

approval

12 February 1948

UNITED STATES

v.

Case No. 000-50-5-20

Martin BIRSACK, et al.

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 21-25 September 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Martin BIRSACK, Ernst BUEHRER, Heinrich FULSCHE, Dominik GLERA, Ignaz GROSS, Franz KISS, Rene Theodor KORSITZKY, Wilhelm LEFFERS, Max SEIDL, Kurt WINKLER, and Albert ZEITLIG, 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 subcamps, including but not limited to Ebensee, Gros-Raming, 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.

III. SUMMARY OF EVIDENCE: All the accused with the exception of Ernst

BUERGER, who was an inmate, were members of the SS at Mauthausen Concentration Camp and/or its subcamps for considerable periods of time between the dates alleged, and all were shown to have participated as officials, guards or in other capacities in the Mauthausen Concentration Camp mass atrocity. Prosecution's Exhibit P-Ex 11 (R 14) is a certified copy of the charge, particulars, findings and sentences in the parent Mauthausen Concentration Camp case (United States v. Altfuldisch, et al, 000-50-5, opinion DJAWC, February 1947, hereinafter referred to as the "Parent Case" see Section V, post).

Little weight is given to the testimony of witness Karl Geiger.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Martin BIERSAOK

A nolle prosequi was entered in favor of this accused (R 170).

2. Ernst BUERGER

Nationality:	German
Age:	42
Civilian Status:	Barber
Party Status:	Unknown
Military Status:	Unknown
Plea:	NG
Findings:	G
Sentence:	Imprisonment for life

Evidence for Prosecution: The accused was an inmate in Mauthausen Concentration Camp (R 57) from the end of 1939 until 8 February 1944 (R 239). He worked as a barber in Block 17 (R 57, 58, 79, 126, 240) and either was room eldest of block 17 or at times acted as, or took the place of, the room eldest (R 57, 58, 79, 240).

In the summer of 1943 (R 79) the accused beat inmates often (R 58, 79, 82), especially in the morning when inmates would not arise quickly (R 79). On occasions when the accused was dishing out food, he would strike inmates with the instrument that he was using (R 80). He beat inmates with a hose or military belt (R 80). Witness Honold, who was an inmate in the same block as the accused, testified that on one

occasion at the end of June or in July 1943 (R 87) he entered the room just as the accused was stepping with the heel of his boot on an inmate who was lying on the floor. The accused kicked the inmate in the diaphragm from the waist up. In addition to the mistreatment of this inmate by the accused the block eldest and a medic had taken part in beating him (R 79, 80, 81, 83, 84, 88). The inmate was then taken to the corner of the sleeping quarters, where he remained on the ground until evening and during the night, while sleeping two meters from him, the inmate died (R 80). He further testified that the next day the body was carried to the washroom by inmates, where it remained until roll call was taken by the block leader, after which it was taken to the crematory (R 80), and it was said by other inmates that the dead inmate was a Frenchman (R 81).

Witness Karl Geiger testified that, during the period after January 1942 while on his way to work with the electrical detail in the mornings, he observed the accused chase inmates out of the room in his block. The accused beat inmates severely with a stick. The witness warned the accused repeatedly that he should cease that practice. Around that time an average of five, six, or seven inmates were beaten to death each day in block 17 (R 126, 127). Just outside the block, one morning shortly before the witness moved out to work (R 128), he observed the accused beat an inmate with a heavy wooden club (R 127). The inmate died as a result of this beating (R 127). The body was carried away and put next to other dead bodies (R 129). The above incident happened after 1 January 1942 (R 127).

Witness Koelfel, a former inmate, stated in an extrajudicial sworn statement, that in August 1943 he saw the accused beat and kick a French inmate in such a fashion, that he probably received internal injuries as a result of which he died. The accused kicked the inmate on four occasions during the course of the afternoon. During the evening, when the Frenchman died the witness slept next to him. At times during the night, and in the mornings, the accused beat inmates with a leather belt or kicked them (R 164; P-Ex 221).

Evidence for Defense: Witness Schoeps, a prosecution witness, could not say whether or not beatings administered by the accused resulted in the death of any inmates at Mauthausen (R 77). Witness Honold testified that he was told that the French inmate who died after being mistreated by the accused, had been beaten just previously by a block eldest and a medic (R 84). Witness Keller in his capacity as camp eldest at Mauthausen Concentration Camp never had it brought to his attention that mistreatments by the accused ever resulted in any inmate's death (R 172). During the two and one-half months witness Wojtschak spent in quarantine in Block 17 at Mauthausen Concentration Camp, he assisted the accused as a barber. He saw the accused almost every day, and during said time never saw or heard that the accused mistreated inmates (R 185). While working as a capo at the non-commissioned officers' club at Mauthausen, witness Hildner never heard of the accused mistreating persons to the extent that they died (R 247). In extrajudicial unsworn statements two witnesses stated that the accused behaved well towards his co-inmates (R 256; D-Exs 7A, 8A).

