

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

5 November 1947

UNITED STATES)

v.)

Case No. 12-1542)

Max HERMANN, et al.)

REVIEW AND RECOMMENDATIONS

I. PRELIMINARY: The accused were tried at Dachau, Germany, during the period 10-26 June 1946, before an Intermediate Military Government Court. Although the record of trial recites (R 1) that the Court trying this case is a General Military Government Court appointed by paragraph 3, Special Orders No. 130, 7 June 1946, no copy of this order is attached to the record. Nor has a careful search at all Headquarters of this Command, where pertinent records might probably be found, disclosed the existence of an order as described in the record of trial. Moreover, this search has definitely established that no such order was in fact issued.

By authority of paragraph 3, Special Orders No. 130, Headquarters, Third United States Army, 24 May 1946, the personnel comprising this Court was authorized to sit as an Intermediate Military Government Court. It thus appears that the recital in the record inaccurately sets forth the date of the appointing order and that the Court trying this case was a validly appointed and existing Intermediate Military Government Court with the limited powers granted to such a tribunal.

II. CHARGES AND PARTICULARS:

FIRST CHARGE: Violation of the Laws of War.

Particulars: In that Max HERMANN, Hans STAUDINGER, Johan PEILLER, Josef VON DER GRUN, Heinrich HEIDENREICH, Hans LUCHMANN, and Franz X. FRIEDL, German nationals, did, at or near AITENKIRCHEN, Germany, on or about 13 June 1944, willfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of an unidentified member of the United States Army who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich.

SECOND CHARGE: Violation of the Laws of War.

Particulars: In that Max HERMANN, Hans STAUDINGER, Therese GEBHARDT, Johann HEILMEIER, Korbinian K. INDL, Elise KREIS, Josef VON DER GRUN, Heinrich HEIDENREICH and Hans LECHNER, did, at ATTENKIRCHEN, Germany, on or about 13 June 1944, wilfully, deliberately and wrongfully encourage, aid and abet and participate in the killing of an unidentified member of the United States Army, who was then an unarmed, surrendered prisoner of war in the custody of the then German Reich.

III. SUMMARY OF EVIDENCE: Before noon of 13 June 1944, three or more American flyers parachuted from a disabled and falling plane in the vicinity of Sillertshausen, near Attenkirchen, Kreis Freising, Germany. One of the flyers, after landing safely and being taken prisoner, was removed from his captors by certain of the accused and shot to death. The second flyer was taken prisoner some distance from the scene of the above incident, transported to the town of Attenkirchen and placed in the local jail. Later the same day the door of this flyer's cell was broken open and he too was killed by certain of the accused. A third flyer was found in a wounded condition and delivered to a Freising hospital. A fourth flyer was reputedly transported to a prisoner of war camp. Neither of the latter two is involved in this case.

The first charge is predicated on the killing of the flyer near the scene of the plane crash a short distance from Sillertshausen. The second charge is based on the killing of the flyer in the cell of the police station at Attenkirchen. Hereinafter, the incident covered by Charge I will be referred to as Incident Number 1, and that by Charge II as Incident Number 2. A description of the two incidents follows:

a. **Incident Number 1:** About 1030 hours, 13 June 1944, after an air raid on Munich (R 74, 195; P-Ex 21a) an American flyer (R 27) parachuted from an American plane (R 154) near Sillertshausen, Kreis Freising, Germany (R 26). The flyer was taken into custody by a German air corps soldier (R 27). He was unarmed (R 27, 38). At nearby Hirnkirchen the prisoner was turned over to one Bauer, a member of the home guard (R 34) who had been instructed by a Burgomeister Hagel to take him on to Attenkirchen (R 27, 28, 43). On the way to Attenkirchen, near Sillertshausen, Bauer was stopped by accused STAUDINGER, HERMANN, and a man named Karl and the prisoner was taken from him (R 28, 30). All three of these men were armed (R 31, 32). STAUDINGER addressed Bauer with abusive language and asked him if he didn't know what he was supposed to do (R 30).

STAUDINGER then ordered HERMANN and Karl to take the flyer toward a nearby woods while he stayed behind to see that Bauer left (R 31, 65; P-Ex 2c). HERMANN and Karl took the prisoner down a slope toward the woods (R 31). About fifteen minutes later two shots were fired and the flyer dropped (R 32, 65; P-Ex 2c). HERMANN and Karl then returned and one of them said, "It has been done" (R 32). STAUDINGER, Karl and HERMANN left the scene of the shooting and started in the direction of the plane (R 53). There they joined the group consisting of Villechner, the Kreisleiter of Freising, Lieutenant FRIEDL, district leader of police at Freising, KÄNDL, and others (R 65; P-Ex 2c). Villechner and certain of the others walked over to view the body of the flyer (R 781, 782). The victim was lying on the ground, a gun shot wound in his neck, writhing in pain (R 195; P-Ex 19c). FRIEDL, at the direction of Villechner, ordered VON DER GRÜN and a man named Kress to carry the flyer into the woods (R 380, 506, 65; P-Ex 2a, R 195; P-Ex 19c, R 73; P-Ex 4c, R 195; P-Ex 14c). VON DER GRÜN then returned to the road to keep the people away (R 506, 195; P-Ex 19c). Villechner borrowed a pistol from one of the group, after FRIEDL had first refused him his, and fired a shot into the flyer (R 65; P-Ex 2a). That afternoon the body of the flyer was seen lying in the woods (R 461).

