

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

18 August 1947

UNITED STATES)

v.)

Case No. 12-551

Josef EHLEN, et al.)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 21 October - 7 November 1946, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

FIRST CHARGE: Violation of the Laws of War.

Particulars: In that Josef EHLEN, August VIELHL, Reinhard ECK, Franz MULLER, Martin BALSCH and Paul WINKLER, German nationals, did, at or near NENTERSHAUSEN, Germany, on or about 27 September 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of four unknown members of the United States Army, who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

SECOND CHARGE: Violation of the Laws of War.

Particulars: In that Josef EHLEN, August VIELHL, Reinhard ECK, Franz MULLER, Martin BALSCH and Paul WINKLER, German nationals, did, at or near NENTERSHAUSEN, Germany, on or about 27 September 1944, wilfully, deliberately and wrongfully encourage, aid, abet and participate in assaults upon two unknown members of the United States Army, who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

(The particulars under the Second Charge were amended during the trial to add the words, "and Suess" between the word, "Nentershausen" and the word, "Germany." Further, by adding the words, "or more" between the word, "two" and the word, "unknown" (R 586-588.)

III. SUMMARY OF EVIDENCE: Following a bombing attack upon the interior of Germany, 27 September 1944, four American flyers parachuted to earth from their disabled plane and landed in Kreis Rotenburg. Two landed near the town of Nentershausen and the other two landed near the neighboring village of Suess.

Incident No. 1. The two flyers who landed near Nentershausen were brought into a conference room of a labor camp in that town, one by Gestapo agents Hellwig and Eggert and accused WINKLER; the other flyer by accused

BALSSE, a policeman, and Eggert. These two flyers were beaten in the presence of all the accused and then taken outside and shot to death. For the sake of clarity this incident will be hereinafter referred to as "Incident No. 1".

Incident No. 2. The other two flyers who landed near Suess were picked up by Eggert and accused EHLEN and VIELL. They were beaten at Suess and then removed to the labor camp in Nentershausen, mentioned above. They were shot to death near the same building as the other flyers. This incident will be hereinafter referred to as "Incident No. 2".

Accused EHLEN was the commanding officer of the labor camp in Nentershausen where these incidents took place. Accused VIELL was a high official of the labor camp and subordinate only to EHLEN. Accused BECK was a local baker. Accused MULLER was a safety foreman assigned to the mines of the neighborhood. Accused BALSSE was a local policeman. Accused WINKLER was the district mining inspector with authority in many mines over a wide area.

Six of the perpetrators involved in these incidents were tried in this case. Hellwig committed suicide in July 1945 before apprehension. Eggert was not in custody when this case was tried. However, since the trial in this case, he was tried and sentenced to death on 3 June 1947 in case number 12-551-1, United States v. Eggert. The essential facts as proved in that case were in all material respects the same as those developed in this case. Eggert's name is incorrectly spelled "Eckhardt" throughout this record.

From the record it appears that extrajudicial sworn testimony was probably procured from some of the accused by a form of coercion or duress. The facts concerning the procurement thereof are set forth in detail in Section V, post, and the legal significance thereof is discussed in Section VI, post. When evidence of coercion or duress appeared in the trial of this case, the Court directed that the prosecution and the defense proceed to the situs of the incidents in order to procure witnesses. These were located and testified at the trial. The evidence, summarized heretofore and presented in detail hereinafter in Section IV, is exclusively that given by the witnesses at the trial and does not include the data contained in the extrajudicial sworn testimony allegedly induced through coercion or duress.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Josef EHLEN

Nationality:	German
Age:	33
Civilian Status:	Labor Camp Commander
Party Status:	Not Shown
Military Status:	None
Floor:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	Death by hanging

Evidence for Prosecution:

Incident No. 1. One of the two flyers who landed near Nentershausen was brought to that town by Gestapo agents Hellwig and Eggert at approximately 1800 hours 27 September 1944. After a conference between accused WINKLER and these agents and after WINKLER had dismissed the burgermeister (R 606-609,619), the flyer was taken to the Nentershausen Labor Camp by WINKLER and the agents. In the conference room of the camp they were joined by the accused and accused VILHL, MULLER, ELSSE and the local police chief (R 30, 37). The accused was present when the second flyer was brought in and when both flyers were beaten (R 30, 49, 50, 325, 422). The accused left the room when the agents and the other above enumerated accused took these flyers into the yard and shot them to death (R 49, 422, 423).

