

HEADQUARTERS
UNITED STATES FORCES IN AUSTRIA
Office of the Judge Advocate
APO 777, U. S. ARMY

SUBJECT: Review of Record of Trial by Military Commission, of Istvan Csihas, Istvan Lengyel, Istvan Eros, Miklos Bakos, Karoly Ney and Ferenc Karolyi: US vs Karolyi, Ney et al: Case No: 5-100

TO : Commanding General
United States Forces in Austria
APO 777, U. S. Army

1. Pursuant to paragraphs 14a and b, War Crimes Memorandum Number 3, this Headquarters, dated 23 April 1946, the record of trial in the case of the above-named defendants, tried at Salzburg, Austria, 22 May to 7 June 1946, has been referred to me for review and recommendations for action.

2. a. The accused were tried on the following charge and specification:

CHARGE: Violation of the Laws of War.

Specification: In that Istvan Csihas, Istvan Lengyel, Istvan Eros, Miklos Bakos, Karoly Ney, Ferenc Karolyi, members of the Hungarian SS, did, on or about March 1945, at or in the vicinity of Sur, Hungary, wilfully, deliberately and wrongfully encourage, aid, abet, and participate in the killing of Donald P. Brown, Hubert R. Burnette, Felix Kozekowski, Preston J. Hill, members of the United States Army, and an unknown member of the United States Army, all of whom were surrendered, unarmed prisoners of war in the custody of the German Reich.

b. Each of the accused were found guilty of the specification and the charge. Csihas, Bakos, Ney and Karolyi were sentenced to be hanged by the neck until dead, while Eros and Lengyel were sentenced to confinement at hard labor for the term of their natural lives.

3. GENERAL STATEMENT OF THE EVIDENCE

The accused were all members of the SS Kampfgruppe Ney, a voluntary Hungarian unit that aligned itself on the side of Germany after the Armistice was signed between Hungary and the United Nations in January 1945 (Prosecution Exhibit 13). Ney was commanding officer, Karolyi was executive officer, Bakos was commanding officer of the troops of the Gendarmerie. Csihas was a second lieutenant under Bakos, and Lengyel and Eros were enlisted men of the Gendarmerie. This unit had its headquarters at Sur, Hungary, in March 1945.

On the fifth day of March 1945 an American bomber passed over Sur and three officers and five enlisted men of the crew bailed out and parachuted safely to the ground, although two of the enlisted men were injured (R 305, 306, 317). They were captured by different groups and brought to the headquarters of Kampfgruppe Ney (R 306, 105). On orders of the Fourth SS Panzer Corps Headquarters (R 84), or on the initiative of Major Ney only (R 106), an attempt was made to deliver the flyers to that headquarters at Inota on the evening of the day of their capture, but this was not successful because of the condition of the roads, and they were returned to the headquarters of the Ney group. The next day the three officer prisoners were delivered at the Fourth SS Panzer Corps Headquarters at Inota by the accused Karolyi and one Lieutenant Schmidt to a Captain Grund, and a receipt was obtained for their delivery. The reason given for the failure to deliver all the prisoners was that the car ordered for the purpose proved to be a passenger car rather than a truck and was too small. Karolyi inquired of Captain Grund, Fourth Corps Headquarters, as to the disposition of the five enlisted men remaining at Sur and it was ordered that they be delivered to either the Corps Headquarters at Inota or the Fourth Wehrmacht Cavalry Brigade at Aka (R 84). Subsequently in the discussion Captain Grund made the remark to Karolyi that they must have too much gasoline at the unit

to the SS Headquarters, but no direct order was given by that headquarters to Karolyi for their execution (R 86). During the conversations between Karolyi and Captain Grund Lieutenant Schmidt was not in the room but it would not have been impossible for him to have overheard the order and following implications (R 87). Karolyi and Lieutenant Schmidt returned to their headquarters and Karolyi went into the room occupied by Ney, who at the time was ill and had a high fever, and reported the delivery of the three officers to the higher headquarters. He told Ney of the order for the disposition of the five enlisted men (R 87), (previously stated as either to the Fourth Wehrmacht Cavalry Brigade located in Aka or to the Corps at Inota (R 84) which agrees with Ney's statement R 107). He then told Ney that he had gotten the impression the officers were to be executed and it was the desire of the Corps Headquarters that the enlisted men actually be executed instead of taken to Aka (R 86). During the delivery of this order by Karolyi to Ney other officers were present, but when the subject of the impression Karolyi had received as to the desires of Corps Headquarters for the execution of the enlisted men was to be discussed the other officers were ordered from the room by Ney at the request of Karolyi (R 94). Karolyi, on order from Ney, called Bakos to report to Ney. Bakos arrived in an adjoining room during the discussion between Karolyi and Ney regarding the implied desires of Corps Headquarters and could have overheard the last part of their discussion. Either Karolyi or Ney gave Bakos an order to have the five enlisted men taken to the Fourth Cavalry Brigade at Aka the next morning by escort in charge of an officer. After receiving this order Bakos inquired if there was anything further and was told there was not. Bakos received this order about 5 PM and departed (R 95, 109, 48). Karolyi remained with Ney until about 11 PM but left early the next day on official business with General Winkelman. He returned to his own headquarters four days later (R 87).

According to Bakos, shortly after he returned to his quarters from Ney's room he received a telephone call from a Captain Peter, Ney's Adjutant, to return to the castle to receive important orders (R 151). Thereupon Bakos returned to the castle to Captain Peter's office where, in the presence of Lieutenant Schmidt, Captain Peter told Bakos that he had received a telephone call from Corps Headquarters inquiring what was being done about the American flyers. Peter had relied in the conversation with Corps that Major Ney had ordered the prisoners taken to Aka, at which Corps Headquarters was upset and said that they had sent orders through Lieutenant Schmidt that were easy to understand and if Ney was unwilling or unable to execute these orders they would take the necessary steps to carry the orders through. The order was "The American enlisted men are meant not to be brought to Aka and handed over to the command post in Aka but they were to be executed by shooting," before the next noon (R 152).

Bakos replied to Peter upon receipt of the new order that he had shortly before received contrary orders from Karolyi. Peter replied that the last order had arrived shortly before and had to be executed. Lieutenant Schmidt interrupted to say that he had already brought such orders with him and that the Corps Headquarters does not consider the airmen as prisoners of war. Bakos claims that he then tried to see Ney but was told he could not see him because he was feeling worse (R 156).

Peter, according to Bakos, said "You get the orders and it is impossible to talk to the Major." Bakos tried to see Karolyi by going to his room (R 157, 51) but Karolyi was not there, so he left. On his way back to his quarters he passed Lieutenant Csikas and told him that orders about the prisoners had arrived from Corps Headquarters (R 161). Bakos then tried to call Ney by phone but was unsuccessful. Lieutenant Csikas returned to the quarters shared by him and Bakos about 10 PM. Bakos told him the flyers were to be executed the following day and that as Bakos would be gone he, Lieutenant Csikas, would be in command of the execution platoon (R 162).

The next morning detailed orders for the execution were given by Bakos to Csikas and he was told to summon four men for the "escort" (R 163). He left and returned with four enlisted men including Eros and Lengyel (conflict in testimony as to whether they were volunteers exists and will be discussed later). The order to execute the flyers was given by Bakos.

quired whether they were ready to volunteer and all replied in the affirmative

Prosecution Exhibit 2, Statement 2). (Conflict: He asked whether they understood the orders (R 163)) He then gave instructions that the uniforms and other identification from all the flyers should be brought back to headquarters (R 163). Shortly thereafter a wagon ordered by Bakos appeared and Csikas with his detail started off with the prisoners, the two injured flyers riding and the others walking. When they arrived at the place of execution the men on the wagon were ordered off and they realized then they were to be killed. They asked for and received permission to pray and knelt by the road and prayed for 15 or 20 minutes. They were then taken further into the forest, lined up with their backs to their executioners after having been refused to be allowed to dig their own graves. One of the men held a rosary in his hand and the other four held hands. The executioners, including Csikas, Lengyel and Eros lined up behind them and Csikas gave the order to fire. Csikas was armed with a pistol and the others with machine pistols. Shots were fired and all of the American flyers immediately fell to the ground. One of them still moved so another shot was fired into him by a member of the squad who is not now on trial (R 254, 255, 307). All clothing except undergarments, all jewelry, small articles and identification tags were removed from the bodies and returned to Sur (R 308) and subsequently turned over to Bakos who distributed the articles other than clothing among the execution squad. He kept a watch for himself (R 308, 309, 256). Shortly after the execution a burial detail went out under instructions from Bakos (R 309, 256).

