

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

11 March 1948

UNITED STATES )

v. )

Case No. 000-50-5-33

Heinrich SCHMITZ, et al. )

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 10 - 17 September 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Heinrich SCHMITZ, Mathias MOLITOR, Hermann LUECHAU, Alois BEER, Michael GROLIMUSS, Hans KUMBEL, Emil GLOECKNER (and) Andreas SCHILLING, 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-Raming, Gusskirchen, Gussen, Hinterbrühl, 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 of the convicted accused were members of the SS at Ebensee, a subcamp of Mauthausen Concentration Camp, for considerable periods of time between the dates alleged, and were shown to have

participated in various capacities in the Mauthausen Concentration Camp mass atrocity. At various times accused SCHMITZ served in Mauthausen itself. At Ebensee, he served as a detail leader, as second in command of and as commander of the guard. While at Mauthausen, accused GLOCKNER served as a guard and participated in troop training. At Ebensee, his principal duty was management of the cartons for the troops. Accused SCHILLING served at Ebensee in both troop and inmate hospitals. While there his duties embraced roll call leader, block leader and assistant medic. In addition to participating in the execution of the common design by virtue of position held, all of the convicted accused participated in beating and otherwise mistreating inmates of subcamp Ebensee. Prosecution's Exhibit 7-Ex 4 (R 11) is a certified copy of the charge, particulars, findings, and sentences of the parent Mauthausen Concentration Camp case (United States-v. Altfuldisch, et al., COO-50-5, opinion D.M.W.C. February 1947, hereinafter referred to as the "Parent Case", see Section V, post).

#### IV. EVIDENCE AND RECOMMENDATIONS:

##### 1. Heinrich SCHMITZ

Nationality:	German
Age:	56
Civilian Status:	Weaver
Party Status:	Unknown
Military Status:	Waffen SS Sergeant
Flea:	NG
Findings:	G
Sentence:	5 years, commencing 9 May 1945

Evidence for Prosecution: The accused served in the main camp and various subcamps, beginning at the main camp, Mauthausen Concentration Camp, on 1 January 1940 where he remained until May 1942. Subsequently and in sequence, he served at subcamp Brettstein, May 1942 to November 1942; the main camp, November 1942 to 13 January 1943; SS Special Subcamp Hirtzen, 13 January 1943 to 17 June 1943; main camp, 17 June 1943 to

28 June 1943; subcamp Wiener-Neustadt, 28 June 1943 to the end of October 1943; main camp, October 1943 to 13 January 1944; and subcamp Ebensee, 12 or 13 January 1944 to 5 May 1945. While on duty at subcamp Ebensee, the accused served as a detail leader, as second in command and as commander of the guard (R 319, 320).

In December 1944 or near the beginning of 1945, a Rumanian Jewish inmate of subcamp Ebensee, brother of the witness (R 40, 43, 45, 48) and who was working in the stone quarry detail, fell asleep one morning because of weakness (R 40, 47). When the inmates of the detail were assembled that morning on the roll call square near the small quarry, preparatory to returning to camp, the witness' brother was missing (R 40, 42). Soon thereafter he appeared on roll call square followed by the accused, who struck him with his rifle and pushed him (R 40-42, 44). Blood was running down the inmate's head from under his cap (R 41, 42, 45). The victim was given 25 lashes by the accused in front of the formation a few minutes later. The victim collapsed and could not get up (R 41, 45). The witness observed the beating of his brother from a distance of two or three steps away. The witness and another inmate carried the victim back to camp (R 41, 45, 46). The victim died before they arrived at the camp. A dispensary doctor examined the body within 15 minutes after the beating and pronounced it dead (R 41, 42, 47). The same witness heard and saw that the accused was a beater (R 40, 44).

Near the end of April, while twice on route to and from the small stone quarry of Ebensee, a second witness saw the accused strike inmates with his rifle when they fell behind on the march or stopped on account of worn out shoes (R 51-56). He struck some 10 or 15 inmates on these marches (R 51). The witness himself was struck by the accused (R 55). The inmates tried to get inside of the march column to avoid being struck by the accused (R 53). The accused was seen to beat exhausted inmates in the tunnel at Ebensee (R 52). The witness also saw the accused beat inmates frequently and severely at the quarry (R 52, 55).

