

3 February 1948

UNITED STATES )

v. )

Case No. 000-50-2-109

Johannes BERSCHIED, et al. )

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 12-25 August 1947 before a General Military Government Court.

II. CHARGES AND PARTICULARS:

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

Particulars: In that Johannes Berschheid, Wilhelm Bolk, Jakob Peter Bosch, Friedrich Rudolf Budde, Iwan Denesowytsch, Emil Euchner, Heinrich Lehner, Michael Maisel, Fritz Wilhelm Moeckesch, Franz Pietzarka, Friedrich Wilhelm Sanders, Emil Schumacher, Josef Spengler and Franz Ludwig Silbernagel acting in pursuance of a common design to commit the acts hereinafter alleged, and as individuals aiding in the operation of the Dachau Concentration Camp and camps subsidiary thereto, did, at or in the vicinity of DACHAU and LANDSBERG, Germany, between about 1 January 1942 and about 29 April 1945, willfully, deliberately, and wrongfully encourage, aid, abet and participate in the subjection of civilian nationals of nations then at war with the then German Reich to cruelties and mistreatment, including killings, beatings, tortures, starvation, abuses and indignities, the exact names and numbers of such civilian nationals being unknown but aggregating many thousands who were then and there in the custody of the German Reich in exercise of belligerent control.

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

Particulars: In that Johannes Berschheid, Wilhelm Bolk, Jakob Peter Bosch, Friedrich Rudolf Budde, Iwan Denesowytsch, Emil Euchner, Heinrich Lehner, Michael Maisel, Fritz Wilhelm Moeckesch, Franz Pietzarka, Friedrich Wilhelm Sanders, Emil Schumacher, Josef Spengler and Franz Ludwig Silbernagel acting in pursuance of a common design to commit the acts hereinafter alleged, and as individuals aiding in the operation of the Dachau Concentration Camp and camps subsidiary thereto, did at or in the vicinity of DACHAU and LANDSBERG, Germany, between about 1 January 1942 and about 29 April 1945, willfully, deliberately and wrongfully encourage, aid, abet and participate in the subjection of 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 cruelties and mistreatment, including killings, beatings, tortures, starvation, abuses and indignities, the exact names and numbers of such prisoners of war being unknown, but aggregating many hundreds.

III. SUMMARY OF EVIDENCE: The accused BERSCHIED, BOLK, DEMESOWITZSCH, EUCHNER and PIETZARKA were members of the SS with various duties at the Dachau Concentration Camp, subcamp Augsburg and its various outcamps for considerable periods of time between the dates alleged. The accused LEHNER was a civilian manager of the pressing department at the Messerschmitt factory at Augsburg, Germany, for a considerable period of time between the dates alleged. Many civilian internees and prisoners of war of various United Nations were beaten and mistreated at subcamp Augsburg, and its various outcamps and at the Messerschmitt factory, by the accused. Prosecution's Exhibit P-Ex 10 (R 17) is a certified copy of the charges, particulars, findings and sentences in the Parent Dachau Concentration Camp Case (United States v. Weiss, et al., Case No 000-50-2, opinion DJAWC, March 1946, hereinafter referred to as the "Parent Case"; see Section V, post).

IV. EVIDENCE AND RECOMMENDATIONS:

1. Johannes BERSCHIED

Nationality:	German
Age:	35
Civilian Status:	Mason
Party Status:	NSDAP from 1933
Military Status:	SS Corporal
Plea:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	15 years, commencing 27 April 1945

Evidence for Prosecution: The accused was an SS Corporal at subcamp Augsburg and its various outcamps from 1943 until April 1945 (R 439-441, 447).

Witness Slawinski, who was an inmate at subcamp Augsburg and its various outcamps from April 1943 to April 1945, testified that he knew the accused as a guard and detail leader at subcamp Augsburg and its various outcamps from the beginning of 1944 to April 1945. He saw the accused beat many inmates with his fists, with various tools, with pieces of electric wire and once with a piece of wood, and he also saw him kick

them (R 22). Many of the inmates were knocked to the ground. Some remained lying on the ground for several hours until they were carried to the camp by other inmates (R 22, 23). These beatings took place on the march to and from work and at the Messerschmitt factory (R 23).