Incident No. 2. Subsequent to the killing of the two flyers, referred to in Incident No. 1, the accused, with Eggert and accused VILHL were dispatched to Suess to return the two flyers who had landed nearby. They were instructed by accused WINKLER that these flyers were likewise to be killed (R 508, 509, 535, 536). At Suess the accused beat one of the two flyers over the head with a chair (R 588, 589). The flyers were then taken to the labor camp at Nentershausen in accordance with the instructions received. In the presence of the accused the flyers were shot to death (R 367-369). The accused and accused VILHL reported to accused WINKLER, "Mr. Mining Inspector, the order has been carried out" (R 509, 536).

At an early hour next morning, 28 September 1944, the accused ordered witness Brill out of bed and directed him to transport the bodies of the four flyers to the cemetery before daylight (R 627-630). On the same day, the accused stated to his father, "We had picked up 2 American flyers from Suess and on the way the Americans attacked us so we had to shoot them" (R 702).

Evidence for Defense:

Incident No. 1. The accused testified in his own behalf that he was present in the building where the first two flyers were mistreated and beaten but that he was in a room adjacent to the conference room. He denied that he participated in the beatings or killings. He admitted that he unlocked and opened the rear exit door for the agents when they took the flyers out to their death, however, he did not hear the shots which killed them a few meters from him and he did not learn of their deaths until the next morning (R 427, 428, 435, 436). After the departure of the others, he ordered employees to clean the conference room and went to join the other accused (R 428, 429).

Incident No. 2. The accused received an order from Hellwig, relayed by Eggert and accused VILHL, to go with Eggert and VILHL to Suess to act as a guide in returning the other flyers. They went there and brought the two flyers to the labor camp conference room where Eggert required the flyers to lower their trousers so that he could make a physical examination in an effort to determine whether they were Jews (R 429, 430). The flyers were taken outside one at a time, the first one by Eggert and accused VILHL, while the accused guarded the other one (R 431). After Eggert and accused VILHL returned, they and the accused took the second one out to a point about 40 to 46 meters from the building where Eggert shot him (R 432, 433). This last flyer was suffering from head and foot wounds he had received from the air action; someone in Suess had given him first aid sometime during the day (R 431, 583). Both the flyers were killed 40 to 46 meters from the building (R 432, 433). The accused walked by both dead flyers and went to rejoin the agents and other accused (R 433).

During that evening the accused saw WINKLER at a "celebration" party; but he did not remember talking to him (R 434, 435). Next morning about 0500 hours, witness Brill directed the accused by telephone to take the flyers who had been shot and killed out to the cemetery (R 435).

Sufficiency of Evidence: The evidence given by the witnesses who confronted the accused and who were subjected to cross-examination, if taken alone, is sufficient to sustain and warrant the findings of guilty. The sentence is not excessive.

Petitions: No Petitions for Review were filed. Petitions for Clemency were filed by Franz Feupel, Priest, 18 February 1947 and 2 June 1947; Mayor of Nentershausen, 6 June 1947; J. H. Maeldner, attorney, 17 June 1947, in which it was asserted that Gestapo Agent Eggert had admitted his guilt and had exonerated the accused, which is not borne out by the record in Eggert's trial, Case No. 12-551-1; and Marier Ehlen, wife of the accused, 7 July 1947.

Recommendation: That the findings and sentence be approved.

2. August VIELH

Nationality:	German
Age:	47
Civilian Status:	Miner
Party Status:	Not Shown
Military Status:	None
Plan:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	Death by hanging

Evidence for Prosecution:

Incident No. 1. The proof of facts which occurred up to the time the first flyer was brought into the conference room of the labor camp as made by the prosecution with reference to accused EHLEN is equally applicable to the accused. The accused was present when the second flyer was brought in and when both flyers were beaten (R 30, 325, 423, 424). The accused went to the kitchen and washed blood spots from his hands a short time before he went out with the others to the shooting of the flyers (R 45).