During an air raid in March or April 1945, a third witness saw the accused beat weak inmates of the Fingerleiden detail of Ebensee severely

with a cudgel (R 59, 60).

The first witness referred to above was called by the prosecution as a rebuttal witness and testified that he never knew another guard by the name of Schmidt at Ebensee (R 328).

Evidence for Defense: Kurth, a former inmate clerk of the SS canteen at Ebensee, testified that the accused was not one of the beaters commonly known throughout the camp (R 196, 197).

Emloth, a former SS staff sergeant at Ebensee, testified that he was quartered with the accused there for over one year (R 212, 215). The accused was never an SS man at heart (R 212). The accused never carried a rifle. He treated the inmates decently and he supplied them with bread and sometimes potatoes, which were left over from the SS mess, on a first come first served basis (R 213, 219-221). He further testified that there was another Schmidt in the SS company who resembled the accused (R 214, 217).

Deistler, former SS man and member of the accused's detail at Ebensee, testified that the accused, as detail leader and chief of the guards, never carried a rifle and gave food to inmates, picking up some food for this purpose from a woman (R 232, 233, 235). The witness never heard of or saw the accused mistreating or killing any inmates (R 233, 235). He testified further that there were several Schmidts among the SS personnel at Ebensee and that the inmates never complained about the accused (R 234).

Pinzenbach, former first sergeant of the 30th Company at Ebensee, testified that the accused was a church member and not a strict soldier, lacking bearing, which prevented his promotion. Furthermore, the accused did not carry a rifle, only a pistol, and had no right to take a rifle from a guard (R 243, 252, 257, 258). There were often other Schmitz or Schmidts in Ebensee. There was a guard in the company by name of Schmidt who carried a rifle (R 244). The witness arrived at Ebensee with the Melk transport. There were no dead in his transport (R 251, 252). The witness further testified that he heard that the accused carried bread to the inmates during the forenoon (R 255, 256).

The accused testified that he carried a pistol while at Ebensee. He denied that he ever carried a rifle or ever took a rifle away from a guard in order to use it (R 320, 321). He asserted he was not promoted during his period of service because he was a church member (R 320). He likewise admitted that he knew a man in his own company at Ebensee by the name of Schmidt, but that the latter's <sup>physical</sup> characteristics were different from his own (R 321, 322). The other Schmidt wore caps and uniforms similar to his (R 322, 323). The accused denied that he had ever served as an ordinary guard with a detail at Ebensee (R 320).

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, 18 September 1947. Petitions for Clemency were filed by Major A.R. Myatt, Jr.; wife of accused, 1 August 1946; accused, two, 10 September 1947, one, 11 September 1947, and two, undated.

Recommendation: That the findings and sentence be approved.

2. Mathias MOLTOR

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

3. Hermann LUECHAU

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

4. Alois BEER

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

5. Michael GROLIMUSS

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

6. Hans KUJREL

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

7. Emil GLOBCKNER

Nationality:	German
Age:	52
Civilian Status:	Unknown
Party Status:	Unknown
Military Status:	Waffen SS

Facts: NG  
Findings: G  
Sentences: 10 years, commencing 14 May 1945

Evidence for Prosecution: The accused served at Mauthausen from 25 September 1941 to 30 November 1941 and at subcamp Ebensee from 30 November 1941 to 5 May 1945 (R 308). The accused served as a guard at Mauthausen and engaged in troop training (R 308). At Ebensee he served as a canteen clerk in the supply room in charge of the canteen (R 308) and there is some evidence that he served at subcamp Wiener-Neustadt from July to the end of August 1943 (R 244, 250).