The accused testified that he was an inmate at Mauthausen Concentration Camp from the end of 1939 until 8 February 1944 (R 239); that in April 1942 he was sent to Block 17 to work as a barber; that he never worked as block or room eldest, but when the room eldest was gone, he took over from him (R 240); that while in Block 17 he never beat inmates with a club (R 240); and that he never stepped on an inmate in Block 17 as a result of which the inmate died (R 240). He further testified that he never beat or kicked inmates to the extent of causing death (R 240); that he never mistreated inmates with his belt (R 241); and that he was himself mistreated by prosecution witnesses Geiger and Schoeps while at Mauthausen (R 242).

Sufficiency of Evidence: The statement of witness Woelfel appears to corroborate the incident referred to in the testimony of witness Honold as to the beating to death of a French inmate. Although little credence is given to the testimony of Karl Geiger, the evidence adduced by witness Honold and the extrajudicial sworn statement of Woelfel is sufficient to warrant the findings of guilty by the Court. The sentence is not excessive.

Petitions: A Petition for Review was filed by defense counsel, Major William A. Cates, 16 October 1947. A Petition for Clemency was filed by the accused, 15 October 1947.

Recommendation: That the findings and sentence be approved.

3. Heinrich FULSCHE

Nationality:	German
Age:	34
Civilian Status:	Mason
Party Status:	Nazi party since 1937
Military Status:	Staff SS
Plen:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused was a member of the SS (R 20), working as second detail leader in the stone quarry Wienergraben (Vienna Ditch) (R 19, 38, 258; P-Ex 24A), at Mauthausen Concentration Camp in 1940, 1941 and 1942 (R 19, 38, 258; P-Ex 24A) and left Mauthausen Concentration Camp at the end of 1942 (R 19).

Witness Bauer, a former inmate, testified that one day in the spring or summer of 1942, while working in the work shop in the Vienna Ditch, he was looking out the window when, from a distance of 10 to 15 meters, he saw capo Sarembo mistreating a Czech inmate. The accused came to the scene about 1100 hours and with capo Sarembo took the inmate behind the chipping works and hanged him (R 20). The accused had kicked the inmate with his feet and the capo hit and beat him. Sarembo put the noose around the inmate's neck and the accused took hold of the rope and helped pull him up in the air. The incident took place in a little wooden building which was used as an outdoor toilet for the inmates. When the noon day roll call was held, the Czech was cut down, laid on the ground next to the people who had fallen in and was included in the number of people who were counted off. That night after the body was checked off the records as dead it was taken to the crematory (R 20-23).

This witness further testified that on another occasion in May, June or July 1942 (R 23), the Jewish workers who were carrying rocks in the Vienna Ditch had to walk through a stream (R 24). As a Dutch Jewish inmate (R 25) was trying to climb out of the water, the accused kept standing on the inmate's fingers with his boots. The Jewish inmate kept falling back into the water. It was not long before the inmate became exhausted, fell back into the water, collapsed and drowned. When the inmate's body was pulled out of the water, it was carried back into the camp by his comrades (R 24).

The same witness testified that, on still another occasion in May or June 1942, at about 1400 hours, while working in a quarry, a French inmate got so weak he could no longer stand. The inmate lay on the ground until evening next to the chains which were used to hoist the stones in the Vienna Ditch (R 26). After work was over two Russians started to carry the inmate back to camp. These Russians, being undernourished, were unable to carry the body very far. After carrying him up 144 steps on the way out of the Vienna Ditch they dropped their comrade on the steps. The Frenchman lay prostrate on the steps while the other inmates walked past him. The accused brought up the rear with two or three guards. When the accused reached the inmate, he kicked him off the steps into the chain of guards. One of the guards then shot the inmate. Two other inmates then carried the body back to camp. After reaching the camp the body was counted in the roll call and then carried to the crematory (R 27, 28). When the body had been deposited on the roll call square the witness was about 15 meters away (R 27). When the guards had opened fire on the Frenchman the witness was about 50 to 60 meters away from him (R 28).

The witness testified that he knew the accused as an SS man; that he had worked under the accused's supervision in the Vienna Ditch for two and one half years; and that he remembered the above incidents occurred in 1942 because the accused contracted tuberculosis and left the camp five or six months later and did not return (R 19, 25, 26, 29).

Witness Schubert stated in an extrajudicial sworn statement that during the time he knew the accused, from September 1939 to 1942 as a guard in

the Vienna Ditch he was a beater (R 258; P-Ex 24A).

The accused testified on cross-examination that after he became a civilian in 1943, he worked as a mason in the Vienna Ditch (R 180, 181); that he had 15 to 20 inmates working under his supervision (R 181); that before he went to the hospital in 1941 he worked in the Vienna Ditch (R 181); and that he knew the Jewish inmate Bauer (R 182).

Evidence for Defense: Witness Keller testified that during the time he was at Mauthausen Concentration Camp, from 1939 until 1943, he acted as camp eldest and knew the accused but did not see him at camp during 1942 and 1943 (R 173).

In a medical certificate from the state hospital of the Province Schleswig-Holstein it was stated, that sick papers on the accused were not on file at the hospital. A few notes were found which stated that the accused transferred as a patient on 22 October 1941 from the hospital ward, Buchwald-Hohenweise to the hospital ward, Molln in Lauenburg. The exact date of discharge was not known but, according to a posting on the personnel index card, the accused must have been at the hospital for medical treatment on 21 July 1942 (R 175; D-Ex 1A).