The identification tags taken from the bodies (R 308) were turned over to Bakos and were found buried under a shed in Altmark where they had been hidden by Ferenc Albitz after they had been given to him by Mrs Bakos with instructions to destroy them. (Prosecution Exhibit 1, Statement 5a, and Sub Exhibit 14)

In the absence of Bakos, Csikas reported to Ney he "had executed the orders" (R 256). Ney was sick in bed and had his face to the wall and gave no reply. (Ney denies receiving this report (R 108)). Bakos returned later in the afternoon and Csikas reported to him the execution of the orders (R 163, 256). Bakos then went to the castle and reported to Captain Peter that the order had been carried out. Peter then, according to Bakos, took the telephone and asked for a connection with Corps Headquarters (R 163). Bakos then tried to see Ney or Karolyi, but Karolyi was gone and Peter told him he could not go into Ney's room.

Two days after the execution Bakos reported to Ney he had executed the American flyers according to orders by Corps Headquarters. Ney was lying in bed, did not return his salute, and made no reply (R 169). Ney testified that after several days Bakos reported "Major, I have executed the orders," and at that time he did not know the Americans had been killed (R 108).

Five bodies were disinterred in a wooded area near Sur, Hungary, 30 and 31 October 1945, all clothed in underwear. All other clothing was missing. An autopsy revealed that the cause of death in each case was gunshot wounds (Prosecution Exhibit 3).

Official reports disclose that included in the crew of a plane that crashed near Acsteszer, Hungary, were T/Sgt Donald P. Brown, 12080949, S/Sgt Hubert R. Burnette, 15066343, T/Sgt Felix Kozekowski, 32916625, S/Sgt Preston Hill, 33249495, First Lieutenant Farrington, Second Lieutenant Knox, Second Lieutenant Ames, and First Lieutenant Bremmermann (Prosecution Exhibit 1 and Exhibit 14). Karolyi remembers that one of the captured officers was Farrington and is rather certain that two others were named Ames and Bremmerman (Prosecution Exhibit 1, Exhibit 11). The identification tags, identified as being the same as given Ferenc Albitz by Mrs Bakos, bear the names Hubert R. Burnette, 15066343, Felix Kozekowski, 32916625, Donald P. Brown, 12080949, and Preston J. Hill, 33249495 (Prosecution Exhibit 1, Exhibit 15).

4. EVIDENCE RELATING TO RESPECTIVE ACCUSED

a. Miklos Bakos.

and Bros, testified to having received the order for execution from Bakos (Prosecution Exhibit 1, Statement 4, p 1; Statement 5, p 1; Statement 6, p 2; Prosecution Exhibit 2, Statement 7, p 1; Statement 8, p 1; Statement 9, p 3; Statement 14, p 3; Statement 15, p 4; R 254, 307, 317). Aside from the statement of 24 August 1945 (Prosecution Exhibit 1, Statement 9) in which he denies all knowledge of or participation in the execution, Bakos himself freely admits having given the order for the execution of the flyer (Prosecution Exhibit 2, Statement 1, p 1; R 162). In addition, there is corroborative evidence of his participation and knowledge. Bakos ordered a burial detail before the prisoners left Sur (R 254). He received a watch taken from one of the flyers (Prosecution Exhibit 1, Statement 4, p 2) and his wife tried to have American identification tags and chains destroyed (Prosecution Exhibit 1, Statement 1, p 3).

(2) Defense: Bakos was fully informed of his rights as a witness and elected to testify under oath (R 146). His testimony relating to the execution was that at about five o'clock in the afternoon of the day after the plane crashed (R 148) he received an order from Major Ney (R 150) that he was to have the American prisoners escorted to Aka and handed over to the commanding officer there; that the escort had to be commanded by an officer and instructed what to do in case of an attempted escape (R 150). Having received this order, Bakos left Ney's room and returned to his quarters (R 151). Shortly after arriving there, Bakos was called by Captain Peter, aide de camp of Ney (R 280) and told that important orders had arrived and Bakos should come up to accept them (R 151). When Bakos arrived at the castle (the headquarters of the Group), Peter told him that Corps Headquarters had given him, Peter, an order that the flyers were not to be escorted to Aka but were to be executed in Sur (R 152); that for the execution of this order, he, Peter, and the commander of the military police, Bakos, were held personally responsible (R 152). There was also some conversation in which Peter told Bakos that the Corps was upset about the proposed disposition of the prisoners as they claimed to have given explicit orders to Schmidt and said that if Ney was unable or unwilling to execute those orders, the Corps would take the necessary steps to do it (R 152). Bakos told Peter that a short time before, he, Bakos, had received contradictory orders from Karolyi, whereupon Peter replied that the order has to be executed as the Corps did not consider airmen prisoners of war (R 156). Bakos tried to speak to Ney but was informed that Ney was too ill (R 156). He looked for Karolyi but Karolyi was not in his room (R 157). Bakos spoke to Peter again saying he did not understand the orders of the Corps and before he executed them he wanted to talk to Ney (R 157). Peter replied, "You got the orders. It is impossible to talk with the Major." And added that the order must be executed (R 157, 159). Lt Schmidt was present during this conversation and told Bakos that the American officers could be executed at the Corps and it was the desire of Corps Headquarters that the same thing should happen to the enlisted men (R 159). Peter suggested that the easiest way would be to shoot the prisoners during the night and to simulate an attempted escape (R 159). Bakos then returned to his quarters and there tried to call Maj Ney on the telephone (R 161). Captain Peter answered the telephone (R 161) and Bakos did not talk to Ney.

That night when Lt Csihas returned to the room they shared (R 241), Bakos told him of the new orders received from Corps Headquarters, that the prisoners had to be shot. He stated that as he, Bakos, had to leave Sur, Csihas would have to command the firing squad (R 162). The next morning Peter called up Bakos and asked about the orders for the execution (R 162). Bakos said he was at that time giving the orders. Then he told Csihas that the prisoners had to be taken in the direction of Aka and executed on the way, adding that those were strict orders from Corps Headquarters (R 163). Csihas left the room and returned shortly with four enlisted men. Bakos told them that on orders from higher headquarters the American prisoners were to be taken out on the road to Aka and shot (R 163). He then told Csihas that according to the orders of Peter, the uniforms and identifications of the Americans were to be brought back to the quarters (R 163). Bakos then left the area and returned between four and five o'clock in the afternoon. Csihas reported to him that the orders had been executed. Bakos went to the castle and reported to Peter who, according to Bakos, picked up the telephone and asked for a connection with Corps Headquarters (R 163). Bakos did not hear the conversation

on the second afternoon after the execution he reported to Ney that the flyers had been executed (R 164).

b. Csikas.

(1) Prosecution: At about 10 o'clock in the evening of the day following the capture of the parachutists, Csikas was informed by Bakos in their room that the American soldiers, then in captivity, were to be shot the next day (R 254). Bakos also told Csikas that these orders came from Corps Headquarters and that an officer must participate in the shooting. Since he, Bakos, was to be away, Csikas would have to be the officer (R 254; Prosecution Exhibit 2, Statement 8, p 1). The next morning, Csikas and four enlisted men received the official order from Bakos to take the captured soldiers in the direction of Aka and execute them in the woods (Prosecution Exhibit 1, Statement 6, p 2; Prosecution Exhibit 2, Statement 7, p 1; R 254). Csikas was told by Bakos to take everything from the flyers that would help to identify them (R 255) and that Bakos had arranged for the burial (R 255). Shortly after a wagon appeared and the detail started off toward Aka with the prisoners. Two of the flyers were injured and rode on the wagon; the other three walked (Prosecution Exhibit 1, Statement 6, p 2). When they arrived at the forest, Csikas gave the order to dismount. One of the Americans asked what was going to happen and Csikas told him. Csikas gave the men permission to pray for 15 or 20 minutes; then they walked further into the woods. The prisoners asked permission to dig their grave, but this was refused. The prisoners were lined up with their backs toward Csikas. Csikas and the four Hungarians lined up a short distance behind the prisoners. Csikas gave the command to fire and shot one of the prisoners himself. After the first volley, all the prisoners collapsed to the ground. One of the men of the firing squad fired again saying, "He was still moving." All clothing, identification tags, and jewelry were removed from the prisoners and were brought back to Sur. Upon his return, Csikas reported to Ney that he had "executed the orders;" later when Bakos returned, Csikas reported to him. That evening Bakos distributed the valuables taken from the flyers: Csikas received a wrist watch (Prosecution Exhibit 1, Statement 6, p 2; R 256, 257). Prosecution also introduced some evidence that Csikas was a volunteer for the mission of commanding the firing squad (Prosecution Exhibit 2, Statement 5, p 5, 7; Statement 6, p 5), but this was later denied by the maker (see below).