Incident No. 2. After the two flyers mentioned in Incident No. 1 were killed, the accused with EHLEN and Eggert were sent to Suess to get two more flyers who were being held there (R 243, 366). They went under orders from WINKLER to the effect that the flyers at Suess were to be likewise killed (R 508, 535, 536). These flyers were brought to the labor camp conference room after EHLEN beat one of them with a chair in the presence of the accused (R 584, 589). The accused was present and went with Eggert when the first of these two flyers was taken outside and killed (R 431). He was also present when the last flyer was taken outside by all three and shot to death (R 432, 433). The accused and EHLEN later reported to WINKLER at a "celebration", "Mr. Mining Inspector, the order has been carried out" (R 509, 536).

Evidence for Defense:

Incident No. 1. The accused testified in his own behalf. He admitted he was present in the building and in the next room to the conference room while the first two flyers were interrogated; but he denied that he participated or that he in any manner struck either of these two (R 360, 363). He testified that he went to the toilet when the Gestapo agents and EHLEN took the flyers outside the building. He did not hear any shots and did not learn of the flyers' deaths until several days later when he heard it through gossip in the town (R 363, 367, 373).

Incident No. 2. The accused testified that shortly after the two flyers mentioned in Incident No. 1 were taken out of the building, he, EHLEN and Eggert were dispatched to Suess for two more flyers (R 366). They returned the two flyers to the labor camp where Eggert shot them to death outside the main building (R 368). These flyers were taken out of the building one at a time, the first one by Eggert alone. The accused did not hear the shots that killed this one (R 367). He went with Eggert and EHLEN when the second flyer was taken out and was present at the shooting (R 368).

The accused testified that he believed the first three flyers had been put into the bunker until he saw the third one lying near the fourth one, both dead. He still believed the first and second ones had been locked up until he heard differently several days later (R 401, 414). He testified that EHLEN

and he reported to WINKLER at the "celebration" that Eggert had killed the two flyers brought from Suess (R 370).

Sufficiency of Evidence: The evidence given by the witnesses who confronted the accused and who were subjected to cross-examination, when taken alone, is sufficient to sustain and warrant the findings of guilty. The sentence is not excessive.

Petitions: No Petitions for Review were filed. Petitions for Clemency were filed by Fritz Legge, pastor, 29 Nov. 1946; the Evangelic Church office, Schotten II, Germany, 29 Nov. 1946; Stauk, 29 Nov. 1946; the mayor of Rudingshain, Germany, 13 Nov. 1946; Heinrich Viehl, 13 Nov. 1946; Heinrich Long, 1 Dec. 1946; 11 persons from Rudingshain, 1 Dec. 1946; and 4 members of the Social Democratic Party of Rudingshain, 2 Dec. 1946.

Recommendation: That the findings and sentence be approved.

3. Reinhard BLACK

Nationality:	German
Age:	48
Civilian Status:	Baker
Party Status:	None
Military Status:	None
Floor:	NG Charge I; NG Charge II
Findings:	NG Charge I; G Charge II
Sentence:	4 years, commencing 20 May 1945

Evidence for Prosecution:

Incident No. 1. For proof of the accused's participation, prosecution was relegated to the extrajudicial sworn testimony of BHLIN (P-Ex 1) and WINKLER (P-Ex 4).

Evidence for Defense:

Incident No. 1. The accused testified in his own behalf that, while returning to his bakery from a potato field on 27 September 1944, he stopped at the labor camp at approximately 1930 hours, leaving his children who accompanied him with the cart, and entered the office building. He came to see Camp Commander BHLIN with reference to collecting approximately 2700 marks for

bread which he had sold there during the month as had been his custom for many months (R 485, 495). As the accused entered, BABSSL was leaving (R 485). He wandered into the conference room from which he had heard people talking. He testified that as he came into the room he saw accused WINKLER, VIEHL and MULLEN sitting at a table, the two American flyers standing against the wall, and the two Gestapo agents Hellwig and Eggert standing next to the flyers with a pistol (R 486). He stated that he left immediately, rejoined his children at the cart and went home, not returning. He estimated that he was away from his children and cart "about four to five minutes to and from the camp" (R 487). He did not strike any flyer (R 489).