In an extrajudicial unsworn statement a witness related that he knew the accused at Mauthausen during 1938 to 1940, during which time the accused acted sensibly toward inmates and treated them as human beings (R 176; D-Ex 2A).

In an unsworn statement signed by 10 inhabitants who lived near Mauthausen, it was stated that the accused left Mauthausen Concentration Camp in July 1941 for a tuberculosis hospital, where he remained until November 1942. After the accused returned from the tuberculosis hospital he was interned at the camp dispensary for two months (R 176; D-Ex 3A).

In a declaration in lieu of an oath signed by 21 people it was stated that the accused was absent from Camp Gusen and Mauthausen during the time from 4 August 1941 until December 1942. During this period of time the accused was in the phthisis hospital at Daubau, Hohen-Wiese, Molln-Lauenburg, and was discharged from Molln in the beginning of December 1942. The accused was discharged from the SS in

February 1943 and was employed after that date as a civilian worker (R 177; D-Ex 4A).

A certificate stated that the accused gave notice to the police of his departure to a hospital in Dachau, on 4 August 1941 (R 178; D-Ex 5A).

Witness Hildner stated that he knew the accused from 1939 until 1942 but recalls that the accused was sent to the hospital because of a lung ailment during 1941. The witness worked as a capo in the non-commissioned officers' club. He does not recall seeing the accused at meals after the summer or early fall of 1941 (R 245, 246).

Witness Madlmayer testified that while working in Gusen, a subcamp of Mauthausen, during 1941, he was told by the block leader that the accused had to leave Mauthausen because he had tuberculosis (R 253).

The accused testified that, during the years 1942 and 1943, he did not occupy any position, official or otherwise, in the Mauthausen Concentration Camp (R 179). He left Mauthausen on the first Sunday in August 1941. During 1942 he was in the hospital Molln in Lauenburg (R 179). In 1943 he was a civilian, having been discharged from the Waffen SS on 5 March 1943. During the time 1 January 1943 to 5 March 1945 he was at home (R 180). He denied that he tightened a rope around a Czech inmate's neck (R 183) and testified that he was not in camp but in the hospital at the time the incident was supposed to have happened (R 184).

The evidence regarding the hospitalization of the accused for tuberculosis is supported by a statement from Major E. C. Hill, War Crimes Group, Headquarters, British Army of the Rhine, 25 March 1948, which is bound with the record of trial, to the effect that the records of Molln Hospital in Lauenburg show that the accused was a patient there from 22 October 1941 to 21 October 1942.

Sufficiency of Evidence: One witness, Bauer, testified that the accused participated in three killings, a hanging, a drowning and a shooting. He fixes the time of these incidents as in the spring or summer of 1942 and explains that he remembers the time because the accused left the camp

five or six months later on account of having contracted tuberculosis and did not return. The evidence for the defense indicates that the accused was hospitalized from July or August 1941 to November or December 1942 for tuberculosis. This evidence is supported by a statement from Major E. G. Hill, War Crimes Group, Headquarters, British Army of the Rhine, 25 March 1948, to the effect that the hospital records of Molln Hospital in Lauenburg show that the accused was a patient there from 22 October 1941. to 21 October 1942, a period of time covering the time of the killings testified to by witness Bauer. While the witness probably was sincere in his testimony as to the occurrence of the incidents, it is clear that he was mistaken as to the time. Obviously, the killings, if they occurred, took place in the spring or summer of 1941 rather than in 1942.

The evidence indicates that the accused worked as a civilian stone mason in the Gusen stone quarry in 1943, but the record of trial does not disclose the length of time he worked in that capacity or what occurred. In the absence of evidence as to the time he worked in a civilian capacity and as to what occurred during that time, the participation of the accused in the mass atrocity operation in this civilian capacity was too remote to serve as a proper gauge for the Court in imposing a sentence.

The findings of guilty are not warranted by the evidence.

Petitions: A Petition for Review was filed by defense counsel Major William A. Oates, 16 October 1947. Petitions for Clemency were filed by the accused, undated; George Krueger, 28 September 1947; Phillipp Mutko, 28 September 1947; Max Seidl, 28 September 1947; Heine Wigand, 29 September 1947; Freinut Herte and three other persons, 30 September 1947; certificate, signature illegible, 9 October 1947; Kraft, 9 October 1947; Otto Friedrich Kleinguenther, 16 October 1947; accused's wife, Stefanie Fulsche, 22 October 1947; Arnold Damaschke, 22 October 1947; Franz Kofler, 22 October 1947; Karl Strang, 22 October 1947; Reinhard Purucker, 13 November 1947; Willi Luerswald, 14 November 1947; and Wilhelm Grill, 14 November 1947.

Recommendation: That the findings and sentence be disapproved.

4. Dominik GLERL

This accused was neither served nor tried (R 1).

5. Ignaz GROSS

This accused was neither served nor tried (R 1).

6. Franz KISS

This accused was neither served nor tried (R 1).