b. Incident Number 2: The second victim, also an American flyer (R 75, 92, 465, 467, 502) and a crew member of the plane which crashed near Sillertshausen, parachuted safely, was taken into custody and transported to Attenuktion (R 74, 92). There he was locked in a cell in the police station (R 92, 508). This was sometime between 1030 and 1100 hours on 13 June 1944 (R 92). The accused GEBHARDT maintained an apartment on the second floor of the same building that housed the police station (R 65; P-Ex 2a, R 73; P-Ex 4c, R 90; P-Ex 5). At about 1400 hours that afternoon Villechner and the accused, HERMANN, STAUDINGER, VON DER GRÜN, HEIDENREICH, LECHNER, and others assembled at the apartment of Mrs. GEBHARDT (R 92-93, 195; P-Ex 21c, R 65; P-Ex 2c). HEILMEIER, chauffeur for Kreisleiter Villechner, remained below at his car (R 324, 192; P-Ex 11c, R 65; P-Ex 2a). In Mrs. GEBHARDT's quarters this group consumed food and liquor (R 65; P-Ex 2a). The killing of the flyer which had occurred that morning was discussed, as well as the prospective killing of the flyer in the cell below (R 65; P-Ex 2a, R 195; P-Ex 16a, R 195; P-Ex 17a). Certain of the accused were

not present the entire time (A 192; P-Ex 11a, A 195; P-Ex 10c, A 195; P-Ex 21a). Villochner ordered the accused STAUDINGER to go below and kill the flyer (A 65; P-Ex 2a). STAUDINGER went downstairs and had HEILMEIER procure a hammer for him from the woman in the post office (A 192; P-Ex 11a, A 93). He then broke open the cell door and assaulted the flyer with the hammer (A 65; P-Ex 2c, A 192; P-Ex 11c). A short while later the group from Mrs. GEBHARDT's apartment came downstairs (A 192; P-Ex 11c, A 65; P-Ex 2c). Villochner ordered HEILMEIER to race the motor of his car while those who had come down from the apartment beat the flyer (A 65; P-Ex 2a). There is evidence that LECHNER did (A 65; P-Ex 2a) and did not (A 192; P-Ex 11c) participate in this attack. Villochner ordered STAUDINGER to give HEIMANN a pistol. HEIMANN fired two shots into the victim. The flyer did not move any more (A 65; P-Ex 2c). Later in the day the dead body was seen lying in the cell (A 94-98, 156). The following morning the remains were buried at the cemetery Hochmutting in Schlossheim (A 159).

IV. EVIDENCE AND RECOMMENDATIONS:

1. MAX HEIMANN (The surname and Christian name actually spelled MAXIMILIAN HEIMANN, P-Ex 3.)

Nationality:	German
Age:	48
Civilian Status:	Employee Regional Labor Office
Party Status:	NSDAP since 1933; Lieutenant S.
Military Status:	None
Plan:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	Death by hanging

Evidence for Prosecution: This accused was charged under both Charge I and Charge II.

a. Incident Number 1: When the report was received at the Kreisleitung building in Freising of the fallen enemy plane, and the parachutists near Attenkirchen, this accused started for the scene with Kreisleiter Villochner's party (A 65; P-Ex 2a, A 179). Upon arrival Villochner sent STAUDINGER, Karl, this accused, and a possible fourth person named Ehle to search for the flyer who was reported to be in the custody of Bauer (A 65; P-Ex 2a, A 68; P-Ex 3c). Not far from Sillertshausen they found Bauer and took the unarmed (A 27, 38) American

flyer from him (R 28, 30). HERMANN and Karl then took the flyer in the direction of a nearby woods (R 31). Two shots were fired and the flyer went down on the ground (R 32, 65; P-Ex 2c). HERMANN and Karl returned, reporting to SPÄUDINGER (R 32) or Villochner (R 65; P-Ex 2c) that the job was done (R 32). Later this flyer was observed to be badly wounded (R 195; P-Ex 19a), but apparently not dead (R 195; P-Ex 14a). He was then taken into the woods and another shot fired into him by Villochner (R 65; P-Ex 2a). The flyer's dead body was seen in the woods that afternoon (R 461).

b. Incident Number 2: This accused was also present during the afternoon, in the apartment of Mrs. GEBHARDT together with the rest of Kreisleiter Villochner's party (R 92, 93, R 65; P-Ex 2a). He was one of the group that beat the flyer in the cell, after SPÄUDINGER's original attack with the hammer (R 192; P-Ex 11a, R 65; P-Ex 2c). Villochner handed him the pistol received from Heilmeyer (R 339). While the motor of Villochner's car was racing to muffle the sound, this accused fired two shots into the flyer's body (R 65; P-Ex 2a, 1. 192; P-Ex 11a). After that the victim did not move (R 65; P-Ex 2a).

Evidence for Defense: This accused took the stand and testified in his own defense (R 251).

a. Incident Number 1: He admitted going into the woods with the captured flyer but denies that he had anything to do with the shooting there. In fact, he was unarmed at the time (R 263, 264). He states the person who shot the flyer was a man named Ede (or Jule) (R 263). His extrajudicial sworn statements marked Prosecution's Exhibits 3 and 4 were dictated to him and are not accurate (R 258, et seq.). Although he was not beaten he was threatened before making them (R 287, 288).

b. Incident Number 2: He admitted that he was present at Mrs. GEBHARDT's apartment and received food and a few drinks (R 286). He claims that Jule borrowed a pistol and went into the flyer's cell and later returned saying it was not necessary to race the motor of the car any more (R 295). He also claimed that when Kreisleiter Villochner ordered him to do something he did not have the ability to resist (R 253). He was very much afraid of Villochner who had a strong hold upon him (R 256).

