

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

22 January 1948

UNITED STATES }

v. }

Case No. 12-2036

Hans ROTHACKER, et al. }

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 12-29 May 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

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

Particulars: In that the accused, Hans ROTHACKER, Franz DECK, Adolf Phillip EIERMANN, Xaver GOTZ, Matthäus GOTZMANN, Maurus HAITZLER, Wilhelm KARCHER, Fritz KERN, Isidor KLUMPP, Hermann Wendelin KRIEG, Rudolf MERKEL, Kurt OVERLACK, Julius RATZKE, Johann Gotthilf SCHNEIDER, Heinrich STICHLING and Franz WEILAND, German nationals, between the 9th day of December 1941 and the 8th day of May 1945, at sundry places within the then German Reich, individually and collectively, as principals, accessories, leaders, organizers, instigators and accomplices, did engage in, formulate and participate in a common plan or design to commit, or cause to be committed, violations of the Laws and Usages of War, and pursuant thereto did deliberately and wrongfully encourage, aid, abet, order and participate in, or took a consenting part in the subjection of members of the Armed Forces of the United States of America, who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, to cruelties and mistreatment, including killings, beatings, tortures, abuses and indignities.

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

Particulars: In that Hans ROTHACKER, Franz DECK, Adolf Phillip EIERMANN, Xaver GOTZ, Matthäus GOTZMANN, Maurus HAITZLER, Wilhelm KARCHER, Fritz KERN, Kurt OVERLACK, Julius RATZKE, Johann Gotthilf SCHNEIDER, Heinrich STICHLING, and Franz WEILAND, German nationals, did, on or about 9 August 1944, at or near WEISENBACH, Germany, wilfully, deliberately and wrongfully encourage, aid, abet, order and participate in the killing of a member of the United States Army, believed to be Staff Sergeant Robert L. HAMMON, ASN 13109766, who was then and there a surrendered, unarmed and wounded prisoner of war in the custody of the

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

Particulars: In that Hans ROTHACKER, Franz DECK, Adolf EIERMANN, Maurus HAITZLER, Isidor KLUMPP, Hermann Wendelin KRIEG, Rudolf MERKEL, Kurt OVERLACK, Julius RATZKE, Heinrich STICHLING and Franz WEILAND, German nationals, did, on or about 9 August 1944, at or near WEISENBACH, Germany, wilfully, deliberately and wrongfully encourage, aid, abet, order and participate in the killing of a member of the United States Army, believed to be Sergeant Robert A. McDONOUGH, ASN 11120761, who was then and there a surrendered, unarmed and wounded prisoner of war in the custody of the then German Reich.

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

Particulars: In that Hans ROTHACKER, Adolf EIERMANN, Xaver GOTZ, Matthias GOTZMANN, Maurus HAITZLER, Wilhelm KIRCHER, Fritz KERN, Kurt OVERLACK, Julius RATZKE, Heinrich STICHLING, and Franz WEILAND, German nationals, did, on or about 9 August 1944, at or near OBERTSROT, Germany, wilfully, deliberately and wrongfully encourage, aid, abet, order and participate in the killing of a member of the United States Army, believed to be Sergeant Kenneth L. PALMER, ASN 13073655, who was then and there a surrendered, unarmed and wounded prisoner of war in the custody of the then German Reich.

(The surname of accused WEILAND actually spelled WIELAND, R 14, 707.)

III. SUMMARY OF EVIDENCE: Shortly before noon, 9 August 1944, three American flyers parachuted in the area encompassing the little towns of Obertsrot, Hilpertsau and Weisenbach in kreis Nastatt, Germany. These men were crew members of an American bombing plane which had been disabled by flak and German fighters. Each of the three was wounded, unarmed and surrendered willingly. All were brutally killed. The first, landing on what is known in that locality as the Weinerbuckel, was given first aid and transported safely to the courthouse at Weisenbach. That afternoon certain of the accused entered the courthouse and proceeded to beat and shoot this victim to death. The second flyer, who had landed on a hill called the Schoellkopf, fell into the hands of others of the accused who likewise beat and finally shot him to death. This killing took place less than a hundred meters from the point of landing. The third came to earth not far from the houses of Hilpertsau.

He received some but not serious mistreatment before a rural policeman took him in custody. As the flyer and policeman were on their way toward Gernsbach they were overtaken by certain of the accused and others who forcibly took the flyer from the policeman. Then, as in the case of the first two victims, this flyer was also beaten and shot to death. Each of the killings was marked by the singularly cruel and cold blooded manner in which it was perpetrated.

Four separate crimes are charged in this case. The particulars of the first charge allege a common design among all the accused. The remaining charges cover the separate incidents involving the killing of the three flyers. Hereafter, Charge I will be referred to as "The Common Design", Charge II will be designated "Incident No. 1", Charge III will be "Incident No. 2", and Charge IV, "Incident No. 3". A description of each follows:

a. The Common Design: Prior to August 1944 (R 210, 230; P-Ex 16a, p. 2; R 160), the kreisleiter of Rastatt, a man named Heinrich Dieffenbacher (R 666; P-Ex 42, p. 2; R 102, 659, 660, 216; P-Ex 24, p. 2) issued an order concerning captured flyers to the various party officials of his kreis (R 226; P-Ex 34a, p. 1). This occurred at a meeting held in the city of Rastatt (R 519). The substance of this order was that captured enemy flyers were henceforth to be killed (R 519, 520, 226; P-Ex 34a, p. 1, R 230; P-Ex 37a). The kreisleiter also instructed the local unit leaders that information concerning this order should be passed on to the people (R 226; P-Ex 34a, p. 1). He also directed that mobile groups, sometimes referred to as pursuit troops or Rollkommandos, be formed to make the order effective (R 479, 666; P-Ex 42, pp 4, 5, R 230; P-Ex 37a). When a murmur of opposition developed from some of his listeners the kreisleiter stated he would himself choose the men for the pursuit troops (R 521, 479, 357, 226; P-Ex 34a, p. 1).

Also, prior to August 1944 a Captain Kollmeier, chief of police of kreis Rastatt, caused to be transmitted to all police under his

people, and in the event the people attempted to take captured flyers from the custody of the police no force, and particularly no weapons, should be used against them (R 100, 101, 152).

After the meeting of the kreisleiter referred to above and prior to August 1944, various subordinate party leaders in kreis Rastatt passed on the order to kill flyers (R 214; P-Ex 21a, p 2, R 215; P-Ex 22a). Furthermore, there is evidence that at least one pursuit troop was formed (R 226; P-Ex 35a, R 178, 210; P-Ex 16a, p 2). The killing of the three flyers in kreis Rastatt on 9 August 1944 was the result of the situation hereinabove outlined (R 214; P-Ex 21a).

The particulars of the common design charge were supplemented and made more definitive by a document in the nature of a bill of particulars furnished the defense by the prosecution before the trial commenced (R 7, 8).

b. Incident No. 1: The American flyer (R 120; P-Ex 8, p 4), who landed on the Wainerbuckel, was wounded when taken into custody (R 77; P-Ex 2a). This was somewhere between 1000 and 1100 hours (R 77; P-Ex 2a, R 79; P-Ex 4). After being given first aid (R 77; P-Ex 2a) he was transported to the courthouse in the nearby town of Weisenbach where he was locked in the office of the recorder of deeds (R 77; P-Ex 2a, R 78; P-Ex 3a). Kohler, the mayor of Weisenbach, instructed the clerk to keep this room locked until the flyer was taken away (R 79; P-Ex 4a). A little later during the day SA Lieutenant Pompeuse (who subsequently on 2 June 1945 at the internment camp at Metz committed suicide by hanging (R 632), SCHNEIDER and KILCHER and a man named Kern arrived at the Weisenbach courthouse (R 222; P-Ex 31a). They entered the room and attacked the wounded flyer, beating him severely (R 223; P-Ex 32, pp 2-4). He was then removed to the courtyard where the beating was continued and he was finally shot in the back of the head by Pompeuse (R 223; P-Ex 32, p 4, R 184-186). There was some evidence that BIERMANN (R 155) and GOTZMANN (R 183; P-Ex 11) were also at the courthouse during this attack.

F-Ex 32, p 7). This identification bracelet bore the name Robert L. Harmon (R 156, 157; F-Ex 10). The body was removed that afternoon to the cemetery chapel at Weisenbach (R 79; F-Ex 4a) and was subsequently interred in the cemetery there (R 151). After the killing of this flyer the group involved and Walter Schmoll proceeded to a tavern in Gernsbach and drank (R 114, 496, 223; F-Ex 32, p 6, R 224; F-Ex 33a).

c. Incident No. 2: The American flyer who landed on the wooded elevation known as the Schoellkopf (R 247, 248) was badly wounded (R 145; F-Ex 6a, R 213; F-Ex 20, p 5, R 287) and exhausted (R 142; F-Ex 5a). He was unarmed (R 213; F-Ex 20, p 5) and readily surrendered (R 142; F-Ex 5a). Franz Klumpp, a medic, together with KUEIG and MEUKEL, began carrying the flyer down the hill (R 142; F-Ex 5a, R 145; F-Ex 6a). At approximately this time EIBELMANN came upon the scene. Using WIELAND as interpreter he questioned the flyer (R 216; F-Ex 24, p 3). He cursed him and ordered that he not be allowed to leave the woods alive (R 215; F-Ex 23a, R 213; F-Ex 20, p 13). A vicious attack was then commenced upon the flyer (R 213; F-Ex 20, pp 13-14). He was beaten severely and finally shot to death (R 215; F-Ex 22a, R 213; F-Ex 20, p 14). Participants in the assault were EIBELMANN, MEUKEL, KUEIG, Isidor KLUMPP and possibly others (R 213, F-Ex 20, pp 10-13, R 214; F-Ex 21a, R 215; F-Ex 22a, R 215; F-Ex 23a). This victim wore identification tags bearing the name Ashes (R 216; F-Ex 24, p 3, R 287) and was subsequently identified as probably being Sergeant Robert McDonough who had borrowed the tags from his crew mate Roy Ashes that morning (R 209; F-Ex 15, pp 2, 3). The body was taken to a funeral home at Weisenbach (R 213; F-Ex 20, p 15). Thereafter it was buried in the Weisenbach cemetery (R 208; F-Ex 14a).