7. Rene Theodor KORSITZKY

Nationality:	Czechoslovakian
Age:	34
Civilian Status:	Painter
Party Status:	Unknown
Military Status:	Waffen SS, Sergeant
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused was a member of the Waffen SS since 11 November 1938 (R 215). As an SS sergeant (R 57) he was assigned to duty at Mauthausen Concentration Camp on 1 January 1942 (R 216). While at Mauthausen he was in charge of the distribution of material (R 94, 130, 216), was a block leader (R 30, 94) and a construction detail leader (R 160; P-Ex 15A). The accused was also detail leader of the Russian Camp (R 59, 61). He remained at Mauthausen Concentration Camp until after May 1943 (R 130).

Witness Bauer testified that the accused beat and kicked inmates and used all the means and methods at the disposal of an SS man (R 31). One day four Jewish inmates, having worked hard at the quarry, were unable to walk back to camp. They were carried back by Jewish comrades. These four Jews were laid down at roll call so that they could be counted off. While at roll call the accused walked behind the inmates and when one made a move the accused would give him a blow. The accused kicked two inmates and knocked them to the ground, then stood on them for about 15 minutes. The witness was eight meters away at the time

of the incident. Later the witness saw the two bodies taken to the crematory (R 32). Usually when the accused entered Block 3 and "attention" was shouted, the accused grabbed a pot or a pan and beat inmates who did not jump to their feet (R 33, 34).

The witness further testified that one day, either at the end of the summer of 1942 or in the spring of 1943, when the accused was detail leader at the construction site, he ordered two Jews to smear each other with human excrement. At the time Captain Bachmeier, leader of the protective custody camp, happened to ride by. Captain Bachmeier asked the inmates who ordered them to do it. They told him the accused. The captain called the accused, reprimanded him and ordered him from his detail. An SS sergeant was made detail leader. The same evening while marching back from work the witness saw these two Jews being carried back to camp, dead. The consensus of opinion among the inmates was that the accused had suggested to the new detail leader that these two Jews be murdered (R 34, 35). The witness saw the accused beat and take part in executions. He was one of the most feared block leaders in the camp (R 37).

Witness Rehn testified that on 20 April 1942, at about 1130 hours, while at roll call square, an execution squad consisting of five men (R 46) wearing regular belts, steel helmets and rifles (R 48), marched past. The whole camp had to stand still. After the roll call the witness heard the salvos fired and also heard shots or reports of pistols. The execution squad marched back. The accused was a member of the squad (R 46) which shot 20 Czech inmates to death. While marching to work after the noon meal the witness saw the 20 bodies unloaded from a French baggage car in the direction of the crematory (R 47). The witness was 15 meters distant from the dead bodies when he saw them being unloaded (R 48).

One day in the summer, June or July of 1942, the same witness saw the accused catch nine Spanish inmates smoking in the collar of the inmates' hospital. The accused took a shovel handle and as the inmates came out one at a time, he gave them blows with the shovel

blow that knocked him to the ground after which the accused kicked him (R 50).

Witness Schoeps testified that while the accused was one of the detail leaders of the Russian Camp construction detail the mortality rate of the inmates working there averaged 80 to 100 a day (R 61). Other inmates told Schoeps that inmates of the Russian camp detail who ran into the chain of guards were shot to death (R 63). The accused was present at executions by musketry (R 65). Witness Schoeps saw the accused march through camp with six or eight SS men wearing steel helmets. They were led by the officer who was in charge of the shooting (R 70).

Witness Von Posen testified that one day in the summer of 1942 a Jewish attorney from Hamburg, Otto Bauer, came to Mauthausen Concentration Camp. He was assigned to capo Schmidt's detail working in the material shack. A few days later the witness visited Bauer and noticed that he was covered with blood. He was told by Bauer that the accused beat him up (R 94, 96) because he was wearing a Jewish star (R 94). Bauer was beaten by the accused a second time. Bauer told the witness that he couldn't stand the tortures any longer and that the coming evening he would commit suicide (R 94). At 8300 hours Bauer gave the witness his spectacles, notes, and a message to his wife and daughter. During the night the witness saw Bauer jump out the window into the charged wire. He died immediately. The next morning after the details had gone to work the electricity was turned off, the body taken down and carried off to the crematory (R 95). During the time the witness worked in the accused's detail he saw him kick inmates (R 96).

Witness Kauduth testified that the accused was one of the most brutal beaters in camp; that he was personally beaten innumerable times by the accused; that in the fall of 1942 the accused was present at the execution of 80 Czech inmates (R 113); that the accused was one of six men in the execution detail; that a Captain Bachmeier (R 114, 119) gave the order to fire (R 114, 120); and that the men in the detail wore SS uniforms, boots, steel helmets, rifle belts and carbines

also saw the accused take part in an execution at the execution square behind the work shop. The inmates executed were Russians, Poles and Czechs. The Czechs were shot shortly after the Heydrich affair (R 132, 133). A few times when executions took place the witness heard orders read. They stated that the inmates were sentenced to death by order of the Reich Security Head Office, signed by Himmler (R 133).

