

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

JJR/rmk

23 January 1948

UNITED STATES )

v. )

Willi AUERSWALD, et al. )

Case No. 000-50-5-8

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 2-17 July 1947, before a General Military Government Court.

II. CHARGE AND PARTICULARS:

CHARGE: Violation of the Laws and Usages of War.

Particulars: In that Willi AUERSWALD, Hans FREYHOLDT, Moses FERNANDEZ, Hermann FUSTEN, Otto HUESS, Karl KOLBE, Werner KUEHN, Alwin SCHILLER, 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, Graz-Raining, Günskirchen, Gusen, Hinterbrühl, Lambach, Linz, Loiblpass, Molk, 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, Yugoslaves, 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 convicted accused were assigned for duty at Mauthausen Concentration Camp subcamps Steyr, St. Aegy, and St. Lambrecht, in Austria, between 1 January 1942 and 5 May 1945. These sub-camps are hereinafter referred to as Steyr, St. Aegy and St. Lambrecht. Prosecution's Exhibit P-7x 2 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 (R 31). The accused, acting in their various capacities of authority in these camps participated in, and subjected the inmates to various forms of mistreatments, abuses and indignities.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Willi AUERSWALD

Nationality:	German
Age:	52
Civilian Status:	Textile Worker
Party Status:	Unknown
Military Status:	Waffen SS Master Sergeant
Plea:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused was a master sergeant of the SS acting as roll call leader (R 33), labor commitment leader (R 170), and chief of the post office (R 33), in Steyr (R 75) from the spring of 1942 until November 1944 (R 197; P-Ex 7a; R 201; P-Ex 10). He was then transferred to subcamp St. Aegy (R 441).

He frequently assaulted and beat inmates and was very much feared by them (R 34, 199; P-Ex 9A). In beating the inmates, the accused sometimes used his fist, a stick (R 34), a club (R 163), a riding crop (R 75), or whatever he may have had in his hand at the time (R 34). He also kicked them (R 75).

One witness testified that the accused slapped and kicked him (R 75). Another testified that the accused gave a Spanish inmate 25 strokes across the buttocks (R 160). A third witness testified that the accused administered 25 blows to two or three inmates with an oxtail whip (R 170); and a fourth, that the accused punished inmates who were reported by civilian superintendents at the factory (R 153).

In an extrajudicial sworn statement the accused stated that he frequently carried out beating punishment imposed by the camp commander; and that sometimes he beat with his hands inmates about whom he had to complain (R 202; P-Ex 10).

In an extrajudicial sworn statement accused HEISS, camp commander at Steyr, stated that the accused and the rapport leader Otto frequently and arbitrarily inflicted flogging punishment of 25 strokes (R 554; P-Ex 21a).

Witness Boehm, an inmate who worked on practically all the work details during his confinement over the period covered by the charges, testified that on one occasion in February or March 1945 the accused severely beat a Russian inmate who had broken out of a transport. The Russian knelt and plead not to be killed, but the accused, with the assistance of another SS man, killed him by throwing him into the electrically charged wire enclosing the camp (R 33, 35, 38, 40-42, 45).

In an extrajudicial sworn statement, Wilhelm Kuhnke stated that in the summer of 1943 the accused declared to the camp eldest that he did not want to see a certain young Pole and a Polish priest any more. The young Pole was hanged in block 3 and the priest was brought back to camp and shot to death (presumably by the accused). In August 1943 an old Pole who had been shot at by a medic was shot to death by the accused. One Sunday in 1944 an inmate of block 1 died as a result of mistreatment by the accused and Jarson. In 1944 the accused declared to three Russians that he wanted to see them hanging in an hour. The Russians hanged themselves (R 197; P-Ex 7a).

Tadeux Salamonowski, in an extrajudicial sworn statement stated that the accused allegedly had ordered an Italian to be hanged (R 199; P-Ex 9A). In an extrajudicial sworn statement the accused stated that in the summer of 1942, pursuant to orders by Camp Commander Lieutenant Colonel Goecke, he gave an inmate a rope with which he hanged himself (R 201; P-Ex 10).

Gustav Claussen, in an extrajudicial sworn statement, stated that he was a clerk with the "Labor Allocation" detail at Mauthausen Concentration Camp from about September 1944 to November 1944. At this time

St. Aegydi was built and the accused was assigned as camp commander. About 300 physically fit inmates were transferred from Mauthausen to St. Aegydi. After a few weeks it was reported that about one half of the inmates at St. Aegydi had died or were so seriously ill that they could not be allocated for work. An investigation was made and the accused as camp leader was held responsible for the deaths of these inmates (R 202; P-Ex 11a).

Evidence for Defense: A prosecution witness testified that he did not know of any particular acts of cruelty or mistreatments of inmates at Camp Steyr by the accused (R 188). A former block eldest testified that the accused was protective custody camp leader until the fall of 1944 (R 396, 397, 499); that he had never heard of the accused killing anyone; but that he had heard that the accused beat inmates as a result of reports that came in from details. Inmates received 15 to 20 blows over the buttocks (R 396-397).