Witness Lehmann, who was an inmate at subcamp Augsburg and the various outcamps thereof from March 1943 to 30 April 1945, testified that he knew the accused as a guard and detail leader during that period of time (R 44-46). The accused wore an air corps uniform until the changeover in 1944, at which time he wore an SS uniform (R 46, 47). On the marches to and from the Messerschmitt factory, the inmates were required to run the entire distance which was approximately 3 to 5 kilometers each way. Those that lagged behind were kicked and pushed with the butt of the accused's rifle and a few of these inmates collapsed (R 47, 48). At the Messerschmitt factory, the accused used to beat the inmates with a rubber cable or a piece of iron. Many of the inmates so beaten were taken to the dispensary (R 48, 49).

Witness Skrzypok, who was a former inmate of subcamp Augsburg, testified that from the summer of 1944 until April 1945, he saw the accused beat many inmates with the butt of his rifle, and kick them with his feet after he had knocked many of them to the ground. Once the accused beat him over the head with his steel helmet three times and then struck him in the face with his hand, cutting his left eyebrow (R 110-112).

Witness Rohbein, who was an inmate at subcamp Augsburg and its various outcamps from 1943 to April 1945, testified that he knew the accused as a guard and detail leader during that period of time. On the marches to and from work he saw the accused beat inmates with the butt of his rifle and with his fists, and he also kicked them. Many inmates were beaten to the ground and had to be taken to the dispensary. During air raid alarms he saw the accused beat and chase the inmates into a gravel pit. The witness was bitten on the leg by a dog turned loose on the inmates by the accused (R 147-150). There were many Russian, Polish, French and Italian prisoners of war at subcamp Augsburg and the

Evidence for Defense: The accused testified in his own behalf that he joined the air force in August 1941 and was transferred to the Waffen SS on 1 September 1944 as he was not fit for active duty (R 439, 440). In 1943 he was transferred to subcamp Augsburg with an air force guard company. His rank in the SS was that of corporal and he did duty at subcamp Augsburg and the various outcamps thereof until April 1945. His duties were to guard inmates inside and outside the Messerschmitt factory and around the camp but he was not allowed to enter the camp proper (R 440, 441). He denied the testimony of prosecution witnesses, and testified that he did not beat any inmates; that he did not use the butt of a rifle on the inmates and that he did not kick them. He also testified that once in separating two inmates who were fighting, he pushed them apart, and one fell to the ground (R 442); and that all together there were about 3 or 4 incidents of inmates fighting in which it was necessary for him to intercede (R 443).

Sufficiency of Evidence: The accused was a member of the SS with the duties of guard and detail leader at subcamp Augsburg and its various outcamps and at the Messerschmitt factory for a considerable period of time between the dates alleged. In addition thereto, it was shown that he personally beat and mistreated many inmates and prisoners of war.

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

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

2. Wilhelm BOLK

Nationality:	German
Age:	40
Civilian Status:	Musician
Party Status:	None
Military Status:	SS Technical Sergeant
Plea:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II

Evidence for Prosecution: The accused was an SS Technical Sergeant at subcamp Augsburg and its various outcamps with duties of guard, detail leader and officer of the day from March 1944 to April 1945 (R 36-366).

Witness Slawinski testified that the accused was a detail leader, and that in the summer of 1944 in the Messerschmitt factory Plant #1D, he saw the accused, who at that time was acting officer of the day and in charge, beat an inmate with his fists until he bled (R 24, 38). In the winter of 1944-1945 in Plant #4A, he saw the accused beat inmates with his fists (R 24). In the fall of 1944 near the Adelbert School, inmates were beaten by the accused (R 24, 25). Throughout the year of 1944 he heard the accused order capos to beat the inmates with tools, which they did. These inmates who were beaten by the capos were knocked to the ground. Later they were returned to the camp. Two of those were Russians who died as a result of these beatings (R 25, 26). The Russians in subcamp Augsburg and the various outcamps thereto, were partly prisoners of war and partly former prisoners of war that had been discharged as such and placed in concentration camps (R 43).

Witness Lehmann testified that he saw the accused, between October 1944 and April 1945, beat many inmates and prisoners of war of various nationalities going to and from work; that the accused used to beat them with pieces of wood and a rubber cable; and that he also kicked dogs on the inmates. This witness also testified that the accused also beat inmates at the Messerschmitt factory; that he reported any SS man to headquarters who showed any consideration at all toward the inmates (R 54, 55); that he saw the accused chase and intimidate inmates during air raid alarms (R 56, 57); and that the accused wore an air force uniform until shortly before the end when all of the guards and other personnel changed to SS uniforms (R 57).