Witness Stockinger stated in an extrajudicial sworn statement that around the end of April 1942 the accused killed a young Pole. The witness along with several Polish inmates worked with the electrocable detail. The work, which consisted of digging a ditch, was very heavy. A number of the inmates could not stand it. They were beaten and mistreated by the SS until they ran through the guard chain which was about five meters distant from the ditch. As they ran beyond the guard chain they were shot down by the guards. One day this young Pole could not work anymore. The accused appeared and mistreated him until he agreed to go through the guard chain. Just short of the guard chain the Pole stopped and wanted to return. The witness jumped out of the ditch to help the Pole, but the accused shouted to the witness to get back. The Pole was kicked through the guard chain by the accused. A guard three meters distant from the Pole refused to shoot him. Thereupon, the accused threatened to report the guard to the camp commander. Forced by the threat the guard shot three or four times at the Pole, who was lying just across the guard line. The Pole started to get up and the guard refused to fire anymore at him. Thereupon the accused shouted at the guard, took his rifle, which had been reloaded, and shot the Pole two or three times in the head. The accused then walked away from the scene. From the middle of 1942 to September 1943 while working in the SS pharmacy the witness on several occasions observed the accused march with the execution detail to the place of execution behind the camp (R 158; P-EX 12A).

Witness Sanner stated in an extrajudicial sworn statement that while he was assigned to the labor allocation office he saw the accused

death; that the accused also helped kill Dutch Jews; and that he chased them into the electric wire in camp (R 160; P-Ex 15A).

This witness stated in another extrajudicial sworn statement that he saw the accused march off with an execution detail; that later he heard shots; and that the next day in his office he saw the death reports which stated that 25 inmates of different nationalities had been executed (R 161; P-Ex 16A).

Witness Gebhardt stated, in an extrajudicial sworn statement, that in May 1942 he saw the accused compel an inmate to eat his own excrement (P-Ex 17A, R 161). In another extrajudicial sworn statement a witness related that one day in the spring of 1942, two Polish inmates were brought from Gusen; that the accused took the inmates behind the kitchen and beat them until they fainted; that the accused then put the inmates in iron chains; that the inmates spent the night in chains; that the next morning one of the inmates was dead; and that the other inmate was taken to the hospital after which the affiant never saw the inmate anymore (R 162; P-Ex 18A).

Witness Kleschinski, a former inmate, stated in an extrajudicial sworn statement that in May 1942 he saw the accused beat a Polish inmate so severely that three days later he died; that in June 1942, he saw the accused at the Russian camp beat three Russians until they were unconscious; and that in April 1942 he was personally beaten by the accused as a result of which he lost four teeth and received two deep scars on his head (P-Ex 19A, R 162).

Witness Wegner, a former inmate, stated in an extrajudicial sworn statement that during 1942 on many occasions he saw the accused beat inmates until the victims fell to the ground or floor of the barracks; that the accused would then kick the victim in the throat; that on many occasions the kick resulted in almost immediate death of the victim or in such severe injury that he later died. He further stated that in September 1942 he was beaten by the accused until his face swelled to double its normal size; that the accused reported him with the result that he was subjected to 15 lashes on the buttocks with an oxtail whip;

and that during 1942 the witness observed the accused escorting inmates to the gas chamber (P-Ex 23A, R 170).

In an extrajudicial sworn statement the accused stated that he was drafted into the SS on 11 November 1938; that from 30 April 1939 to January 1943 he was assigned to Mauthausen Concentration Camp where he was a block leader and a detail leader and was in charge of the distribution of materials in the construction work; that in the beginning of 1942 he was in charge of a work detail in the Vienna Ditch composed of Dutch Jews. He further stated that this type of work was very hard and caused a number of inmates to collapse. One inmate, in despair, ran towards the chain of guards and was shot and another one jumped from the precipice. In the spring and summer of 1942 the accused was in charge of the "Russian detail working place camp construction". Many Russian inmates tried to escape and some were shot in the attempt. On two occasions he was present at executions. In one case, inmates were hanged in the garage yard and, in the other case, in the roll call square. Pursuant to orders, he repeatedly pushed inmates. He slapped inmates rather than report them (P-Ex 21A, R 164).

Evidence for Defense: The accused testified that he was a Czech citizen; that he joined the Waffen SS on 11 November 1938 (R 215); that on 1 January 1942 he was assigned to duty at the Mauthausen Concentration Camp where he remained until the end of January 1943; that he was in charge of the distribution of materials (R 216). He further testified that during his time at Mauthausen he never chased any inmates into the chain of guards (R 216); that he never beat Jewish inmates in block 5; that he never chased any Jews out of the window into the electric wire; and that he never took part in gassings or injections at Mauthausen (R 217). He admitted that after 1 January 1942 he took part in two executions, but testified that orders were read prior to these executions (R 217); that the first execution was of two German inmates who had been deserters from the German Army; that on another occasion inmates were hanged in the garage yard; and that an order from the SS Reichsfuehrer was read by the Camp Commander (R 218). In carrying out his

duties to maintain order he obeyed, at times, orders of camp commander Ziencis (R 220, 221).