d. Incident No. 3: The third flyer landed in the neighborhood of Hilpertsau (R 97) at a point not far from the town's railway station (R 83). He, too, was unarmed (R 98), wounded (R 84), and surrendered willingly (R 98). There is evidence that he was struck several light blows (R 90, 98, 99) when Weinguertner, a policeman, took him into custody or immediately thereafter (R 84, 89, 90, 98, 99). This mis-

the flyer's wound (R 84, 97, 98) and started with him in the direction of Gernsbach (R 98). After passing safely through the Hilpertsau and Obertsrot areas with his prisoner (R 98) Weingaertner was overtaken and stopped by Pompeuse, Kern, and accused KARCHER and GOTZMANN (R 107, 108). This occurred on the road between Obertsrot and Gernsbach about one and one-half kilometers south of Obertsrot (R 101). These men had come from the direction of Obertsrot by bicycle (R 99). A melee ensued in which Pompeuse and his band forcibly took the flyer from the custody of the policeman, pushed him off the road into an adjoining turnip patch, and proceeded to beat (R 99) and finally shoot the victim (R 108, 218; I-Ex 26a, p 1, R 218; I-Ex 27a) to death (R 91, 218; I-Ex 26a, p 1). Later during the day the flyer's body was removed from the scene (R 332) and taken to a former church at Obertsrot (R 121; I-Ex 9, p 1). The remains were buried in the Weisenbach cemetery (R 208, I-Ex 12a). This victim was identified as probably being Sergeant Palmer (R 121; I-Ex 9a, pp 1, 2).

IV. EVIDENCE AND RECOMMENDATIONS:

1. Hans ROTHACKER

Nationality:	German
Age:	43
Civilian Status:	Trade Employee
Party Status:	Kreisleiter of Buehl Baden
Military Status:	Unknown
Pleas:	NG Charge I; NG Charge II; NG Charge III; NG Charge IV
Findings:	G Charge I; NG Charge II; NG Charge III; NG Charge IV
Sentence:	3 years, commencing 1 May 1945

Only so much of the evidence will here be considered as has a bearing on the question of this accused's guilt or innocence under Charge I (The Common Design).

Evidence for Prosecution: The accused was the kreisleiter of Buehl Baden (R 212; I-Ex 20, p 6; I-Ex 20, p 2) and resided in

1944, he received a directive over the name of Martin Bormann, the substance of which was that party members should get the population into a mood for "spontaneous action" against captured allied flyers (R 222; P-Ex 30, p 2). It was meant by the order that captured flyers were to be killed (Idem pp 2, 3). The accused brought this document to the attention of the ortgruppenleiter in his district. He did this twice, once verbally and the second time in writing (Idem p 5). It was his intention that the order be carried out in case of an emergency (Idem p 5).

SCHNEIDER in his extrajudicial sworn statement declares that he heard "through our Kreisleiter" that an order relating to captured enemy flyers existed. The kreisleiter's name was Hans ROTHACKER who, while he did not read the order to him, informed him that "--an order like that had come from the government" (R 223; P-Ex 32, p 2).

Evidence for Defense: All witnesses to whom the question was put, including the various accused, stated that the kreisleiter of kreis Rastatt throughout the year 1944 was a man named Dieffenbacher (R 269, 356, 513, 519, 216; P-Ex 24, p 2, R 102, 120; P-Ex 8, p 6, R 183; P-Ex 11; p 4, R 666; P-Ex 42, p 2). The orders relating to the disposition of captured flyers in kreis Rastatt came from him (R 519, 520, 226, P-Ex 34a, p 1, R 209; P-Ex 16, p 2, R 183; P-Ex 11, p 4, R 230; P-Ex 37a, p 1). It was he who directed the formation of, or himself formed, the so-called pursuit troops (R 178, 478, 479, 230; P-Ex 37a, p 1). Kreis Buehl Baden adjoins but is separate and distinct from kreis Rastatt (R 234; P-Ex 38).

SCHNEIDER, testifying under oath, undertook to explain (R 507-510) that portion of his extrajudicial sworn statement referring to this accused (R 223; P-Ex 32, p 2). He denied having ever seen this accused prior to meeting him in prison (R 507). And the information concerning an order relating to captured flyers was given him by the accused during their time together in prison (R 508). Throughout 1944 SCHNEIDER resided in Stauffenberg which is located in kreis Rastatt (R 513).

This accused after being informed of his rights declined to take the

Sufficiency of Evidence: At the conclusion of the prosecution's case this accused moved for findings of not guilty as to all Charges (R 236). This motion was denied (R 237).

This motion was well taken and should have been granted. Charge I was defined and limited by the instrument purporting to be a bill of particulars and which was filed by the prosecution prior to the commencement of the trial (R 7, 8). It specified the nature, the participants, the locus operandi, and the overt acts resulting from the said common design.

Nothing done by this accused brings him within the purview of this Charge. He is not shown to have had any connection with Kreis Rastatt, or its inhabitants. He had no authority to issue orders there, and had no jurisdiction over the procedures followed or the acts done in that area. He was not in the chain of command through which orders passed to that kreis. That he was a kreisleiter and conveyed the Bormann order to his ortsgruppenleiter in Kreis Buchl Baden, with the intention that that order be followed in an emergency, does not have the effect of making him a participant in the common design alleged in the particulars of Charge I.

The evidence fails to establish that this accused had any connection with the situs, the participants, or the acts involved in the common design. Accordingly, it follows that the Court's findings of guilty cannot be sustained.

The findings of guilty to Charge I are not warranted by the evidence.

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. No Petitions for Clemency were filed.

Recommendation: That the findings of guilty and the sentence be disapproved.

2. Franz DECK

This accused was not served and not tried (R 1, 2).

Age:	54
Civilian Status:	Painter
Party Status:	Nazi since 1933; Ortsgruppenleiter since 1939
Military Status:	Served in Volksturm
Pleas:	NG Charge I; NG Charge II; NG Charge III; NG Charge IV
Findings:	G Charge I; G Charge II; G Charge III; NG Charge IV
Sentence:	Death by hanging

Only that evidence relating to the question of this accused's guilt or innocence under Charges I, II and III will be here discussed.

Evidence for Prosecution:

a. The Common Design: This accused, as Ortsgruppenleiter of Weisenbach, had charge of the party meetings there. At these meetings he emphasized the kreisleiter's order that flyers were to be beaten to death (R 160, 214; I-Ex 21a, pp 2, 3, R 215; I-Ex 22a). Both Johann Bosch and accused Isidor KLUMPF heard him state that captured flyers were to be killed (R 157, 158, 214; I-Ex 21a, p 2, R 215; I-Ex 22a). This was before the killing of the three flyers (Idem, R 183; I-Ex 11, p 4). In fact, Isidor KLUMPF claims it was this propaganda that caused him to become implicated in the killing on the Schoellkopf (R 214; I-Ex 21a, pp 2, 3).

In his extrajudicial sworn statement of 16 August 1946, this accused admits he transmitted the kreisleiter's order to kill flyers. But he does not specify when this meeting was held (R 211; I-Ex 17a). At a party gathering which took place a few days after the killing of the flyers this accused was reported to have "glorified" the action (R 155).

b. Incident No. 1: Johann Bosch testified he saw this accused walking back and forth in front of the courthouse at Weisenbach immediately before the flyer confined there was attacked and killed (R 150, 177). He did not know what this accused was doing (R 151).

beaten to death" (R 155). A few days later this accused reportedly commended the deed (R 155).

c. Incident No. 2: It was about 1030 hours that morning when this accused, from his home in Weisenbach, saw parachutes in the sky (R 210; F-Ex 16a, p 1). Taking his motorcycle (R 148) he started immediately for the Schoellkopf where, as he had been informed, a flyer had already landed (R 210; F-Ex 16a, p 1). On the way he told schoolteacher WIELAND to come along, that his services as interpreter would be needed (R 216; F-Ex 24, p 2). When this accused arrived at the scene he found Franz KLUMPF and accused MEIKEL and KIEG carrying the wounded flyer down the hill (R 142; F-Ex 5a, p 1, R 213; F-Ex 19a). He ordered that the flyer be thrown to the ground (R 213; F-Ex 19a, R 215; F-Ex 23a). Using WIELAND as interpreter he questioned the flyer (R 216; F-Ex 24, p 3). From this point on, the precise sequence of events is not quite clear. The spectators were driven away (R 412, 142; F-Ex 5a, p 1, R 145; F-Ex 6a, p 1, R 146; F-Ex 7a). He then gave the order that the prisoner should be killed (R 213; F-Ex 20, p 9, R 215; F-Ex 23a, R 183; F-Ex 11, p 4). In his extrajudicial statements of 30 July 1946 (R 210; F-Ex 16a) and 16 August 1946 (R 211; F-Ex 17a) this accused admitted that he said the flyer had to be killed. The flyer, after being brutally beaten, during the course of which he had attempted vainly to run from his assailants (R 149), was shot by a man named Gerstner (R 166, 215; F-Ex 23a). The body was then covered with fern (R 215; F-Ex 23a). That afternoon it was taken to Weisenbach (R 213; F-Ex 20, p 15).

Evidence for Defense: This accused testified in his own defense (R 244, 632). By virtue of his position as Ortsgruppenleiter of Weisenbach (R 245) he was subject to the orders of the Kreisleiter of Kreis Rastatt (R 666; F-Ex 42, p 2) and was obligated to carry out the orders handed down to him (R 247, 260). His extrajudicial sworn statement dated 22 August 1945 (R 666; F-Ex 42) was made while he was under

a. The Common Design: He was present at the meeting in which Dieffenbacher issued the order that pursuit troops were to be formed to kill captured flyers (R 245, 246, 259). But he states that there was a protest against this order and neither he (R 246, 260, 261) nor, as far as he knew, any other Ortsgruppenleiter organized such a troop (R 246). Subsequent to the meeting he only repeated the Kreisleiter's order to the extent of saying that pursuit troops were to be formed to the end that flyers would not be brought in as prisoners (R 247). In making the Kreisleiter's order known he never believed that such a thing (i.e., landing of flyers) would ever happen in their little valley (R 268).