In lieu of testifying, the accused had his defense counsel read his unsworn statement to the Court, in which he stated that during his tour of duty he tried to get transferred from the SS and Mauthausen. He admitted that he sometimes beat inmates on his own responsibility, but that such beatings saved the inmates from being sent to Mauthausen where their lives would probably have been taken (R 437). With reference to a hanging that occurred in the summer of 1943, before accused HEISS' tour at Steyr, a Yugoslav or an Italian was hanged. He and a priest had escaped. The priest had been killed by a guard at tower B. The Yugoslav was brought to Lieutenant Colonel Goecke, camp commander at the time. After questioning it was found that the Yugoslav had committed burglary. Goecke asked the accused whether he had a rope. The accused gave a piece of twine to the inmate and Goecke told the inmate that he did not want to see him anymore. That night the Yugoslav hanged himself, but not with the twine given him by accused (R 438).

The accused further stated that the hanging of the Russians in the

time at Steyr (R 438), he having left there for St. Legzd in October 1944 (R 441). He admitted to confessing in front of several American interrogators that he had killed an old Pole (R 438). The accused explained that he was supposed to have given the Pole a fourth and final mercy shot. He did not believe that he gave the final shot, but, if he did so, it would have been merciful as the man's brain was protruding and he would not have lived but a few minutes longer (R 439).

The accused denied any knowledge of the death of the inmate in block 1, concerning which there was testimony that such death resulted from mistreatment by Janson and the accused (R 439).

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. It appears that he acted willingly and not under immediate compulsion. The Court was warranted from the evidence as to the nature and extent of his participation in its findings of guilty. The sentence is not excessive.

Petitions: A Petition for Review, undated, was filed by Major A. R. Myatt, Jr., defense counsel. Petitions for Clemency were filed by Major A. R. Myatt, Jr., defense counsel, undated, and another 23 December 1947; Landrat of Stollberg, 17 January 1948; the accused, 14 September 1947; Helmut Siemokat, 5 October 1947; accused HEISS, 3 November 1947; Christian Democratic Party of Germany, Local Union Mittledorf, 29 November 1947; Evangelic Lutheran Superintendency of Stollberg, 5 December 1947; Paul Seidel, 8 December 1947; and Dr. Hans Fritz von Zwehl, 22 December 1947.

Recommendation: That the findings and sentence be approved.

2. Hans FREYHOLDT

Nationality:	German
Age:	47
Civilian Status:	Writer
Party Status:	Unknown
Military Status:	Waffen SS
Plea:	NG

Sentence:

15 years, commencing 8 May 1945

Evidence for Prosecution: The accused acted as a detail leader (R 70, 91, 103; P-Ex 4), guard (R 468), and a train commander (R 91, P-Ex 4) at Steyr from 14 July 1944 until 2 May 1945 (R 468).

The accused beat inmates (R 71, 564) at the mess line in the factory (R 79, 199; P-Ex 8A) and at work details (R 104). He was known among Polish inmates as the "big dog" (R 86). He beat and mistreated inmates of all nationalities (R 91; P-Ex 4) (R 196, 199, 205; P-Exs 6A, 8A, 14). He made reports on weak inmates and those who in his opinion were not working hard enough in order that they would be sent to punishment companies (R 91; P-Ex 4). A witness heard from other inmates that the accused shot a Czech inmate in the workshop and the day before the accused beat him (R 104). The same witness testified that on another occasion the accused shot two Czech nationals (R 106). During a six month period the accused, on the average of two or three times a week, beat inmates at the train because they moved too slowly (R 105). The accused mistreated and beat other inmates with a club (R 174; P-Ex 5).

In three extrajudicial sworn statements, former inmates of Steyr stated that the accused beat inmates with a wire cable (R 205; P-Ex 13), a whip, a club, or with whatever weapon he happened to have in his hands at the time. He also kicked them (R 206, 562; P-Exs 15, 23). This punishment was given to inmates of all nationalities (R 205; P-Ex 13). The accused also beat two of the witnesses (R 206, 562; P-Exs 15, 23).

Evidence for Defense: One prosecution witness did not know of any particular acts of cruelty or mistreatment of inmates in Steyr by the accused (R 188). A former SS guard at Steyr never saw the accused beat inmates (R 317). The accused protected weak inmates against stronger inmates and protected inmates against civilians at the factory (R 362). Another member of the SS, a former detail leader at Steyr from 6 September 1944 to 6 May 1945, never heard of or saw the accused beat or strike anyone, nor did he know of his killing anyone (R 386).

The accused testified that he was assigned to the SS by the army on 14 July 1944 and that he did not enter the SS voluntarily (R 467). He was stationed at Steyr from 14 July 1944 to 2 May 1945 as detail leader and guard. While at Steyr he never struck or beat any inmates, nor did he ever kill or order anyone killed. He never reported inmates because of deficient work. At no time did he ever touch or rush any inmates while they were going to the mess at the factory. If inmates became sick while at work and needed immediate attention, the factory doctor was notified. However, if the sickness did not require immediate attention, the camp was notified (R 468, 469). His nickname among the inmates at Steyr was "Prima Berlin Man". He was never assigned to the bearing factory detail (R 470). He never beat Josef Hirsch or Kramski (R 471). He did not shoot a Czech. At the time of the supposed incident he was with the German army in Kuestrin (R 471, 474). He did not know an inmate named Oberlander, nor did he accompany a transport to Gusen in the month of April 1945. The transport was escorted by a Captain Gaertner, together with members of his company (R 471).