Both EHLEN and WINKLER repudiated their extrajudicial sworn testimony insofar as the accused was concerned and testified that he did not strike either of the two flyers he happened to see (R 241, 424). VIEHL testified as to the accused, "He came in and left right away" and did not "beat or mishandle either of these two flyers" (R 362). Joseph Hogeman, testifying for the prosecution, stated he did not see the accused on the day in question (R 34). Margarete Schneider testified that she did not see the accused (R 70). BABSSL testified that as he left the building after delivering the second flyer he met the accused in the hallway (R 466).

Sufficiency of Evidence: The evidence is insufficient to sustain a finding of guilty.

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

Recommendation: That the findings and sentence be disapproved.

4. Franz MULLEN

Nationality:	German
Age:	48
Civilian Status:	Minor Foreman
Party Status:	Not Shown
Military Status:	None
Plea:	NG Charge I; NG Charge II
Findings:	NG Charge I; G Charge II
Sentence:	6 years, commencing 5 June 1945

Evidence for Prosecution:

Incident No. 1. The accused was at the labor camp and joined Gestapo agents WINKLER, LEBEN and VILHL soon after the first flyer was brought into the conference room (R 310, 360, 636) where the first flyer was beaten (R 328). Shortly thereafter another flyer was brought into the room and he, too, was beaten. Later both flyers were taken outside and shot to death. The above mentioned persons including the accused, went outside together when these two flyers were shot (R 45). Before the flyers were taken out and killed, the accused and VILHL went into the kitchen room and washed blood spots from their hands. At this time the accused said, "These pigs who also killed my son are not worthy of anything but being annihilated" (R 45).

Evidence for Defense:

Incident No. 1. The accused, testifying in his own behalf, admitted that he was present in the conference room during the interrogation and beating of the two flyers. He denied, however, that he went outside with the others when the flyers were killed or that he washed blood from his hands or that he made a statement to the effect that the flyers should be killed (R 313, 322). He did not hear the death shots (R 341); and he did not know that any flyers were shot or killed until the next day at noon (R 342). He testified that he went to a restaurant at about 2000 hours and from there to his home at midnight by bus (R 314).

Sufficiency of Evidence: The evidence given by the witnesses who confronted the accused and who were subjected to cross-examination is sufficient to sustain and warrant the findings of guilty. The sentence is not excessive.

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

Recommendation: That the findings and sentence be approved.

5. Martin Babool

Nationality:	German
Age:	50
Civilian Status:	Local Policeman
Party Status:	Not shown

Military Status:	None
Plea:	NG Charge I; NG Charge II
Findings:	NG Charge I; G Charge II
Sentence:	6 years, commencing 25 June 1945

Evidence for Prosecution:

Incident No. 1. The accused was present in the labor camp and joined Gestapo agents WINKLER, EHLEN, VIELHL and MULLER soon after the first flyer was brought into the conference room (R 361, 362) where the flyer was beaten (R 328). The accused and Eggert were sent out into the town and brought in the second flyer (R 461). Both flyers were beaten. Later they were taken outside and shot to death. According to the testimony of a witness present at the interrogation of the accused, the latter admitted that he took a watch which belonged to a flyer; it was found concealed in his cell (R 191).

Evidence for Defense:

Incident No. 1. The accused testified in his own behalf that at about 1900 hours on 27 September 1944 in the hallway of the labor camp office building, he encountered Eggert who directed the accused to accompany him to an apartment to get a flyer. He complied and delivered the flyer to Hellwig in the conference room. Immediately thereafter he left for his home where he spent the rest of the evening and night (R 460-463). As he left the camp building, he met accused Ebba in the hallway (R 466). At the time of this incident he had been a policeman only three days (R 474).