Prior to arraignment it was stated by defense counsel that there was some

question as to whether this accused was of sound mind and suggested the question of his sanity be determined (A 10). The Court interrogated the accused relative to this matter (A 10, et seq.). He was also given an examination by the Neuropsychiatric Section Chief of the 98th General Hospital. The report of this examination indicates this accused, at the time of the offense, was not suffering from a mental defect, disease or derangement and that he was able to understand the nature of the trial proceedings and to assist his defense counsel in the preparation and trial of his case (A 21; P-Ex 1).

Sufficiency of Evidence: The Court was warranted in concluding from the evidence that this accused was sane at the time the offense was committed and at the time of the trial. The evidence indicates that he was capable of distinguishing right from wrong and of adhering to the right.

With regard to the evidence offered in support of superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is excessive.

Petitions: A Petition for Review was filed by defense counsel, 3 July 1946. No Petitions for Clemency were filed.

Recommendation: That the findings be approved, but that the sentence be changed to ten years, commencing 26 June 1946.

2. H. MS. STAUDINGER:

Nationality:	German
Age:	44
Civilian Status:	Administrative assistant to Kreisleiter
Party Status:	NSDAP 1922; rejoined, 1933
Military Status:	Air Force; 3 years prior to 1942
Plans:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentences:	Death by hanging

Evidence for Prosecution: This accused was charged under both Charge I and Charge II.

a. Incident Number 1: He was the leading actor in removing the captured flyer from Bauer's custody (R 28, 30, 233) and in directing Karl and HELLMANN (A 231) and possibly Jelo (A 73; P-Ex 4a) to take him down the slope to the woods. He had ordered the flyer to be shot (A 73; P-Ex 4a). This was for the purpose of carrying out the order of the Kreisleiter (A 65; P-Ex 2a).

b. Incident Number 2: When the decision was made by the Kreisleiter at Mrs. GEBHARDT's party to kill the flyer in the cell of the Attenkirchen jail, he ordered this accused to put it into effect (A 65; P-Ex 2a). After forcing his way into the cell by breaking the door, this accused attacked and beat the flyer with a hammer (A 192; P-Ex 11a). When he left, his victim was lying on the floor covered with blood (A 192; P-Ex 11a, A 65; P-Ex 2a). Later, SPAUDINGER obtained from HEILMEIER the pistol used by HELLMANN in shooting the flyer after the second beating was administered (A 193; P-Ex 11a). SPAUDINGER had a bad reputation in his community (A 308).

Evidence for Defense: Accused took the stand (A 214) and testified that his extrajudicial sworn testimony (A 65; P-Ex 2a) was obtained from him after he had suffered severe mistreatment (A 215, 216). This mistreatment occurred at the Moosburg prison (A 215) two days previous to his making the statement (A 250). At the time he made and signed it he was subjected to duress in the form of threats (A 237, 250). He denied the truth of certain portions of this statement (A 217, 218, 220, 222) and other incriminating parts, he qualified (A 222-224, 238, 248). He admitted taking the flyer from Bauer's custody (A 233), but denies he ordered the man shot (A 233, 234, 235), although previously VILLECHNER had ordered him to "bump off the flyer" (A 222, 235, 236).

Incident Number 2: He admits having broken open the cell door of the Attenkirchen jail and attacking the flyer with a hammer, but denies he did the flyer any serious harm (A 238, 239). He also admits he did not fasten the cell door when he left (A 249). On this occasion, as in the case of Incident Number 1, he was acting pursuant to the order of his superior, Kreisleiter VILLECHNER, who had remained in Mrs. GEBHARDT's upstairs apartment (A 222). This accused entertained a great fear of the Kreisleiter (A 222, 223, 242). He denied knowledge of who killed this flyer (A 228).

Sufficiency of Evidence: With regard to the evidence offered in support of superior orders, this accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is excessive.

Petitions: No Petitions for Review were filed. An undated Petition for Clemency signed by five members of accused's family, was filed.

Recommendation: That the findings be approved, but that the sentence be changed to ten years, commencing 26 June 1946.

3. JOHANN HEILMEIER (The surname actually spelled HEILMEYER, P-Ex 11.)

Nationality:	German
Age:	30
Civilian Status:	Chauffeur for Kreisleiter
Party Status:	SA 1935; NSDAP 1941
Military Status:	None
Plea:	NG Charge I; NG Charge II
Findings:	NG Charge I; G Charge II
Sentence:	Life imprisonment, commencing 26 June 1946

Evidence for Prosecution: This accused was charged under both Charge I and Charge II. He was acquitted of Charge I. For this reason only that evidence dealing with Charge II, Incident Number 2, is considered.

As chauffeur for Kreisleiter Villechner (R 146), he drove the Kreisleiter and some of the members of his party from Freising to the scene of the plane crash on the morning of 13 June 1944 (R 192; P-Ex 11a). Later, he brought them to the police building in Attenkirchen. He did not join the others in Mrs. GEBHARDT's apartment, but waited below in the car (R 65; P-Ex 2a, R 192; P-Ex 11a).

STAUDINGER came down to the car and had this accused obtain the hammer which was used in beating the flyer (R 224, R 192; P-Ex 11a, R 56; P-Ex 2a). He watched STAUDINGER as the latter forced open the cell door. He heard STAUDINGER beating the flyer, and when STAUDINGER left he saw the victim's battered body on the floor of the cell (R 192; P-Ex 11a). He reported to Villechner that the flyer in the

cell was not dead (A 192; P-Ex 11a). This accused supplied the pistol used to shoot the flyer (A 78; P-Ex 3a, A 65; P-Ex 2c, A 192; P-Ex 11c). When the group from Mrs. GEBHARDT's apartment entered the cell and the flyer was beaten and shot, he, at VILLECHNER's direction, raced the motor of his car to cover up the sounds coming from the cell (A 138, A 192; P-Ex 11a, A 65; P-Ex 2c).