Sufficiency of Evidence: 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 Major William A. Octes, 16 October 1947. Petitions for Clemency were filed by the accused, undated; Peter Bachrens, 25 August 1947; Wigand Heine, 1 September 1947; accused's sister, Mrs. Frieda Bartl, 25 September 1947; Ernst BUEGER, 28 September 1947; accused, 29 September 1947; O. F. Kleingunther, 14 October 1947; Viktor Damasty, 24 October 1947; E. Jetter, 31 October 1947; accused's sister, Mrs. Frieda Bartl, 4 November, 5 November 1947 and 8 January 1948; Anton Lasnitschka, 8 November 1947; Frieda Mueck, 10 November 1947; Heinrich Esch, 12 November 1947; Steffe Breitenfeld, 12 November 1947; Rudolf Riedel, 17 November 1947; Heinrich Esch, 18 and 20 November 1947; E. Jetter, 21 November 1947; Walter Fronning, 3 December 1947; Karl Sulzer, 22 December 1947; accused's sister, Mrs. Frieda Bartl, along with petitions by Alfred Emmert, 24 November 1947; Paul Ricken, 20 January 1948; Georg Streitwolf, 7 February 1948; Irene Epatude, 8 February 1948; Karl Schulz, 24 January 1948; Franz Werdshoff, 9 February, 1948 and Josef Becker, 16 February 1948.

Recommendation: That the findings and sentence be approved.

8. Wilhelm LEFFERS:

This accused was neither served nor tried (R 1).

9. Max STIDL

Nationality:	German
Age:	28
Civilian Status:	Laborer
Party Status:	Nazi Party since 1938
Military Status:	Waffen SS
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused was an SS sergeant at Mauthausen Concentration Camp (R 57, 71, 111) from 9 May 1939 until he was taken into the army in March 1943 (P-Ex 20A, R 163). During his time at Mauthausen he worked in administration (R 92, 93) and as a block leader and bunker chief (R 111, 226).

Witness Koller testified that the accused beat inmates of various nationalities with anything he could get hold of at the moment, such as a club or shovel handle (R 156).

Witness Kanduth testified that, while he was an inmate in Mauthausen in September or October 1942, 135 Czech women were brought to Mauthausen Concentration Camp and placed in the bunker; that the accused was bunker chief at the time; that after about three days the witness saw the accused, Altfeldisch and Streitweiser divide the women into groups of 30. Later these three men, along with other SS led the women to the gas chamber (R 117, 120), after which they left. At 2100 hours that evening the witness and some other inmates had to carry the dead women from the gas chamber to the crematory. The dentist arrived during the night and pulled the teeth of the women having pencil marks on their chests, the sign signifying that the person had gold teeth. The bodies were cremated during the night (R 117, 118). He further testified that from the lists given to him he was able to determine ^{that} the women were Czechs because their names and nationality was

Witness Geiger testified that one evening after roll call a comrade from the SS pharmacy told him that Bachmeier had ordered some potassium cyanide; that he and some comrades notified the other inmates in camp not to drink or eat anything until given a counter order (R 136). The next day he took charge of guarding the kitchen. He noticed the boss of the kitchen, Stregle, order all the inmates who worked in the kitchen to go into the cellar. He saw Bachmeier enter the kitchen and hand Stregle a small package, the contents of which Stregle put in a pot of coffee. The accused came to the kitchen from the bunker. Geiger sent a comrade to warn inmates in all the cells not to drink the coffee. He then saw the accused and Stregle in the presence of Bachmeier carry the kettle to the bunker. The witness then went to the bunker cellar where he met the cleaner to whom he related what had happened. While Geiger and the cleaner were talking they heard the coffee being poured by the accused and Stregle, in the presence of Bachmeier (R 137). The coffee was distributed to all cells. Geiger heard Stregle and Bachmeier leave so that the accused was the only one remaining (R 138). About a half hour later, the accused called the cleaner. When the cleaner returned he brought two or three tablespoonsful of the coffee, which he had taken from the kettle. Geiger then went to his comrades at the clothing warehouse where he fed the coffee to a cat. After a short while the cat died. Geiger then went to the capo of the crematory and told him to let him know if any bodies were brought from the bunker. At 2330 hours that night he heard from the capo. He then went to the frigidaire cellar of the crematory where he saw 52 dead bodies. These bodies gave the appearance of having been poisoned. In addition, he saw five dead bodies in the bunker, the deaths being attributable to shots in the head. The bunker had been guarded by inmates from the time the coffee was first poured until the corpses were picked up. As the accused was the only SS man in the bunker from the time Bachmeier left, the witness concluded that the five deaths could "definitely be attributed to the score of SEIDL". Geiger had not heard shots fired, but assumed that the shots must have been fired while he was at the clothing store (R 138, 139). Most of the dead inmates were Czechs

and Poles (R 139). Geiger found out the nationalities from the camp clerk's office after the deaths were recorded (R 140).

Witness Wagner, a former inmate stated in an extrajudicial sworn statement that he personally saw the accused act as executioner of at least 15 persons, by means of hanging; that he saw the accused beat hundreds of inmates during 1942 and the early part of 1943; that he also saw the accused hang inmates by their wrists and torture them during the course of investigations; and that on several occasions he saw the accused escort inmates to the gas chamber (P-Ex 23A, R 170).

In an extrajudicial sworn statement the accused stated that he was detail leader at Mauthausen Concentration Camp from March 1939 until the fall of 1941, after which he worked in the bunker until February 1943, and that during the period February 1942 to February 1943, he was in charge of the bunker. On three occasions he was ordered to escort inmates to the execution place. In all, about 13 inmates were shot and one hanged. The commander, Colonel Ziersis, and other camp officials were present at the executions. In the summer of 1942 he had to turn over eight Yugoslav inmates to the prison compound commander Bachmeier. These inmates were to be gassed. At times he slapped inmates whom he had to discipline (P-Ex 20A, R 163).