Witness Poinmessor, who was a former inmate at subcamp Augsburg and its various outcamps, testified that he saw the accused during

August, September and October 1944, beat many inmates with the butt of his rifle while escorting them, as a guard, to and from work; that some of the inmates were beaten to the ground and had to be helped to work or back to camp; and that the inmates beaten by the accused included both civilian internees and prisoners of war (R 99, 100).

Witness Kaminski, who was a former inmate at subcamp Au\_sburg and its various outcamps, testified that he saw the accused in March 1945, during an air raid alarm, beat many inmates with a piece of wood in order to drive them into the gravel pit which was used to protect the personnel during air raids. One of the inmates who had been hit several times and knocked to the ground by the accused, died in the gravel pit shortly thereafter (R 185-187).

Evidence for Defense: The accused testified in his own behalf that he voluntarily enlisted in the air force in 1937; that in March 1944 he was ordered to duty at the Messerschmitt factory at Augsburg; and that on 1 September 1944 he was automatically transferred to the Waffen SS in grade. His duties consisted mainly of officer of the day which called for him to inspect the guards at the Messerschmitt factory and at the camp, to inspect the troop quarters, and to supervise the guards on the marches to and from work and the loading of the trains in which the inmates were riding to work (R 386-388). He noticed several guards who were carrying sticks during the time the inmates were getting on the train, and he made the guards throw away the sticks. On the days that he was not officer of the day he had no contact with the inmates (R 389, 390). He denied the testimony of witnesses Slawinski, Lehmann and Kacinski in toto as to the beatings and mistreatment of inmates (R 390-393). During air raids when the inmates were sent to the gravel pit he never had any trouble with any of the inmates nor did he see any guard beat an inmate (R 397, 398): It was part of his duty to see that the guards did not beat the inmates. If one had beaten an inmate he would have reported him (R 399).

Witness Feinmesser identified accused HOLK as accused BUDDE (R 98,

selected accused BERSCHIED as accused BOLK (R 105).

Witness Adamezyek, who was a former inmate at subcamp Augsburg and its various outcamps, testified that he knew the accused there from April 1944 until April 1945 as the officer of the day and for a few days as a detail leader (R 404, 405). As a detail leader, the accused had a good reputation amongst the inmates. Once after an air raid, some of the inmates were missing so the accused sent other inmates with the guards to find them. This was done so that the accused would not have to report them. If he had reported them they would have been punished (R 406).

Sufficiency of Evidence: The accused was a member of the SS with duties of detail leader and officer of the day at subcamp Augsburg and its various outcamps and at the Messerschmitt factory for considerable periods of time between the dates alleged. In addition thereto, he beat and mistreated many civilian inmates and prisoners of war.

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

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

3. Jakob Peter BOSCH:

This accused was acquitted (R 555).

4. Friedrich Rudolf BUDE:

A nolle prosequi was entered in favor of this accused (R 295).

5. Iwan DENESO YTSCH:

Nationality:	Polish
Age:	26
Civilian Status:	Unknown
Party Status:	Unknown
Military Status:	SS Private
Plea:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	5 years, commencing 25 May 1945

Messerschmitt factory during November 1943, he saw the accused beat and mistreat a French inmate who had been a former officer of the French army (R 59, 60); that this inmate, after he was beaten, was returned to Camp Dachau; and that he saw the records at a later date which disclosed the fact that this inmate had died (# 60).

Witness Skrzyppek testified that, from the summer of 1942 until April 1945, he saw the accused beat many inmates on their heads, in their faces and on their backs with the butt of his rifle (R 112-114).

Evidence for Defense: The accused testified in his own behalf that he was drafted into the German army in 1943 from his home in Poland which was occupied by the German army when they made up the Ukrainian divisions; that he was assigned to Camp Dachau, where he stayed for approximately four months undergoing training; that he was then assigned to subcamp Augsburg as a guard (R 371); that he was at subcamp Augsburg and its various outcamps from September 1943 to the capitulation; and that he did guard duty at the various camps, at the Messerschmitt factory and on the marches to and from work (R 375). He denied any testimony of witness Lehmann and testified that he never attacked or beat a French inmate. He denied the testimony of witness Skrzyppek that he struck him on the head four times with his rifle or that he beat any inmates at all (R 372, 375). He never saw any guards beat any inmates at any time in the various camps, or on the marches, or at the factory (R 376). At the Messerschmitt factory during the day he was only on guard on the outside. During the night, when he was on guard at the factory, he was on the inside of the factory at a stationary post (R 378, 379). He was never on duty inside any of the camps and he never saw any inmates beaten or mistreated there (R 380, 383).