After the motor had stopped running he said to Mrs. GEBHARDT, "The old SA spirit is living again." (A 117, 118, 127). Later, this accused and one Jehle entered the cell and noticed that the flyer was still alive. The two men then "stood with our feet on his chest***" (A 192; P-Ex 11a). VON DEL GINN looked into the cell and saw the flyer lying on the cot and a man standing with one foot on the victim's "throat and one on his belly" (A 510, 532, 533).

About 14 days after this incident occurred this accused told a German army captain that he had seen the flyer while he was still alive and had beaten him to death (A 149).

Evidence for Defense: This accused testified in his own defense (A 314). Prior to making the extrajudicial sworn statement marked Prosecution's Exhibit 11, he was subjected to severe physical mistreatment and threatened with death (A 315-318). He denied this statement in part, admitted it in part, and qualified it in part (A 340, et seq.). This accused, whose total education consisted of six years school attendance, part of it in a school for mentally deficient children (A 334), suffered from a chronic disease which disqualified him from service in the Wehrmacht (A 235). He gave the following version of Incident Number 2:

On returning from the scene of the plane crash he parked his car in front of the police station, but did not go up to Mrs. GEBHARDT's apartment (A 324). Mrs. GEBHARDT brought him some food which he ate in the car (A 325). Jehle came to the car and stated that he, Jehle, had killed the flyer in the woods that morning (A 325). STAUDINGER, his superior, directed him to get a hammer and he did so (A 325). When he saw STAUDINGER working on the door of the flyer's cell, he reported the fact to VILLECHNER (A 326). He also reported to VILLECHNER that the flyer needed help when he saw the victim after STAUDINGER's assault. The Kreisleiter ordered him to move the car closer to the cell and to keep the motor running (A 327). Later, he gave the Kreisleiter the pistol (A 339, 353-354) and continued

to keep the motor running as he was ordered. During this time he heard a shot (A 328). When he entered the cell later he only lightly touched the flyer's body with his feet (A 329, 345-346) and found the man was dead (A 329). He denied the statement ascribed to him about the SA spirit living again (A 335, 361), and also denied he told the German captain, Habermayer, that he had beaten the flyer to death (A 366). His actions were pursuant to orders from his superiors (A 325, 353). It was stipulated that certain witnesses, if present in Court, would testify that this accused was a good man (A 370-371).

Sufficiency of Evidence: With regard to the evidence offered in support of superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

The findings of guilty are warranted by the evidence. The sentence is excessive.

Recommendation: That the findings be approved, but that the sentence be changed to ten years, commencing 26 June 1946.

4. JOSEF VON DER GRUN (The surname actually spelled GRÜN, P-Ex 25.)

Nationality:	German
Age:	55
Civilian Status:	Chief, Rural Police
Party Status:	NSDAP 1931; Blockleiter
Military Status:	None
Plea:	NG Charge I; NG Charge II
Findings:	G Charge I; NG Charge II
Sentence:	2 years, commencing 27 May 1945

Evidence for Prosecution: This accused was charged under both Charge I and Charge II. He was acquitted of Charge II. The discussion of evidence is limited to Charge I, Incident Number 1.

When the report was received at his office in Attenkirchen that an enemy flyer had crashed nearby, this accused, in line with his duties as police chief, promptly went to the scene and made an investigation. Thereafter, he returned to Attenkirchen and reported the matter by telephone to his superior, Lieutenant FRIEDL, at Freising (A 195; P-Ex 19a).

At about the time Vilschneider and his party passed through Attenkirchen, Lieutenant FRIEDL arrived there in his auto (A 195; P-Ex 19c). He stopped and delayed about one-half to one hour before he and this accused proceeded on to the scene of the crash. FRIEDL explained the delay in this wise, "We cannot interfere with what they are going to do with the prisoner" (A 195; P-Ex 19c). On their arrival, Vilschneider stated that one flyer had been shot (A 195; P-Ex 14c), and that the terror flyers "are going to be killed" (A 195; P-Ex 19a). Near the woods, they saw a wounded flyer lying on the ground, writhing in pain (A 195; P-Ex 14c, A 195; P-Ex 19c). On orders from the Kreisleiter and Lieutenant FRIEDL this accused took hold of one of the victim's legs and helped drag him into the nearby woods. Then, on the order of Lieutenant FRIEDL, he went down to the road to keep the people away (A 195; P-Ex 19c). In a few moments he heard the sound of a shot. Lieutenant FRIEDL told him the body would probably be buried in the woods. They then returned to Attenkirchen (A 195; P-Ex 19c).

Later this accused told a German sergeant investigating the affair that the flyer was shot trying to escape (A 155).

Evidence for Defense: The accused took the stand and testified in his own defense (A 501). He stated that portions of his extrajudicial sworn statement marked Prosecution Exhibit 19 (A 516-518, 520, 534, 535), and also that marked Prosecution Exhibit 20, were not correct (A 536). Although not physically mistreated, he was subjected to threats at the time these sworn statements were made (A 528).

He admitted carrying the body of the flyer into the woods, but claimed he did this upon the orders of Lieutenant FRIEDL (A 507). He did not notice any signs of life about the flyer at this time (A 507). This accused had an excellent reputation in his community (A 304). He claimed he was acting on orders all the time.

Sufficiency of Evidence: With regard to the evidence offered in support of superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post.

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

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

Recommendation: That the findings and sentence be approved.

5. HEINRICH HEIDENRICH

This accused was acquitted (R. 855).