(2) Defense: Csikas was fully advised of his rights as a witness and elected to testify under oath. He denied that he had volunteered for the assignment (R 258) but insisted he was simply carrying out an order that he could not refuse to execute (R 258). In other respects he described in detail the order for the execution of the American prisoners and his participation substantially as given above (R 253-290). Bakos, after admitting in court that his statement that Csikas was a volunteer was untrue, testified that he was not a volunteer (R 180, 181).

c. Istvan Lengyel and Istvan Eros.

(1) Prosecution: With one difference, the evidence relating to these two accused is substantially the same. On 7 March 1945 they were enlisted men in the Group Gendarmerie commanded by Captain Bakos. On that day they were ordered by Lt Csikas to the office of Captain Bakos from whom they received an order to the effect that they were to escort the Americans to Aka but the Americans were not to arrive there; they were to be shot on the way. They returned to their quarters and got their equipment and machine pistols. Shortly afterwards they started out with the prisoners. When the party got to the woods, it stopped. The Americans prayed for 15 or 20 minutes and then they all went further into the woods. The prisoners lined up and the firing squad lined up a short distance behind them. Lt Csikas gave the order to fire and all the Americans fell. Then the clothing, jewelry and identifications were taken from the bodies and the squad returned to their quarters. Lengyel received a mechanical pencil at the distribution of the personal effects but Eros received

including Prosecution Exhibit 1, Statements 4, 5, and 6; Prosecution Exhibit 2, Statement 7, p 1; Statements 14 and 15; R 254, 305-312, 317-321).

(2) Defense: Eros was advised of his rights as witness and elected to testify under oath (R 304). He told the same story of the order and the execution of the Americans (R 305, 312).

Lengyel was advised of his rights as a witness and elected to testify under oath (R 315). Lengyel admitted that he had been a member of the firing squad (R 317) but denied that he had fired a shot (R 317) saying that he had locked his pistol before the order to fire was given (R 317).

d. Karoly Ney.

(1) Prosecution: On 5 March 1945, the day the Americans were captured, Karoly Ney was ill in bed with Pneumonia (R 106). When the prisoners arrived at Sur, Ney ordered his Chief of Staff, Captain Karolyi, to send all the men to Corps Headquarters at Inota (Prosecution Exhibit 1, Statement 8, p 1; Prosecution Exhibit 2, Statement 12, p 1; R 106). The prisoners started out with Lt Schmidt, but because of bad weather and road conditions could not get through to their destination, and returned (Prosecution Exhibit 18, Statement 8, p 1). The next day, Karolyi, Schmidt and the three American officers drove to Corps Headquarters at Inota. There Karolyi handed over the three officers to Captain Grund, Corps Intelligence Officer, and received a receipt for them (Prosecution Exhibit 1, Statement 7, p 2; Prosecution Exhibit 2, Statement 12, p 4; R 84). Karolyi then asked Grund what should be done with the other prisoners and Grund said they were to be delivered either to Corps Headquarters at Inota or the Wehrmacht Cavalry Brigade at Aka (R 84). While Karolyi was with Grund, Grund made some remarks that gave Karolyi the impression that the Corps was dissatisfied with the way the group handled the prisoners (R 84) but wanted them executed instead of delivered to headquarters (R 86, 87, 92). Lt Schmidt was in a position to overhear this conversation (R 87). When Karolyi returned to Sur he reported to Ney that the officers had been delivered and that the five enlisted men should be conducted to Aka (Prosecution Exhibit 2, Statement 7, p 2, 3; R 86), or to Corps Headquarters at Inota (R 84, 107). Karolyi then told Ney the impression he had received from Grund about the handling of the prisoners (R 86). Ney sent for Bakos, the commanding officer of the Gendarmerie, a known sadist (Prosecution Exhibit 1, Statement 7, p 4; Prosecution Exhibit 2, Statement 11, p 5; R 86). Bakos arrived before the end of the conversation and could have heard part of it (Prosecution Exhibit 2, Statement 10, p 1; R 149). Ney ordered Bakos to escort the five prisoners to Aka and to deliver them to the Wehrmacht unit there; Ney insisted that the platoon be commanded by an officer and instructed in the rules of prisoner escort; that arms were to be used only in the event of an attempted escape (Prosecution Exhibit 1, Statement 7, p 3; Prosecution Exhibit 2, Statement 12, p 1; R 86, 107). Bakos then left the room (R 86). The next day Lt Csikas reported to Ney that "the orders had been executed" (Prosecution Exhibit 1, Statement 6, p 2; Prosecution Exhibit 2, Statement 7, p 1; R 256). The second day following the execution, Bakos reported to Ney that the American airmen had been executed (Prosecution Exhibit 2, Statement 3, p 2; R 164). No receipt for the prisoners was brought to Ney nor did he ask for one (R 136). Between three days and a week after the incident, rumors reached Ney that the prisoners had not reached their destination as he had ordered; yet he did not investigate those rumors (R 136, 137). Bakos was relieved of his command but for reasons unconnected with this incident (R 109).

There was some other evidence adduced by the prosecution of dubious probative force: "Bakos gave me the orders which he said came from the Fourth SS Panzer Corps through Major Ney", (Prosecution Exhibit 1, Statement 6, p 2); "To my knowledge, Ney, through Captain Karolyi, got the order from the Germans to execute the five flyers immediately," (Prosecution Exhibit 8, p 2); "Pinko told finally that the orders for captive interrogation and execution have been given by Major Charles Ney," (Prosecution Exhibit 5, Statement 3, p 1); "I have to the truth as I know the Americans have obtained the real story from other men. Major Ney, who is now a Lt Col, gave me the order to deny everything and to figure out some story," (Prosecution Exhibit 1, Statement 6, p 2). "Q. Did Ney know about this?" (The execution of the flyers). "A. He must have known about this

it is probable that he gave the order to Bakos." (Prosecution Exhibit 7, p 3). Bakos testified that he "supposed" Ney knew of the change of orders (R 232).

(2) Defense: Ney was fully advised of his rights as witness and elected to testify under oath (R 104, 105). Ney testified that early in March 1945 it was reported to him that a bomber had crashed in the vicinity and several men who had jumped from the plane had been captured. He ordered that the enlisted men be turned over to the Gendarmerie and the officers interrogated (R 105). He then directed Captain Karolyi to report the prisoners to the Corps and ordered that all the prisoners were to be transported there. Later that evening Lt Schmid reported to him that he had been unable to get through to the Corps because of bad roads. He then ordered Karolyi to obtain a car and transport all the prisoners to Corps Headquarters. That was the normal disposition of prisoners of war. During this time, Ney was sick in bed with pneumonia (R 106). The next day Karolyi reported that he had taken only the officers to Corps because the vehicle was too small. Ney asked Karolyi what Corps wanted done with the other men. Karolyi reported to Ney that Corps wanted them handled in a short way and that made Ney angry. He told Karolyi he was a soldier not a hangman. Ney then sent for Bakos and gave him a formal direct order to transport the prisoners to the Wehrmacht unit at Aka (R 107). That two, three or four days later Bakos reported to Ney that his orders had been executed; that he, Ney, has no recollection of Lt Csikas ever having reported to him but learned that from Csikas some time later (R 108). That although Bakos might have heard of the conversation between Ney and Karolyi, yet Bakos knew that it was his order and intention (to have the flyers transported safely) (R 109); that he sent the prisoners to the Wehrmacht at Aka because he did not want them to have the same fate as the officers he had sent to the SS at Inota (R 110); that he directed an officer to accompany the escort as additional protection against the people (R 111); that his order to Csikas to deny everything related to an entirely different matter (R 115).