Espina, a former Spanish inmate of Mauthausen and former member of the French Legion as well as a prisoner of war since Dunkerque (R 24-26, 37, 38), saw the accused, a guard on a garage building detail, shoot two Spanish inmate prisoners of war during the noon meal time about September 1942 (R 18-19, 26, 28, 29, 32, 38-39). The witness and the two victims were inmate members of the garage building detail at Mauthausen (R 30). The witness observed the shooting from approximately 75 to 100 meters (R 18, 32). One victim was shot in the forehead and died. That evening he was carried back to camp by the witness and others (R 18, 19, 32). The other victim was wounded twice in the left leg and bled as he was carried away some ten minutes later, which was observed at a distance of approximately five meters by the witness. This wounding was confirmed later by a doctor (R 18, 19, 32). The witness heard that the wounded victim died three days later (R 19). He testified that he never saw him alive again (R 19, 20). The accused reported the incident to the detail leader and locked his rifle (R 20). According to Espina, the accused had served as a guard at the stone quarry, the Wiener Ditch (R 21, 22, 23) when during 1941 and 1942 the witness and other detail members had been compelled to carry stones weighing 52 kilograms apiece, approximately 114 pounds, up 182 steps of the stone quarry and approximately 700 meters to the camp (R 21-23, 31-37).

A former inmate testified that, while working on special detail Max

at Mauthausen Concentration Camp during the summer of 1943, He saw the accused, a detail leader, put his foot on the neck of a Yugoslav inmate in the detail, who had been forced to eat out of a food bowl with the dog of an SS man. When the inmate tried to get away from the bowl, the accused kicked him (R 60, 61).

During the construction of Ebensee, in December 1943, the accused was detail leader of the detail "Barackon Comando Fundament". Vojacek, a former inmate, testified that upon his refusal to beat the inmates of the detail, the accused beat him on the buttocks three times with a cudgel, a root shaped like a whip, about one meter long and three centimeters thick. The witness also testified that the accused "ran like a madman among the prisoners and beat them". The inmates beaten on this occasion included Czechs, Poles, Yugoslavs and Russians (R 62, 63). Vojacek further testified that later that same afternoon the accused threw stones at the inmates. An old Pole was struck. He stumbled and collapsed. The accused then beat the Pole, who was bleeding from the wounds caused by the stones. When the victim did not arise, his comrades removed him to a place near a forest where he remained until that evening, when he was carried into the camp to the dispensary. The witness never saw the victim again (R 63-66).

Defense witness Melching admitted that he had heard that the accused shot two inmates of the weaving shop at Ebensee when these two inmates attempted to escape in November or December 1943. They were probably Germans (R 189, 192).

Kurth, a witness for the defense, testified that he heard the accused went searching for escaped inmates (R 196). Kufel, a former Czechoslovakian inmate of Mauthausen/and a defense witness at the trial, testified that in the afternoon of 13 December 1943, while the accused and he were chasing two German inmates who escaped from Ebensee, the accused killed the two inmates with a rifle when they tried to escape after recapture (R 225-230). Defense witness Rheinlein heard that the accused had killed an escaped German inmate (R 204, 208).

Evidence for Defense: Melching, a former inmate of Mauthausen and Ebensee, testified that he did not know the accused while he was in the main camp; that he did not know anything about the accused having killed, mistreated, or beaten inmates; and that he neither saw nor heard of such incidents (R 182, 186-188). He stated that he would have heard about it if the accused had killed anyone (R 183). The accused gave the witness and other inmates food and cigarettes (R 183). The accused was not known as a brutal man or beater in the camp (R 183, 184, 187). No Spaniards were reported as killed at Ebensee (R 184). The accused, the witness, and other inmates listened to foreign radio broadcasting stations (R 184).

A former inmate clerk of the canteen at Ebensee testified that the accused as chief thereof was always friendly and helpful to him and, according to reports, to other inmates (R 193, 194, 199, 200). He never heard of the accused mistreating or killing inmates. He would have heard of it had the accused killed an inmate (R 193, 194). Two days before the liberation of Ebensee, the accused took the witness and another inmate out of the camp at great personal risk to himself. He defended them against a great beater and a Gestapo official (R 195). The witness testified that the accused spread news of the plans of the SS to blow up the inmates in the tunnels of Ebensee prior to the arrival of the Americans. This exposure of the plans enabled the inmates to successfully resist their execution (R 197-199).

A former German inmate of Ebensee testified that the accused gave cigarettes to inmates and listened to foreign radio stations with the witness (R 204, 205). The accused removed the witness and another inmate from the camp before the liberation (R 205, 206).