Accused WRESS, camp commander, testified that he never heard of the accused beating or killing anyone (R 495). The ballbearing factory was not in operation when the accused was in the camp. It had been destroyed on 2 April 1944. The accused worked as detail leader and for a time in the orderly room. He did not remember the accused accompanying a transport from Steyr to Gusen in April 1945 (R 496).

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

Petitions: A Petition for Review, undated, was filed by Major A. R. Myatt, Jr., defense counsel. Petitions for Clemency were filed by accused WRESS, 3 November 1947; and Major A. R. Myatt, Jr., defense counsel, 23 December 1947.

Recommendation: That the findings and sentence be approved.

3. Moses FERNANDEZ

This accused was neither served nor tried (R 28, 118).

4. Hermann FUSTEN

Nationality:	German
Age:	54
Civilian Status:	Painter
Party Status:	Unknown
Military Status:	Waffen SS
Place:	NG
Findings:	G
Sentence:	Death by hanging

Evidence for Prosecution: The accused was a detail leader (R 127, 129) and later in the charge of clothing supplies and the SS arsenal at Steyr (R 137). He arrived at Steyr on 16 or 17 February 1943 and remained until 5 May 1945 (R 481, 483).

Witness Kazmierczek testified that in June or July 1943 the accused ordered a guard to kill a Polish inmate who had crossed the chain of guards to retrieve his cap, which had been thrown across by a capo with accused's connivance. The witness saw the shooting and the dead body (R 128-131). On another occasion, apparently in June or July 1943, the accused ordered an inmate to the chain of guards. The accused pushed the inmate forward. The inmate went beyond the chain of guards. A guard fired and killed the inmate. Accused shook hands with the guard and patted him on the back (R 133, 140, 141). This witness further testified that, in May 1943 after he had been dragged out of a collapsed excavation in which he had splintered a bone in his feet, the accused kicked his foot (R 135, 136). Witness Kazmierczek's testimony is corroborated by his extrajudicial sworn statement (R 132; D-Ex 11).

Defense witness Kancials testified that the accused was called "the Prussian" by the inmates. The accused mistreated inmates in the factory by goading them with a stick. The witness heard other inmates say the accused had killed inmates (R 224). In his extrajudicial sworn statement, the witness stated that the accused beat Russian and Polish inmates almost every day, and that he, the witness, was beaten by the accused about five times with



A former barracks leader and block eldest at Steyr heard that a Max Thomaser, one of the men from accused's detail, was shot and killed in the cellar of the ball bearing factory (R 399, 400).

Evidence for Defense: One prosecution witness testified that he never saw the accused abuse any of the inmates of Steyr (R 172). Another prosecution witness testified that he did not know of any particular acts of cruelty or mistreatment of inmates in Steyr that were committed by the accused (R 188). A former SS guard at Steyr testified that the accused was in charge of the clothing store and weapons room; and that he never saw the accused beat anyone, nor did he ever hear that the accused killed anyone (R 363, 389).

The accused testified to the effect that he arrived at Steyr on 16 or 17 February 1943 (R 481). In June or July 1943, while on guard duty, he heard someone call and then suddenly a shot was fired. He looked down in the stone quarry and saw an inmate lying on the ground. Upon investigation he learned the inmate had been shot in the back of the head. He then telephoned the camp, after which he marched off with his detail. This was the only time anyone of the inmates from any of his details was ever shot (R 482). He heard the dead man was a German national (R 487). During the period from 18 February 1944 to 5 May 1945, he was in charge of the tools, clothing, arms and equipment. He never reported Kahke (R 483). He made a mild report about inmates stealing pears from trees belonging to civilians in the neighborhood of Steyr. When inmates took a sack of potatoes from a woman, he had most of the potatoes returned but did not make a report about the incident (R 484). He denied beating witness Kanciela, but stated that, if he was the one who had stolen apples, he slapped his face (R 491). Accused HEISE testified that the accused at first was detail leader in the camp. Later the accused was put in charge of equipment and clothing, during the period 18 February 1944 to 5 May 1945 (R 497). The inmate who was killed in the cellar or canal in April 1944 was a German habitual criminal, who was in protective custody. The accused was not on duty at that place at the time (R 498).

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, undated. Petitions for Clemency were filed by Major A. R. Myatt, Jr., defense counsel, <sup>one</sup>undated, and another 23 December 1947; Parson Jourgens of Lintfist, 31 July 1947; accused, 10 August 1947; former Mayor of Lesaar, 20 August 1947; Rheinbreussen G.m.b.h., 20 August 1947; wife of the accused, Mrs. Kunigunde Eusten, 21 August 1947; accused HEISS, 3 November 1947; and Willi Haus, 19 November 1947.

Recommendation: That the findings and sentence be approved.