Evidence for Defense: Witness Weber, a former inmate, who worked as a painter in the bunker at Mauthausen during the latter part of 1942, testified that he never heard that the accused gave inmates poisoned coffee; that the first time he heard the story was at Dachau on the day he testified in this case; and that, while working in the bunker, he never saw or heard that the accused shot any inmates (R 190). In an extrajudicial unsworn statement Alois Speiser, a former inmate, stated that the accused did not act badly toward his work detail. The accused was transferred to the front in February 1943 (D-Ex 6A, R 194).

The accused testified that he was a member of the Waffen SS when he served at Mauthausen Concentration Camp; that at first he was a detail leader in the camp, then block leader and later bunker chief (R 226); and

that he did not take part in the gassing of the Czech women at Mauthausen shortly after the Heydrich affair. He explained that the women arrived at Mauthausen one night and two or three days later SS Captain Bachmeier, accompanied by Streitweiser and Altfuldisch approached the accused and required him to open the cells to let the women out (R 226). He further testified that he did not go to the gas chamber with the Czech women; that he never participated in any executions at Mauthausen; that he never chased anyone into the electric wire or drowned anyone; and that he never participated in the poisoning of inmates (R 227).

Sufficiency of Evidence: 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. Although little weight, if any, can be given to the testimony of witness Karl Geiger the Court was warranted from other evidence in its findings of guilty. The sentence is not excessive.

Petitions: A Petition for Review was filed by defense attorney Major William A. Oates, 16 October 1947. Petitions for Clemency were filed by Ernst BUECHER, 28 September 1947; Alois Speiser, 4 October 1947; Karl Antl, 16 October 1947; Kaufmann, 21 October 1947; Franz Kofler, 31 October 1947; Alois Speiser, 16 November 1947; Juan Sampere, 24 November 1947; Rudolf Halaba, 24 November 1947; Rudolf Seply, 25 November 1947; Karl Antl, 29 November 1947; Edmund Kolka, 15 December 1947; the accused, 5 January 1948; Dr. Robert Bandorf, 16 January and 18 February 1948; and Ernst Glofke, 17 January 1948.

Recommendation: That the findings and sentence be approved.

10. Kurt WINKLER:

This accused was neither served nor tried (R 1).

11. Albert ZEITRAEG

Nationality:	German
Age:	28
Civilian Status:	Bank employee
Party Status:	Nazi Party

Military Status:	Waffen SS Sergeant
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused was an SS sergeant at Mauthausen Concentration Camp (R 92, 196, 208) from 1 January 1942 (R 208) until some time after February 1943 (R 196). During this time he acted as clerk in the orderly room of the protective custody camp (P-Ex 13A, R 159; 208), as leader of the punishment company (R 99), and, for awhile, worked as detail leader (R 196, 208) in the chicken stalls and pig sties (R 208).

Witness Von Posen testified that in the beginning of the year 1942, while an inmate at Mauthausen Concentration Camp, he met an inmate, Werschun, who told Von Posen that the accused had beaten him (R 97). The witness further testified that, one day at a distance of about 70 to 80 meters, he saw the accused kill seven Yugoslav (R 99) inmates ~~by shooting~~ by shooting them in the neck with his service pistol (R 101). These inmates had been members of the punishment company and were walking along a road near the Vienna Ditch when the incident occurred (R 98). Because of exhaustion, the men had collapsed and the accused drew his pistol and gave each a shot in the back of the neck (R 101). When the bodies were carried back to camp they passed within a distance of 12 feet from the witness (R 99). At noon the same day the witness was told by inmate Werschun that the accused had threatened to shoot him. Von Posen then went to protective custody camp leader Schultz and had Werschun transferred to SS Schernikau's detail, thereby saving Werschun's life (R 98). The witness further testified that he worked as a clerk in the commitment office and had to record death reports; that every day 40 to 50 shootings occurred in the punishment company, which was under the leadership of the accused (R 99); and that he saw the accused and accused KORSITZKY beat people (R 101).

Witness Stockinger, a former inmate, stated in an extrajudicial sworn statement that in March 1942 he was assigned to the punishment company carrying stones; that one day the accused and another SS man were assigned to

handle the detail; that later, when a majority of the inmates were tired, the accused and the other SS man began beating them; that the accused suggested that the inmates go through the guard chain; and that two of the non-German inmates did go toward the guard chain and were shot. He further stated that these men would not have gone through the guard chain of their own accord, but were forced to do so by the accused; that during October 1942 while working in the SS pharmacy he saw the accused participate in executions; and that one time in October 1942 when 90 Czechs were executed he saw the accused and some other SS men with steel helmets and rifles march to the place of execution (P-Ex 13A, R 159).