There is much additional evidence to support Ney's contention that he gave only one order and that for the safe delivery of the prisoners to Aka (Prosecution Exhibit 1, Statement 7, p 3; Prosecution Exhibit 2, Statement 10, p 1; Statement 11, p 5; Statement 12, p 1; Statement 13, p 4; R 86, 99, 100, 101, 150, 212). Ney was astonished when he learned about the execution (R 262).

c. Ferenc Karolyi.

(1) Prosecution: The day the American flyers were captured, the officers were brought to Captain Ferenc Karolyi, Chief of Staff of the Ney Group (R 135) for interrogation. After a short interrogation, Karolyi asked Ney for further orders relating to the prisoners and was told to have all of them escorted to Corps Headquarters at Inota. All the prisoners started out with Lt Schmidt and returned to Sur about 1 hour later. Next day Karolyi, Schmidt and the American officers went to Inota, leaving the American enlisted men in Sur. When Karolyi arrived at Corps Headquarters he reported to Captain Grund, Corps Intelligence Officer; Karolyi handed over the three officers, got a receipt for them and asked what should be done with the prisoners left at Sur. Grund replied that the prisoners should be escorted either to Corps Headquarters at Inota or a Wehrmacht Cavalry Brigade at Aka. While Karolyi was in Grund's office, Grund made some remarks which gave Karolyi the impression that the Corps did not agree with his way of handling captive airmen (R 84), but wanted them executed (Prosecution Exhibit 2, Statement 11; R 84-86). Karolyi returned to Sur about 5 PM and reported to Ney who was then ill in bed with pneumonia. The report was in two parts (R 104). The first part was a formal report that he had delivered the officers to the Corps, showed Ney the receipt and told him the Corps orders for the other prisoners (R 86). Then Karolyi conveyed to Ney the impression that Grund had given him, i.e. to have the prisoners executed shortly after their capture (R 87). Ney sent for Gendarmerie Officer Captain Bakos and then either Ney or Karolyi gave Bakos the order to escort the enlisted men to the Cavalry Unit at Aka. After Bakos left the room, Karolyi stayed with Ney until about 11 o'clock (Prosecution Exhibit 2, Statement 10; Statement 11; R 87).

(2) Defense: Karolyi was fully advised of his rights as a witness and elected to testify under oath (R 82, 83). Karolyi testified in substance to the

his trip to Inota, he left Sur for four days (R 87); that he never conveyed the impression he had received from Grund to Peter or Schmidt (R 88); that Bakos never received an order for the execution (R 337); however, Schmidt could overhear the conversation Karolyi had had with Grund (R 87, 332) and Bakos could have heard the report that he, Karolyi, made to Ney (R 95, 100).

5. PROCEEDINGS

The Military Commission before which this case was tried was appointed pursuant to letter, Headquarters, U. S. Forces, European Theater (AG 250.4 GAF-AGO), subject: "Authority to Appoint Military Commissions," dated 10 October 1945. The proceedings were had pursuant to War Crimes Memorandum No. 3, this headquarters, dated 23 April 1946, which sets forth regulations for the trial of war criminals. The accused were represented by a major and a captain, both of whom were attorneys, and the accused Bakos in addition retained civilian counsel of his own selection. The proceedings were interpreted by competent sworn interpreters in Hungarian language for the benefit of the accused, and in German for the benefit of civilian counsel. Except to the extent hereafter mentioned, a fair and impartial trial was had. Challenges were permitted and the accused expressed themselves as satisfied with the counsel and membership of the Commission. The Commission consisted of nine senior officers, which was six more than the required minimum of three. The findings and sentences were concurred in by at least two thirds of the members present, as required.

6. JURISDICTION

That a Military Commission has the power to try an enemy individual for an offense against the laws of war is well settled. It is clear that the Commission has jurisdiction over the accused and over the offense charged.

7. PROCEDURE

a. The rules of procedure applicable to this case are prescribed in War Crimes Memorandum Number 3, this headquarters, dated 23 April 1945. That directive proscribes generally that Military Commissions shall have the power to make, as occasion requires, such rules for the conduct of their proceedings consistent with the powers of such commissions, and with the rules of procedure set forth in the Memorandum, as are deemed necessary for a full and fair trial of the accused, having regard for, without being bound by, the rules of procedure and evidence prescribed for General Courts-Martial. It further provides that paragraphs 38-47 FM 27-5, "Military Government and Civil Affairs," 23 December 1943, are designed as a general guide in this field and will be followed except as modified by the instructions of this Headquarters.

The adoption of the procedures prescribed in this directive is predicated on sound ground. To begin with, the directive is modeled after similar directives published by 6th and 12th Army Groups for the Trial of spies in France by Military Commissions in which death sentences were confirmed. Furthermore, the provision for the admission of such evidence as would "in the opinion of the President, have probative value to a reasonable man" was taken from an Executive Order of the President, dated 2 July 1942, in which the President established that standard for the admission of evidence in the famous "saboteur trial," (Ex parte Quirin, 317 US 1). It is the standard prescribed for war crimes trials in Germany and in the Pacific, and was expressly upheld in the Supreme Court of the United States including the acceptance of hearsay and documents involving hearsay. (In re Yamashita, No 61 Miscellaneous, October Term 1945, rendered 4 February 1946.)

However, the adoption of these standards has been productive of certain difficult legal questions in which there is conflict with established practices, the question being whether the directive is intended to override such conflict. Principal among these questions are: (1) concerning the admissibility of "accomplice testimony" as applicable to other accused; (2) the rule against "proving conduct by character" and finally, (3) the question whether pretrial interrogations by the Trial Judge Advocate in the guise of an investigator of an

(1) With reference to "accomplice testimony" it will be noted that practically the entire case of the prosecution was based on admissions and confessions, as well as testimony concerning each other contained in the pre-trial statements of the respective accused, and the testimony in court of one accused concerning the acts of his co-accused. No unsworn statements are involved and paragraph 76 MCM 1928, is therefore inapplicable, but paragraph 114c MCM 1928 provides in part: "The acts and statements of a conspirator done or made after the common design has been accomplished or abandoned, are not admissible against the others, except acts and statements in furtherance of an escape." At first blush this rule would appear to render inadmissible, if strictly applied in these proceedings, all evidence given in pre-trial statements by one accused against the others. However, it is my opinion that the rule should not be applied for three reasons:

(A) In the first place, no conspiracy is alleged in this case, and no attempt was made to prove one. There is no allegation of joint action, nor do the customary words "in pursuance of a common intent" appear in the specification. Each accused is charged as a principal with his particular part in the result, i.e., did encourage, aid, abet and participate in "the killing." This specification lacks the technical nicety and particularity found in criminal pleading, yet beyond question states an offense under the laws of war. It would be inconsistent with the obvious intent of the pleader to contend that a foundation of conspiracy must be laid before evidence of one co-accused could be admitted against others as required where a conspiracy is alleged.

(b) In the second place, the rule quoted in (a) above does not affect the competency of one accused to testify against the others (paragraph 114c MCM). In this case each accused voluntarily took the stand under oath and in the course of direct or cross-examination repeated or denied many of his pre-trial declarations. No effort is made to make a direct comparison of these statements for the reason that it is believed unnecessary in view of the conclusion expressed, and the belief, based on a general consideration of the record as a whole, that sufficient actual sworn testimony is included in the record to justify action by the court and reviewing authority.

(c) In the third place, the court was authorized by the pertinent directive to admit evidence "of probative value to a reasonable man." While generally intended to relax the rules of evidence with reference to credibility tests, i.e., hearsay, authentication of documents, confessions, and other technical aspects (In re Yamashita, supra) the mandate is that evidence of probative value shall be received. Certainly the direct testimony of A, based on personal knowledge and relevant and material to the issue being tried, concerning the conduct of B, has probative value as to B's guilt, and the fact that the evidence was given prior to trial would not appear to deprive it of that value or render it inadmissible under this rule.