5. Otto HEISS

Nationality:	German
Age:	49
Civilian Status:	Office Clerk
Party Status:	Nazi Party 1933
Military Status:	Waffen SS First Lieutenant
Plea:	NG
Findings:	G
Sentence:	Imprisonment for life

Evidence for Prosecution: The accused testified that he was a first lieutenant of the SS; that he was assigned to Mauthausen Concentration Camp in February 1940, where for a while during 1943 he was supervisor of the guards on the Wiener Graven (Vienna Ditch) detail (R 502). He was camp commander at Steyr (R 34, 171) from 27 August 1943 to 6 May 1945 (R 502).

One witness testified that in April 1945 three inmates, two Russians and a Pole who had escaped, were brought before the accused at the camp gate by two technical sergeants. The witness heard the accused say that these inmates would be put against the wire. He asserts that he saw two of them electrocuted at the wire the next day (R 58-60). He later saw the corpses (R 68). Another witness testified that he heard that an inmate by the name of Weinberg was hanged by order of the accused (R 73).

A third witness testified that a German tailor inmate (R 123) was stripped and tortured for two days in camp and then taken to the gate and in the accused's presence told he was free and could go (R 99). The inmate ran through the chain of guards. One guard shot at him. The accused went after the inmate on a motorcycle. Later the inmate was shot and killed (R 100).

A fourth witness testified that three inmates who had escaped were returned to Steyr and that he heard the accused say at the roll call square, "These three who were brought back today had to hang themselves. If you try to escape, the same will happen to you." The next day he saw the bodies of the three inmates hanging in the bathroom. The bodies showed evidence of having been severely beaten (R 102, 103, corroborated R 176, 177).

A fifth witness testified that inmates who had been reported to the detail leaders by a civilian factory superintendent were punished on the spot in the factory and if the report was passed on <sup>to</sup> the camp he was given further punishment there (R 153). A sixth witness testified that when an escaped Russian inmate was captured and returned to camp, the accused hit him in the face several times with his fist (R 188).

Accused AUERSWALD stated in an extrajudicial sworn statement that the accused very frequently ordered beating punishments which he, the camp eldest and rapport leaders, had to carry out; that the conditions at Steyr were particularly bad during the time the accused was camp commander; that the provisioning of the inmates was insufficient, one reason being that the accused had embezzled part of the inmates' food and used it for himself and his family; and that on a monthly average, 100 inmates died from a total of 2000 at Steyr. Furthermore, nearly every month, a transport of 50 to 100 severely ill inmates whose condition was hopeless, were moved to Mauthausen Concentration Camp. In the summer of 1943, because of undernourishment, exhaustion, and poor sanitary facilities, a typhoid epidemic broke out, resulting in many deaths. About 15 to 20 inmates were shot while trying to escape. Capos repeatedly beat inmates with their hands and sticks. Inmates collapsed while working, because of overstrain (R 202; P-Ex 10).

In an unsworn pretrial statement, a former inmate at Steyr stated that the accused ordered a captured inmate to be shot. However, the prospective victim was first exhibited to the other inmates by standing him on a chair with his hands bound and blood running over his face. The accused shouted: "This man tried to escape and he goes forward to his punishment". The victim was then paraded to music in front of the accused and the inmates. All inmates were compelled to spit at the victim. Later shots were heard and the witness saw the victim's corpse. The accused condoned the killing of numerous inmates (R 207; P-Ex 16 pp. 3, 4).

Two defense witnesses testified that they heard that inmates who tried to escape were killed (R 287, 349).

In an extrajudicial sworn statement, the accused stated that he became camp commander of Steyr on 27 August 1943; that all SS personnel of the camp were subordinate to him; that he was responsible for the health and the working arrangements of the inmates; that he directed punishments and in four or five cases; <sup>and</sup> that he administered several strokes at the request of inmates who preferred punishment of this kind to being sent to Mauthausen. He further stated that he beat three inmates with an empty rubber tube who were responsible for the escape of 11 inmates from Steyr (R 554; P-Ex 21a).

Lieutenant Werner Conn, U. S. Army Investigator, testified from certain death records, which were admitted in evidence as Prosecution's exhibit P-Ex 25, but withdrawn from the record (R 570, 572), that 40 Jews were killed in the Vienna Ditch between November 1942 and May 1943 (R 572); and that 106 Jews had been killed there from October 1942 to May 1943. During the time the accused was commander of Steyr, 3 September 1943 to 17 March 1945, camp records indicated 22 cases of unnatural deaths occurred (R 573).

Evidence for Defense: A prosecution witness testified that the accused was often away from camp to procure food (R 441); that when the accused took over Steyr, a marked improvement took place (R 40, corroborated R 167, 398); that the accused officially prohibited beatings (R 44, corroborated R 76, 322; D-Ex 1a; R 358, 389) and that he tried as far as

possible to get additional food from the "Steyr works" (R 144, 145). Another witness testified that the accused received the first group of Jews in Steyr in 1944 with the statement that there was to be no racial, religious, or nationality discrimination in the camp (R 76); and that the accused made periodic inspections of work food distribution (R 77). The witness further testified that he had been in more than six concentration camps and that the food was better in Steyr than at the others (R 88). Inmates received bonuses for the work they did with which they could buy lemonade or beer at the camp store (R 93). A third witness testified that beatings of inmates were without the knowledge of the camp commander (R 173). A former inmate stated in an extrajudicial unsworn statement that the camp leader had a good heart and did his best to give them something to eat (R 207; P-Ex 16 p. 3).