A former SS staff sergeant and detail leader, Emmluth, testified that the accused was good to the inmate who worked for the SS canteen and that he never heard of the accused killing or mistreating inmates (R 211, 217, 218). He testified that there was talk among the inmates that the accused gave cigarettes to them (R 218).

Kurbel, a former Czech inmate and later SS corporal, testified that he served on a soldier training detail with the accused at Maut-



hausen. The accused was liked by the inmates. They said nothing against him. The witness also knew the accused at Ebensee (R 222-223). Binzenbach, former first sergeant of the 30th Company at Ebensee, testified that the accused was a very decent comrade. The witness had never heard of the accused beating or mistreating inmates (R 241), although he would have heard of such incidents had they occurred (R 241, 254).

The accused testified that he did not kill two Spanish inmates as alleged by witness Cueto (R 309, 310). Had he shot the inmates, it would have been difficult to keep the fact a secret (R 310). He denied that he ever shot anyone just to please himself; that he was on the special detail Max in 1943; that he ever kicked any inmates for refusing to eat from the same pail with a dog on that detail or at any other place; that he beat Vojacek on the buttocks with a root; that he threw stones at or beat an old Polish inmate as related by Vojacek; and that he served as a guard at Ebensee or as a special detail leader there (R 310, 311, 313-315). He admitted that he failed to state in his extrajudicial sworn statement (R 316; I-Ex 6) that he served as a guard at Mauthausen (R 313, 314). The accused further testified that he was told to tell the truth in making the statement but he testified that he was told there would be no punishment for the omission of small details (R 317).

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 defense counsel, Major A. R. Myatt, Jr., 18 September 1947. Petitions for Clemency were filed by Major A. R. Myatt, Jr., undated; Mitzel Mueller, 1 July 1947; Rudolf Tenly and wife, 17 August 1947; Jan Nadolny, Hans Leckner and Winiarek Mieszyslaw, 30 September 1947; accused, 3 February 1948, 19 September 1947, and one undated.

Recommendation: That the findings and sentence be approved.

6. Andreas SCHILLING

Nationality:	Rumanian
Age:	37

Civilian Status:	Unknown
Party Status:	Unknown
Military Status:	Waffen SS Corporal
Plea:	NG
Findings:	G
Sentences:	Death by hanging

Evidence for Prosecution: The accused served at Mauthausen from 8 August 1943 to 25 November 1943 and from 26 November 1943 to 5 May 1945 at subcamp Ebensee. At Ebensee he served as a guard and later as a nurse in the hospitals (R 282). His various duties in the hospitals included roll call leader, block leader, and assistant medic, etc. (R 92, 93, 122, 123, 136, 145, 146, 148, 174, 293; F-Ex 5A).

Vojacek, a former barber at Ebensee testified that on several occasions he saw the accused chase ill inmates from the hospital admission room, refusing to admit them (R 69-70). He saw the accused beat eight or ten patients. The accused kicked others who had collapsed (R 90). The accused used a wooden club about 30 inches in length and three or four centimeters in thickness in administering these beatings (R 71, 72). The victims of these beatings included Poles, Hungarians and Russians (R 71).

Vojacek also testified that the accused was present when three inmate transports arrived at Ebensee, one from Gross-Rosen in January 1945 (R 73), one from Wolfberg (Wolfenberg) near the beginning of March 1945 (R 82), and one from Melk near the middle of April 1945 (R 88). The inmates in the Gross-Rosen transport stood on roll call square without food or water in front of the crematory from about 1630 hours until the following morning. Groups of 100 were then permitted to enter the bathroom. While they undressed preparatory to entering the bathroom, the accused and other SS men beat them with clubs. The witness was in the bathroom cutting the hair of the incoming inmates and observed these beatings. After cold and hot showers, the inmates were forced back into the cold of the outdoors (R 73, 74). Approximately 300 severely ill inmates died on the square in front of the crematory (R 74). Many

inmates fell in the bathroom. Those who were seriously ill or starved were carried out on stretchers and placed behind the disinfection building (R 74, 75). They were thus carried out after a capo spoke to the accused, a medic, about there being too many inmates on the floor of the bathroom. The witness heard the accused give the direction (R 75, 76, 79). Of the some 30 inmates placed behind the disinfection building, approximately 20 could still move their hands, legs or eyes (R 76, 77). Those who were still alive either died or froze to death. At roll call, the accused reported the live inmates lying in rear of the disinfection building as dead (R 78, 79, 134). Immediately after roll call, the inmates lying behind the disinfection barracks were carried to the crematory in accordance with directions by the accused, who was the highest in rank in the dispensary (R 79).