The accused testified that, while he was at Mauthausen Concentration Camp, he once acted as block leader in the Vienna Ditch. He admitted that he participated in two or three executions (R 212) and that he took part in executions of Czech inmates after the Heydrich affair. He explained that an order had been read in which it was stated that the victims had acted in a traitorous fashion toward Germany (R 213). He further testified that, on another occasion, he took part in an execution where six men were shot to death (R 212); that an order had been read accusing the inmates of having dynamited a telephone booth and an ammunition train (R 213); and that a third execution which he attended was in the garage yard, where he acted as a guard to block off the road (R 214). He admitted that he beat inmates rather than report them (R 209).

Evidence for Defense: Witness Mey testified that, during January and February 1943, he worked as a capo inmate in the Schloss Lent detail under the accused; that on one occasion the inmates on the detail complained that the food was bad; and that the accused put in a formal complaint and, as a result, the food got better (R 196). He and witness Mathes testified that only on one occasion did they see the accused beat anyone. He gave an inmate a box on the ear with his open hand (R 196, 201, 202).

Witness Taulber, a former inmate and assistant capo (R 205) on the Schloss Lent detail, testified that he never saw the accused mistreat inmates (R 204).

The accused's wife testified that at times, while living near Mauthausen, inmates brought coal and wood to her house. Her husband told her to feed the inmates but that he was not to see her do it (R 207).

The accused testified that he volunteered for the SS and had been a member since April 1939; that he served at Mauthausen from 1 January 1941; that he first worked in the clerk's office in the protective custody camp and then later on worked in the chicken stalls and the pig sties as detail leader (R 208). He further testified that he never shot any Czechs in the neck (R 208, 209); that he beat inmates who committed violations rather than submit reports about them (R 209); that at no time did he punish inmates at Mauthausen except to maintain discipline (R 209); that the prosecution witness Von Posen lied when testifying (R 210); and that orders were read at the executions at which he participated (R 213, 214).

Sufficiency of Evidence: 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 Court was warranted from the evidence in its findings of guilty. The sentence is not excessive.

Petitions: A Petition for Review was filed by defense attorney, Major William A. Gates, 16 October 1947. Petitions for Clemency were filed by Georg Streitwolf, 10 October 1947; Richard Kueppers, 10 October 1947; Arnold Damaschke, 23 October 1947; accused's wife, Irmgard Zeitrag, 23 October 1947; Adolf Stumpf, 6 November 1947; accused's wife, Irmgard Kueppers, Zeitrag, 7 November 1947 and 9 January 1948; and Richard/ 28 January 1948.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

1. Jurisdiction: A question not raised during the course of trial merits discussion, viz., did the Court have jurisdiction of the persons of the accused who are allegedly nationals of other United Nations? Rene Theodor KORSITKY is a national of Czechoslovakia.

War criminals, brigands, and pirates are the common enemies of all mankind and all nations have an equal interest in their apprehension and

punishment for their violations of international law. Concerning this question, it is stated in Volume I, Sixth Edition, "Wheaton's International Law", page 269, that every independent state has the judicial power to punish "piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed." Nationals of other United Nations were sentenced, which sentences have been approved and carried into execution, in the Lauthausen Concentration Camp case (United States v. Altfuldisch, et al., opinion DJAWC, February 1947), and in the Belsen Concentration Camp case, British Army of the Rhine, December 1945. Apparently, all concerned with the reviews and approvals in these cases considered the universality of jurisdiction over war crimes to be so well recognized that discussion was not necessary. Military Government Courts have jurisdiction over the nationals of any country, who are in the United States Zone of Occupation, except as to certain classes of American and other nationals, e.g., military personnel, which are not pertinent to the jurisdictional question here involved. Concerning jurisdiction over war crimes, no limitation is imposed. (See Section 5-300.2 and 5-300.3, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Office of Military Government for Germany (US), 27 March 1947). Concerning the general question of universality of jurisdiction over war crimes see "Universality of Jurisdiction Over War Crimes", by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp. 177-218.

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

2. Administrative Determination of Guilt, Hangings and Shootings:

There is evidence that a number of inmates were executed by hanging and shooting and that accused KORSITZKY, SEIDL and ZEITRAEG participated in some of these executions. In one instance, shortly after the Heydrich affair, 80 Czechs were executed. It was contended that an order was read at the execution reciting that the victims had acted in a "traitorous" manner toward Germany. The order supposedly came from the Reich Security

Head Office.

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

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

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

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

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

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

It is apparent (1) that the hangings and shootings following administrative determination of guilt were illegal; (2) that the defense failed to meet its burden of going forward with the evidence to establish that such hangings and shootings were legal; and (3) that none of the accused believed they were legal.

3. Application of Parent Case: The Court was required to take cognizance of the decision rendered in the Parent Mauthausen Concentration Camp 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-AGO, subject: "Trial of War Crimes Cases", 14 October 1946, and the Parent Case). Except as to accused FULSCHE, the 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 proceedings, in concluding that they not only participated to a substantial degree, but that the nature and extent of their participation were such as to warrant the sentences imposed.

4. Superior Orders: The accused KORSITZKY, SEIDL and ZEITRAEG, as

actions as being 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 543; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJAWC, December 1945; and 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.)

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

VI. CONCLUSIONS:

1. It is recommended that the findings and the sentences as to accused BULGGER, KONSITZKY, SEIDL and ZEITRAEG be approved, but that the findings and sentence as to accused FULSCHE be disapproved.

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

JOHN J. RYAN
Capt. C&P
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