(2) With reference to the "rule against proving conduct by character," a more serious question is presented. Paragraph 112 of the Manual of Courts-Martial is specific on this question. "A fundamental rule is that the prosecution may not evidence the doing of an act by showing the accused's bad moral character or former misdeeds as a basis for an inference of guilt. This forbids any reference to his bad character in any form, either by general repute or by personal opinions of individuals who know him, and by any reference in the evidence to former specific offenses or other acts of misconduct whether he has or has not ever been tried and convicted of their commission." (One exception to this prohibition relates to the proof of motive, intent, or guilty knowledge by showing other acts of the accused manifesting that intent. The Trial Judge Advocate attempted to utilize this exception in this case in one instance in which it was obviously inapplicable (p 191). Does the relaxation of the rules of evidence under the rule stated in War Crimes Memorandum 3 permit proof of the crime charged by evidence of other unrelated crimes? In my opinion it does not. Every offense must be proved by the prosecution on the facts and law relating to the offense

charged. To prove that a person committed a similar or other offense does not tend to prove that he committed the separate and new offense for which he is being tried.

Evidence of other separate crimes, in addition to being entirely irrelevant to the issue, may under certain circumstances have the effect of creating bias and prejudice against the accused, and therefore it will be necessary as to each accused in this case to consider the extent to which such evidence was presented. Only in the event that there is sufficient admissible evidence to sustain the finding may evidence tending to create bias and prejudice be disregarded as not affecting the administration of substantial justice.

(3) With reference to (3) "pretrial interrogations by the Trial Judge Advocate," it is believed that some degree of departure from accepted standards of fair play is involved. Because of the scarcity of personnel, it was necessary to utilize the services of a legally trained commander of an existing War Crimes Investigating Team as Trial Judge Advocate of the Commission. There is no official connection between these functions, any more than had the Trial Judge Advocate been the commander of an Infantry battalion or a Post Exchange officer with the duty of trying this case imposed upon him in addition to his other duties. The case was not referred to him for investigation but for trial. It is true that as Trial Judge Advocate he had the right to interrogate witnesses and accused, subject to their right against self-incrimination, but not as a war crimes investigator. It developed that he acted as the latter, and that almost the entire cross examination was predicated upon confronting each accused with conflicting statements and admissions previously made to him or to others. Thus the question is again presented whether the error was prejudicial, to be weighed in the case of each accused against the existence of other and sufficient judicial evidence to warrant conviction.

b. A further procedural problem in this particular case is presented by the obvious abuse on the part of the Trial Judge Advocate of the "let down" in established practices. The record in this case is so replete with irregularities when judged by normal court-martial procedures, or even when judged in the light of the authorized relaxation of the rules of evidence, that its review presents a most difficult legal problem. The Trial Judge Advocate approached his duty of prosecuting with overzealousness and with cunning. His objections to variances on the part of the defense (in most instances he was by far the greater offender on the same point) were so prompt as to be indicative of keen legal acumen and little basis exists for assuming that his conduct was caused by his being uninformed on the correct procedure. On the whole, he appeared to be inspired to obtain convictions.

Instances of what are believed to be deliberate abuses by the Trial Judge Advocate are too numerous to enumerate but the following are among the more flagrant:

R 9: The introduction in one lump of "records of interrogation secured by members of War Crimes Team 6836 during the investigation of the charges

* * *." Each document should have been separately submitted to the defense and separately offered in evidence in order that inadmissible parts could be contested. The defense itself did not raise this question, contenting itself with inquiring into the collective authenticity of the documents, and the court was not properly informed as to the probative value of the proposed collection of exhibits at the time they were received in evidence.

R 30: The introduction of a report of the CIC as to the nature and reputation of the accused's unit. The court ruled that the information had probative value.

R 172: The Trial Judge Advocate asked: "Would it surprise you if you heard that Karolyi had these American officers killed and not delivered?" No evidence had been offered to substantiate this; it was contrary to evidence before the commission, it was irrelevant to the issue and could have been offered

only for the purpose of poisoning the mind of the court as to one of the accused. It was inadmissible even if intended to prove the bad character of Karolyi for the reason that his character had not been placed in evidence. It was a flagrant case of the Trial Judge Advocate's testifying to his purpose of obtaining convictions at any price and by any methods. The court erred, in my opinion, in overruling the objection by the defense on its objection to this "question."

R 185: Trial Judge Advocate "testified" -- "What would you say if Kariakin's sister came into court and testified that when you sold her this parachute you told her it came from a plane wrecked near Sur * * * ." There was no evidence to support this declaration, and the Trial Judge Advocate did not ask this question of the witness when she was later called.

R 189: Trial Judge Advocate "testified" -- " * * * did Ney succeed in getting Hollicer to sign his estate over to the Ney Group?" There had been no evidence concerning the Hollicer case which itself was irrelevant to the issues, involving the mistreatment and beating of a Jew.

R 189: "Speech" by Trial Judge Advocate -- " * * * Kampfgruppe Ney was a gang of bandits, depending in a great measure on their funds as derived from the pillage, the torture, the murder of innocent people * * * ." There was no evidence to support this statement, and such evidence would have been irrelevant and inadmissible if offered.

R 192: Trial Judge Advocate read from Albitz statement "Bakos was very much a sadist * * * he once tied my hands behind my back and pulled them up in the air for two hours * * * ." This statement was in evidence, but erroneously so, being irrelevant until the character of Bakos had been placed in issue.

R 222: Another "speech" by Trial Judge Advocate -- " * * * Bakos and others took other people who were there, gathered them up and slaughtered them all * * * ." The purpose being to show that these people were disposed toward evaluating human life as nothing and which would have a motive and an intent to dispatch unlawfully to their death these five American flyers." Again, there was no evidence to support this declaration, and such evidence, if available, would have been inadmissible as irrelevant and having nothing to do with the offense charged.

R 247: The offer by the Trial Judge Advocate of a motion to strike the prejudicial and damaging evidence concerning the irrelevant past conduct of Bakos and others "at the proper time" -- which could only mean after he had succeeded in bringing in such evidence (upon which he had consistently dwelled) by his own utterances and otherwise, to his heart's content. After being called to account by the defense, he slyly offered to join in the motion to strike. (The court, in my opinion, correctly ruled that three objectionable items be stricken but erred in its ruling not to strike the "matters pertaining to Karolyi's connection with the alleged disposition of the three American officers." The only evidence before the court on this question was uniformly and exclusively that Ney had delivered the officers to the proper place and obtained a receipt for them. The defense aimed its motion at the contrary utterances and inferences of the Trial Judge Advocate for which there was no supporting evidence.)

The above list is far from exhaustive but consists of items indicative of the problem under discussion. The examples are mentioned at some length in order that it may be fully understood why it is necessary to take them under serious consideration.

It appears that the President and members took their duties seriously and conscientiously. Confronted with difficult questions raised by the newly-prescribed procedure and the apparent unethical practices of the Trial Judge Advocate, it is obvious that they made a fair-minded search for the truth. It is an established rule that error in the admission of evidence will not be sufficient to require disapproval of a finding or a sentence unless it appears that the substantial rights of the accused have been injuriously affected "in the light of all the facts as shown by the record" (MOM p 74, Wharton's Criminal

in each case beyond a reasonable doubt. It is not the function of the Staff Judge Advocate to substitute his judgment for that of the court. It is his duty to ascertain whether there is sufficient admissible evidence "of probative value to a reasonable man" to sustain the finding and sentence; and to note legal errors, and to determine the extent of their prejudicial effect upon the substantial rights of the accused, such determination to be predicated upon the record as a whole. The errors committed during the course of this trial were numerous, and are especially regrettable in view of the extensive and careful preparations made for the proper handling of this case. Careful consideration of the record in its entirety has been made and consideration has been given the effect of the prejudicial evidence with respect to each separate accused as will be hereinafter indicated.

8. SPECIAL DEFENSES

The defense of "superior orders" was squarely presented to the commission in the cases of four of the accused, and it therefore calls for special consideration.