Witness Vojaek further testified that the accused was present when the Wolfberg (Wolfenberg) transport arrived at Ebensee near the beginning of March 1945. About 20 to 30 sick, exhausted and starved Hungarian, Polish and Russian inmates were placed behind the disinfection barracks where they remained until they died. Some died within 15 minutes after being placed there (R 95, 130, 135, 155). The accused ordered the removal of the collapsed inmates by simply saying "Take them out" (R 89). No medical attention was given to the inmates placed behind the disinfection barracks (R 84, 85, 89, 127, 155). Over 200 inmates of that transport died in one night (R 127). Bengel and Loercher also saw how the accused prevented the separation of the sick from the dead (R 127, 128, 134, 141, 142, 149, 150).

Approximately 40 ill Polish, Russian, French and Italian inmates of the Melk transport (R 86), which reached Ebensee about the middle of April 1945, were placed behind the disinfection barracks and died there (R 86).

Tesse, a Pole and former inmate doctor in the hospital at Ebensee (R 92-94, 105, 106, 111, 119), testified that he heard the accused was a merciless beater and that he killed by beatings and gas injections (R 94). The accused was "king" in the admission room for ambulatory patients and

admission had to be authorized by him (R 94). Accused was seen to refuse hospitalization to fever-ridden ill inmates and to beat them indiscriminately "in a murderous fashion" with a stick upon all parts of their bodies (R 95, 96). In March 1945, Tesse saw the accused beat a young Hungarian inmate, a new arrival on the Gross-Rosen transport, and kick his ulcerous leg for 15 minutes until the inmate became unconscious and collapsed (R 96, 97, 107, 108). Within three hours gangrene developed and the inmate died (R 97, 108).

Tesse further testified that on another occasion, during an afternoon near the beginning of April 1945, he saw the accused in the ambulatory room of the hospital beat an ill, persistent young Jewish inmate with a stick so severely that blood flowed from the inmate's nostrils and he became unconscious (R 98, 99). The inmate died that night from what the witness' post-mortem revealed to be a cerebral hemorrhage resulting from blows on the head (R 99, 109). The witness saw the accused in April 1945 at Ebensee severely beat a Polish inmate doctor with the leg of a stool. The victim had sold his pillow. The victim became unconscious and two hours later was taken to the crematory as dead. The incident occurred in Ebensee in April 1945 (R 100-102, 109, 110, 112). In March and April 1945, Tesse saw the accused trample ill Polish, Hungarian and Rumanian inmates lying closely packed on the floor of the Ebensee hospital (R 102, 103). Tesse further testified that, for other inmates and himself, "the name SCHILLING is the bloodiest name in all the concentration camp careers there" (R 105, 113, 116, 117).

Loercher, former inmate and room eldest of the Ebensee dispensary and later wapo of the disinfection room and the dispensary (R 122, 120), testified that the accused beat ill inmates in the admission room of the dispensary, especially those inmates the accused thought were feigning illness (R 124). In March or April 1945, the accused beat a young Russian inmate with a stick one meter long and about two inches thick. The beating, as the accused chased the victim out of the dispensary, was so severe that after the victim ran about 100 meters he collapsed. Half

an hour later an examination of the Russian's body showed him to be dead (R 124, 128). On one occasion, the accused beat a Hungarian doctor with his fist because the doctor had accepted an inmate as ill whom the accused ostensibly thought was not ill (R 125, 133). In March or April 1944 the witness heard the accused order Beck, the block eldest, to tie four Russian and Polish inmates, alleged thieves, with straps and chains to a double-decker bunk in such manner that they had to stand on their tiptoes to avoid strangulation. Each time the accused entered the block, he beat the inmates with a stick or his hands or kicked them in their bellies. No food or drink was given to them. After two days and two nights they showed no life and were removed. Loercher heard from an inmate doctor that the accused killed these inmates in the laundry of the block by giving them injections (R 125, 126, 132-134). He did not see the victims again (R 134).

