 years, commencing 28 May 1945

Evidence for Prosecution: The accused stated in his Statement that he was sent to Mauthausen Concentration Camp in September 1943 to be executed for attempted desertion from military service on the Russian front. This sentence was later set aside, and after four weeks in the main camp he was transferred to subcamp Schwachat, also known as Heidfeld, where he worked in the kitchen. Thereafter, he was sent to subcamp Hinterbrühl, also known as Moedling, where he served as a capo. He left there on an evacuation march to main camp, Mauthausen, arriving on 7 April 1945. He remained until liberation on 5 May 1945 (R 45; P-Ex 4A). He spent about two months at subcamp Florisdorf during the period September 1943 to November 1944 (R 264). Before going to Florisdorf, the accused worked in the kitchen, but upon return to Schwachat became camp eldest (R 265). About November 1944 he was transferred to subcamp Hinterbrühl and served as a capo in the Heinkel factory (R 264, 265). On the evacuation march to main camp Mauthausen in April 1945 he wore an SS uniform without insignia (R 264, 267).

Milonia, an Austrian inmate of Mauthausen from 22 January 1942 to



The accused was a member of the camp police and wore a khaki brown uniform (R 47, 48). About the middle of April 1945, the witness saw the accused between blocks 1 and 6 in the roll call yard beat a Russian inmate (R 47, 49-51, 57). The accused used a club about 75 centimeters long (R 52). The witness saw the Russian lying on the ground unconscious (R 49, 53). The next morning he saw the dead body of this same Russian lying in front of the crematory (R 50, 53, 54). He had an open wound on his head and also on his back (R 52).

Emmett, an inmate of subcamp Schwachat from August 1943 to June 1944 testified that he knew the accused following the fall of 1943, when the accused worked in the kitchen (R 63, 66). The witness worked at the hospital and one evening during the fall of 1943 a young Russian was brought to the hospital unconscious. The victim died the same evening without having regained consciousness (R 64, 71, 72). In the presence of the witness, the accused admitted to the Polish inmate physician, Dr. Krakowski, that he had beaten the man with a hook (a fire poker), but did not intend to kill him (R 64, 71). The witness later helped to put the body of this victim in a coffin at the morgue for transfer to the crematory in Vienna (R 67, 68). The physician told the witness that the man was killed by a blow (R 70). The witness further testified that he saw the accused mistreat inmates of various nationalities (R 64, 65).

Brunnlehner, a German inmate of subcamp Schwechat, testified that he knew the accused at Schwechat when he worked in the kitchen and also when he was camp eldest there (R 73, 74). The accused was rough, brutal and mistreated the inmates, among them being French, Russians, Poles and others. The accused used his hands, fists and on occasions he used some instrument (R 74). He also saw the accused in an SS uniform and armed with a rifle on the evacuation march from Hinterbruhl in April 1945 (R 75). During the march, the witness saw the accused raise his rifle, together with other guards, and shoot at a Polish inmate who had stepped out of the column to get some water. The witness did not know



what happened to the inmate, except that another Polish inmate told him that his comrade had been shot (R 76, 77, 79).

Woitschak, a German inmate of subcamp Schwachat from August or September 1943 to June 1944, testified that he knew the accused there when the latter was capo in the kitchen (R 152, 153). This witness saw the accused beat Jews and Russians, among others, often with any kind of an instrument he could find at hand. Sometimes he used a rubber hose or a stick (R 153). In the fall of 1943, he saw the accused hit a Russian inmate on the head in the kitchen with an iron bar. The inmate collapsed and was taken to the hospital. The witness further testified that the next day he heard that this victim had died. He heard that the accused told the inmate doctor that he did not intend to do it (R 153, 154).

In his Statement, Nedimovic, a Yugoslav inmate of subcamp Florisdorf from 1 December 1944 to 1 April 1945, stated that he knew the accused as a chief capo at subcamp Florisdorf; that he was given an SS uniform and pistol on the evacuation march; that he, the witness, was beaten and kicked by the accused while in Florisdorf; and that on the evacuation march he saw the accused shoot four Polish inmates to death (R 59; P-Ex 5).