Sufficiency of Evidence: The evidence given by the witnesses who confronted the accused and who were subjected to cross-examination is sufficient to sustain and warrant the findings of guilty. 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. Paul WINKLER

Nationality:	German
Age:	51
Civilian Status:	District Mining Inspector

Party Status:	NSDAP (Early membership)
Military Status:	None
Plea:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	Death by hanging

Evidence for Prosecution:

Incident No. 1. Of the two flyers who landed near Nentershausen the first was brought to the town by Gestapo agents Hellwig and Eggert at about 1800 hours on 27 September 1944. As the agents were marching the flyer to the overnight quarters arranged for him in the city hall, the accused, who had been standing nearby and who had evidently heard the arrangements made between the burgermeister and the agents, interceded by saying, "He belongs to (in) the Russian Laborers' Camp." Thereupon one of the agents turned to the burgermeister and said, "There is no need for your quartering this man. I will take him along myself" (R 608). After a brief conference between the accused and Gestapo agents, the accused dismissed the burgermeister, saying, "Mr. Mayor, right now you are not present" (R 609, 619). Subsequent to the burgermeister's departure, the accused and the agents drove with the flyer to the Eastern (Russian) Laborers' Camp and in the conference room they were joined by accused VIELH, MULLER, EHLEN, BLESSL and the local police chief.

There the accused struck the flyer several times in the face with his hands. He remonstrated with the police chief when the latter objected, stating "For me (police chief) to keep out of this, this is a prisoner of the Gestapo" (R 29-31, 362). The accused, who was the district mining inspector, had scheduled a conference in Nentershausen for the evening of 27 September 1944 to be attended by some of the accused and by Franz Mueller (R 236) who is hereinafter called "witness Mueller" to clearly distinguish him from the accused Franz MULLER. Witness Mueller appeared in the town during the late afternoon of that day. He found all of the accused except BUCK at the labor camp. Through an open door he also saw the flyer. He testified that the accused and VIELH expressed indignation about the air attack and that the accused stated, "The conference will not take place today, we have something more

important to do." The witness then departed for his home (R 636, 637).

The second flyer who was being held in an apartment house in the town was brought to the camp by accused BÄCKEL, Gestapo agent Eggert and another person (R 460, 461). In the room the flyers were beaten with a chair leg, a bottle, fists and hands. Their screams were heard by various people who were near the room and the accused's voice was heard to call out the word, "Kassel". One of the flyers also referred to the city of Kassel (R 654, 664, 665, 694). Then the flyers were taken outside of the building by the accused, VIEHL, MÜLLER, LIELEN and Gestapo agents and shot to death. LIELEN, the camp commander, ordered women employees to clean up the conference room. The chair leg, a broken bottle, and blood on the floor, door and sofa were found there (R 45, 657). The accused departed at about 1930 hours to a restaurant (R 243, 364).

Incident No. 2. When the accused and the others learned that two more flyers were being held at the parish house in the nearby village of Suess, VIEHL, LIELEN, and Eggert the driver were dispatched to get them (R 244, 366). A witness testified that the accused said to him that he, the accused, had given the order to pick up the two flyers in Suess and not to bring them back to Nentershausen alive. The statement as to the order he had given was repeated by the accused to others at a party which he attended after the flyers from Suess were killed (R 508, 535, 536). After the killing of these flyers, at about 0100 hours LIELEN and VIEHL sought out the accused and reported, "Mr. Mining Inspector, the order has been carried out" (R 509). The accused "explained" to those present, "This was the nicest day of his life" (P-Ex 7).

On Tuesday before Easter 1945, the accused, while walking past the Nentershausen cemetery, beat on his chest and said to a witness who testified, "Here the ones that I shot lie" (R 550, 552).

Evidence for Defense: The accused testified in his own behalf and denied categorically every fact set out in his extrajudicial sworn testimony (P-Ex 4) except his name, date and place of birth (R 253). However, on cross-examination he admitted the truth of every fact stated therein except one. He denied giving VIEHL and LIELEN an order "to go to Suess to pick up the two flyers and not to bring them back to Nentershausen alive" (R 254-284), Incident No. 2. He

denied that he left the conference room and went outside with the others when the first two flyers were killed, Incident No. 1.

Sufficiency of Evidence: The evidence given by the witnesses who confronted the accused and who were subjected to cross-examination is sufficient to sustain and warrant the findings of guilty. The sentence is not excessive.