Vengel, a former inmate of Ebensee (R 137, 138, 140, 147), observed the accused frequently, almost daily, beat inmates with his hands, a stick, a hose or a rubber cudgel, in the dispensary admission room. The beatings occurred daily and involved three to ten or more inmates each day (R 137-140, 146-149). The victims were of many nationalities (R 143). The accused and not the doctors controlled admission to the hospital (R 153, 154).

Heile, a scientist and former block eldest of Ebensee, testified that one morning in late 1944 while he was taking a shower, he saw the accused, two male nurses, and a dispensary capo give warm and cold showers for about 20 minutes to a Hungarian Jewish inmate in the shower room. When this failed to revive the inmate, the accused doused the unconscious man in his face and mouth with a very cold stream of water for approximately 10 to 15 minutes. Heile found the man dead upon examination after the accused departed. The witness saw the body there on the shower room floor later that day (R 165, 166).

Davidowitz, a former inmate of Ebensee (R 168), observed the accused in the early fall of 1944 pull his father, a Hungarian, from a file of inmates on Wall Hall square and beat him with his fists until he collapsed.

The witness carried his father to the dispensary and never saw him alive again. The room-elder of the dispensary told the witness that his father died six or eight days later (R 168-172).

In his extrajudicial sworn statement Wetterwald, former French inmate doctor of Ebensee, stated that the accused brutally mistreated inmates between 11 May 1944 and 5 May 1945. He saw the accused immerse the head of a Polish inmate in a pail of water. He also saw him beat inmates, as well as hospital personnel, with his fist or an iron rod. The witness saw the accused prepare a list of ill inmates to be given gasoline injections. The witness also stated therein that the accused participated in giving the gasoline injections in the hearts of the inmates [however, the witness did not state whether he saw him]. In October 1944 the accused ordered the witness to give a badly wounded inmate from the stone quarry a gasoline injection. The witness refused. The witness saw the accused beat inmates on sick call and send Jews back to work ~~when~~ they were too ill to stand on their feet. In May 1944 the witness was kicked by the accused. In March 1945 the accused beat inmates on the incoming Gross-Rosen transport. He sorted the ill inmates from others for purposes of extermination. He enforced extermination methods. The accused exposed ill inmates to the cold and cut the rations of tubercular patients in half (R 174; P-Ex SA).

A defense witness, Melching, admitted that the accused was a "bad SS man" (R 188).

Suidzinski, a former inmate of Ebensee, testified that he collapsed one morning in January 1945, while working in a tunnel at Ebensee. He was carried on a stretcher to the reception room of the hospital where the accused kicked him in the side. The accused slapped and kicked him so severely that within four weeks an infection developed on his arm, necessitating an operation without anesthetic which left a large scar, the latter being exhibited to the Court (R 330-333, 335). After the kicking the witness became unconscious. When he regained consciousness he saw that he was in the crematory and lying completely naked in a pile of corpses (R 332, 334, 335). He escaped from there to the dispensary and thence

to his barracks (R 232, 234).

Evidence for Defense: Binzenbach, a former first sergeant of the 30th Company in Ebensee, testified that the accused was a quiet, modest and decent comrade (R 237, 238, 248, 247). The accused could not have been responsible for the entire cleanliness and administration of the hospital. As the result of an accident, the accused was hospitalized during November and December 1944, although [it appears] the accused was not completely off duty during part of this time (R 239, 240, 249, 250).

Geiger, former SS doctor at Ebensee during April and May 1944, testified that the accused served under him; that the accused was a courier more or less of inferior rank; and that the accused was not charged with responsibility for cleanliness and administration in the hospital, which in reality rested upon the camp doctor (R 260, 269, 275). During the witness' tour no mistreatments of inmates and no tying of inmates to the beds in the hospital occurred (R 263, 264). Witness Loercher was treated properly in the hospital (R 264). Only the doctors could accept inmates. The medics had nothing to say about admittance (R 265, 273). No medic could order inmates to leave the hospital (R 265, 266). The accused had no right to counteract the admittance orders of inmate doctor Curvosier (R 266). The accused had nothing to do with any injections during the summer of 1944 (R 266, 267). The witness further testified that the camp barber could not see from his work shop in the delousing chamber what was going on in the open square behind the disinfection barracks (R 268, 269). The accused was not in the inmate hospital while the witness served there (R 272).