In his unsworn extrajudicial statement of 30 July 1946 he states that he does not believe that he notified his political co-workers of the Kreisleiter's order. He refused to form a pursuit troop and he made no propaganda in this regard (R 210, I-Ex 16a, p 2).

WIELAND testified that he was present at a meeting at which this accused made reference to the Kreisleiter's statement concerning flyers, but he did not hear him actually give any order (R 283).

b. Incident No. 1: After returning home from the Schoellkopf he learned a flyer was held prisoner at the Weisenbach courthouse (R 256). Believing this was the same flyer he had seen on the Schoellkopf he went to the courthouse and had Mayor Kohler show him the prisoner (R 256). He then returned to his workshop. Later he was told that some men had called at the courthouse for the flyer. Thereupon he returned to the courthouse but the flyer was gone and he saw no people about the place. At this point he observed Pompeuse leaving the toilet drying his hands on a towel (R 256, 257). Pompeuse told him that he had killed the flyer (R 257, 258, 264, 265). He denied that he had telephoned Pompeuse asking him to kill the flyer and he also denied that he waited outside the courthouse for Pompeuse (R 264).

None of those shown by the evidence to have been a party to the killing of the flyer at the courthouse names or refers to this accused as a participant. DECK, in his extrajudicial sworn statement, identified

as being one of them (R 183; P-Ex 11, p 6). SCHNEIDER, in his unsworn pretrial statement, likewise does not name this accused as a participant in the killing at the courthouse (R 222; P-Ex 31a, R 223; P-Ex 32, pp 3, 4). Walter Schmoll in his testimony failed to name this accused as one of those present at the courthouse (R 113, 114). He also testified that subsequently, when Pompeuse and his group drank at Stoll's tavern, this accused was not present and his name was not referred to (R 115, 116).

Both in his testimony in Court (R 256-258) and in his extrajudicial sworn statement (R 210; P-Ex 16a, p 2) this accused denied any connection with the killing of the flyer at the Weisenbach courthouse.

Incident No. 2: In going to the Schoellkopf he acted impulsively and without thinking (R 259). He had no intention of either doing anything against the flyer himself or inciting the people to do so (R 210; P-Ex 16a, p 2). When he arrived at the scene he asked policeman Bosch to order the people away because they had no business there, especially the children (R 249, 250). This accused states that he was very excited (R 250) and may have said that the flyer should be killed, but he did not say this in the form of an order to the people (R 251). He denies that he either saw (R 254, 263) or heard the flyer beaten (R 263). Nor does he know who did this (R 666; P-Ex 42, pp 5, 6). After addressing some questions to the flyer through the interpreter WIELAND he left the scene to look for the parachute (R 253). While doing this he heard a commotion and, upon looking back he saw the flyer running down the hill (R 254). He observed how the flyer, upon reaching a spot about where policeman Bosch was standing, picked up a wooden stick and raised it in a threatening attitude (R 254, 210; P-Ex 16a, p 1).

In his extrajudicial sworn statement of 22 August 1945 he says the whole thing would not have happened if the flyer had not attempted to run away and if the bombers had not returned at about that time, thus causing the people to become excited (R 666; P-Ex 42, p 9).

leading actor and the person primarily responsible for the killing of the flyer on the Schoellkopf.

The evidence as to Charge II is insufficient to support the findings of guilty. While it is possible and probable that he knew the flyer at the courthouse was destined to be killed that afternoon, the evidence fails to establish that he participated in this killing. The testimony of Johann Bosch that he saw this accused in front of the courthouse is, in the absence of anything more, an insufficient basis to support the finding. Nor does the statement made by this accused subsequent to the killing and in which he commended the act supply the lack of proof.

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.

Findings of guilty to Charges I and III are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. Petitions for Clemency were filed by the wife of this accused, Anna Eiermann, 19 December 1947; the Archbishop of Freiburg, 8 July 1947; and Dr. Max Hau, defense counsel, 17 December 1947.

Recommendation: That the findings of guilty to Charge II be disapproved; and that the findings of guilty to Charges I and III and the sentence be approved.

4. Xaver GOTZ

Nationality:	German
Age:	49
Civilian Status:	Cardboard Cutter
Party Status:	Nazi since 1943
Military Status:	Inducted into Army 1944
Pleas:	NG Charge I; NG Charge II; NG Charge IV

Sentence:

5 years, commencing 7 February 1947

This accused was found guilty only of participation in the common design (Charge I). As a result, the evidence to be discussed herein will be limited to that which has a possible bearing on his participation therein.

Evidence for Prosecution: The accused was a member of the Nazi party and attended its meetings (R 462). On 9 August 1944 he was an employee of the firm Casimir Kast (R 453) where he also acted as an air raid warden (R 278, 453). When the alarm sounded during the morning of that day he immediately proceeded to his post (R 454). While the alarm was still in progress, Kern, who as chief foreman at the factory was this accused's superior (R 455, 460) and was also his superior insofar as his air raid duties were concerned (R 455), came to him and asked for a wrench (R 454). This accused told Kern where the wrench lay. Whereupon Kern took it and left (R 454). This was the wrench Kern used in attacking the flyer referred to in Incident No. 3 (R 99, 218; I-Ex 26a). Later when Kern returned he told him that the wrench was laying by a garage. When this accused found it he noticed that it was smeared with blood (R 456).

Prosecution's I-Ex 29a (R 221) is the report of an investigation made by two French policemen. It contains an interrogation of this accused. This interrogation includes a statement that he saw a parachute landing a short while before Kern had asked him for the wrench (R 221; I-Ex 29a, pp 1, 2). In it also is a statement by Lidya Mckenheil to the effect that after the air raid alarm she saw this accused with a wrench in his hand which, according to rumor, he had used to kill an American aviator. In addition, it contains the statement of Michael Goetz who relates that this accused was a very big Nazi and that he learned from hearsay that this accused had given Kern the wrench, saying to him "Kill him" (Idem p 3).

Thomas Krieg testified he heard people say this accused had

There was evidence that from his post as air raid warden this accused could or should have seen the parachuting flyers (R 599, 600).

Evidence for Defense: This accused testified under oath (R 452). Although a Nazi since 1943 he held no rank in the party (R 453). When the air raid alarm sounded he went to his post and stayed there until the alarm was over (R 454, 458). He did not see any parachutes coming down (R 455, 458). From his post it was impossible to see a parachute in the air because trees obstructed the view (R 606). He denied seeing any flyers either dead or alive on that day (R 457).

OVERLACK testified this accused could not see the scene where the flyer landed from his post (R 547). Leopold Krieger testified it was a distance of 800 meters from this accused's post to the point in question (R 278). August Geiger, when first questioned, testified that this accused could (R 599, 600) and later changed this to say he could not (R 606, 612, 615) see the flyer coming down from his post.

This accused testified that when Kern borrowed the wrench he did not know the purpose for which he wanted it (R 462) nor did Kern tell him (R 454). Instead of answering this accused's question on this point, Kern asked if three bicyclists had passed on the road from Gernsbach to Hilpertsau. At that moment three men on bicycles came along and Kern joined them (R 454). These men were KARCHER (R 463), Pompeuse and GOTZMANN (R 454). Prior to this occasion Kern and others of this accused's superiors had borrowed his tools (R 455).

Lidya Ackenheil testified that after the noon meal she saw this accused coming back to the factory with a wrench (R 104). The balance of her testimony was hearsay, the source of which she did not identify and did not know (R 103-105).

This accused testified that for three days prior to being questioned by the French policemen (R 221; T-Lx 29a) he was beaten, kicked and mistreated to such an extent that he became unconscious (R 460). At the conclusion of the interrogation he was not asked to sign

ascribed to him in this document (R 460, 461). He denied having said that he saw a parachuting aviator suspended in the air (R 461).

Leopold Krieger stated this accused was a good and industrious worker (R 279).

Sufficiency of Evidence: The evidence is not sufficient to tie this accused into the common design. His membership in the party and attendance at meetings, while a factor to be considered, does not make him a participant in the common design. Knowledge alone, assuming he had it, is not sufficient. But the Court in arriving at its findings of not guilty to Charge IV must necessarily have concluded that this accused, in permitting Kern to use his wrench, had no knowledge of the purpose for which it was to be used. In the light of this fact the only remaining basis to support conviction is conjecture.

The findings of guilty are not warranted by the evidence.

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. Petitions for Clemency were filed by Pastor Weis, 25 February 1946, and Dr. Max Rau, defense counsel, 17 December 1947.

Recommendation: That the findings of guilty and the sentence be disapproved.

5. Matthaus GOTZMANN

Nationality:	German
Age:	54
Civilian Status:	Postal secretary
Party Status:	Nazi since 1934; Block leader
Military Status:	None
Pleas:	NG Charge I; NG Charge II; NG Charge IV
Findings:	G Charge I; G Charge II; G Charge IV
Sentence:	Death by hanging

Evidence for Prosecution:

that captured flyers be killed (R 519-521, 226; P-Ex 34a, p 1). Both KARCHER and STICHLING in their unsworn pretrial statements (R 218; P-Ex 26a, p 1, R 226; P-Ex 35a, p 1) identified this accused as a member of the pursuit troop. OVERLACK also names him as a member in his unsworn pretrial statement (R 230; P-Ex 37a, p 1). When Pompeuse, the leader, took this group into action shortly before noon (R 304) on 9 August 1944 this accused accompanied him (R 217; P-Ex 25a, R 218; P-Ex 26a, R 305). He was present and participated in the attack on the flyer referred to in Incident No. 3 (R 120; P-Ex 8, p 4, R 107).

b. Incident No. 1: Deck in his extrajudicial sworn statement places this accused at the scene of the beating and killing of the flyer in the courthouse, and courtyard adjacent to it, in Weisenbach (R 183; P-Ex 11, p 6). He names the following as present and participating: Pompeuse, KARCHER, Kern, SCHNEIDER and this accused (Idem pp 6, 13). He described how he saw this accused beat the victim with a rubber hose (Idem p 13).