Petitions: No Petitions for Review were filed. Petitions for Clemency were filed by Richard Simon, 1 October 1946; Heinz Behensky, 2 October 1946; Hans Meyer, 4 October 1946; Else Winkler, wife of the accused, 4 October 1946 and 9 October 1946; Fritz Heuse, 5 October 1946; Emma Stadler, 5 October 1946; Georg Schone, 6 October 1946; Gustav Winkler, father of the accused, 9 October 1946; and Margarete Reissig, 9 October 1946.

Recommendation: That the findings and sentence be approved.

V. METHODS OF ACQUISITION OF EXTRAJUDICIAL SWORN TESTIMONY

1. Josef BHIEN

The accused testified that he was mistreated and beaten when his extrajudicial sworn testimony, Prosecution's Exhibits 1 and 2, were taken. He stated that he was arrested in Hersfeld in April 1945 at which time he was beaten by his interrogators (apparently by the German Burgermeister, Iwanowski) (R 21, 25). The accused stated that on 24 June 1945 he was threatened with an axe handle (R 439). Later on 27 or 28 June 1945 he was interrogated in Camp 93, Schwerzenborn where he was again mistreated. He was required to take off his clothes and was whipped across the back by an officer; a soldier also beat him with his fists (R 22). He was required on this occasion to take a squatting position with his back against a wall while a bayonet was held under him in such a fashion that if he fell or failed to hold his position he would have fallen on the bayonet. Thereupon he finally appealed to the major in charge to stop the people from beating him. He agreed to sign anything that the major gave him or, in the alternative, asked that he be shot (R 21-23, 438).

The accused WINKLER testified that during the time last mentioned he was brought into the presence of the accused in the interrogation room. He observed that the accused's face was swollen and that blood was on his lips and clothing.

On the next day or the day following, the accused exhibited his back bearing three red, partly open lash stripes approximately 20 centimeters in length. The accused stated to WINKLER that he had been beaten during the interrogation by a U.S. Army Investigating Team (R 13, 14). He also told WINKLER that he was forced to make a statement under coercion in order to avoid "further mistreatments" (R 15).

The accused VIEHL testified that he saw the accused at Internment Camp 93, Schwarzenborn on 27 June 1945 in the interrogation barracks. At that time he observed that the accused was "very disturbed, blood stains on his shirt and he was full of blood" (R 18). In addition, accused's face was swollen. On the following day VIEHL saw the accused in the latter's quarters while he was washing, VIEHL observed three blue and red, partly open wounds on the accused's back (R 18, 19). VIEHL was told by the accused at that time that he had been beaten with a whip by Americans in order to get statements from him (R 19). The accused also told VIEHL that he had been whipped before, on or about 20 April 1945, by three Americans (R 20).

2. August VIEHL

The accused testified that his extrajudicial sworn testimony, prosecution's Exhibit 3, was untrue and that he had made it because he had been beaten (R 393-395). He also testified that on 27 June 1945, during an interrogation, he was required to remove his jacket at which time he was beaten by four Americans and Iwanowski, a German national, who had volunteered to assist the Americans in the investigation. Iwanowski administered his beating with a stick. As a result of this beating the accused signed the statement which was typed by Iwanowski. On this occasion his left lip was beaten open and 12 teeth knocked out (R 105-107). He stated that the American personnel present were a major, first lieutenant, an American interpreter and an American enlisted man (R 109). This interrogation occurred in a small castle near Nentershausen (R 106).

Witness Iwanowski admitted that he struck the accused at the time of this interrogation (R 112). Iwanowski named the Americans who were present during the accused's interrogation; they were Major Best and Lt. Breen; but he did not

know the name of the enlisted man. Larry Scheerer was the typist and probably the interpreter (R 113). The accused ELCA stated that he was taken to the interrogation room by an American soldier during the accused's interrogation and he observed that the accused's face was bloody and swollen. He saw an American holding a rubber club (R 99).

3. Leinhard ELCK

The accused testified that he was beaten during his first arrest in Hersfeld during 1945 at which time he was placed on the floor, face downward, and was trampled on by "people". He was then placed next to a rough wall, face toward the wall. He was beaten from behind in such a fashion that he fell towards the wall. One American who had a big leather glove beat the accused. As a result of this beating he lost one molar and 80% to 90% of his hearing in his left ear. He had a nervous breakdown and has developed heart trouble (R 100, 101). As a consequence of this beating and because of threats, he was forced to sign the extrajudicial testimony (R 100).