In his Statement, Kiewitt, a German inmate of subcamp Schwachat in December 1944, stated that he worked in the hospital at Schwachat; that in the summer of 1944 an inmate who was either a Pole or a Russian was delivered to the hospital with a serious head injury; that he died without regaining consciousness; and that the witness was present in the operating room and heard the accused tell Dr. Krakowski that he did not intend to beat the victim to death but only to beat him. The witness further stated therein that the accused was usually brutal; that he frequently saw the accused mistreat inmates of various nationalities and beat them with assorted instruments; and that many had to be delivered to the hospital (R 62; P-Ex 6A).

The accused testified that he beat inmates with his hands (R 267); that on the evacuation march orders were given directing that anyone who



collapsed on the march was to be killed (R 272); and that of the estimated 1750 inmates who left Hinterbruehl, approximately 140 or 160 were missing upon arrival at Mauthausen (R 274).

Evidence for Defense: Ostermann, a former inmate, testified he was with the accused at Schwechat and knew him as block eldest or camp eldest; that he never heard that the accused beat any inmates to death (R 212, 213); that he was on the evacuation march and never heard that the accused shot inmates on that march (R 215); that the accused was considerate of inmates at Schwechat and allowed roll call to be taken inside the buildings in bad weather (R 216); and that the accused permitted inmates to forage for food (R 218).

Koetzle, a former inmate of Schwechat, testified that he knew the accused from September 1943 to April 1945 (R 224); that he never heard of the accused beating any inmates to death (R 225); that it is possible that the accused slapped inmates for stealing food (R 226); that he was in the same platoon and marched side by side with the accused on the evacuation march from Hinterbruehl to Mauthausen and did not see or hear of the accused killing any inmates (R 227, 228); that he was with the accused in Mauthausen and did not learn of the accused beating or killing any inmates there (R 228); and that the accused had nothing whatsoever to do with any killing on the evacuation march (R 235).

\ Zgorzelski, a former <sup>Polish</sup> inmate of Hinterbruehl, testified that he knew the accused as a capo there, but that he never saw nor heard of the accused killing any inmates (R 237); that he saw the accused slap some inmates; but that he never saw the accused use anything except his hands to beat inmates (R 238).

Helfmeier, a former SS guard at subcamps Florisdorf and Hinterbruehl, testified that he was with the accused on the evacuation march from Hinterbruehl to Mauthausen and that he never saw or heard of the accused killing or mistreating any inmates (R 240, 242).

Hilgers, a former SS guard at Hinterbruehl, testified that he knew the accused in the Heinkel factory at Hinterbruehl; that he never heard



of or saw the accused beat or kill any inmates; that he was with the accused on the evacuation march from Hinterbruehl to Mauthausen; and that he never heard of or saw the accused beat or kill inmates on the evacuation march (R 249, 250).

Bruening, a former SS concentration camp guard at Hinterbruehl, stated in an unsworn pretrial statement that he was with the accused in the Heinkel factory at Hinterbruehl; that he saw the accused occasionally slap inmates for infraction of the rules; that he was the accused's platoon leader on the evacuation march; and that the accused did not beat or mistreat inmates (R 281; D-Ex 8A).

The accused testified that he was a capo at the Heinkel factory (R 265); that he never beat any Russian to death (R 266); that he did not shoot or kill four inmates on the evacuation march (R 267); and that he did not have a weapon on the evacuation march (R 267). He admitted that he slapped inmates with his hands, when they stole or violated camp rules. He denied that he ever beat any inmate with a club, hose, or any kind of instrument (R 267).

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

Petitions: A Petition for Review was filed by Major A. R. Myatt, Jr., defense counsel, 10 September 1947. Petitions for Clemency were filed by the accused, 20 January 1948 and 22 February 1948; Alois Riml, 23 January 1948; accused's father, Wilhelm Barner, 26 January 1948; and accused's brother, Willy Barner, 4 February 1948.

Recommendation: That the findings and sentence be approved.