In an extrajudicial sworn statement, the accused stated that punishments were given at the request of the inmates instead of their being sent to Mauthausen; and that when accused AUERSWALD inflicted flogging punishments of 25 strokes, it was an arbitrary act (R 554; P-Ex 21A p. 1).

A fourth witness, a civilian operator of a soda water plant, testified that while the accused was camp commander he served lemonade to the inmates (R 250). The physical condition of the inmates was good (R 251). A fifth witness testified that the inmates were transported to work at the factory (R 253). The accused ordered bonuses for the inmates (R 254, 264, corroborated R 398). The accused had good toilets and also a shoe repair shop set up in the camp (R 256, corroborated R 340). After the tunnels were finished the accused arranged for all the inmates to be admitted to the tunnels during air raid attacks (R 256, corroborated R 279). Inmates worked 48 hours weekly while civilians at the factory worked 60 hours weekly (R 260, 261). The witness further testified that he only heard of one inmate escaping from Steyr (R 263); that he never saw a guard beating or mistreating an inmate; that he saw a camp heat inmates (R 260); that inmates at Steyr were fed better than those in the work camp at Mauthausen; and that the prisoner of war camp was never under the command of the accused (R 270). A sixth

witness testified that the accused asked for an easy work schedule for the inmates doing heavy work (R 289). The accused never beat any of his men (R 291, corroborated 352). A seventh witness testified that the accused procured extra food for the camp (R 302, corroborated 331; D-Ex 3; R 345). An eighth witness testified that the accused made arrangements for laundering inmate clothing (R 342). A ninth witness testified that the accused had a good reputation for truth and veracity in the community in which he lived (R 327).

A tenth witness testified he saw Klein shoot inmate Boellmann at a time when the accused was present in camp (R 402, 406). He heard that inmates Grill, Endres, Wallner, a dispensary capo, and his clerk hanged themselves (R 403). The most punishment inmates received in camp was 15, 20, or 25 lashes (R 410). An eleventh witness testified that during his time at Steyr, 5 February 1943 to October 1943, the fence was not electrified (R 419).

Witness Zbigniew, in an extrajudicial sworn statement, stated that toward the end of April 1945 he saw a Russian electrocuted on the wire for trying to escape. Otto threw the man into the wire. The accused was nowhere around at the time (R 428; D-Ex 8 p. 1, 2).

An extract from the record in the Parent Case indicates that in January 1945 the hangings of three inmates, Grill, an Austrian, Albo, a Czech, and Franz, were not ordered by the accused, but that they hanged themselves (R 434; D-Ex 13 p. 1). A witness in that case testified that the death of inmate Weinberger was the work of Otto and not the camp commander. Another witness testified that a block eldest told him that inmate Weinberger was hanged at the direction of the roll call leader. A third witness in that case testified that he saw Otto throw a Russian inmate against the electrically charged wire. Another time Otto threw a Russian inmate against the electrified wire and the inmate died. The camp commander in a speech told the SS and inmates that it was forbidden to beat inmates. A fourth witness in that case testified that during an evening in October

1944, Otto took three Russians to the washroom and hanged them. He did not see the camp commander on that evening (R 434; D-Ex 13).

The accused testified that he belonged to the Nazi Party following 1 May 1933. In July 1933 he joined the general SS, after which he belonged to the German Labor Force and the NSV, having joined these organizations because they advertised that they were for social righteousness. In February 1940 he received notice that he had been transferred into the Waffen SS, the transfer having taken place without his knowledge (R 500). He then reported to Mauthausen Concentration Camp contrary to his desire. Attempts to transfer out of the SS were without success (R 501). At first he was a guard leader of details at Mauthausen Concentration Camp. He also worked as outside guard detail leader, and in the orderly room. Later he was promoted to SS second lieutenant. As such, he was commander of the guards, controller of the outside details and partly responsible for supervising the guards at the stone quarry, Vienna Ditch (R 502, 554; P-Ex 21A). He received orders to go to camp Steyr on 27 August 1943, where he was camp commander until the end of the war. He left Steyr 6 May 1945 (R 502).

As camp commander he had the entire supervision of the Protective Custody Camp and of the guard units which were stationed there. He was responsible for the security of the entire camp, the work details, and the administration of the camp (R 503). He instructed troops, guards, and detail leaders that beatings were strictly prohibited. Jewish inmates were to receive the same treatment as the other inmates. In case of an attempt to escape, the guards were to call three times to the inmate to "Halt", and, if he did not heed, the guard was to use his weapon in order to prevent the escape (R 504). Capos and inmates who looted food were transferred to Mauthausen Concentration Camp. Reports received from civilians were investigated by him (R 505, 506). His camp had no punishment company (R 507). There was self administration inside the camp (R 508). He received extra rations, and bought groceries, food, meat, etc., for the camp and the dispensary (R 518-520), and clothing and shoes for the inmates.