4. Franz MULIER

The accused testified that he was mistreated severely for about six hours during an interrogation conducted by Iwanowski at Montershausen in the mayor's office. He stated, "Six of my teeth were knocked out, the right ear drum was broken, my head was beaten in such a shape I am still under medical treatment today, rope was put around my neck, and my head pulled towards the rear, with the knuckles I was beaten on the forehead constantly; and I was beaten almost continuously with two pack straps with iron trimmings on it, and a black jack." (R 317). These beatings were administered by Iwanowski (R 318). At this same time he was beaten by another with his fists until he, the accused, dropped from the chair unconscious. His left cheek was open and the bleeding continued (R 318). The witness Iwanowski testified that he beat the accused on one occasion when Americans were not present. This whipping was administered with a German pack belt (R 83, 84). The accused has never signed any statement in this case (R 320).

5. Paul WINKLER

The accused testified that the Americans who took his extrajudicial

sworn testimony beat him and at the same time VILHL and LHLN were permitted to beat him because he told of their activities in the matter under investigation (R 122-125, 85-87). The latter beating occurred in the presence of American officials (R 87). These beatings occurred in the Internment Camp at Schwarzenborn on or about 27 or 28 June 1945. In the interrogation room were Iwanowski, an American major, an American lieutenant, an interpreter, an American soldier and perhaps others (R 122). The major beat the accused over his head and shoulder with a rubber hose. Iwanowski beat the accused on his nose twice with his fist. The American soldier with a pair of rubber gloves on his fists worked on the accused's head. The accused was then required to assume a squatting position over an open bladed knife set in the ground beneath him; his back was pressed against a board placed in a vertical position in front of the door. While in this position, he was interrogated and beaten around the head. The soldier pressed down on his shoulder and the accused dropped to one side to avoid the knife. He was jabbed in the back and hit in the face by the soldier, causing momentary unconsciousness (R 122, 123). Upon becoming conscious he was kicked in the back and was ordered to get up and run around the room three times in a circle. He was beaten on the stomach by the soldier with the gloves. Blood came from his mouth. He was directed to take the squatting position in front of the board again and while trying to comply he was beaten again in the stomach by the soldier. Whereupon the accused agreed to do what his interrogators wanted. He stated that he was denied something warm to drink or eat and was returned to his cell, being kicked into it (R 124).

On the next day the accused was beaten by Iwanowski and a soldier wearing white gloves. A lieutenant, sitting nearby on a chair during the interrogation, scratched a record of the accused's lies on the floor and directed twenty blows for every lie. After the first beating the accused signed a statement prepared for his signature; he denied that he ever read the statement prior to signing (R 125).

The accused BLSEL testified that on 27 or 28 June 1945 he was led through the interrogation room at Schwarzenborn where he saw the accused. The accused's face was swollen and so changed that BLSEL could hardly recognize him (R 117).

Later that same day BALSS and the accused were confronted with each other in the interrogation room (R 117). The accused at first denied that BALSS had beaten any of the flyers; whereupon Iwanowski and an American beat the accused (R 118). BALSS noticed that the whole right side of the accused's face was swollen, his eyes were red and swollen, and his mouth turned upwards and outside so that he could hardly talk. After the beating, the accused stated that BALSS had beaten the flyer (R 118). BALSS testified that this last statement by the accused was untrue (R 117).

Iwanowski testified that the accused was bruised and bled profusely after EHLEN and VIELH had whipped him and that he had lost some teeth (R 86).

It appears that the Iwanowski was very unfriendly to the accused at the time the American Army overran the community, where the crimes were committed; that he was appointed Burgermeister; and that he caused the accused to be arrested. It is also apparent from the record of trial that he beat the accused some on his own initiative. The exact amount of the mistreatment which is assignable to the War Crimes Investigating Team, assigned to the Ninth U.S. Army, is not too clear.