2. Franz FIRSCHING

Nationality:	German
Age:	42
Civilian Status:	Butcher
Party Status:	DAF
Military Status:	Waffen SS Corporal
Plea:	NG



Evidence for Prosecution: The accused testified that he was drafted into the army in 1940. He was transferred to the Waffen SS 1 September 1944 and assigned to subcamp Florisdorf where he served for awhile as a guard. Later he was assigned to work in the kitchen (R 282, 283). In November 1944 he was assigned to subcamp Hinterbruehl, where he served in the same capacities until 1 April 1945, when the camp was evacuated (R 283).

Emmett, a German inmate of subcamp Hinterbruehl from December 1944 to April 1945, testified that he knew the accused as SS kitchen chief (R 120, 121). He worked in the kitchen and saw the accused frequently beat French, Poles, Russians, Czechs and other inmates with a rubber hose until they were covered with blood. Some of them collapsed and some required medical attention (R 120, 121).

Woltschak, a German inmate of subcamp Florisdorf in 1944, testified that he and a Russian comrade were beaten with a rubber hose by the accused (R 154, 155).

The accused admitted slapping inmates with his hands (R 284, 285).

Evidence for Defense: Koetzle, a former inmate, testified that the accused treated inmates in Florisdorf and Hinterbruehl very decently (R 230).

The accused testified that he was an SS kitchen guard at Hinterbruehl; that he was assigned to guard duty in the kitchen to prevent inmates from stealing food; that he slapped inmates for stealing food; that this was much milder punishment than the inmates would have received had he reported them; and that he never killed or severely beat any inmates (R 283, 284).

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

Petitions: A Petition for Review was filed by Major A. R. Wyatt, Jr., defense counsel, 10 September 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.



3. Ferdinand GEISLER

This accused was found not guilty by reason of insanity (R 15, 364).

4. Ludwig GINTERS

Nationality:	German
Age:	42
Civilian Status:	Unknown
Party Status:	Unknown
Military Status:	Waffen SS Corporal
Plea:	NG
Findings:	G
Sentence:	8 years, commencing 5 May 1945

Evidence for Prosecution: The accused was transferred from the air corps to the Waffen SS on 1 September 1944 and performed duty at Schwechat from April 1944 to 26 June 1944, Florisdorf from June to November 1944, and Hinterbruehl from November 1944 to 1 April 1945, all subcamps of Mauthausen Concentration Camp. He was a guard on the evacuation march in early April 1945 from Hinterbruehl to Mauthausen (R 301, 302).

Koetzle, a German inmate of subcamp Hinterbruehl from September 1944 until the camp was evacuated in April 1945, testified he knew the accused at Hinterbruehl and during the evacuation march to Mauthausen in April 1945 (R 141). He saw the accused shoot a sick Polish inmate in the neck on 3 April 1945 while on the evacuation march (R 142). The witness was about 15 meters from the scene of this incident and saw blood gush from the victim after he was shot (R 143).

Traunsberger, a German inmate of subcamp Florisdorf in 1944, testified that he was on the evacuation march from Hinterbruehl to Mauthausen in April 1945 and saw the accused beat inmates on the march with the butt of a rifle (R 145, 146).

Accused BARNER testified that he saw the accused on the evacuation march in April 1945 shoot two Polish inmates dead (R 277).



Accused SOEENS, who was also on the evacuation march from Hinterbruehl to Mauthausen in April 1945, testified that the accused told him that he shot an inmate to death on the evacuation march (R 341, 351).

In his testimony the accused admitted that he shot and killed a sick inmate on the evacuation march in April 1945, but claimed he was ordered by his superior, an SS technical sergeant, to kill the inmate (R 302, 305, 306).

Evidence for Defense: The accused testified that he shot an inmate on the evacuation march because he was ordered to do so by his superior, an SS technical sergeant. He asserted that he never mistreated or killed anyone else (R 302).

Sufficiency of Evidence: The Court was warranted from the evidence as to the nature and extent of his participation in its findings of guilty. With regard to the evidence offered in support of superior orders, it does not appear that the accused acted unwillingly or under the immediate compulsion of superior orders. The accused failed to meet the burden of proof as to superior orders as 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 Major A. R. Myatt, Jr., defense counsel, 10 September 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.