Johann Bosch testified that he heard one of the men participating in the attack on the flyer in the courtyard was this accused (R 152).

c. Incident No. 3: When Pompeuse gathered his group together that morning he was joined by this accused at the post office (R 217; P-Ex 25a, R 665; P-Ex 41a), probably after having first notified him by phone (R 226; P-Ex 35a, p 2). They left Gernsbach on bicycles (R 305), being joined on the way by KARCHER (R 218; P-Exs 26a, p 1 and 27a) and Kern (R 454). On the road between Gernsbach and Obertsrot, at a point estimated to have been 500 meters from the entrance to the Casimir Kast factory (R 230; P-Ex 37a, p 1), they came upon policeman Weinguertner and the captured flyer (R 99, 107). The group dismounted and proceeded toward the policeman and his prisoner (R 107, 218; P-Ex 27a). A general free for all ensued (R 112, 217; P-Ex 25a). Pompeuse directed his efforts against the policeman (R 107, 108) while the others attacked the prisoner who had been pushed off the road into a turnip patch by KARCHER (R 330, 218; P-Ex 27a). Kern attacked the flyer with a wrench (R 307, 331, 218;

Gaudry, in his extrajudicial sworn statement, states he saw this accused beating the flyer (R 120; F-Ex 8, p 5). Walter Schmoll testified that this accused was in the midst of the action (R 109, 117). After the beating the flyer was shot by Pompeuse (R 331). The body was taken away that afternoon (R 109).

Evidence for Defense: This accused testified under oath (R 303). He claimed that when he was first arrested he was so severely mistreated by his captors that his jaw was fractured and he lost all his lower molar teeth (R 311). This mistreatment occurred at Gernsbach and again at Baden-Baden. On one occasion he was subjected to a mock execution (R 315). The people responsible for this were French (R 316). Because of his very bad physical condition he did not know what he put into his extrajudicial statements (R 312).

Prosecution witness Walter Schmoll testified that he knew this accused from childhood and that he had the reputation of being a decent man (R 116).

a. The Common Design: He denied that he had ever received an order regarding the mistreatment of flyers (R 304). He went along with Lieutenant Pompeuse because he was ordered to do so (R 217; F-Ex 25a). He believed that they were going to capture the flyer and not kill him (R 314, 315). He denied that he had ever been a member of Pompeuse's pursuit troop, and he denied also that STICHLING had given him an order to go with Pompeuse to kill the flyer (R 313).

b. Incident No. 1: He testified that he was not in Weisenbach on 9 August 1944 (R 310). Policeman Bosch admitted he did not know whether this accused was in Weisenbach the day the flyer was killed at the courthouse there (R 167). Klara Bosch testified the men she saw attacking the flyer in the courtyard of the courthouse were SCHNEIDER (R 187, 188), Deck (R 189), and a third man of whose identity she was not certain but who, according to gossip, was probably Pompeuse (R 190). Walter Schmoll testified he saw KLICHER, Pompeuse, SCHNEIDER and Kern at the courthouse in Weisenbach. But he does not mention this accused as having been present

judicial statements (R 222; 1-Ex 31a) names the participants in the killing as being Pompeuse, KARCHER, Kern, and himself. Testifying under oath he stated that he did not see this accused at all on this particular day (R 497). KARCHER denied that this accused went along to the courthouse at Weisenbach that afternoon (R 335) and denied that he was present there (R 348).

c. Incident No. 3: This accused left his work at the post office and accompanied Pompeuse because the latter ordered him to go along (R 305). They left in the direction of Obertsrot on their bicycles picking up KARCHER and Kern along the way (R 306). When they met the policeman and the captured American flyer, Pompeuse gave the order to dismount (R 306). This accused denied he took part in the attack that then took place, but stated he stood a short distance away watching the highway (R 307, 323). While the struggle was in progress he walked to the Scheuren road and told a lady coming along the highway to go away. When he returned to the scene Kern was standing over the fallen flyer with a bloody wrench in his hand (R 307). Pompeuse scolded him for having acted in a cowardly manner and then sent him to Gernsbach to make a report (R 308).

This accused denied that he had a weapon on his person (R 310) and denied that he at any time struck the flyer or had any contact with him (R 310, 316, 321). KARCHER corroborates this accused's claim that he was standing some distance away when the attack was being made upon the flyer (R 346).

OVERLACK testified that he stood at a point much closer to the scene of the attack than the Frenchman Gaudry (R 120; 1-Ex 8) and he was unable to see what was happening (R 568). He added that the place from which Gaudry claims to have seen the action on the road was too far away to have permitted this (R 569).

Sufficiency of Evidence: The only evidence implicating this accused in the killing of the flyer at the courthouse in Weisenbach

did not testify in person and, therefore, the Court had no opportunity to form a judgment as to his credibility. Moreover, an examination into his interrogation as well as the manner in which it was conducted indicates that no great value should be attached to it. The weight of the evidence shows that this accused was not present in Weisenbach and had no part in the attack upon the flyer there. There is as to this Charge a failure of competent proof. The Court's findings as to Charge II, therefore, cannot be sustained.

As to Charges I and IV the evidence supports the findings of guilty. There is some ground for believing that this accused participated to a limited degree only in the attack upon the flyer covered by Incident No. 3. While the evidence shows that he joined in the initial attack he appears to have withdrawn after the flyer was taken from the policeman's custody. There is credible evidence that he was not present at the scene while the flyer was being beaten in the turnip patch and was not present when Pompeuse fired a shot into the victim's body. While these considerations do not have the effect of changing the accused's guilt they are matters that may properly be taken into account in determining the propriety of the sentence. The sentence is excessive.

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.

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. Petitions for Clemency were filed by Lina Gotzmann, wife of this accused, 7 November 1947; Charles Gotzmann, stepson of this accused, 12 November 1947; and Dr. Max Rau, defense counsel, 14 December 1947.

Recommendation: That the findings of guilty to Charge II be disapproved; and that the findings of guilty to Charges I and IV and the sentence be approved, but that the sentence be commuted to imprisonment for life.

6. Maurus HAITZLER

Nationality:	German
Age:	59
Civilian Status:	Master Polisher
Party Status:	Nazi 1933; Ortsgruppenleiter in Au
Military Status:	Served in World War I
Charges:	NG Charge I; NG Charge II; NG Charge III; NG Charge IV
Findings:	G Charge I; NG Charge II; NG Charge III; NG Charge IV
Sentence:	4 years, commencing 16 December 1945

Only so much of the evidence will be considered as has a bearing upon the question of this accused's guilt or innocence under Charge I (The Common Design).

Evidence for Prosecution: The accused was appointed local unit leader or Ortsgruppenleiter of Au-Murgtal in 1943 (R 381, 394; I-Ex 39a, pp 1, 2). He was present at the party meeting at Kastatt in about June of 1944 at which Kreisleiter Dieffenbacher issued the order with reference to captured flyers (R 381-383, 541, 226; I-Ex 34a, p 1). At a meeting in Au attended by about 20 party members this accused repeated the Kreisleiter's order (R 226; I-Ex 34a, p 1).

Johann Bosch testified a man named Bleier informed him this accused addressed a meeting at which he stated captured flyers were to be beaten to death (R 169). Rieder, an assistant to the accused in party matters, stated a speaker discussed the treatment of enemy flyers at a meeting over which this accused presided (R 403, 404). This accused admitted that that portion of his extrajudicial unsworn statement dated 22 December 1945 (R 394; I-Ex 39a, p 3) wherein he denied having attended the Kreisleiter's meeting referred to above, was not true (R 397, 398).

Accused Hermann KIEG was a block leader in the party at Au (R 394; I-Ex 39a, p 2).

Evidence for Defense: Testifying under oath (R 380) this accused stated that he was opposed to the Kreisleiter's order that flyers be

that he repeated this order to the people prior to 9 August 1944 (R 383). In a discussion with Rieder he stated his position, namely, that if flyers fell in his section they were to be turned over either to the police or the Wehrmacht (R 386).

The meeting at the "Zur Krone" referred to in his unsworn pre-trial statement of 26 December 1945 (R 226; I-Ex 34a) was held a long time after the incident involving the flyers had occurred (R 392, 395). At that meeting he did not say one word more than was required by the kreisleiter's order (R 226; I-Ex 34a, p 1).

He claims duress was used upon him by French investigators at the time he made his statement of 22 December 1945, Exhibit I-Ex 39a (R 390). In addition, he was excited, sick and nervous (R 391). He denied that Hermann KUEG attended one of his meetings prior to 9 August 1944 at which he published the kreisleiter's order (R 393).

On 9 August 1944 a bomb fell into the factory where he worked. He was busy throughout the day. Not until about eight o'clock that evening did he hear a captured flyer had been killed (R 384, 385).

This accused claims that he was opposed to the mistreatment of flyers for the reason, among others, that he had two sons who were in the German air force and one of these had been killed on a bombing mission (R 386, 226; I-Ex 34a, p 2).

Sufficiency of Evidence: The evidence does not satisfactorily establish participation in the execution of the common design.

Petitions: A Petition for Review was filed by Robert M. Donihl, Chief Defense Counsel, 29 May 1947. Petitions for Clemency were filed by Ursula Hatzler, wife of the accused, 15 June 1947; the Archbishop of Freiburg, 8 July 1947; 12 former party members of the Rastatt district, 13 August 1947; and the accused, 28 February 1948.

Recommendation: That the findings of guilty and the sentence be disapproved.