Sufficiency of Evidence: The accused was a member of the SS with duties as a guard at subcamp Augsburg and its various outcamps and at the Messerschmitt factory for a considerable period of time between the dates alleged. In addition thereto, it was shown that he personally beat and mistreated many inmates. A discussion concerning the accused's nationality appears in Section 7, post.



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

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

6. Emil EUCHNER

Nationality:	German
Age:	34
Civilian Status:	Plumber
Party Status:	NSDAP from 1934
Military Status:	SS Corporal
Plea:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	5 years, commencing 27 April 1945

Evidence for Prosecution: The accused was an SS corporal with duties as a guard at subcamp Augsburg and its various outcamps from the fall of 1943 to April 1945 (R 424, 425, 429).

Witness Breiding, who was a former inmate at subcamp Augsburg and its various outcamps, testified that the accused was a guard at subcamp Augsburg and its various outcamps; and that he saw the accused, as a guard, beat inmates with a stick and kick them with his feet. These beatings, that he saw administered to the inmates by the accused, occurred in April 1944 (R 155-159).

Evidence for Defense: The accused testified in his own behalf that he was drafted into the air corps in August 1939; that in the fall of 1943 he was placed on guard duty with an air force guard unit at subcamp Augsburg; that on 1 September 1944, he was transferred to the Waffen SS; and that he continued his duty at subcamp Augsburg and its various outcamps, as a guard, until April 1945 (R 424, 425, 429). He denied the testimony of witness Breiding, and testified that he was never permitted to enter into the camp proper and therefore could not have beaten the inmates as described by the witness; and that he did not carry a stick,

or beat inmates (R 425-427). The accused testified further that he never saw any guard beat an inmate; that he never heard of inmates being beaten (R 429, 430); that he believed the inmates' ration was inadequate, and helped to secure additional food for the inmates when he could; and that once he helped an inmate receive two letters from the outside, which was illegal (R 433).

Witness Herderich stated in his unsworn pretrial statement that during August to November 1944, the accused was on duty at outcamp Lauingen of subcamp Augsburg as a guard. The accused did not mistreat any of the inmates and helped the inmates secure food from the farmers (R 437; D-Ex 1).

Witness Roehm stated in his unsworn pretrial statement that during the years 1943-1945 the accused, at subcamp Augsburg and the various outcamps thereof, did not mistreat any inmates and helped them whenever he was in a position to do so. The accused even transmitted some letters for him, which was strictly forbidden (R 437; D-Ex 2).

Sufficiency of Evidence: The accused was a member of the SS with duties as a guard at subcamp Augsburg and its various outcamps and at the Messerschmitt factory for a considerable period of time between the dates alleged. In addition thereto it was shown that he personally beat and mistreated the inmates.

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

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

7. Heinrich LEHNER

Nationality:	German
Age:	46
Civilian Status:	Mechanic
Party Status:	NSDAP from 1942
Military Status:	None

Plea: NG Charge I; NG Charge II  
Findings: G Charge I; G Charge II  
Sentence: 5 years, commencing 2 November 1945

Evidence for Prosecution: The accused was a civilian employee of the Messerschmitt factory from January 1939 until April 1945 (R 509).

Witness Lehmann testified that the accused was a factory manager in Plant 4A of the Messerschmitt factory (R 64). During the period of February to April 1945, he saw the accused beat many inmates with a piece of a rubber cable and destroy the extra food which the inmates had received in packages from the outside and were cooking on the small heating stoves (R 64-66).

Witness Skrzypek testified that during March 1945, he saw the accused strike a French inmate in the face with his hand and then he reported him to his superior. As a result of this report, the inmate was given 25 lashes with an ox tail (R 115).

Evidence for Defense: The accused testified in his own behalf that he migrated to the United States from Germany in June 1928; that he was married in 1931 in Long Island; that he became a naturalized American citizen in 1933; that while in the United States he worked in various airplane factories until December 1938 when he returned to Germany due to his wife's health; that he had expected to return to the United States in two years' time so as not to forfeit his United States' citizenship; that in January 1939 he secured employment at the Messerschmitt factory in Augsburg; that in the early part of 1940 he became a German citizen; that French civilian workers arrived at the Messerschmitt factory in 1940; and that concentration camp inmates arrived there for work in 1942 (R 505-511, 521). The accused testified further that the pressure from his superiors was very great to maintain an increased production; that this pressure was coupled with threats to the various department managers from their superiors (R 457, 514); and that due to this pressure and excitement when the machines or tools became broken through the carelessness of the various workers, he sometimes slapped an inmate or shoved one (R 515).