5. Wilhelm HOCHWITZ

Nationality:	German
Age:	43
Civilian Status:	Textile worker
Party Status:	None
Military Status:	Waffen SS Corporal
Plea:	NG
Findings:	G
Sentence:	5 years, commencing 5 May 1945

Evidence for Prosecution: The accused was transferred on 1 September 1944 from the air corps to the Waffen SS and sent to Florisdorf, a subcamp of Mauthausen, where he served as a guard until the middle of November 1944 (R 315). He was then assigned to subcamp Hinterbruehl and served as a block leader until April 1945 (R 315). He served on the evacuation march from Hinterbruehl to Mauthausen in April 1945 (R 315, 316).

Tummel, a former SS guard who knew and served with the accused at subcamps Florisdorf and Hinterbruehl in 1944 and 1945, stated in one of his Statements that he saw the accused beat inmates with a rubber cable (R 140; P-Ex 20A). In a subsequent Statement, he stated that he frequently saw the accused beat inmates at subcamp Hinterbruehl with a rubber cable one-half to three fourths of a meter long and about finger thick; that the accused beat inmates of many nationalities; that in the beginning of 1945 he saw the accused beat several inmates over the head and shoulders with a rubber club, while chasing them through a gate; and that he ran after one whose cap had fallen and especially beat him (R 151; P-Ex 24A).

Evidence for Defense: Helfmier, a former SS guard at subcamp Florisdorf, testified that he knew the accused in Florisdorf; that he was with him on the evacuation march; and that the accused behaved decently toward the inmates (R 244, 245).

Hilgers, another former SS guard at Florisdorf, testified that he knew the accused there and was with him on the evacuation march. He never saw or heard of the accused beating or killing inmates (R 251, 252).



The accused testified that he had no weapons on the evacuation march (R 316); that the Statements of Tummel, his accuser, P-Exs 20A and 24A, "can be a lie or out of revenge" (R 316); that he and Tummel had a fight in the concentration camp and since that time have been enemies; and that after the liberation of Mauthausen Tummel threatened to state that he, the accused, beat inmates. The accused denied that he ever beat, mistreated or killed any inmates (R 317).

Sufficiency of Evidence: The Court was warranted from the evidence as to the nature and extent of his participation in its findings of guilty. The sentence is not excessive.

Petitions: A Petition for Review was filed by Major A.R. Myatt, defense counsel, 10 September 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

c. Viktor ROBER

Nationality:	German
Age:	46
Civilian Status:	Unknown
Party Status:	DAF
Military Status:	Waffen SS Corporal
Plea:	NG
Findings:	G
Sentence:	8 years, commencing 5 May 1945

Evidence for Prosecution: The accused was transferred from the air corps to the Waffen SS on 1 September 1944 and served at Schweschat until it was evacuated. He was promoted to block leader there (R 322, 323). The accused also participated in the evacuation march from Schweschat to <sup>to</sup> Hinterbrühl and thence/Mauthausen (R 323, 324).

Ostermann, a German inmate of Schweschat from April 1943 until the evacuation on 31 March 1945, testified that he knew the accused there and also on the evacuation march to Mauthausen in April 1945 (R 160, 161); that he saw the accused beat and shoot inmates during the march (R 161);



and that he saw the accused shoot two inmates in the neck, one of whom was a Frenchman and the other was either a Russian, Pole or Jew (R 162, 163). The witness was marching at the end of the column and the accused was only eight or ten meters away with free space between them at the time he saw him shoot the two inmates (R 163, 164).

Accused BARNER in his Statement stated that he saw the accused shoot and kill one sick prisoner on the evacuation march in April 1945 (R 45; P-Ex 4A).

In his testimony, the accused admitted that on the evacuation march in April 1945 he shot to death a Frenchman who was attempting to escape (R 324, 325).