6. HEINRICH LICHNER

Nationality:	German
Age:	48
Civilian Status:	Mayor of Freising, Germany
Party Status:	NSDAP 1926; Colonel, SA
Military Status:	None
Plas:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	7 years, commencing 7 17 1945

Evidence for Prosecution: This accused was charged under both Charge I and Charge II.

Incident Number 1: At the request of Villochener, he accompanied the group from Freising to the scene of the crash (R. 173; P-Ex 21a, R. 65; P-Ex 2a, R. 192; P-Ex 11c). Villochener is alleged to have stated to the members of this party that the purpose of their trip was to carry out the order providing for the killing of parachuted flyers (R. 65; P-Ex 2a). After STAUDINGER and his men, Karl and HEIMANN, had taken the flyer from Bauer and shot him, Karl reported to the Kreisleiter that the order was carried out. This accused, together with others, was standing with the Kreisleiter near the plane when this occurred (R. 65; P-Ex 2a). He is also identified as being present in the gathering around the wounded flyer when Lieutenant FRIEDL gave the order to carry the victim into the woods (R. 195; P-Ex 19a), and STAUDINGER's extrajudicial sworn testimony (R. 65; P-Ex 2a) places him in the company that followed behind as the flyer was being carried away. Whether he was actually present when the victim was shot the last time does not appear. This accused, with others of the Kreisleiter's party, then returned to Attenkirchen and stopped at the apartment of Mrs. GEBHARDT (R. 195; P-Ex 19a, R. 165; P-Ex 2a).

Incident Number 2: At the apartment of Mrs. GEBHARDT he partook of the food and drink dispensed there (K 65; P-Ex 2a, R 195; P-Ex 21a). The incidents of the day were discussed, including the killing of the flyer near Sillertshausen and the intended disposition of the flyer in the cell below (K 65; P-Ex 2a, R 73; P-Ex 4a, R 195; P-Ex 16a, R 195; P-Ex 17a). After a conversation between Villedchner and SLUDINGER the latter left the room (K 195; P-Ex 21a). Later the entire group left Mrs. GEBHARDT's apartment and went below (K 65; P-Ex 2a, R 192; P-Ex 11a). The flyer was then beaten and shot (K 192; P-Ex 11a, R 195; P-Ex 22a, K 65; P-Ex 2a). In his extrajudicial sworn testimony SLUDINGER places this accused in the group entering the cell (K 65; P-Ex 2a). But the extrajudicial sworn testimony of HEILMEIER specifically excepts this accused and HEIDENREICH from being among those who were present at the beating and shooting of the victim (K 192; P-Ex 11a).

Evidence for Defense: This accused testified in his own defense (K 724). He denied any connection with the killing of the flyers, stating he had no knowledge beforehand of what was going to happen (K 739, 759) and afterward did not even see the bodies of the victims (K 735). His extrajudicial sworn testimony (K 195; P-Ex 21) was obtained from him after he had been ordered to bed by a doctor, and after his interrogator had threatened him (K 735). While the statement in general is true (K 740), parts of it were dictated, and as to those it is not true (K 735-737, 739-743).

Incident Number 1: He arrived at the scene of the plane crash with Villedchner and HEILMEIER at about 1230 hours (K 724). Nothing had been said in his presence about killing flyers (K 724-725). When he stepped out of the car it was reported to him that the pilot of the plane had been captured and delivered to the mayor (K 725). As he was examining parts of the plane he observed Villedchner, FRIEDL and another policeman go toward the road. He heard none of them give any orders and saw no dead American flyer (K 726). When the Kreisleiter was in the car and they were on their way back to Attenkirchen, he was told that a flyer had been shot trying to escape (K 726-727).

Incident Number 2: On his return to Attenkirchen he went with the others to the apartment of Mrs. GEBHARDT where he ate and drank and remained for about one

to one and a half hours (A 727). He heard no conversation concerning the killing of flyers and he did not observe Mrs. GEBHARDT attempting to influence Villochner. He noticed Villochner and STAUDINGER talking excitedly together but did not hear what was said (A 728). He left the apartment and went to the office of the police station to make a phone call (A 729). On his return STAUDINGER was gone. He went downstairs and saw STAUDINGER coming from the washroom adjoining the cell with a hammer in his hand (A 729), his face contorted (A 743). At once he returned to the apartment, took his hat and went out into the street (A 729-730). He walked about fifteen meters from the main entrance to the building housing the police station (A 731, 90; P-Ex 5) and spoke to some people. During this time he heard the Kreisleiter's car running and saw HEILMEIER and Villochner standing there (A 731-732). A little while later an ambulance drove up carrying two American flyers, one of them wounded (A 733). Karl began to strike one of these flyers and this accused intervened to stop him (A 331, 734). That he protected the flyer in the ambulance is corroborated by the prosecution witness Kettner (A 114).

This accused was the mayor of Freising (A 178), but his authority was limited to the borders of the town (A 186). He was neither subordinate to nor the superior of the Kreisleiter (A 765). He had a good reputation in his community (A 181, 456).

When the accused STAUDINGER took the stand he denied that portion of his extrajudicial sworn testimony (A 65; P-Ex 2a) wherein he states this accused went downstairs to the cell (A 225-226).

Sufficiency of Evidence:

Incident Number 1: As to Charge I, the defense motion for a finding of not guilty (A 196) at the conclusion of the prosecution's case (A 195) was well taken and should have been granted. In its strongest light the evidence against this accused does no more than establish his presence at the scene of the first incident. He was not a participant. He was at most a spectator without authority to act.

"One who is merely present and sees that a homicide is about to be committed, and yet in no manner interferes, is not thereby deemed to participate in the commission of the offense."
(26 American Jurisprudence, Homicide, Section 60, p.200.)