7. Wilhelm KARCHER

Nationality:

German

Civilian Status:	Auto Mechanic and Chauffeur
Party Status:	Nazi since 1936; Technical Sergeant, National Socialist Motor Corps.
Military Status:	None
Pleas:	NG Charge I; NG Charge II; NG Charge IV
Findings:	G Charge I; G Charge II; G Charge IV
Sentence:	Death by hanging

Evidence for Prosecution:

a. The Common Design: By his own admission (R 218; F-Ex 26a, p 1) and by the unsworn pretrial statements of STICHLING (R 226; F-Ex 35a, p 1) and OVERLACK (R 230; F-Ex 37a, p 1), and the extrajudicial sworn statement of SCHNEIDER (R 223; F-Ex 32, p 6), this accused was a member of the so-called pursuit troop in the Gernsbach area. To the same effect is the testimony of Johann Bosch (R 179). In this capacity he accompanied its leader, Pompeuse, and participated in the assault upon and killing of the flyers referred to under Incidents 1 and 3 (R 107, 218; F-Ex 26a, p 1).

b. Incident No. 1: About one o'clock in the afternoon (R 333) Pompeuse and SCHNEIDER started from the city hall at Gernsbach for Weisenbach (R 493, 494). They picked up this accused along the way and were joined at Weisenbach by Kern (R 223; F-Ex 32, p 2). There, at the courthouse, Pompeuse had the clerk open the door to the room in which the wounded flyer was locked and the assault upon him began forthwith (R 223; F-Ex 32, pp 2, 3). Deck states he saw this accused beat the flyer with a rubber hose (R 183; F-Ex 11, pp 8, 13). SCHNEIDER states he saw both Kern and this accused attack the flyer and strike him about the head with wrenches (R 223; F-Ex 32, p 3). After the initial assault the flyer was taken to a courtyard adjacent to the courthouse where after more beating he was shot by Pompeuse (R 222;

by this accused to stay outside and wait (R 113).

After the killing had been completed, this group, viz., Kern, Pompeuse, SCHNEIDER, Walter Schmoll and the accused, stopped at a tavern to drink (R 114, 496, 223; P-Ex 32, p 6). Here, in the presence of this accused and SCHNEIDER, Walter Schmoll heard Pompeuse say "Well, again today it has been proven who we can use" (R 116).

c. Incident No. 3: The accused was one of the four who took the flyer from the custody of policeman Weingaertner on the road between Gernsbach and Hilpertsau (R 99, 107-109, 217; P-Ex 25a). This accused was armed with a rubber hose (R 328, 329).

GOTZMANN states he saw this accused beat the flyer and then, with Kern, throw him off the road into a field (R 217; P-Ex 25a, R 665; P-Ex 41a). OVERLACK, from his nearby factory, saw this accused rush forward and beat the flyer (R 228; P-Ex 36a, p 2). In his testimony in Court OVERLACK qualified this portion of his unsworn pretrial statement (R 562, 566-568). Walter Schmoll saw him raise a rubber weapon, draw his hand back and get ready to deliver a blow (R 116). Gruber saw him at the scene, where the flyer's body lay, with the other participants (R 90, 91).

In his extrajudicial statements this accused admitted beating the flyer (R 218; P-Ex 26a, p 1) with a rubber hose (R 218; P-Ex 27a). He also admitted his guilt to SCHNEIDER (R 223; P-Ex 32, p 7). In his testimony in Court he did not deny that he struck the flyer (R 330), and he admitted being present when Pompeuse fired a shot into the victim (R 331).

Evidence for Defense: This accused claimed that the French placed him under duress at the time they interrogated him (R 341). He denied certain of the matters contained in the extrajudicial statement he made at Wiesbaden, claiming that at that time he was in bad physical condition and his nerves were not well (R 347).

a. The Common Design: This accused testified that he very seldom attended any of the party meetings in Gernsbach and he never heard of a pursuit troop existing there. He could not remember having ever heard of any orders with reference to the treatment of captured flyers (R 327). Pompeuse was a first lieutenant and had authority over the SA garrison territory which encompassed the places material to this case. It was for this reason that he accompanied him on 9 August 1944 (R 328, 350).

b. Incident No. 1: The reason given by this accused for going with Pompeuse to the courthouse at Weisenbach in the afternoon was that he was informed he was to be interrogated there in connection with the incident of the morning (R 351). He denied that he struck the flyer at the courthouse in Weisenbach or that he saw him struck by anyone (R 348, 349). He claimed that he was not in the city hall when the attack took place, but stood on the outside. He did not know what had taken place there until after it had occurred (R 352). Klara Bosch, from her apartment above the courtyard, saw only three men about the flyer (R 191). These were Deck (R 186), SCHNEIDER (R 187, 188) and, according to gossip, the third was probably Pompeuse (R 190). SCHNEIDER testified this accused was not present when the beating took place, but that he was outside in the street (R 495, 496).

c. Incident No. 3: The accused accompanied Pompeuse and the others that morning because Pompeuse had ordered him to go along to arrest a flyer (R 352). It was Pompeuse and not he who removed the prisoner from Weingaertner's custody. He admits striking the flyer with a rubber hose but he did this only for the purpose of getting Kern and the flyer away from the middle of the road (R 346) as this street had much traffic (R 345). Once Kern and the flyer were on the side of the road he left the scene (R 346).

Sufficiency of Evidence: A discussion of the evidence is not necessary. It is clear and leaves no doubt as to this accused's guilt.

authorities discussed in Section V, post.

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

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. A Petition for Clemency was filed by this accused, 13 December 1947.

Recommendation: That the findings and sentence be approved.

8. Fritz KERN

This accused was not served and not tried. (R 2).

9. Isidor KLUMPP

Nationality:	German
Age:	53
Civilian Status:	Saw Mill Foreman
Party Status:	Nazi since 1940; Block Leader
Military Status:	Served in World War I
Pleas:	NG Charge I; NG Charge III
Findings:	G Charge I; G Charge III
Sentence:	Death by hanging

Evidence for Prosecution:

a. The Common Design: This accused testified that as a party block leader at Weisenbach he was under the immediate supervision of EIERMANN (R 420, 421). In his unsworn pretrial statement of 12 January 1946 (R 214; P-Ex 21a, pp 2, 3) he states that he frequently attended meetings at which EIERMANN and later WIELAND emphasized that enemy flyers were to be killed. And he adds it was this propaganda that was responsible for his actions on 9 August 1944 (Idem p 3). Johann Bosch testified that STICHLING told him this accused was a member of the pursuit troop (R 179). He also testified he heard that when at a meeting held subsequent to 9 August 1944 EIERMANN, referring apparently to the killing of the flyer at the courthouse in Weisenbach, "glorified the deed", this accused was the only one present who shouted approval (R 155).

9 August 1944. Noting that one would land in the Schoellkopf area he proceeded there on foot (R 214; F-Ex 21a, p 2). When he arrived at the scene a group had already gathered (R 214; F-Ex 21a, p 2). Hermann KRIEG, at page one of his unsworn pretrial statement marked exhibit F-Ex 18a (R 212) and at page nine of his sworn extrajudicial statement marked exhibit F-Ex 20 (R 213), stated that the accused fashioned a club about one meter in length and 20 to 30 millimeters in width which was used to beat the flyer.

Gerstner in a sworn extrajudicial statement (R 146, 181; F-Ex 7a) stated that this accused handed him a wooden club which he, Gerstner, used to beat the flyer. Johann Bosch, in his testimony in Court (R 155), and Deck, in his extrajudicial sworn statement (R 183; F-Ex 11, p 4), tell how, when the wounded and badly beaten flyer came staggering down the slope, this accused shouted to Johann Bosch to shoot him. In his extrajudicial sworn statement of 15 August 1946 (R 215; F-Ex 22a) as well as in his testimony in Court (R 424, 433, 434) this accused admitted that he called to Johann Bosch to shoot the flyer. In his former statement (R 214; F-Ex 21a, p 2) he also admits that he struck the flyer three times with his club.

Evidence for Defense: The accused claimed that at the time he signed the statement at Baden-Baden 12 January 1946 (R 214; F-Ex 21a) he was sick (R 425) and under duress (R 426). The statement did not reflect what had actually occurred (R 427, 430).

a. The Common Design: Although Johann Bosch claimed he had been informed by STICHLING that this accused was a member of the pursuit troop (R 179), STICHLING's pretrial unsworn statement does not identify him as such (R 226; F-Ex 35a, p 1). Nor do SCHNEIDER (R 223; F-Ex 32, pp 5, 6), OVERLACK (R 230; F-Ex 37a, p 1), or KIRCHER (R 218; F-Ex 26a, p 1) name him as a member. Testifying under oath this accused stated that he attended only one party meeting at which the matter of captured flyers was discussed, but denied that any orders in this connection

mind of rescuing the flyer (R 422, 428, 429). The stick he carried he had picked up at the edge of the woods (R 436) because the hill on which the flyer had landed was steep and an old wound made it difficult for him to ascent it without an aid (R 423). He denied that he at any time struck or laid hands on the flyer. In fact he came no nearer than three or four meters to him (R 427). His reason for shouting to Johann Bosch to kill the flyer was a desire to spare the victim further suffering (R 424, 433, 434). He claimed that that portion of the statement made by him at Baden Baden (R 214; I-Ex 21a, p 2) wherein he admitted striking the flyer with a club was not true. He made that admission and signed that statement only because of the threats of a former Gestapo agent named Spaet (R 430). At least one of those present at the scene stated he did not see this accused strike the flyer (R 411).

Sufficiency of Evidence: The evidence supports the conclusion that this accused was a participant in the conspiracy and in the killing of the flyer on the Schoellkopf.

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

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief. Defense Counsel, 29 May 1947. Petitions for Clemency were filed by the pastor of the Weisenbach Diocese, Robert Blum, 5 December 1947; the Archbishop of Freiburg, 8 July 1947; and Dr. Max Rau, defense counsel, 17 December 1947.

Recommendation: That the findings and sentence be approved.

10. Hermann Wendelin KRIEG

Nationality:	German
Age:	36
Civilian Status:	Barrel Maker and Truck Driver
Party Status:	Nazi since 1940; Block Leader at Au
Military Status:	In Army 1940-1941
Pleas:	NG Charge I; NG Charge III

Evidence for Prosecution:

a. Sanity: The defense contended that this accused was insane both at the time of the offense and at the time of the trial (R 56). Dr. Burdach, a psychologist and civilian internee at Dachau (R 45), stated he had examined this accused and had had him under observation (R 55, 56). Based on this as well as inquiry into the subject's history it appeared that there was hereditary insanity in his family and that he had suffered from a mental condition known as schizophrenia for a period of 11 years (R 54, 55, 61; D-Ex 1a). During this time he had undergone at least two distinct attacks. On two occasions he had been placed in institutions for the mentally sick (R 61; D-Ex 1a). It was the opinion of this doctor that this accused could distinguish between right and wrong and would probably be capable of conferring with his counsel (R 58). He could not say with certainty whether the accused was sane in August 1944 (R 60).