Evidence for Defence: In his testimony, the accused admitted that he shot one inmate on the evacuation march because his immediate superior, an SS sergeant, standing near him at the time ordered him to shoot an inmate, who was too sick to continue the march; that immediately after he received this order, the inmate started to walk toward a nearby forest and he ordered him to halt; and that the inmate did not halt, whereupon he shot him (R 325). He denied ever beating or mistreating any inmate (R 325).

Sufficiency of Evidence: The Court was warranted by the evidence concerning the nature and extent of his participation in its findings of guilty. With regard to the evidence offered in support of superior orders it is shown that the desire of the accused to co-operate with superiors was stronger than other considerations; that he did not act unwillingly or under the immediate compulsion of superior orders; that in any event the Court gave ample consideration to any such element which may have been present and that the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post. The sentence is not excessive.

Petitions: A Petition for Review was filed by Major A. R. Myatt, Jr., defense counsel, 10 September 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.



7. Jakob SOENS

Nationality:	German
Age:	45
Civilian Status:	Unknown
Party Status:	DAF
Military Status:	Waffen SS Corporal
Plea:	NG
Findings:	G
Sentence:	5 years, commencing 5 May 1945

Evidence for Prosecution: The accused was a member of the Waffen SS and a block leader at subcamp Florisdorf in August and September 1944 and at Hinterbrühl from October 1944 to the evacuation thereof in April 1945. He participated in the evacuation march from Hinterbrühl to Mauthausen in April 1945 (R 340, 341).

Kostele, a German inmate of subcamp Hinterbrühl from September 1944 to 1 April 1945, testified that he saw the accused in November 1944 hit a Polish inmate on the head with the butt of a pistol. The victim collapsed (R 181, 182). The victim had escaped four weeks before and had been recaptured and returned by the police from the Heinkel factory to the camp gate where the accused was on duty. The police called to the accused, who went out and hit the inmate (R 181).

Accused BARNER in his unsworn pretrial statement stated that he knew the accused at subcamp Hinterbrühl and worked with him on a detail. The accused beat inmates on the detail of various nationalities with his fists or a rubber hose. Accused BARNER stated therein that he saw the accused, during the winter of 1944 and spring of 1945, beat inmates of Polish, French, Italian and other nationalities during air raids so severely that they were not able to walk and had to be carried by their comrades. He saw the accused beat a Polish inmate with the butt of a pistol. This inmate had previously escaped and had been recaptured by the accused (R 171; P-Ex 30A). However, accused BARNER testified that he had been mistaken in his identity of the accused, although it appears that BARNER



and the accused were stationed together at Hinterbruehl for a considerable period of time (R 269, 270). He came to this conclusion after talking to the accused, while they were in detention at Daebau (R 270).

The accused testified that while at Hinterbruehl he hit an inmate over the head with the butt of his pistol (R 343, 344). According to the accused, this inmate had escaped two or three weeks before and in the process of being recaptured the inmate drew a knife on him (R 344). The accused first fired a warning shot at 15 to 20 meters and the escapee stopped. When the accused approached him with a pistol in hand, the escapee drew a knife (R 352). The accused further testified that he knew accused BARNER very well (R 345).

Evidence for Defense. Emmett, a former inmate of Schwabach, Florisdorf and Hinterbruehl, testified that he knew the accused from the fall of 1944 to the spring of 1945 (R 220); that the accused was very decent and prevented many beatings being given to inmates by the roll call leader (R 220); and that he never heard of the accused ever beating or mistreating an inmate. On the contrary, the accused was good to the inmates (R 221).

Accused BARNER testified that he made a mistake in his unsworn pre-trial statement, P-Ex 30A, in which he identified the accused; that in P-Ex 30A he was talking about Zeigler and not the accused (R 268).

The accused testified that he was on the evacuation march, but did not beat or kill any inmates; that he never beat or killed anyone while he was at Florisdorf or Hinterbruehl (R 343); that he arrested an escaped inmate who had committed rape and thefts in Hinterbruehl; that he shot near the inmate once to make him stop; that when he approached him the inmate drew a butcher knife; that he then beat the inmate over the head with the butt of his pistol; and that this was the only time he ever beat an inmate (R 343, 344).