Moreover, it should be noted that the evidence of the prosecution does not satisfactorily show this accused to have been actually present when the flyer was shot.

Incident Number 2: The only evidence of direct participation on the part of this accused in the killing of the flyer in the cell at Attenkirchen is contained in paragraph 4 of the extrajudicial sworn statement of the accused STAUDINGER (R 65; P-Ex 2a). STAUDINGER repudiated this portion of his statement in Court (R 225-226) and it is contradicted by the extrajudicial sworn statement of HEILMEIER (R 192; P-Ex 11a). STAUDINGER, HEILMEIER and the accused all took the stand and testified. It was for the Court to determine what credence to give their testimony. It is inconceivable that this accused while attending the GEBHARDT party did not know what had happened that morning and what was proposed to be done that afternoon. The evidence fully justifies the inference of knowledge. There is also evidence to support the conclusion that he participated. But the question of the degree of his participation should be looked into in determining the propriety of the sentence. Under the peculiar facts of this case insofar as they relate to this accused, it is believed a reduction in the sentence should be made.

The findings of guilty as to Charge II are warranted by the evidence. The sentence is excessive.

Petitions: 1. Petition for Review, dated 3 July 1946, was filed by defense counsel. No Petitions for Clemency were filed.

Recommendation: That the findings of guilty be disapproved as to Charge I and approved as to Charge II. That the sentence be changed to four years, commencing 7 May 1945.

7. FRANZ X. FRIEDL

Nationality:	German
Age:	59
Civilian Status:	Mural Police Chief
Party Status:	NSDAP 1937
Military Status:	None
Plea:	NG Charge I

Findings:

G Charge I

Sentence:

7 years, commencing
25 January 1946

Evidence for Prosecution: This accused was charged only under Charge I, Incident Number 1. He held the position of Chief of Rural Police of the district of Freising (R 178, 195; P-Ex 14c). VON DER GRUN was his subordinate (R 195; P-Ex 19a). During the middle of 1944 he received an order stating that German police were not to protect enemy flyers from the fury of the German population (R 195; P-Ex 14a).

On 13 June 1944, when he received the report at Freising that an enemy plane had fallen and flyers had parachuted from it, he set out in his car for Attenkirchen (R 195; P-Ex 14a). He arrived there at about the time the cars carrying Villechner's party were passing through (R 192; P-Ex 11a). He delayed for some time at Attenkirchen explaining to VON DER GRUN that they could not interfere with what the Kreisleitung were going to do to the flyers (R 195; P-Ex 19a). When he and VON DER GRUN finally arrived at the scene of the crashed plane, Villechner told him that the terror flyers were going to be killed (R 195; P-Ex 19a). The Kreisleiter, this accused and others then proceeded to a place near a woods where the body of a flyer was lying. This flyer was not dead but wounded (R 195; P-Ex 14a). Villechner ordered this accused to have the victim dragged into a nearby woods (R 195; P-Ex 19a). He transmitted to VON DER GRUN the order of the Kreisleiter and the man was taken to a place out of sight in the woods (R 195; P-Ex 14a). He then sent VON DER GRUN to guard the road (R 195; P-Ex 19a). Villechner asked the accused for his pistol but when the request was refused the Kreisleiter obtained another and shot the flyer (R 65; P-Ex 2a). It was the duty of this accused to look after the safety of captured enemy flyers in Kreis Freising (R 181). At the scene of the crash he was the superior in command (R 401-402).

Evidence for Defense: This accused took the stand and testified in his own defense (R 372). He repudiated his extrajudicial sworn statement (R 195; P-Ex 14) in part (R 382). At the time he made it he was nervous and excited (R 382).

After receiving the report of the fallen plane, he traveled from Freising to Attenkirchen by the shortest route (R 376), picked up VON DER GRUN and went on to the location of the plane (R 376-377). He ordered VON DER GRUN to carry the

flyer into the woods because the day was hot and he wanted to make the wounded man comfortable (R 380). When the flyer was placed on the ground in the woods he was already dead (R 381). He denied hearing any talk about a mercy shot (R 381-382). After returning to Attenkirchen (R 385) he made an official report of the incident (R 386) and also instructed VON DER GRUN to make a report (R 387). He then went back to Freising (R 389). Evidence was introduced showing the good character and reputation of this accused in his community (R 181, 182).

Sufficiency of Evidence: This accused held a very responsible position in Kreis Freising. His delay at Attenkirchen and his explanation for that delay evidence his guilty knowledge of the plan to kill the flyer. And after arriving at the scene his order to VON DER GRUN to take the flyer into the woods constitutes participation. As the witness Father Kirschboeck put it, under these circumstances "No reasonable person might presume that anything good would happen to the flyer."

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

Petitions: A Petition for Review, dated 3 July 1946, was filed by defense counsel. No Petitions for Clemency were filed.

Recommendation: That the findings and sentence be approved.

8. THERESE GEBHARDT

Nationality:	German
Age:	45
Civilian Status:	Not shown
Party Status:	Local Women's League Leader
Military Status:	None
Plon:	NG Charge II
Findings:	G Charge II
Sentence:	Life imprisonment, commencing 26 June 1946

Evidence for Prosecution: This accused was charged only under Charge II, Incident Number 2. She was resident of Attenkirchen, living in an apartment located one flight above the ground, in the building which housed the police station (R 90; P-Ex 5, R 73; P-Ex 4:). During the afternoon of 13 June 1944, she entertained

Kreisleiter Villochner and his company at her apartment serving them food and drinks (R 195; P-Ex 16a, R 65; P-Ex 2a). The killing of the flyer near Sillerts- hausen was discussed, as well as the proposed killing of the flyer confined in the cell below (R 195; P-Ex 17a, R 65; P-Ex 2a). This accused not only participated in these conversations, but insisted the flyer in the cell be put to death and that she be allowed to observe it (R 192; P-Ex 2a). She went down to the cell with the others and was present and participated when the flyer was beaten and finally shot (R 65; P-Ex 2a, R 192; P-Ex 11c). Earlier that day she had upbraided the Schmidhuber girl because the flyer had been brought to Attenkirchen alive. She said that flyers were not soldiers and must be bumped off (i. 76). Later in speaking to the investigator Richter, she referred to flyers as a dirty bunch who were not to be felt sorry for (R 809-810).