He had the inmates' laundry done each week. He had new barracks, a sanitary water system, and a sewage system built in camp. Carpentry, electrical plumbing and clothing shops were established in camp (R 521, 522). His endeavors to improve the conditions included procurement of motor cars, and the building of 11 barracks, a big kitchen, 1200 beds, meters of concrete piping, hundreds of meters of steel piping, installations for shower bath, lighting system, field railroads and various other improvements (R 527, 528).

The accused further testified that, around 11 or 12 March 1945, a group of 11 inmates escaped. Five days later he received a report that three German inmates, Grill, Endres and Albo were captured. He spoke to them and they said they would like to hang themselves (R 510). He did nothing, and he let them do this of their own free will for reasons of humanity (R 537). The three Germans committed suicide the night of 16 or 17 March 1945 (R 512). After about 10 days he received a report that an additional six of the group had been apprehended. He received word not to send them to Mauthausen but to liquidate them in Steyr. After investigation he issued a directive that nothing was to happen to these inmates, but that they were to be transferred to Guern. From information received, those inmates survived the end of the war (R 513).

At one time three Jewish inmates reported Weinberger to him for stealing. He talked with Weinberger and told him to return to his comrades. The next morning the accused received a report that Weinberger was lynched by his comrades (R 515).

He made every effort to have roll call leader Otto relieved from camp, but without success (R 525-527). There was an order that, in case the enemy should approach, all inmates were to be liquidated. He told the plant manager of the "Steyr works" he would never carry out the order (R 528, 545). He estimates there were between 12 to 15 unnatural deaths in the camp (R 510). While on duty at the Vienna Ditch, he never heard of 106 Dutch Jews being killed (R 541).

Sufficiency of Evidence: The Court was warranted from the evidence as to the nature and extent of his participation, particularly that as to his



position and killings at his direction, in its findings of guilty. The sentence is not excessive.

Petitions: A Petition for Review, undated, was filed by Major A. R. Myatt, Jr., defense counsel. Petitions for Clemency were filed by Major A. R. Myatt, Jr., Defense Counsel, one undated, and another 23 December 1947; Willi Haus, 1 August 1947; Evangelic Lutheran Parochial Offices of Itersbach, 5 August 1947; wife of accused, Mrs. Gertrude Heess, 10 August 1947; and accused, 3 November 1947.

Recommendation: That the findings and sentence be approved.

6. Karl KOLBE

Nationality:	German
Age:	25
Civilian Status:	Miller
Party Status:	Unknown
Military Status:	Waffen SS Corporal
Plea:	NG
Findings:	G
Sentence:	5 years, commencing 6 May 1945

Evidence for Prosecution: The accused testified that he was assigned to Steyr at the end of September 1944 where he remained as a guard until the first of April 1945, when he was transferred to a fighting unit (R 216, 221).

In an extrajudicial sworn statement, a former inmate of Steyr stated that the accused was feared very much by the inmates. He saw the accused beat, kick and sometimes use a stick on Russians, Poles, and Czechs because they did not produce enough at the factory or slowed down on the job. He further stated that the accused kicked inmates and sometimes pushed them with his rifle butt for not moving fast enough (R 561; P-5x 22). This former inmate, as a defense witness, testified that the accused beat internees every two or three days when he was a guard with his detail (R 565).

Evidence for Defense: The accused testified that he was transferred from the air force to the Waffen SS because he was too short for combat duty;

that he was assigned to a guard unit in a concentration camp; and that he was sent to Steyr for duty as a guard (R 216). He further testified that he never participated in any illegal killings. He never mistreated or beat any inmates at Steyr (R 217, 222).

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

Petitions: A Petition for Review, undated, was filed by Major A. R. Myatt, Jr., defense counsel. Petitions for Clemency were filed by accused HEISS, 3 November 1947; and Major A. R. Myatt, Jr., defense counsel, 23 December 1947.

Recommendation: That the findings and sentence be approved.

7. Werner KUFHN

Nationality:	German
Age:	24
Civilian Status:	Master Locksmith
Party Status:	Unknown
Military Status:	Waffen SS Corporal
Plea:	NI
Findings:	G
Sentence:	Imprisonment for Life

Evidence for Prosecution: The accused was a member of the SS stationed at Steyr, where he acted as a camp guard (R 56; P-Ex 3) at the main factory and at the building of the railroad track and camp dumps, from the latter part of September 1944 to 2 April 1945 (R 446).

In an extrajudicial sworn statement Josef Kancials, a former inmate of Steyr (R 56; P-Ex 3), stated that from a distance of 10 meters he saw the accused at about 1700 to 1800 hours in the summer of 1944 beat a Russian or Polish inmate with his rifle butt and kick him to death while he was lying on the ground. The beating was so terrific that there is no doubt in his mind the man was killed then and there. However, the witness marched on and, although the victim looked dead, the witness could not be

other inmates on many occasions while they were marching to and from work because they were weak and could not walk fast enough; that the accused was very much feared; and that whenever he appeared, the inmates quickly got out of his way (R 56; P-Ex 3).