The accused testified that he often acted as a courier. When inmates were to be deloused the accused accompanied them to their barracks (R 283). He denied that he had any authority to decide whether an inmate could be admitted into the hospital. That authority was vested in the inmate doctors (R 283, 285, 294). He also denied that he was responsible for the administration and cleanliness of the hospital (R 283, 294). He asserted that he had to take orders from the other medic (R 284). The accused further testified that he was in an accident on 26 August 1944, as a

result of which he was hospitalized from approximately 26 October 1944 to 23 December 1944 (R 285). He did not pour water on a Hungarian Jew in November 1944. He admitted slapping inmates with his hands. However, he denied using any instrument in administering punishment for black marketing, stealing or other violations of regulations (R 286, 287, 300, 301). He denied that he kicked a young Hungarian Jew; that he beat the inmate doctor, Goldstern, to death (R 287); that he or anyone in his presence gave gasoline injections to inmates at Ebensee (R 287); that he trampled on inmates lying on the floor in April 1945 (R 288); that he tied four Russian or Polish inmates to a bed and mistreated them in April or May 1944 (R 288); and that he knew witness Davidowitz or his father whom he was supposed to have killed (R 288).

The accused denied having anything to do with the unloading of corpses on incoming transports; and that he had any power to give orders with reference thereto. Sergeant Kreindl was in charge of such unloading and the accused could not issue orders contrary to his (R 289, 290, 298-300, 302). On the other hand his duty was to disinfect the cars used in transporting the inmates (R 303, 304). The accused asserted he was present at the arrival of the Wolfsberg (Wolfsenberg) transport where he found two or three inmates alive among the 80 or 90 corpses and that he instructed the camp clerk to ask the sergeant to see that these inmates were removed to the washroom, undressed and washed, the living to be separated from the dead (R 290, 291, 297-300). He did not give any other orders with reference to these inmates arriving on the transport and he does not know what happened to any of them after that (R 290, 291, 297). A medic was present when this transport arrived and when it was unloaded (R 292).

The accused further testified that automobiles sometimes came from the Ebensee stone quarry with dead inmates. However, they never numbered 20, but only two or three at a time (R 291, 294). The accused made written reports as to these inmates to the blocks (R 292, 295). He denied being the only SS man present when these vehicles came in from the Ebensee



quarry (R 296). Live inmates on these stone quarry arrivals were treated for their injuries and all ostensibly dead were examined in order to make certain (R 296, 297). The accused denied directing that living inmates be placed among the corpses behind the washroom. He never heard of such action being taken (R 297). The accused further testified that he had neither seen nor heard of any inmate being beaten in the hospital reception room (R 301).

Sufficiency of Evidence: Rumania was a co-belligerent of Germany. The Court was warranted from the evidence as to the nature and extent of his participation, especially that concerning illegal killings by him, in its findings of guilty. The sentence is not excessive.

Petitions: A Petition for Review was filed by defense counsel, Major A. R. Myatt, Jr., 18 September 1947. Petitions for Clemency were filed by Major A. R. Myatt, Jr., undated; accused, 14 August 1947 and 18 September 1947; Maria Korn, Kosmider Zygmunt, Imenienionek Ryscard, Berek Kazimierz, Wacław Predawczuk, 28 September 1947; Franz Loidl, 5 October 1947; Maria Kern, 29 September 1947, 7 October 1947, 10 October 1947 and 13 November 1947; Imenienionek Ryscard, 7 October 1947; Berek Kazimierz, 7 October 1947; Kosmider Zygmunt, 7 October 1947; Wacław Predawczuk, 7 October 1947; Wolfgang Genesko, 2 November 1947; Angelo Quaglia, 3 November 1947; and Hubert Henkel, 3 November 1947.