Evidence for Defense: This accused took the stand and testified in her own defense (R 650). She claimed her unsworn pretrial statement (R 195; P-Ex 22) was obtained from her by mistreatment (R 654-655), threats (R 654, 657-658, 666), and misrepresentations (R 657). It did not recite the truth (R 653). While in confinement at Germsich she was whipped and otherwise maltreated (i. 700-702). Her explanation of the incident of 13 June 1944, was in pertinent part as follows: Between 1200 and 1300 hours of that day (R 660) or a little later (R 668) Villochner, SLINDINGER, Karl, HELLMANN, LECHNER and others stopped at her apartment. At Villochner's request she prepared food for the entire group. She also gave them coffee, beer and lemonade and Villochner she gave some cognac (R 660). She saw a flyer being led down the corridor of the police building but did not know where he was being taken. There was no talk about this flyer in her apartment (R 661). She was not in the cell at any time that afternoon (R 662). Later that day she learned from a man in the street, whom she did not know (R 668), that there was a dead flyer in the cell (R 663, 668).

Sufficiency of Evidence: The findings of guilty are warranted by the evidence. The sentence is excessive.

Petitions: No petitions for review nor petitions for clemency were filed.

Recommendation: That the findings be approved, but that the sentence be changed to ten years, commencing 28 June 1946.

9. KOLBILIN K. INDL

This accused was acquitted (R 855).

10. ELSE KRIS (Kris)

This accused was not tried (R 8).

V. QUESTIONS OF LAW:

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

While Military Government Courts have jurisdiction over all offenses (See Section 5-300.3, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Headquarters, US Forces, European Theater, 30 November 1945), the jurisdiction to impose punishment is limited by the specific class of Court trying the offense (See Section 5-300.4, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Headquarters, US Forces, European Theater, 30 November 1945). It has been pointed out under Section I, supra, that the Court trying this case was a validly appointed and existing Intermediate Military Government Court. Such a Court has jurisdiction to try accused charged with any type of war crime, but its power to impose punishment is limited by the provisions of Section 5-300.6, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Headquarters, US Forces, European Theater, 30 November 1945. Because of this provision, so much of the sentences imposed by the Court as exceeds imprisonment for 10 years is void. By virtue of Section 5-337 (3), Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Headquarters, US Forces, European Theater, 30 November 1945, the Reviewing Authority is authorized to "affirm, suspend, reduce, commute or modify any sentence or order". Accordingly, in the case of each accused whose sentence exceeds the limit imposed upon Intermediate Military Government Courts, it is recommended that a change to 10 years confinement be made.

Severance: The Court did not abuse its discretion in denying the motion by the defense for severance of the accused as defendants. Severance is not a right or a privilege of the accused. The applicable rule is that such a motion is addressed to the sound discretion of the Court. Under the procedure applicable to the trial of war crimes, the test is whether an injustice would result

to accused and not whether purported substantial rights of accused would be violated, if the motion were overruled, because accused have no right in this connection (United States v. Altfuldisch, et al., opinion DJMCO, February 1947).

Superior Orders: The accused HERMANN, STAUDINGER, HEILMEIER, and VON DER GRUN sought to justify their actions by offering evidence to show that they were acting in compliance with superior orders. Compliance with superior orders does not constitute a defense to the charge of having committed a war crime (Trial of Henry Wirz, 40th Congress, 2nd Sess., House of Representatives, Ex. Doc. No. 23, page 812; Vol. II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJMCO, December 1945; and United States v. Klein, et al., (Hedemur Murder Factory Case), opinion DJMCO, February 1946; and French Republic v. Wagner, et al., Court of Appeals (France), July 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 How. 115, and "Manual for Courts-Martial, U.S. Army", 1928, paragraph 148).

Compliance with superior orders may, under certain circumstances, be considered in mitigation of punishment. However, an accused who seeks relief on such grounds assumes the burden of establishing (a) that he received an order from a superior in fact, directing that he commit the wrongful act, (b) that he did not know or, as a reasonably prudent person, would not have known that the act which he was directed to perform was illegal or contrary to universally accepted standards of human conduct, and (c) that he acted, at least to some extent, under immediate compulsion. Having satisfactorily established these elements, the amount to which his sentence should be mitigated depends upon the character and extent of the immediate compulsion under which he acted. (See London Agreement of 8 August 1945, Concerning Prosecution and Punishment of Major War Criminals of the European Axis; FM 27-10, War Department, U.S. Army, "Rules of Land Warfare", paragraph 345.1, Change No. 1, 15 November 1944; Oppenheim, "International Law", supra, and the Llandovery Castle Case cited therein; "Manual for Courts-Martial", supra; "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Lie Terror of Our Enemies", found in footnote,

page 53, "Military Occupation and the Rules of the Law", by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945, United States v. Thomas, supra; and United States v. Beck, et al., opinion DJAWC, December 1946.)