Kanciala testified as to similar facts about the beating with a rifle butt and kicking of the Russian or Polish inmate. However, contrary to his prior clear statement he testified that he did not see the accused abuse inmates on any other occasion (R 240-248). He further testified that it was a matter of common knowledge or common rumor that the inmate died as a result of the wounds inflicted upon him by the accused (R 248). He explained that it was still warm and hence his position that it was summer (R 241). This witness was recalled and testified that the accused beat inmates in his detail. He also saw the accused beat an inmate who supposedly died afterwards (R 565).

Evidence for Defense: Two former SS guards at Steyr testified they never saw or heard that the accused beat or struck anyone nor did they ever hear that he killed anyone (R 361, 385).

The accused testified that he arrived at Steyr during the last days of September 1944, having been transferred from the air corps to the SS, and remained there until 2 April 1945. While at Steyr he did guard duty at the main factory, at the building of railroad tracks, and at the camp dumps (R 446). The inmates from the main factory were transported to and from camp by train. His rank was corporal. While at Steyr he never killed, beat, struck, or kicked anyone (R 447). On cross-examination the accused testified that he never saw or heard that any inmates were killed, beaten or mistreated, but that he heard that three inmates committed suicide (R 448).

Accused HEISS, former camp commander at Steyr, testified that the accused arrived at Steyr in September 1944. He never heard that this accused ever killed anyone. The details marching to and from work would never have had room for one detail to overtake and pass another on the road, particularly in the case that the prosecution witness mentioned. A

large detail could never have passed by a smaller detail on account of the traffic. Darkness fell at 1730 hours toward the end of September and beginning of October 1944. Roll call was held at about 1700 or 1715 hours (R 494, 495).

Sufficiency of Evidence: The Court was warranted from the evidence concerning the nature and extent of his participation in its findings of guilty. However, the principal prosecution witness against the accused is inconsistent in his testimony and not persuasive. The sentence is excessive.

Petitions: A Petition for Review, undated, was filed by Major A. R. Myatt, Jr., defense counsel. Petitions for Clemency were filed by Major A. R. Myatt, Jr., defense counsel, one undated, and another 23 December 1947; Action Committee of the Anti-fascist block of the town of Ronneburg, signed by Golka, Siltig and Gruender, 24 April 1947; Mrs. Marie Bergerer, 6 August 1947; Free German Trade Union, signed by Reichardt, 7 August 1947; accused HEISS, 7 August 1947 and 3 November 1947; and Evangelic Parochial Officer by superintendent Maelsor, 8 August 1947.

Recommendation: That the findings and sentence be approved, but that the sentence be reduced to imprisonment for 3 years, commencing 17 July 1947.

8. Alwin SCHILLER

Nationality:	German
Age:	27
Civilian Status:	Farmer
Party Status:	Unknown
Military Status:	Wehrmacht Sergeant; Waffen SS Sergeant
Flee:	NO
Findings:	G
Sentence:	10 years, commencing 8 May 1945

Evidence for Prosecution: The accused was a guard at Mauthausen Concentration Camp from April to December 1942; a guard at St. Lambrecht, a subcamp of Mauthausen Concentration Camp, from December 1942 to June

1943; and a guard leader at Steyr from June 1943 (R 460; P-Ex 18) to September 1944 (R 455). He also acted as detail leader (R 42, 126, 158) and was occasionally the deputy roll call leader in Steyr (R 42).

The accused quite often beat straggling inmates of all nationalities on the way to the factory (R 42, 43). He was known in the camp as being a beater (R 42). A witness was personally beaten by the accused on two occasions with a stick which he carried with him (R 43, 53). A second witness testified that in the spring of 1943 the accused hit him on the ear and, when he reeled under the blow, the accused kicked him (R 95). As a result of this blow he was deaf in the ear for six months (R 95). His ankle was smashed as a result of the kick which the accused gave him. He further testified that as a result of this treatment by the accused he was in the dispensary for almost five months. The witness exhibited his enlarged and scarred ankle to the Court (R 96). When he came out of the hospital the accused bludgeoned him against the wall with his fist and beat him on the head and all over his body with a stick (R 97). This witness further testified that the accused severely beat Polish inmates with a stick (R 97, 98). In February 1944, the accused hit the witness in the face and kicked him (R 126). He then gave him 25 strokes on the buttocks with a rubber hose (R 127). The accused was a detail leader who was notorious for his beatings and everybody feared him (R 127, 159), particularly the Poles (R 127). A third witness testified that in 1944 the accused slapped him until his nose bled (R 159).

In two extrajudicial sworn statements, it was related that the accused, while stationed at St. Lambrecht, beat inmates of all nationalities (R 204; P-Ex 12a; R 466; P-Ex 19a).