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



Petitions: A Petition for Review was filed by Major A. R. Myatt, Jr., defense counsel, 10 September 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

8. Willi UEBENER

Nationality:	German
Age:	47
Civilian Status:	Unknown
Party Status:	None
Military Status:	Waffen SS Staff Sergeant
Plea:	NG
Findings:	G
Sentence:	3 years, commencing 3 May 1948

Evidence for Prosecution: The accused served as a noncommissioned officer of the guard at Schwechat from August to October 1944; at Florisdorf from October to December 1944, and at Hinterbrühl from the middle of December 1944 to 1 April 1945, all being subcamps of Mauthausen. In April 1945 he participated in the evacuation march from Hinterbrühl to Mauthausen (R 224, 226).

Kestle, a German inmate of Hinterbrühl from September 1944 to 1 April 1945 who was on the evacuation march from Hinterbrühl to Mauthausen, testified that he knew the accused at Hinterbrühl and on the evacuation march (R 178, 179). It was the duty of the accused to check the guards on work details. When the accused saw an inmate not working fast enough to suit him, he beat the inmate with a stick (R 179). Such beatings happened often and some of the victims collapsed as a result of the beating (R 179). The victims were of various nationalities (R 180). The accused also beat inmates of many nationalities on the evacuation march with a stick until they collapsed and were shot by other guards because they were not able to walk (R 179, 180).

Accused BARNER stated in an unsworn pretrial statement that he saw the accused severely beat inmates at Hinterbrühl with a rubber cudgel. He also saw him beat and knock down inmates every day while on the evacua-



tion march from Hinterbruehl to Mauthausen (R 177; P-Ex 35A). Accused BARNER testified that on the evacuation march from Hinterbruehl to Mauthausen in April 1945 he saw the accused beat an inmate until he collapsed (R 276).

The accused testified that he carried a walking cane on the evacuation march from Hinterbruehl to Mauthausen (R 357). He also admitted in his testimony that he slapped an inmate a few times on the evacuation march (R 357, 358).

Evidence for Defense: The accused testified that he was only a guard and had no other function in the camp. He never beat or mistreated anyone (R 356). He admitted that he was in the evacuation march and that he slapped an inmate, because the inmate took bread from a 15 or 16 year old boy. The accused had given the bread to the boy a few minutes before the slapping occurred. He used his cane to help him along, not to beat inmates (R 357).

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

Petitions: A Petition for Review was filed by Major A. R. Myatt, Jr., defense counsel, 10 September 1947. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

9. Emil HUB

This accused was acquitted (R 365).

V. QUESTIONS OF LAW:

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

Superior Orders: Accused RUBER and GINTERS sought to justify their actions by offering evidence to show that they were acting in compliance with "superior orders". Compliance with superior orders does not constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz. 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 812; Vol. II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandoverly Castle Case, 16 American Journal



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 in fact, directing that he commit the wrongful act, (b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; FM 27-10, War Department, U.S. Army, "Rules of Land Warfare", paragraph 345.1, Change No. 1, 15 November 1944; Oppenheim, "International Law", supra, and the Llandovery Castle Case cited therein; "Manual for Courts-Martial", supra; "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of Our Enemies", found in footnote, page 53, "Military Occupation and the Rules of the Law", by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945, United States v. Thomas, supra; and United States v. Beck, et al., opinion DJAWC, December 1946.)

Parent Case: The Court was required to take cognizance of the decision rendered in the Parent Case, including the findings of the Court therein that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, subjected persons to killings, beatings, tortures, etc., and was warranted



in inferring that those shown to have participated knew of the criminal nature thereof (Letter, Headquarters, United States Forces, European Theater, File AG 000.5 JAG-ACC, subject: "Trial of War Crimes Cases", 14 October 1946, and the Parent Case). All the convicted accused were shown to have participated in the mass atrocity and the Court was warranted by the evidence adduced, either in the Parent Case or in this subsequent proceeding in concluding as to them that they not only participated to a substantial degree but that the nature and extent of their participation were such as to warrant the sentence imposed.

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.

MARVIN D. COLBERT  
Captain CMP  
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