Motion for Findings of Not Guilty: At the conclusion of prosecution's case, the defense made a motion for findings of not guilty as to all accused on all charges. This motion was denied. The Court's action on this motion was proper except as to the accused LECHNER on Charge I (See "Sufficiency of Evidence", Section IV, paragraph 6, page 14, supra). The only question necessary for the Court to determine was whether there was some substantial evidence of each element necessary to constitute the offense charged, even though that evidence was contradicted by stronger evidence. The evidence presented by the prosecution together with the inferences flowing therefrom was sufficient to meet the requirements of the test.

It is never error for a war crimes tribunal to overrule a motion for a finding of not guilty made at the close of the case for the prosecution if it believed there is sufficient evidence to support the charge and that the accused should be required to answer it (Section 5-324.2, Title 5, "Legal and Penal Administration", of "Military Government Regulations", published by Headquarters, US Forces, European Theater, 30 November 1945 and Section 501, page 409, "Manual for Trial of War Crimes and Related Cases", 15 July 1946). A similar practice is followed in Courts-Martials (Paragraph 71, d., "Manual for Courts-Martial, U.S. Army", 20 April 1943).

Service of Charges and Assignment of Counsel: The Record contains no certificate or other instrument showing that charges were served upon the accused nor does it indicate when counsel were assigned. However, at the beginning of the trial, the President of the Court inquired of each accused whether he had been served with a copy of the charge sheet prior to trial and whether each of them was ready for trial. As to both queries each accused answered in the affirmative (R 9). No objection was raised by any of the accused or by counsel in the case that the charges were served an insufficient time before trial. Nor was any request made for continuance on the ground that inadequate time for preparation was allowed. In the light of these facts, the failure of

the record to contain a certificate of service, or to indicate the date when counsel were assigned, can properly be ignored because there is no indication that injustice resulted to the accused.

Admission of Evidence: A number of objections were interposed by counsel for the accused to the admission of certain evidence offered by the prosecution. Reference is particularly made to the objections to Prosecution's Exhibit 2 (K 61-66) and other exhibits (K 190 et seq.). The action of the Court in admitting these exhibits was proper. The applicable rule provides that the sworn statements of accused and witnesses are always admissible regardless of the presence of those who made the statements, unless the Court is of the opinion that the statements have no probative value, or, to apply a similar test, that the statements would not be helpful in arriving at a true finding (See "Manual for Trial of War Crimes and Related Cases", Section 270 C (2)).

No error was committed by the Court in its rulings on questions of evidence. The rights of the accused were at all times amply safeguarded.

Procurement of Extrajudicial Statements: Various of the accused testified that prior to giving their extrajudicial sworn statements, and in the case of GELBHILDT, a pretrial unsworn statement, they were subjected to threats and various forms of mistreatment. These claims, in at least some instances, appear to be not without some foundation. This type of practice should be condemned.

In cases where the evidence is conflicting, in many jurisdictions in the United States, the question of voluntariness of extrajudicial sworn statements or confessions would have been submitted to the jury for its determination in the light of the evidence thereon (See 20 American Jurisprudence, Evidence, Sections 453, 454, 456). In the present case this question was for the Court to determine. All evidence is admissible in a war crimes trial which the Court deems to have probative value. (See Section 5-329, title 5, supra; "Manual for Trial of War Crimes and Related Cases", Section 270). It does not appear that the Court failed to give proper consideration to all the evidence having a bearing on whether the statements in question were voluntary and whether they were made under circumstances which might have induced the accused to state untruths. Moreover, it appears that (1) most of the contents of the various statements referred to ~~was~~ ^{were} corroborated by testimony from the witness stand and, (2) that

certain of the accused admitted on the witness stand that some or substantially all the contents of the statements were true.

It does not appear that the Court accorded inappropriate probative value to the extrajudicial sworn and unsworn statements of the various accused. The Court did not err in admitting them in evidence or in considering them for such probative value as they might have.

Examination of the entire record fails to disclose any error or omission other than those hereinbefore specifically noted, which resulted in injustice to the accused.

Reference for trial: While this case was tried before an Intermediate Military Government Court appointed by Paragraph 3, Special Orders No. 130, Headquarters Third United States Army, 24 May 1946, the record fails to contain a copy of the reference for trial. It is clear that the Court was properly constituted and that it had jurisdiction of the subject matter and of the accused. The absence of a reference for trial is an error technical in nature which resulted in no injustice to any of the accused. The reviewing authority may appropriately ratify the action of the Court which heard the case, by approving the findings and the sentences or as has been in some instances herein recommended by approving the findings and changing the sentences (United States v. Ernst MUELLER, DJAGC, July 1946). In the Review and Recommendations in the Mueller case it was stated:

"It is settled military law that the reviewing authority may ratify the action of a court which, although a case has not been correctly referred to it for trial, has nevertheless proceeded to trial of the case, when such court was in other respects qualified to try it. (CM 198108, Dig. Op. JAG 1912-40, Sec 397 (5) (AM 40), p. 243; Bull. JAG Vol III, No. 2, February 1944, p. 54, CM EPO 393 (1943))."

VI. CONCLUSIONS:

1. It is recommended: a. That the findings be approved as to all accused except LECHNER; that as to him the findings of guilty to Charge I be disapproved, and to Charge II be approved.

b. That the sentences of the accused VON DER GRUN and FRIEDL be approved; that the sentences of the accused HERMANN, STAUDINGER, HEILMEIER, and GEBELDT be changed to 10 years, commencing 26 June 1946; that the sentence of the accused LECHNER be changed to four years,

commencing 7 May 1945.

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

ANTHONY J. ALBERT
Attorney
Post Trial Branch

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

G. E. SIMARIN
Lieutenant Colonel, J.GD
Deputy Judge Advocate
for War Crimes