Dr. Fischer, a medical doctor also specializing in psychiatry (R 125) and a civilian internee at Dachau (R 124), examined this accused in June 1946 (R 126). At that time he found him to be suffering in a certain fixed state of schizophrenia but the main symptoms of the disease were lacking (R 127, 128). He appeared to be incapable of a high degree of "mental capacity or mental cogitation" (R 127). The doctor was unable to say as to this accused's ability to determine between right and wrong in August 1944 (R 129). Being handed exhibit D-Ex 3 (R 124) he stated the symbols on this document meant that this accused was released from the German army as being unfit for combat duty because of a mental illness which then existed or had existed (R 131-133).

Captain Max L. Wool, Medical Corps, US. Army, a medical doctor with the psychiatric section, 98th General Hospital (R 136), testified that he had examined this accused and found him to be suffering from the mental disturbance, schizophrenia (R 138). In his opinion this accused was able basically to distinguish between right and wrong

recalling events as far back as 1944. Also, he was capable of conferring with counsel (R 138).

Johann Bosch testified that at the time material to the case this accused was a licensed vehicle operator, had a man working under his supervision, had a business as a barrel maker and in his opinion had sufficient mentality to know right from wrong (R 173, 174).

At the time of the offense this accused served as a block leader in the party at Au (R 394; F-Ex 39a, p 2). He was also a member of the landwacht in that village (R 213; F-Ex 20, p 8).

b. The Common Design: This accused was a member of the Nazi party since 1940 and served as a block leader in Au (R 394; F-Ex 39a, p 2). About six months prior to 9 August 1944 he attended a meeting held at Au in which STICHLING announced that all parachuting flyers should be killed (R 213; F-Ex 20, pp 18, 19). For evidence of this accused's actions in furtherance of the common design reference is made to his participation in the killing of the flyer referred to under Incident No. 2.

c. Incident No. 2: The accused was at his workshop in Weisenbach when parachuting flyers were seen in the sky. Together with MEINKEL and Deck he started out for the Schoellkopf where it appeared one of the flyers would land (R 407, 415, 213; F-Ex 20, p 4). When they arrived there he went up to the flyer who raised his hands in sign of surrender (R 408, 213; F-Ex 20, pp 5, 6). This flyer was unarmed, wounded and exhausted (R 408, 142; F-Ex 5a, p 1). Franz Michael Klumpp, a medic, came up at about this time and he, MEINKEL and the accused began to carry the flyer out of the brush and down the hill (R 142; F-Ex 5a, p 1, R 145; F-Ex 6a, p 1, R 213; F-Ex 20, p 9, R 408). Here EIERMANN entered the picture. He ordered the flyer to be put on the ground and chased the crowd away (Idem). Willibald Krieg (R 142; F-Ex 5a, p 1) and Franz Michael Klumpp (R 145; F-Ex 6a, p 1), who had witnessed the affair up to this point, were among those driven off. EIERMANN gave the order that

he and MERKEL did so with clubs. The flyer was beaten first up on the hill and again after he made his way down to the road (R 146; I-Ex 7a). Dock stated he saw this accused striking the flyer with a wooden club (R 183; I-Ex 11, p 11). Isidor KLUMPF (R 423, 214; I-Ex 21a) and MERKEL (R 409, 215; I-Ex 23a) both say they saw him attack and beat the flyer.

This accused made three different statements prior to the trial. In them he admits attacking the flyer with a rock and a club (R 212; I-Ex 18a, R 213; I-Ex 19a, R 213; I-Ex 20). At the conclusion of the beating, Gerstner shot the flyer (R 146; I-Ex 7a). That afternoon this accused, MERKEL and Isidor KLUMPF took the body to the funeral home at Weisenbach (R 213; I-Ex 20, p 15).

Evidence for Defense:

a. Sanity: This accused was discharged from the German army 17 September 1941 because of his mental condition (R 124; D-Ex 3a). By letter dated 31 October 1941 it was requested that a guardian be appointed for him for the reason that he was suffering from schizophrenia and not able to look after his financial affairs (R 123; D-Ex 2a). Subsequently in 1941, his father was appointed as his guardian (see statement of Maurus HAITZLER, dated 10 January 1943 at the Landsberg prison). The two German doctors testified that the history of this accused as related to them by him showed he was twice in institutions for the mentally sick (R 55). None of the three expert witnesses stated he knew the difference between right and wrong in August of 1944 (R 60, 129, 137, 138). WIELAND testified that one of his neighbors, a Mrs. Grossman, referred to this accused as "our crazy barrel maker" (R 290, 291).

The Court found the accused "mentally sound on the date set forth in the charges and particulars and subsequent thereto" (R 139).

b and c. These two subdivisions are here combined for the reason that the evidence in defense is applicable to both.

This accused, after being informed of his rights, declined to take the stand (R 633). In his extrajudicial sworn statement of 4 September

(Idem p 4). EIERMANN was the ortsruppenleiter of Weisenbach and when he gave the order to kill the flyer that order had to be obeyed (Idem pp 13, 17). In his unsworn pretrial statement (R 212; I-Ex 18a) he claimed that the reason he threw the rock at the flyer was that he wished to shorten his suffering.

Sufficiency of Evidence: The Court was warranted in concluding from the evidence that this accused was not insane. While it appears that he is and for some time has been suffering from a mental disorder, there is in the record sufficient evidence to support the conclusion that he was capable of distinguishing right from wrong and adhering to the right, both at the time of the offense and at the time of the trial. For a discussion of the point of law here involved reference is made to Section V, post. However, the accused was probably greatly influenced by EIERMANN, a strong character. This factor should be taken into consideration in mitigation.

With regard to the evidence offered in support of superior orders, it does not appear that the accused acted unwillingly. He 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 Robert M. Donihi, Chief Defense Counsel, 29 May 1947. Petitions for Clemency were filed by the Archbishop of Freiburg, 8 July 1947; the pastor of the Weisenbach diocese, Robert Blum, 5 December 1947; two by the accused, one 8 January 1948, and one undated; and Dr. Max Rau, defense counsel, 17 December 1947.

Recommendation: That the findings and sentence be approved, but that the sentence be commuted to imprisonment for life.

11. Rudolf MEISEL

Nationality:

German

Age:

19

Military Status:	None
Pleas:	NG Charge I; NG Charge III
Findings:	G Charge I; G Charge III
Sentence:	Life imprisonment

Evidence for Prosecution:

a. The Common Design: This accused had been a member of the Hitler youth organization since 1943. At the time of the incidents here involved he was working in the employ of Hermann KIEG as an assistant driver (R 407). For evidence of this accused's actions in furtherance of the common design, reference is made to his participation in the killing of the flyer on the Schoellkopf covered in the following paragraph.

b. Incident No. 2: KIEG stated that when the parachutes were in the sky over the Weisenbach area this accused turned to him and suggested that they go up "and get that fish" (R 213; F-Ex 20, p 4). KIEG, Deck and this accused then started for the Schoellkopf where they found the unarmed and wounded airman (R 407, 415, 213; F-Ex 20, pp 4, 5). As they approached he raised his hands in token of surrender (R 408). With Michael Klumpp, a medic, this accused and KIEG began to carry the flyer down the hill (R 145; F-Ex 6a, p 1, R 142; F-Ex 5a, p 1). After they had proceeded about 20 to 50 meters (R 142; F-Ex 5a, p 1, R 408) EIERMANN came upon the scene and ordered that the flyer be put down (R 408). Employing WIELAND as interpreter EIERMANN then questioned the flyer (R 409, 183; F-Ex 11, p 3). EIERMANN gave the order that the flyer was to be beaten to death (R 408, 411, 215; F-Ex 23a). This order was followed and the victim was beaten and finally shot to death (R 181; F-Ex 7a).

In his extrajudicial sworn statement Gerstner described how this accused beat the flyer with a wooden club on the hill and again after he had managed to partially run and partially tumble down the side of the hill to the road (R 146, 181; F-Ex 7a). KIEG, in his unsworn

stated that he saw this accused beat the flyer with a stick which he had taken from Gerstner. In his testimony in Court (R 409) as well as his extrajudicial sworn statement (R 215; I-Ex 23a) this accused admits that he struck the flyer. In Court, however, he added that he did so at the instance of KRIEG (R 409).

Evidence for Defense: When these incidents occurred this accused was 16 years of age and in the employ of Hermann KRIEG who has been hereinabove discussed. He denied certain of the matters contained in his extrajudicial sworn statement (R 215; I-Ex 23a) because at the time he made it he was so excited that he did not know what he was saying (R 412). Also, he was not sure of his facts at that time (R 413).

a and b. These two subdivisions are here combined for the reason that the evidence in defense is applicable to both.

The accused testified that his reason for going to the Schoellkopf was to rescue the flyer (R 414). He denied that he suggested to KRIEG that they go up to get the flyer, but testified it was Deck who suggested this (R 415). Up to the time EIERMANN arrived upon the scene the flyer had not been mistreated in any way (R 408). He claimed he struck the flyer only twice and he did this after KRIEG told him to do so (R 410). He further testified that the flyer had been shot and was dead at the time he struck him (R 410, 414).

Sufficiency of Evidence: The evidence establishes that this accused joined in the attack upon the flyer on the Schoellkopf which resulted in his death. In so doing he participated in and acted in furtherance of the common design embraced in the particulars of Charge I. Accordingly, the Court's findings of guilty are supported by the evidence.

Notice should be taken of this accused's tender years at the time he committed these offenses. It might well be concluded that he acted under the tension of excitement and was influenced by the actions of the older men about him. While these considerations could not serve to remove the fact of his guilt, it is proper that they be looked into in determining the measure of his punishment. It is felt that in this in-

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

Petitions: A petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. A petition for Clemency was filed by the Archbishop of Freiburg, 8 July 1947.

Recommendation: That the findings and sentence be approved, but that the sentence be reduced to imprisonment for 15 years, commencing 29 May 1947.