VI. QUESTIONS OF LAW

Jurisdiction: It is clear that the Court had jurisdiction of the persons of the accused and of the subject matter.

Methods of Procurement of Extrajudicial Sworn Testimony: The Court admitted into evidence the extrajudicial sworn testimony of the accused EHLEN, VIELH, BLICK and WINKLER, Prosecution Exhibits 1, 2, 3, 4, 5 (R 28, 72, 115, 166, 168). The accused testified that they were subjected to coercion, duress and mistreatment as shown in Section V, supra.

It is the position of the majority of the courts in the United States that extrajudicial sworn testimony obtained through coercion, duress and mistreatment is inadmissible where such factors are clearly established (Wharton's Criminal Evidence, 11th Edition, pp. 1016-1019; 20 American Jurisprudence, Section 519). However, the rules of evidence as known in British and American courts do not apply to proceedings before military government courts (Section 270 b, "Manual for Trial of War Crimes and Related Cases", 15 July 1946; Section 5-354.4, Title

"Legal and Penal Administration" of "Military Government Regulations", published by Headquarters, United States Forces, European Theater, 30 November 1945). The doctrine of inadmissibility of extrajudicial sworn testimony procured through coercion and duress is not, therefore, binding upon military government courts.

War crimes tribunals may admit any evidence which the tribunal may deem to have probative value (Section 5-329, Title 5, "Legal and Penal Administration" of "Military Government Regulations", supra; Section 270 c (5), "Manual for Trial of War Crimes and Related Cases", supra). Military government courts are given great latitude and discretionary power with reference to questions of admissibility of evidence. Limitations imposed upon them are those contained in Section 329, Title 5, "Military Government Regulations" cited supra; and none of these prohibit the courts from admitting into evidence extrajudicial sworn testimony obtained through coercion, duress or mistreatment.

Foundation evidence to establish that extrajudicial confessions and statements of accused were voluntarily made has never been a condition precedent to the admission of such confessions and statements in evidence. The procedure has contemplated their admission for the Court to give such weight as it seems appropriate in light of the circumstances surrounding their procurement (Par. 7 c, pp. 4, 5, "Outline of Procedure for Trial of Certain War Criminals by General and Intermediate Military Government Courts", published by the Theater Judge Advocate, August 1945; and Sec. 270 c (4), "Manual for Trial of War Crimes and Related Cases", supra, as amended).

Although it is not a prevailing doctrine in the United States, there are courts and other legal authorities which sustain the view that involuntary confessions and extrajudicial sworn testimony, otherwise inadmissible by virtue of having been derived either through coercion or duress, may be admissible after verification of the inculpatory facts (Wharton's Criminal Evidence, 11th Edition, pp. 993-995; 20 American Jurisprudence, Section 1243; and Wigmore, Evidence, Section 857). The Court in this case admitted the extrajudicial sworn testimony of the accused for whatever probative value it may have. It followed the admission of this testimony with the procurement of witnesses who

could testify to the pertinent facts; it recessed for the express purpose of procurement of these witnesses. The facts established by these witnesses are substantially those set forth in the testimony admitted into evidence.

The Court, by its action, demonstrated that it would evaluate the effect of the factors of coercion, duress and mistreatment of the accused in the procurement, as shown by the evidence as set forth in Section V, supra, upon the substance of this extrajudicial sworn testimony. The Court legally admitted the extrajudicial sworn testimony into evidence and has made its evaluation of it, determining, as its own proper legal function, the credibility and the weight to be given to the testimony.

In any event it appears that the Court by its adjournment and procurement of the personal presence of witnesses prevented the very reprehensible action of the German burgomeister and Ninth U.S. Army war crimes investigative personnel from resulting in an injustice to the accused during the trial. Moreover, the convictions are warranted by evidence of witnesses present in Court to the exclusion of the extrajudicial sworn testimony of the accused.

VII. CONCLUSIONS:

1. It is recommended that the findings and sentences be approved as to accused ELLER, VIEHL, MUEHL, BAESSE and WINKLER, but that the findings and sentence as to accused BECK be disapproved.

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

R. C. HAGAN
Major
Post Trial Branch

Having examined the record of trial, I concur,
this _____ day of _____ 1947.

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