It was a rule in both American and English courts from the earliest cases until 1914 that obedience to a superior order was not a defense in a prosecution for a criminal act. In 1914, however, both the United States and England adopted a rule of absolute nonliability, and this rule was originally published in FM 27-10, paragraph 347. This rule was not in accordance with pre-existing judicial decisions, so on 15 November 1944 the non-liability clause was struck out and the following was substituted:

"Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished." (FM 27-10, par 345.1)

That the rule as thus stated is based on sound logic is recognized by most writers on the subject. Thus Oppenheim, in his work on International Law, page 453, states:

"The fact that a rule of warfare has been violated in pursuance of an order of the belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted in military manuals and by writers, but it is difficult to regard it as expressing a sound legal principle. Undoubtedly a court confronted with the pleas of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to order conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime. Also the political authorities of the belligerent will frequently incline to take into consideration the danger of reprisals against their own nationals which are likely to follow as a measure of retaliation for punishing a war crime *durante bello*. However, subject to these qualifications the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity. To limit liability to the person responsible for the order may frequently amount, in practice, to concentrating responsibility on the head of the State whose accountability, from the point of view of both international and constitutional law, is controversial." (Underscoring supplied)

Likewise Wheaton, writing on the treatment of prisoners of war, at page 180, says:

"If men are taken prisoners in the act of committing, or who had committed, violations of international law, they are not properly entitled to the privileges and treatment accorded to honourable prisoners of war. The fact that they acted under orders cannot furnish a valid excuse; for, if such shifting of responsibility be admitted, then we arrive at the conclusion that millions of men, including responsible officers of the higher command, are to be held free from blame no matter what atrocious deeds they have perpetrated; and that only one person is answerable, namely, the monarch or president of the belligerent State, as the case may be. This is a conclusion which neither reason nor humanity can accept." (Underscoring supplied)

It is interesting to note that even the German Military Penal Code, which was in full force and effect at the time of this offense, likewise incorporates this principle. Section IV, paragraph 47, Deutsches Militärstrafgesetzbuch, states as follows:

"(1) If in the execution of an order relating to service matters a penal law is violated, the commanding officer is solely responsible. Nevertheless, the subordinate obeying the order is subject to penalty as accomplice: 1. If he transgressed the order given, or 2. if he knew that the order of the commanding officer concerned an action the purpose of which was to commit a general or military crime or misdemeanor. (2) If the guilt of the subordinate is minor, his punishment may be suspended."

This principle was followed by a German court in Leipzig after World War I in the Llandovery Castle case. In that case two submarine officers were tried for the machine-gunning to death of helpless lifeboat survivors of a torpedoed Canadian Hospital ship. In rejecting their defense of superior orders the German Supreme Court said:

"It is true that according to the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of law as is punishable, the superior officer issuing such an order is alone responsible. However, the subordinate obeying such an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law. This applies to the case of the accused. Military subordinates are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist if such an order is to be without any doubt whatever against the law. * * * They should, therefore, have refused to obey. As they did not do so, they must be punished."

It must be admitted, however, that to deprive an officer or a soldier completely of the defense of superior orders may place him "between the devil and the deep blue sea." Under orders issued by Adolph Hitler, any officer or soldier who refused to obey an order was to be summarily shot to death by any officer or soldier who had knowledge of such refusal. In discussing the difficult position of a subordinate officer or soldier, Dr. Sheldon Glueck, Professor of Criminal Law and Criminology at Harvard University, in his recent book, "War Crimes, Their Prosecution and Punishment" (September 1944), states:

"Yet in time of hostilities, a soldier - certainly a German or Japanese officer or soldier - may hesitate to disobey even the most glaringly unlawful order. Suppose, for example, his captain orders him to commit wholesale homicide by machine-gunning unoffending enemy civilians, old men, women and children or unarmed and surrendered troops, as many a German and Japanese soldier has been ordered to do. This is so patently unlawful that either he actually knows it to be so or, as a reasonable man, he ought to be held to know such acts to be prohibited not only by international law but by the criminal law of all civilized peoples. He is then, however, between the Charybdis of defying an order patently and shockingly unlawful and being disciplined (perhaps shot on the spot) and the Scylla of obeying it and being later charged with murder."

Professor Glueck further points out the need for a rule which will serve as a deterrent upon extremes of brutality and at the same time take into account the sometimes difficult position of a subordinate who carries out his orders. He suggests the following as a sound basis upon which courts may operate:

"An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he actually knew, or, considering the circumstances, he had reasonable grounds for knowing, that the act ordered is unlawful under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the law of his own country. In applying this rule, whenever the three legal systems clash, the last shall be subordinate."

Professor Glueck further suggests that in fixing sentences, courts ought to consider the following factors among others:

"The age and intelligence of the accused; his military rank; the amount of discretion he enjoyed; the nature and extent of the injury caused by his obeying an illegal order; the kind of unlawful act that was involved (whether it was one generally known to be illegal or one as to the illegality of which there was obscurity); the amount of instruction he had received in respect to the laws and customs of warfare and the kind of manual of rules with which he had been supplied; the circumstances under which he obeyed the illegal order (if it occurred during a time of great danger, or hasty retreat, or of occupation of enemy lands behind the lines, when the danger was less and there was more opportunity to check upon the order); whether the order required instant obedience, or involved an act that could be done later or postponed for a considerable period; and other like considerations. This would mean that many ordinary soldiers would receive but a nominal punishment, while officers chargeable with more knowledge of law and greater discretion would be punished more severely."

From the foregoing it may be concluded that members of military organizations are bound to obey lawful orders only, but that a plea of superior orders may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment, dependent on the facts in each particular case. Before the plea is taken into consideration, the facts should show at least the following: (1) That an actual order was given by a superior, (2) that it was not obviously illegal and contrary to the principles of humanity, or if obviously illegal, (3) that the subordinate was bound to obedience under penalty of immediate and severe punishment.

9. SUFFICIENCY OF THE EVIDENCE

a. Bakos.

The participation of Bakos in the execution has been established beyond doubt. The sole question raised by his testimony and the argument of his special counsel (R 342) is the defense of superior orders. In rejecting this defense, the decision of the commission could rest upon one of two grounds: that no order of a superior was given or that, if given, it was known to be illegal and should not have been executed.

There is evidence to support a conclusion that the order of the Corps Headquarters described by Bakos was never given. The issue raised by Bakos was simple. He testified that he had received no order for the execution from Ney or Karolyi (his immediate commanding officers) but that the order was a Corps order, transmitted to him by Peter or from Corps to Schmidt to Peter to Bakos. Neither Peter nor Schmidt are available as witnesses. The evidence indicates that Schmidt had no official status in the conversation that Karolyi had had at Corps Headquarters and that during this conversation Schmidt stayed in another room (R 87) and could not have received any orders (R 333); when Karolyi and Schmidt left Corps Headquarters, Schmidt did not even know the proposed disposition of the flyers (R 89). There is evidence that Peter could not speak German well enough to talk on the telephone (R 335). So the commission might very well have found that Peter neither received an order from Corps nor reported the execution to Corps as Bakos would have the commission believe (R 163). A finding that there was no superior order from Corps headquarters changing the original order of Major Ney is well supported.

Assuming without conceding that Bakos believed that Corps Headquarters had expressed a desire to have the flyers shot, yet by his own testimony he never received orders to that effect directly from his commanding officer or from an officer of the superior headquarters, the Corps. Peter and Schmidt were both officers serving with the Group (R 280, 284.). Neither of them had any command responsibility or authority to issue orders (Prosecution Exhibit 2, Statement 11, p 3; R 102). Bakos sought to overcome this difficulty by testifying to his repeated attempts to speak to his superior officers, Ney and Karolyi, but his failure to speak to them and receive clear, definite orders, under the circumstances of this case vitiates the argument that in ordering the execution, he was simply obeying the orders of a superior.

Assuming that the order was actually given as claimed by Bakos, however, in order to establish a defense of superior orders in accordance with the principles set forth in paragraph 8, supra, two additional essential elements are required: (1) it must not be such an order that it is universally known to everybody to be without doubt whatever against the laws of war and the principles of humanity, and (2) the subordinate must be bound to obedience under penalty of immediate and severe punishment. A careful consideration of the evidence in this case indicates that both of these elements are lacking.