12. Kurt OVERLACK

This accused was acquitted (R 706).

13. Julius RATZKE

Nationality:	German
Age:	59
Civilian Status:	Electrician
Party Status:	Nazi since 1933; in charge of Film and Radio in Hilbertsau
Military Status:	None
Pleas:	NG Charge I; NG Charge II; NG Charge III; NG Charge IV
Findings:	G Charge I; NG Charge II; NG Charge III; G Charge IV
Sentence:	20 years, commencing 12 February 1947

Only that evidence relating to the question of this accused's guilt or innocence under Charges I and IV will be considered.

Evidence for Prosecution:

a. The Common Design: The accused's position as party official in charge of film and radio made him a member of the staff of Junnicker, the Ortsgruppenleiter of Hilbertsau (R 431). Acting for the Ortsgruppenleiter he attended the kreisleiter's meeting at Rastatt, in June or July of 1944 (R 463), at which the announcement concerning captured flyers was made (R 469). He carried the kreisleiter's message back to

place where the flyer referred to in Incident No. 3 landed, "You don't know the decisions and directives which we have to use against parachutists, that is, we must beat him to death" (R 219; I-Ex 28a).

b. Incident No. 3: The accused was air raid warden at the paper factory of Baden Obertrot where he worked (R 467, 470). Between 1000 and 1100 hours on 9 August 1944 he saw a parachute descend and land about 200 or 250 meters from his post and near the houses of the village (R 470). He went there and saw a flyer with a crowd of about 10 or 15 people gathered about him (R 470, 471). A few moments later a policeman named Weingaertner (R 88) arrived and took the flyer into custody (R 471, 472). The flyer was wounded, unarmed, and surrendered willingly (R 98). Weingaertner, assisted by a man named Urban Kalmbacher, dressed the flyer's wound (R 84, 97, 98). Urban Kalmbacher testified that he saw Junnicker, Rief and this accused arrive on the scene and beat the flyer (R 84). The beating lasted but a moment (R 84, 87). He saw this accused strike the flyer with his hand either once or twice (R 87). Urban Kalmbacher's son Franz told him that evening that he too had witnessed the incident and had scolded this accused and Junnicker for their conduct, to which they had answered that he didn't know his orders (R 85).

Gruber testified he went to the scene and found a large crowd about the flyer. He saw a few men strike the flyer. He identified only Junnicker as one of these (R 90). Later that day while riding along the road between Hilpertsau and Gernsbach he saw the body of this same flyer and four men gathered about it (R 90). The four were Pompeuse, Kern, KIRCHER and GOTZMANN (R 91, 107, 306). Weingaertner testified that while he was bandaging the flyer's wound, or immediately after, some people in the crowd whom he could not identify gave the flyer one or two blows in the face (R 97, 99). Weingaertner then left with his prisoner, going on foot in the direction of Gernsbach (R 98). After travelling safely about four or five kilometers from the place

P-Ex 25a).

Evidence for Defense: This accused claimed that after he was taken prisoner and prior to his interrogations, he was threatened and beaten; on one occasion he was placed against a wall and a shot was fired over his head. All of this claimed mistreatment took place while he was in French custody (R 473-475). He denied the truth of certain of the matters contained in his unsworn pretrial statement (R 219; P-Ex 28a).

a. The Common Design: The accused's duties as officer in charge of film and radio were to keep the radios in the village in repair and make arrangements in connection with the showing of film (R 481). Although he heard Kreisleiter Dieffenbacher say that details were to be formed with membership to be appointed by the kreisleiter, he knew nothing about the pursuit troops (R 479). After he attended the kreisleiter's meeting at Rastatt he had to report the message he received there to his ortsgruppenleiter (R 480). He denied (R 477) having made to Franz Kalmbacher the statement appearing in exhibit P-Ex 28a (R 219).

b. Incident No. 3: The accused denied in Court, as he did in his unsworn pretrial statement (R 219; P-Ex 28a), that he struck the flyer who landed at Hilpertsau (R 471, 484). Whether anyone else abused the flyer he did not know because at Weingaertner's request he engaged himself in removing the parachute from a tree (R 471-473). Neither Gruber (R 92) nor Weingaertner (R 99, 102) identified this accused as one of those who struck the flyer. Urban Kalmbacher denied that his son Franz told him this accused said captured flyers had to be killed (R 85). Liesel Maier in an unsworn pretrial statement said this accused expressed distaste at the flyer's mistreatment (R 669; D-Ex 10a). Sophie Fischer testified she arrived at the place the flyer landed before this accused and stated he did not strike the flyer at any time (R 487, 488). Maria Hofheinz also testified she was at the scene and did not see this accused strike the flyer. She adds that had he done so

Sufficiency of Evidence: There is some evidence that this accused struck the flyer who landed at Hilpertsau one or two blows with his hand. This occurred at the place of landing. However, he was not present at nor a participant in the fatal attack which occurred later at a considerable distance from the place of landing.

The findings of guilty to Charge I are warranted by the evidence. However, as to Charge IV the evidence is inadequate to sustain the findings of guilty. The sentence is excessive.

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. Petitions for Clemency were filed by the Archbishop of Freiburg, 8 July 1947; and Dr. Max Rau, defense counsel, 17 December 1947.

Recommendation: That the findings of guilty to Charge IV be disapproved; that the findings of guilty to Charge I and the sentence be approved, but that the sentence be reduced to imprisonment for four years, commencing 12 February 1947.

14. Johann Gotthilf SCHNEIDER

Nationality:	German
Age:	52
Civilian Status:	Master Mason
Party Status:	Nazi since 1937; SA Staff Sergeant
Military Status:	None
Pleas:	NG Charge I; NG Charge II
Findings:	G Charge I; G Charge II
Sentence:	Death by hanging

Evidence for Prosecution:

a. The Common Design: Johann Bosch testified he was told by STICHLING that this accused was a member of the pursuit troop (R 179). In any event, during the afternoon of 9 August 1944, this accused accompanied KARCHER and Pompeuse from Gernsbach to the courthouse at Weisenbach (R 334, 494) where they were joined by Kern (R 335, 494).

R 226; P-Ex 35a, p 1). There the four, acting together, attacked and killed the flyer referred to in Incident No. 1 (R 183; P-Ex 11, p 13, R 187, 188, 495, 223; P-Ex 32, pp 3, 5).

b. Incident No. 1: After their arrival at the courthouse, Pompeuse had a clerk unlock the door to the room which held the captured flyer (R 223; P-Ex 32, pp 2, 3). Then began an attack upon the flyer which quickly culminated in his death (R 223; P-Ex 32, pp 4-6). This accused testifying under oath (R 492) admitted that he struck the flyer with a wrench (R 495, 500). Klara Bosch, looking down into the courtyard from her apartment in the city hall, saw three men standing about the flyer who was then lying on the ground. Shortly thereafter she heard a shot (R 185, 186). She identified this accused as one of the three men (R 187, 188). In his extrajudicial sworn statement of 31 August 1945 (R 223; P-Ex 32, p 3) this accused stated he struck the victim with his bare hand. But in his statements of 11 July 1945 (R 222; P-Ex 31a) and 15 August 1946 (R 224; P-Ex 33a) he admits beating him over the head with a wrench. After the killing this accused accompanied Pompeuse and the others to a tavern to drink (R 114, 496, 223; P-Ex 32, p 6). At this place Walter Schmoll heard Pompeuse say in the presence of KARCHER and this accused, "Well, again today it has been proven who we can use" (R 116).

Evidence for Defense: The accused testified that after his arrest he was subjected to a great deal of mistreatment in various forms (R 497 et seq.). He was strangled, made the object of a mock execution, beaten and otherwise roughly handled while in French custody (R 497, 499, 501-506). Because of this and his resultant weakened condition he signed statements even though they contained matters that were not correct (R 499, 501, 502). He was not mistreated by the Americans (R 506, 507).

a. The Common Design: He denied ever attending a party meeting at which the treatment of captured flyers was discussed (R 493). That orders to kill flyers existed was not known to him (R 503). He claimed he was not a member of a pursuit troop (R 494, 512) and knew nothing about any such unit (R 494). When Lieutenant Pompeuse told him to go

b. Incident No. 1: At the courthouse he did not enter the room where the flyer was beaten (R 495, 512). He stood in the corridor and when the flyer was brought from the room he struck him only twice on the head (R 495, 496). Pompeuse ordered him to do so and he was afraid of Pompeuse (R 503). A wrench about 20 centimeters long (R 500) had been given him by Pompeuse (R 494, 499). After striking the flyer his conscience bothered him and he went out into the street (R 495). While he was in the street he heard the report of a shot (R 495, 498). At this point he entered the courtyard where he saw the flyer's body lying on its face and bleeding from the neck (R 495). He also observed Pompeuse handing Kern a pistol (R 495, 498). KROCHER testified this accused was not in the courtyard beating the flyer but was standing in the vestibule (R 348).

Sufficiency of Evidence: The evidence as to this accused's guilt is clear. Moreover, both in his extrajudicial statements and in his sworn testimony in Court he admitted that he participated in the ruthless attack on the wounded flyer at the courthouse.

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 not excessive.

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. A Petition for Clemency was filed by Emilie Schneider, wife of accused, 24 June 1947.

Recommendation: That the findings and sentence be approved.

15. Heinrich STICHLING

Nationality:	German
Age:	45
Civilian Status:	Hotel Manager; Mayor of Gernsbach
Party Status:	Nazi since 1933; Ortsgruppenleiter of Gernsbach

Pleas:	NG Charge I; NG Charge II; NG Charge III; NG Charge IV
Findings:	G Charge I; G Charge II; G Charge III; G Charge IV
Sentence:	Life imprisonment

Evidence for Prosecution:

a. The Common Design: In his capacity as Ortsgruppenleiter of Gernsbach (R 153) this accused attended the various party meetings (R 355, 356). He was present when Kreisleiter Dieffenbacher announced, in about June of 1944, that captured flyers were to be killed (R 356, 357, 519-521, 541, 226; F-Ex 35a, p 1). Both KRIEG (R 213; F-Ex 20; pp 18, 19) and HAUZLER (R 398, 399) attended meetings at which this accused passed on the kreisleiter's order. In his unsworn pretrial statement he admitted that he publicized the order at official conferences and at various party meetings (R 226; F-Ex 35a, p 2).