Witness Loos, who was a civilian employee at the Messerschmitt factory, testified that he knew the accused there from 1940. The accused was in charge of the pressing department and had approximately 25 to 40 inmates working under him (R 452-455). When the inmates broke the tools the accused slapped them with his hands (R 456). The accused did not mistreat any inmates except to give them slaps (R 457). The accused did not report the inmates for punishment. Many of the inmates said, "Master, give us a slap but don't report us" (R 458). In 1944 the pressure from the management for increased production was very great. The foreman and managers were threatened with death or being placed in a concentration camp if they did not meet their quota (R 457-460).

Piecko, who was an inmate at subcamp Augsburg and its various out-camps, testified that from April 1943 to 27 April 1945 he worked at the Messerschmitt factory and knew the accused there during that period of time and worked under him (R 466, 467). The accused was under great pressure from his superiors to get more work out of the inmates in order to step up the production. He therefore kept after the inmates to work harder. For those who did work harder, the accused secured additional food from the snack bar (R 468, 469). The accused did not carry a piece of wood or cable around with him nor did he beat inmates with them (R 473). The accused pushed inmates slightly in the ribs in order to keep them working (R 475), and allowed the inmates to cook on the heating stoves the food they had received in packages from the outside (R 477).

Sufficiency of Evidence: The accused was a civilian employee at the Messerschmitt factory with duties as a department manager for a considerable period of time between the dates alleged. It was shown that there were inmates of various nationalities under him whom he beat and mistreated.

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

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

8. Michael MAISEL

This accused was served but not tried.

9. Fritz Wilhelm MOECKESCH

This accused was served but not tried.

10. Franz PIETZARKA

Nationality:	German
Age:	45
Civilian Status:	Unknown
Party Status:	Unknown
Military Status:	SS detail leader
Plea:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	15 years, commencing 27 April 1945

Evidence for Prosecution: The accused was an SS guard and detail leader at subcamp Augsburg and its various outcamps from March 1944 to April 1945 (R. 29, 413-415).

Witness Slawinski testified that during 1944 the accused was a detail leader and on the marches to and from work he saw him beat and kick many inmates; that he most always picked on the inmates with sore feet or who were sick; and that once he took a rifle from a guard and beat an inmate with it. Many inmates who were waiting to be loaded on the train to go to work were chased and mistreated by the accused. Many of the beaten inmates were knocked to the ground and some had to be assisted by other inmates (R 27-29).

Witness Lehmann testified that he saw the accused, when he was a detail leader, beat many inmates with a piece of rubber cable or a piece of wood. Many of these beaten inmates had to be carried back to camp and taken to the dispensary (R 60, 61). These beatings administered by the accused to the inmates occurred during the latter part of 1944 and the first part of 1945. The accused beat civilian inmates and prisoners of war (R 62).

witness Skrzypek testified that between March and July 1944 at the Messerschmitt factory, he saw the accused, who was a detail leader, beat many inmates with a rubber cable (R 116).

Evidence for Defense: The accused testified in his own behalf that he was drafted into the air force on 20 December 1939. In March 1944 he became a guard and detail leader at subcamp Augsburg and various outcamps belonging thereto. In the fall of 1944 he was transferred into the Waffen SS (R 413-415). He denied the testimony of witness Lehmann that he beat the inmates as he described. He testified that once he slapped two inmates who were fighting; that he once slapped an inmate orderly for being impudent and lying to him; and that once he struck an inmate twice with a small piece of a rubber hose for leaving his work, and aiding out and sleeping, but that he did not report him (R 415-417). He denied the testimony of witness Slawinski that he used a rifle butt to strike an inmate, or that he ever knocked an inmate down, or that he chased inmates who were waiting for the trains (R 418). He denied the truth of the testimony of the witness Skrzypek completely (R 419). He further testified that he never saw any guard who was under him beat an inmate; that he did not see any other detail leader beat an inmate (R 420); that he only reported one inmate for trying to escape; and that he never witnessed an inmate being beaten with an ox tail (R 421, 422).