There is no doubt that the order, if given, was known to him to be illegal. He testified that he questioned it repeatedly (R 157, 159); that it was suggested that an attempted escape should be simulated to make the execution appear justified (R 193, 194); that not the commanding officer but two subordinate officers were held responsible for the execution (R 208); that he obeyed parts of the order and disregarded or disobeyed other parts (R 207, 210); and that if he were to receive such orders today he would not obey them (Prosecution Exhibit 2, Statement 1, p 2).

Bakos also attempted to establish that he felt that failure to obey this order would have resulted in his being tried by a court-martial (R 211, 218), yet he also stated that he was afraid that if he were tried by court-martial his family would have been denied vehicles for transportation to a place of safety (R 219) and this was one of the reasons which impelled him to issue the order for the execution. This lacks the element of immediate danger to the subordinate necessary to constitute such facts a defense, or to operate in extenuation to any degree worthy of consideration.

The record contains many instances of incompetent and prejudicial evidence against Bakos. He is described as a sadist (Prosecution Exhibit 1, Statement 1, p 3; Prosecution Exhibit 7, p 3) who found amusement in mistreating persons (Prosecution Exhibit 1, Statement 7, p 4); he was cross-examined at length about his alleged mistreatment of a Hungarian Jew named Hollicer (R 187, 189, 191, 220, 227, 246); reference was made to his alleged

participation in the killing and beating of other people at Sur (Prosecution Exhibit 2, Statement 8, p 2; R 189, 222, 248, 313). Such evidence could only have the effect of creating bias and prejudice against the accused; it has no probative effect upon the issues (but may by its effect upon the commission, result in a conviction). In the case of Bakos, however, participation in the execution has been proved without contradiction or denial; his defense of superior orders was clearly presented to the commission which rejected it and it does not appear that the incompetent evidence, however prejudicial, seriously affected the rights of the accused Bakos.

Special counsel moved for a separate trial and adjournment for the purpose of procuring witnesses (R 36). The motion was denied by the commission (R 41). The motion should have been made before the trial or no later than the arraignment (MCM p 55). It appeared on the argument that this rule was made known to the civilian counsel (R 37) but he chose to wait until the trial was well under way before making his motion. Such a procedure constitutes a waiver. Furthermore, there appears to be no ground for the belief that the witnesses asked for by the counsel for Bakos would ever be found or be available (R 37, 38), nor does it appear anywhere that the defense of the other accused was antagonistic or prejudicial to the defense of Bakos, since his own testimony exonerates Ney and Karolyi and he admits giving the order to his subordinates. The denial of the motion for severance and adjournment upon the merits was proper. It is believed that the finding of guilt as to Bakos should not be disturbed.

b. Csihas.

Csihas by his testimony and argument of counsel presented the sole issue of whether he is guiltless or guilty to a lesser degree because he complied with superior orders. There was some evidence before the court, in spite of the denial of Csihas, to support a finding that Csihas had participated in the killing voluntarily. (Prosecution Exhibit 2, Statement 2, p 2, 4; Statement 3, p 5, 7; Statement 6, p 4). However, the maker of the statement later testified it was untrue (R 181). It appears that when he first learned of the order he said only, "I don't understand the whole thing," (R 264), or "I am not happy for such a job," (R 278). He made no attempt to have the order changed nor does it appear he even tried to speak to Ney, Karolyi or Peter about the order. He personally participated, as an officer, in the actual firing. If such a finding of voluntary participation has been made, the defense or mitigation arising from obedience to superior orders does not apply.

Assuming, however, that it was not a voluntary participation, it is necessary to consider the other elements of this defense as set forth in paragraph 8, supra. The first element of having received the order from a superior officer is established. But Csihas has fallen far short of bringing himself under immunity for the offense charged. Csihas was an officer and clearly knew the difference between a legal and an illegal order. Csihas stated, "I realize it was a cruel order," (Prosecution Exhibit 2, Statement 7, p 3); that he knew it was wrong to carry out the order and would not do so today because the war is over (Prosecution Exhibit 2, Statement 9, p 7). Furthermore, knowledge of the illegality of the order is reflected in the first part of his original interrogation in which he sought to deny all participation in the execution and said he had turned the flyers over to the Germans at Aka (Prosecution Exhibit 8, p 1). Finally, no claim was made by the defense that Csihas was bound to obey the order under penalty of immediate and severe punishment. Thus, the essential elements for the establishment of a valid defense of superior orders are lacking, and the commission was justified in finding accordingly.

No prejudicial errors in the admission of evidence affecting Csihas appear in the record. Some attempts were made by the prosecution to bring the Group into disrepute (R 268, 269); but these do not appear to have affected the issue so far as Csihas was concerned. The deed was acknowledged; the defense was squarely presented to the commission and rejected. It is believed that the

finding of the commission in his case should not be disturbed.

c. Lengyel and Eros:

There was evidence before the commission from which it could be found that these men were volunteers for the execution (Prosecution Exhibit 2, Statement 1, p 1; Statement 2, p 2, 4; Statement 5, p 4, 7; Statement 6, p 4; R 350), although these statements were admitted by the maker in court to be untrue (R 180). It is a probability not to be overlooked that the enlisted men did volunteer. All were noncommissioned officers (Prosecution Exhibit 4, 1st Report, p 3), showing some sort of preference in the selection (R 284), and there was evidence that their hatred was incited by stories of the bombing of the cities of Hungary (Prosecution Exhibit 1, Statement 5, p 1). However, giving the accused the benefit of every doubt it may be assumed that they felt that although the order was not right (Prosecution Exhibit 2, Statement 15, p 7), they, as enlisted men, were obligated to execute it without question. Guilt as to these men is clearly established and these facts have been presented squarely to the commission and appear to have been considered as mitigating circumstances. The mitigation is reflected in the difference of the sentences imposed upon the enlisted men and upon Lt Csikas for the identical offense.

Whether Lengyel actually fired or not is immaterial, except that if true it would indicate an effort to evade compliance with the order. The commission apparently did not believe this claim. He was a member of a firing squad and as such by his presence, encouraged, aided and abetted in the execution.

d. Karoly Ney.

Upon the evidence presented, the commission had a strong basis for its finding of guilty. There is first the damning fact that the execution took place within Ney's command. There was evidence that Karolyi regarded the desires of the Corps as an order (R 99, 104) and it is significant that that was all that Ney remembered of Karolyi's report (R 107). It is almost unbelievable that subordinates on his own staff would countermand his order without his knowledge as claimed by Bakos. It is significant that although Ney was supposed to be ill, and had a turn for the worse on the evening in question, Karolyi testified he was with Ney in his room until 11 PM and that they had supper together. He was clearly not too ill to see Bakos or to be aware of what was occurring. The failure of Ney to take any disciplinary action against Bakos or Csikas or even to investigate the rumor of the atrocity is significant (Ney explains this failure merely by stating he did not know of the execution and did not believe the rumors he later heard, and further, that the Russian advance at this time occupied all his time.) The letter from General Winckelman (Prosecution Exhibit 11, R 123) indicates a state of affairs from which it can be inferred that Ney might have had every desire to please that higher officer. More damaging still, Ney was surprised when he learned Bakos was alive. While not compelling, the evidence is strong that Ney (and Karolyi) were possessed of guilty knowledge and played at least a consenting part in the conduct of Bakos.

However, the evidence in the record is far from one sided. Peter and Schmidt are not available as witnesses, so that there is nothing to disprove Bakos' claim. All the testimony, including the testimony of Bakos himself, is in agreement that Ney gave a correct and proper order. The inferences of guilt, constituting circumstantial evidence, must therefore be weighed against positive, direct and unanimous exculpatory evidence. Even Bakos, who may have invented the story about Peter and Schmidt, does not claim that the so-called superior orders came from or through Ney or Karolyi.

The commission is the sole trier of the facts; it has the duty of appraising the witnesses and weighing the evidence. It was free to disbelieve the testimony of all as a story concocted for the benefit of all placing the blame on persons not available for trial or to testify at all. Circumstantial

evidence may be more convincing than a plausible witness (MOM p 111), and in the absence of serious prejudicial error its findings should not be disturbed. The question whether prejudicial error did in fact affect the judgment of the commission is difficult. The record is, as stated above, replete with incompetent, prejudicial evidence, improper questions, references and innuendoes. Many references are made from which it was apparently intended that the court should infer that the three American officers were also killed and that Ney and Karolyi were responsible for their deaths (R 72, 142, 172, 173). The consideration on the commission gave this evidence appears in the refusal of the commission to strike it from the record (R 248). The alleged striking from the record of other irrelevant and prejudicial evidence, while legally correct, leaves in the mind the question whether the effect of such evidence was erased from the minds of the court.