Josef Kanciala, a former inmate of Steyr, stated in an extrajudicial sworn statement that the accused was his commando leader at Steyr from the end of 1943 until January 1945. He saw the accused beat Poles, Russians, Yugoslavs, and inmates of other nationalities almost every day at the factory. He used his hands and sometimes a whip or stick. Some of these beatings were so severe that the victims fell to the ground. The witness

further stated therein that he was beaten on the face and body at least 50 times by the accused, once so hard that his gums bled. He further testified that the factory supervisors made gifts to the accused to stimulate production. At these times the accused beat the inmates more than at any other time (R 563; P-Ex 24). Kanciala testified that the accused beat him and other inmates nearly every day (R 564).

Evidence for Defense: One witness testified that he never saw the accused abuse any inmates (R 171). Another witness, a former guard who did duty with the accused, testified that he never heard of him beating, striking or kicking anyone (R 394).

The accused testified that he first arrived at Steyr in August 1943 and left about the end of September 1944. He was never inside the inmates' compound at Steyr. He gave a few slaps on the face but never beat anyone with his fists nor did he kick them. He reported a civilian from the factory to Commander HTESS for beating an inmate (R 450-452). He never kicked Kramski in the ankle nor did he beat Kazmierczek (R 453). He admits having slapped six or eight inmates who were implicated in a robbery (R 458).

Accused HTESS testified that the accused was in charge of the additional rations at the Wals ballbearing factory and supervised all details to assure that this food was properly distributed. The accused was never deputy roll call leader. Moreover, he was prohibited from entering the protective camp. The accused left Steyr the end of September 1944 (R 497).

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

Petitions: A Petition for Review, undated, was filed by Major A. R. Myatt, Jr., defense counsel. Petitions for Clemency were filed by accused HTESS, 3 November 1947; and Major A. R. Myatt, Jr., defense counsel, 23 December 1947.

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: The defense challenged the jurisdiction of the Court on the ground that the offense was committed in the Russian Zone of Occupa-

state derives its power from the state. A state is independent of all other states in the exercise of its judicial power, except where restricted by the law of nations (S.S. Lotus, France v. Turkey, 2 Hudson World Court Reports 23). Concerning punishment for a crime of the type involved in the instant case, it has been stated that the sovereign power of a state extends "to the punishment of piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed" (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. (Hadamard Murder Factory Case), opinion DJJWC, February 1946; United States v. Weiss, et al. (Dachau Concentration Camp Case), opinion DJJWC, March 1946; United States v. Becker, et al. (Flossenbure Concentration Camp Case), opinion DJJWC, May 1947; United States v. Brust, opinion DJJWC, September 1947; and United States v. Otto, opinion DJJWC, 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

The defense also challenged the jurisdiction of the Court on the ground that the accused could not be tried in the United States Zone of Occupation unless certain administrative steps were taken as provided by Section 1, Article III, Control Council Law No. 10, which provides:

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

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

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

It is clear that the Court had jurisdiction of the persons of the accused and of the subject matter and that the Court properly overruled the objections by the defense (R 13).

Severance: The Court did not abuse its discretion in denying the motion by the defense for severance of the accused as defendants (R 26-28). Severance is not a right or a privilege of the accused. The applicable rule is that such a motion is addressed to the sound discretion of the Court. Under the procedure applicable to the trial of war crimes cases, the test is whether an injustice would result to accused and not whether purported substantial rights of accused would be violated, if the motion were overruled, because accused have no rights in this connection (United States v. Altfuldisch, et al., opinion DJMTC, February 1947, known as the Mauthausen Concentration Camp Case ).



Application of Parent Case: The Court was required to take cognizance of the decision rendered in the Parent Case, including the findings of the Court therein that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, subjected persons to killings, beatings, tortures, etc., and was warranted in inferring that those shown to have participated knew of the criminal nature thereof (Letter, Headquarters, United States Forces, European Theater, File AG 000.5 JAG-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 that they not only participated to a substantial degree, but that the nature and extent of their participation were such as to warrant the sentence imposed, except for the sentence as to accused KUERN which should be reduced as recommended in Section IV, supra.

Motion to Dismiss: At the close of the prosecution's case, the defense moved for a findings of not guilty because of lack of evidence (R 209, 210). 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 (U.S.), 27 March 1947, and Section 501, page 409, "Manual for Trial of War Crimes and Related Cases", 15 July 1946, as amended). A similar practice is followed in courts-martial (Paragraph 71 d., "Manual for Courts-Martial, U.S. Army", 1928). The Court did not err in overruling the motion (R 211).

Superior Orders: Accused MURSTALD, as shown in Section IV, sought to justify some of his actions by offering evidence to show that he was acting in compliance with superior orders. Compliance with superior orders

does not constitute a defense to the charge of having committed a war crime (Trial of Henry Fitz, 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 812; Volume II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandoverly Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJAWC, December 1945; United States v. Klein, et al. (Hadamar Murder Factory Case), opinion DJAWC, February 1946; and French Republic v. Wagner, et al., Court of Appeals, July 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 How. 115, and "Manual for Courts-Martial, U.S. Army", 1928, paragraph 148).

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

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

VI. CONCLUSIONS:

1. It is recommended that the findings and the sentences be approved, but that the sentence as to accused KUEHN be reduced to imprisonment for 3 years.

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

JOHN J. RYAN  
Capt. CMP  
Post Trial Branch

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

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