Sufficiency of Evidence: The accused was a member of the SS and a detail leader at subcamp Augsburg and its various outcamps and at the Messerschmitt factory for a considerable period of time between the dates alleged. In addition thereto, it was shown that he beat and mistreated many inmates. The accused admitted slapping and beating inmates.

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

Petitions: No Petitions for Review nor Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

11. Friedrich Wilhelm SANDERS

This accused was served but not tried.

12. Emil SCHUMACHER

This accused was served but not tried.

13. Josef SPENGLER

This accused was served but not tried.

14. Franz Ludwig SILBERNAGEL

This accused was acquitted (R 555).

V. QUESTION OF LAW:

Jurisdiction: Although not raised during the trial the question arises as to whether the Court had jurisdiction of accused DENESOWYTSCH, who may be either of Russian or Polish nationality, or a stateless person (Charge Sheet, R 5, 20, 271), since Russia and Poland are members of the United Nations. However, it has long been recognized that war criminals, brigands, and pirates are the common enemies of all mankind and all nations have an equal interest in their apprehension and punishment for their violations of international law. Concerning this question, it is stated in "Wheaton's International Law", Volume I, Sixth Edition, at page 269, that every independent state has the judicial power to punish "piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed". Military Government Courts have jurisdiction over the nationals of any country who are in the United States Zone of Occupation, except as to certain classes of American and other nationals, e.g., military personnel, which are not pertinent to the jurisdictional question here involved. Concerning jurisdiction over war crimes, no limitation is imposed. (See Sections 5-300.2 and 5-300.3, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Headquarters, US Forces, European Theater, 30 November 1945). Concerning the general question of universality of jurisdiction over war crimes see "Universality of Jurisdiction Over War Crimes", by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pp. 177-218.

It may be the defense intended to attack the jurisdiction of the Court on the ground that the accused could not be tried in the United

States Zone of Occupation unless certain administrative steps were taken as provided by Section 4, Article III, Control Council Law No. 10, which provides:

" 4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 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.

Nationality of Accused: It is stated in the heading to the Charge Sheet that accused DENESOWYTSCH is a Russian national. As mentioned above the evidence as to his nationality is conflicting. During his arraignment and later when testifying, the accused gave his nationality as Ukrainian (R 5, 371). His defense counsel described him as a stateless person (R 20). Accused also testified that in 1939 he was a Polish citizen (R 371). In view of the recent changes of control over the area of the accused's nativity and residence prior to the late war, and the further confusion resulting from the accused's service in the armed forces of the German Reich, it is improbable that the charges and particulars could have been drafted in this respect with any more particularity. In any event, as demonstrated by the authority cited on jurisdiction above,



the Court had jurisdiction and no injustice resulted to the accused because of any variance between allegations and proof as to the accused's nationality.

Motion to Dismiss: The Court properly denied the motion of the defense at the close of the prosecution's case to dismiss the charges against all accused for failure to prove the execution of a common design as no evidence was offered to show any agreement among the accused (R 296, 297). No express agreement between any of the accused or between the accused and others is necessary. Proof of participation in a common design may be inferred from proof of facts and circumstances, which, taken together, indicate that they are parts of a complete whole. The legal sufficiency of such charges and particulars has been upheld in many American and British cases (United States v. Weiss, et al., Case No. 000-50-2, opinion DJAWC, March 1946, commonly known as the Dachau Concentration Camp Case; United States v. Altfuldisch, et al., Case No. 000-50-5, opinion DJAWC, February 1947, commonly known as the Mauthausen Concentration Camp Case; United States v. Becker, et al., Case No. 000-50-46, opinion DJAWC, May 1947, commonly known as the Flossenburg Concentration Camp Case; and the Belsen Concentration Camp Case, British Army of the Rhine, December 1945).

Motions for Findings: Also, it was not error for the Court to deny the defense's motion on behalf of accused BOSCH and SILBERNAGEL (R 296, 297), for findings of not guilty, made at the close of the case for the prosecution, if it believed that there was sufficient evidence to support the charge and that the accused should be required to answer it (Section 5-327.2, Change 1 to Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Office of Military Government for Germany (US), 27 March 1947). A similar practice is followed in courts-martial (paragraph 71, d, "Manual for Courts-Martial, U. S. Army 1928").

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-AGQ, 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 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.

ELMER MOODY  
1st Lt, Inf.  
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