Considering the credibility of the respective accused and their respective motives in testifying more or less unanimously to facts the effect of which tended toward the exculpation of all, and weighing against such questionable testimony the strong inferences of guilt arising from the surrounding circumstances, it cannot be said that the evidence was evenly balanced. The commission was free, based on entirely competent and admissible evidence, and as trier of the facts, to conclude beyond a reasonable doubt as to the guilt of Ney. On the matter of prejudice, it must be borne in mind that the court was composed of competent senior officers of much experience who were sworn to reach a verdict according to the evidence, and while they appear to have been to some extent misguided concerning the admissibility of the irrelevant evidence, their conscientious search for the truth is obvious from the record. Accordingly, with the competent evidence before the commission, it does not appear that the judgment of the commission should be overturned on the ground that its verdict was affected by prejudice. Under all the circumstances, it is believed that the finding of guilty as to Ney, at least of encouraging and aiding in the crime to the extent of knowingly playing a consenting part, should be affirmed.

e. Karolyi:

There was ample evidence to support the findings of the commission that, if the order for the execution originated directly or by indirection with Ney, Karolyi played an important part in that initiation. Even though Karolyi denied that the impression he had received from Grund had any effect upon the execution (R 339), yet he also stated that Bakos, under the execution, must have received some sort of an order or some thing that he regarded as an order (R 336). Ney also said that in his opinion, Bakos did not act on his own (R 134). But neither of these is necessarily an admission that the order came from Ney or Karolyi. It seems more likely to be an attempt corroboration of Bakos' claim. There is evidence that the "impression" that Grund gave was regarded as an order of the Corps (R 99, 104, 107). So, if, as the commission found, the order originated within the group, Karolyi was the one who started the machinery moving which resulted in the execution of the American prisoners. He is an accomplice (and therefore a principal under our law) by definition, "One who performs some act or takes some part in the commission of a crime" (Wharton's Criminal Evidence, p 1231), and his absence from the scene on the day of the crime would not constitute a defense. To hold Karolyi as a principal it is not necessary that he should be actually present when the offense was consummated. The offense may be committed in his absence and the offender, though absent at the time, is a principal (Bouvier's Law Dictionary, Volume 3, p 2686). There is the inculpatory fact that the execution occurred in the command of which he was executive officer; that he was present with his commanding officer at the headquarters at the very time when it is claimed that the order was changed by subordinates upon orders from the higher command. However, as in the case of Ney, there is evidence to support a finding that Karolyi was completely innocent of the whole crime (Prosecution Exhibit 1, Statement 7; Statement 8; Prosecution Exhibit 2, Statement 10; Statement 11; Statement 12; Statement 13; R 83-87, 105-107, 150, 152, 333, 6 and 7). There is, therefore, in the case of Karolyi, as in the case of Ney, the problem of weighing circumstantial evidence against positive exculpating evidence.

Ney states that neither he nor Karolyi had any knowledge of the change of orders, and even Bakos, whose defense is that he received the changed order, expressly asserts that the order came from others and completely vindicates Karolyi and Ney.

Here again, however, the commission, as trier of the facts, had the duty of judging the credibility of the witnesses and weighing the evidence. It was free to reject direct testimony and place its faith in contrary circumstantial evidence. It could take into consideration the motives of the respective witnesses to fabricate evidence tending to exculpate. This the commission apparently did with respect to Karolyi as well as Ney.

It is not thought necessary to reiterate the citations of prejudicial, incompetent evidence found in the record. It is clear that, under the circumstances and considering the relative positions of these accused, they affect Karolyi as injuriously as they affect Ney. However, what has been said with respect to the weight of the evidence and the ultimate effect of the prejudicial evidence also applies to Karolyi to the same extent that it applies to Ney. Accordingly, it is believed that the finding of guilty, at least of encouraging and aiding in the crime to the extent of knowingly playing a consenting part, should be affirmed.

f. Summarizing:

The findings of guilty as to each and all of the accused are sustained by evidence which was competent within the test imposed by the order appointing the commission, that it should have probative value to a reasonable man. There are no errors or irregularities affecting the fairness and impartiality of the trial or prejudicial to the substantial rights of these accused in proceedings such as these.

However, the specification, charging each accused as a principal in a violation of the laws of war, alleges that each did wrongfully encourage, aid, abet and participate in "the killing." It thus appears to be contemplated that differing degrees of guilt are possible, meriting different punishments. As stated above, the evidence is not convincing that Karolyi and Ney acted in such manner as to be guilty of "participating in" the execution. It seems more clearly established that they acquiesced in the atrocity and encouraged others by their knowingly refraining from action. It is believed that such differing degrees of connection with the crime should be considered in connection with the approval of sentences.

10. CLEMENCY

Pleas for clemency on behalf of accused Ney and Karolyi have been submitted by their respective wives and also by defense counsel, and a petition for Karolyi has been presented by local counsel subsequent to the conviction. These pleas are generally without merit. The wives contend that their husbands had no part in the event and ask that mercy be shown. The local counsel tries to deny the evidence.

A plea for clemency for all of the accused has been submitted by the civilian counsel for Bakos. That portion of the plea relating to Ney and Karolyi will not, in view of the recommendation to be made, be discussed. The plea is made for mitigation of the sentences of the two enlisted men, Eros and Lengyel. It is believed that the relative positions of these men as subordinates, obeying orders, was considered by the commission and these men have already had the full advantage which can possibly accrue to them from this subordinate position. It is recommended that this plea be denied. Plea for clemency for Csikas has been submitted on the ground that he knows no more than he told at the trial. His entire story and defense was fully presented to the commission and was rejected. It is respectfully submitted that this plea has no merit. The plea for Bakos is based upon the hardship his execution would work on his wife. This is believed to require no comment. He also asks for further investigation of the part in this execution played by

ence of Peter, Schmidt and Grund, their part in the execution of the American prisoners does not exculpate Bakos since, even if he received the changed order as claimed, it should not operate either in defense or in mitigation under the facts in this case. The plea for clemency for Bakos is entirely devoid of merit and deserves no further consideration. A general plea for mercy is made by the lawyer upon the ground that many men have already died as a result of the war, that he personally succeeded in saving five men from death and that war conditions being passed, the sentences should be mitigated. There appears to be no merit in any of these contentions.

11. SENTENCE

The punishment which might be imposed by the commission before which this trial was held included the death penalty. The offense of which the accused have been found guilty is equivalent to the offense of murder described in Article of War 92 for which death or life imprisonment are mandatory. However, varying degrees of punishment are within the province of the court, and the powers of commutation and mitigation are within the authority of the reviewing and confirming authority. As stated above, with respect to Ney and Karolyi, it is believed that they are guilty of what might, by analogy, be called a lesser included offense of encouraging rather than active participation, and that their punishment should not be as severe as that of Bakos and Csikas. It is believed that life imprisonment would be adequate punishment under the facts established by the evidence.

12. OPINION

It is my opinion that:

- a. The commission was legally constituted.
- b. The court had jurisdiction over the persons and the offenses.
- c. The evidence supports the findings of guilty as to each and every accused.
- d. The record discloses no prejudicial errors injuriously affecting the substantial rights of the respective accused.
- e. The sentences are legal with respect to each and every accused.

13. RECOMMENDATION

It is accordingly recommended that:

- a. The sentences of the commission insofar as they apply to the accused Bakos, Csikas, Eros and Lengyel be approved and that the sentences be ordered into execution, and
- b. That the findings and sentences insofar as they apply to the accused Ney and Karolyi be approved, but for the reasons stated the respective sentences of death be commuted to confinement at hard labor for the terms of their respective natural lives.
- c. That the Commanding General, Zone Command, be directed to carry into execution the sentences of Bakos and Csikas at a time and place to be designated by him, and
- d. That the Commanding General, Zone Command, Austria, be directed to effect the commitment of accused Ney, Karolyi, Lengyel and Eros to confinement at hard labor for the terms of their natural lives in the custody of the Austrian authorities.

14. ACTION