Recommendation: That the findings and sentence be approved.

#### V. QUESTIONS OF LAW:

Jurisdiction: The defense attacked the jurisdiction of the Court as to illegal acts of the accused directed at Spanish (R 17), Rumanian (R 43), Hungarian and German nationals (R 57, 331) on the ground that offenses against nationals of a neutral country or those of Germany or a co-belligerent of Germany could not constitute violations of the law of war.

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 whosoever and wheresoever committed" (Wheaton'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 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. 2, pages 177-218; "Law Reports of Trials of War Criminals", by 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).

The other aspect of the question presented in this concentration camp

mass atrocity case relates to what legal significance should be attached, in the trial of an accused alleged to have aided, abetted and participated in the execution of the common design, to the fact that the evidence concerning the extent and nature of an accused's participation therein, aside from the evidence as to his general participation by virtue of position held, shows that one or more of the victims of the acts of violence by the accused was a German national or nationals of co-belligerents of Germany. More specifically, is it appropriate for a war crimes tribunal to consider such individual acts of violence in determining the extent and character of the participation of the accused in the common design?

It is emphasized that the charge alleges participation in the execution of a described common design and not a disassociated act of violence against a German national or nationals of co-belligerents of Germany.

Jurisdiction of the subject matter attaches in this case for the reason that one of the dominant objectives of the operation was to subject nationals of United Nations and stateless persons to killings, beatings, tortures, etc.. Evidence showing that participants in the execution of the common design tortured, beat, or killed one or more German inmates or a national of a co-belligerent of Germany who was an inmate, demonstrates the character of their participation and establishes that they, through example by such acts, encouraged others to commit similar acts of cruelty against inmates without regard to nationality. They thus maintained and furthered the overall objectives of the operation.

Accordingly, it is appropriate to consider such evidence in determining the degree of the participation of the accused in the execution of the common design.

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

Adequacy of Time to Prepare Defense: The charge was served on the accused on 14 August 1947 and the trial opened on 10 September 1947. At the outset of the trial the defense stated that, depending upon developments during the prosecution's presentation of its case, the defense might

need and seek a short continuance at the close of the case for the prosecution (R 10). The defense sought and obtained a recess of a few hours at the close of the prosecution's case (R 177-179). However, the defense raises the question of time to prepare its case in its Petition for Review. The record indicates that the Court allowed adequate opportunity to defense counsel to prepare its case and that the trial never proceeded without the acquiescence of defense counsel. The Court sought to protect the interests of the accused in this connection (R 10, 178, 179, 201).

Motion for a Finding of Not Guilty: After the prosecution rested, the defense moved for a dismissal of so much of the Charge as involved "murder" (R 177). The accused were not charged with illegal killings as such, but with participation in the execution of a common design which involved the subjection of described victims to described illegal acts. It is not error for a war crimes tribunal to overrule a motion for findings of not guilty made at the close of the case for the prosecution, if it believes that there is sufficient evidence to support the charge and that the accused should be required to answer it (Section 5-327.2, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Office of Military Government for Germany (US), 27 March 1947). The motion was properly overruled (R 177). A similar practice is followed in courts-martial (Paragraph 71, d, "Manual for Courts-Martial, U.S. Army", 1928).

Admissibility of Exhibits: The defense objected to the introduction of prosecution's P-Exs 5 and 5A on the ground that the accused was not afforded an opportunity to cross-examine the person making the statement (R 174). These exhibits were admitted into evidence by the Court (R 174). Subsequently, the defense moved to strike these documents from the record on the ground that the defense had not been furnished with a copy in advance as contemplated by an administrative operational memorandum and on the further ground that the contents of the documents were in conflict with testimony given by prosecution witnesses (R 176). The grounds stated did not warrant striking the exhibits. The motion was properly denied by

the Court which admitted these exhibits for whatever probative value the Court might deem them to have (R 177).

Application of Ragant 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-AGO, subject: "Trial of War Crimes Cases", 14 October 1946, and the Parent Case). 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 proceedings, 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 sentences imposed.

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

RICHARD C. HAGAN  
Major JAGD  
Attorney  
Post Trial Branch

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

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