He further stated that several weeks prior to the occurrence of 9 August 1944 Pompeuse told him of the formation of a pursuit troop with orders to kill enemy flyers, pursuant to the direction of the kreisleiter. Pompeuse, according to his statement to this accused, was the leader and Kern, GOTZMANN and KIRCHER were members of this unit (R 226; F-Ex 35a, p 1).

b. Incident No. 1: SCHNEIDER stated that around 1100 hours on 9 August 1944 he received a summons from either this accused (R 223; F-Ex 32, p 2) or Pompeuse (Idem p 7) to report at the Gernsbach city hall. There he was ordered by both this accused and Pompeuse to accompany the latter to Weisenbach (Idem p 2). He did so. On the way they were joined by KIRCHER and at Weisenbach by Kern (Idem p 2). These four men then proceeded to the courthouse there and killed the American flyer (R 223; F-Ex 32, pp 3-5, R 224; F-Ex 33a, R 183; F-Ex 11, p 6). A little later this group and Walter Schmoll (R 114) stopped at a tavern (R 223; F-Ex 32, p 6, R 496). To obtain what they wanted to drink, Pompeuse had Stoll, the tavern owner, speak to this accused over the telephone. Stoll testified that this accused then told him to give them wine and

c. Incident No. 2: KALEG, an active participant in the killing of the flyers on the Schoellkopf, stated that about six weeks before 9 August 1944 he was present at a public meeting held at Au. This accused addressed the meeting and said that parachuting flyers should be killed (R 213; i-Ex 20, pp 18, 19).

d. Incident No. 3: In his unsworn pretrial statement this accused describes how at about 1100 hours on 9 August 1944 Pompeuse came to his office in the city hall of Gernsbach and telephoned the various members of the pursuit troop directing them to report at the office of this accused (R 226; F-Ex 35a, p 2). In his extrajudicial sworn statement KALCHER says he joined Pompeuse and along with GOTZMANN and Kern participated in the killing of the flyer on the Gernsbach-Hilpertsau road (R 218; F-Ex 27a). GOTZMANN in his extrajudicial sworn statement of 21 August 1946 stated that he joined Pompeuse and KALCHER and that they, with Kern, killed the flyer as stated above (R 217; F-Ex 25a). Upon the completion of this killing Pompeuse dispatched GOTZMANN to this accused with the report "Nr. 1 complete job done" (Idem).

Evidence for Defense: The accused claimed that he was blackmailed (R 374) into making his unsworn pretrial statement dated 12 December 1945 (R 226; F-Ex 35a). It contains matters that are not true and misrepresents certain facts (R 374). He was opposed to the actions of Pompeuse and after 9 August 1944 he went with Siegfried Schmoll, a German army officer, to the kreisleiter and protested the killing of the flyers (R 239, 240, 367). Karl Abel testified that this accused did not publicize any orders concerning the mistreatment of flyers prior to 9 August 1944 (R 654). He further testified that he had heard from Pompeuse of the pursuit troop and that this accused had nothing to do with that organization (R 654). There was also evidence offered that this accused befriended people of Jewish blood (R 663, 638; D-Ex 8a) and that he was a man of fine character and assisted the people regardless

with the order of the kreisleiter concerning captured flyers and as a result did not publicize it. He held no meeting at Au prior to the incident concerning the flyers involved herein (R 357). Because of this accused's attitude, the kreisleiter sent a Dr. Merkel to address a meeting on this subject at this accused's hall in Gernsbach (R 358). Pompeuse told this accused that he had been commissioned by the kreisleiter to form a pursuit troop but he did not tell him who the personnel were comprising it (R 359). He denied any connection whatsoever with Pompeuse and this pursuit troop (R 370).

b. Incident No. 1: The accused testified that the statement made by Stoll concerning the telephone conversation with him at the time Pompeuse and the other participants in the courthouse killing were at Stoll's tavern was not true (R 373-375). In fact, he denied hearing anything about the killing of the flyer at Leisenbach until the evening of the day it occurred (R 364). When he had been informed by OVERLACK that enemy flyers were coming down he directed OVERLACK to arrest the flyers and hold them until the police arrived (R 362).

c. Incident No. 2: The accused denied knowing anything whatsoever about the killing of the flyer on the Schoellkopf. The first time he heard about this incident was at his interrogation at Baden Baden on 11 December 1945 (R 366).

d. Incident No. 3: GOTZMANN, testifying under oath, denied that he had received an order from this accused to go with Pompeuse (R 313). He also denied that Pompeuse had ordered him to report to this accused as set out in his extrajudicial sworn statement (R 217; P-Ex 25a). What Pompeuse actually told him to do was to tell this accused to tell the kreisleiter that the affair had been taken care of (R 308), and that was the information GOTZMANN transmitted to this accused (R 309, 363).

Sufficiency of Evidence: The evidence supports the Court's findings of guilty to Charges I, II and IV. As to Charge III, however, there is nothing in the record to indicate that this accused in any way parti-

those present at the killing of the victim involved in Charge III were shown to have been from his Ortsgruppe area.

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 to Charges I, II and IV are warranted by the evidence. The sentence is not excessive.

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. No petitions for Clemency were filed.

Recommendation: That the findings of guilty to Charge III be disapproved; and that the findings of guilty to Charges I, II and IV and the sentence be approved.

16. Franz WIELAND

Nationality:	German
Age:	57
Civilian Status:	Grammar School Teacher
Party Status:	Nazi since 1933; Local Education Leader
Military Status:	Served in World War I
Pleas:	NG Charge I; NG Charge II; NG Charge III; NG Charge IV
Findings:	G Charge I; NG Charge II; G Charge III; NG Charge IV
Sentence:	20 years, commencing 19 April 1945

Only so much of the evidence will be here discussed as has a bearing on the question of this accused's guilt or innocence under Charges I and III.

Evidence for Prosecution:

a. The Common Design: Johann Bosch testified it was the duty of this accused by virtue of his position to educate party members in the meaning of national socialism (R 157). Isidor KLUMPT, in his unsworn pretrial statement, stated that he repeatedly attended meetings at which EIERMANN and later this accused emphasized that captured flyers were to be killed. He ascribes to this propaganda his own conduct on

regarding captured flyers (R 283). In his extrajudicial sworn statement (R 216; F-Ex 24, p 2) he stated he heard the kreisleiter say at a meeting that in north Germany and France the people beat allied flyers to death.

b. Incident No. 2: When the air raid alarm sounded on the morning of 9 August 1944, this accused closed the school at which he was teaching and went to his home (R 234). From there, at EIERMANN's request, he went to the Schoellkopf to act as interpreter (R 252, 285). At the Schoellkopf he found a group including EIERMANN standing about the flyer who was lying on the ground (R 236). He questioned this flyer at EIERMANN's direction (R 256, 257). Then he helped the flyer to his feet and walked a few paces down the hill with him. EIERMANN stopped them and ordered that the flyer be taken in a different direction (R 253, 258, 259, 183; F-Ex 11, p 4).

Franz Michael Klumpp stated that after EIERMANN had ordered him and the others away from the scene this accused was one of the few who remained (R 145; F-Ex 6a, p 1). Isidor KLUMPP stated that this accused was present when KUEG and Gerstner began beating the flyer, the former using a rock and the latter a club (R 424, 215; F-Ex 22a). MERKEL testified to the same effect (R 416).

EIERMANN made three inconsistent statements with reference to this accused prior to giving his testimony in Court. He stated this accused incited the people against the flyer and caused him to run (R 666; F-Ex 42, p 4); that he accused the flyer of being a murderer of women and children (R 210; F-Ex 16a, p 1); and that in speaking to the flyer this accused translated into English the things he, EIERMANN, told him to say (R 211; F-Ex 17a). In his testimony given in Court, EIERMANN did not appear to remember precisely what had happened and he testified that this accused did not know the English equivalent of some of the things he was asked to say to the flyer (R 263).

Evidence for Defense: The accused denied certain portions of his

result it contains inaccuracies (R 294).

a. The Common Design: Isidor KLUMPF denied that at the time he made his unsworn pretrial statement (R 214; P-Ex 21a) he said this accused had emphasized at meetings what was to be done to captured flyers (R 432, 433). He also denied hearing this accused give any orders in this connection at party meetings (R 435). This accused claimed he had no knowledge of any orders regarding captured flyers until after he was captured, that is after the end of the war (R 283, 293). He admitted that there was a meeting at which EIERMANN stated the kreisleiter's views in this regard but very often the people did not follow the kreisleiter in such matters (R 283).

The accused testified that his position as party education leader had nothing to do with politics. Among his duties were the disseminating of educational letters and the giving of scientific lectures (R 297). Johann Bosch testified substantially to the same effect regarding the duties of this accused (R 157).

b. Incident No. 2: The accused was obliged to go to the Schoellkopf to act as interpreter when he was given the order to do so by EIERMANN (R 216; P-Ex 24, p 3). The group that he saw gathered about the flyer upon his arrival there was standing quietly (R 286). After he had finished the questioning (R 294) and was stopped by EIERMANN from walking down the hill with the flyer (R 289) he left for his home (R 289, 290).

During the short time he had been on the Schoellkopf the flyer was not threatened, cursed, or beaten (R 289, 290). He neither heard nor saw the flyer mistreated (R 290). Not until that afternoon did he learn that this flyer had been killed (R 290, 291, 301). EIERMANN testified that this accused had left the scene before the flyer was beaten (R 271). Both Isidor KLUMPF and MENKEL testified that they did not see him strike the flyer (R 424, 409).

Sufficiency of Evidence: The evidence supports the Court's finding that this accused was guilty under Charge I. The evidence under Charge III

Schoellkopf. In view of his attending the kreisleiter's meeting at which the order as to disposition of flyers was originally announced, his general activities in disseminating information as to the order, and the obvious hostile circumstances under which he aided in interrogating the victim, it is apparent that he knew the flyer was to be killed. In arriving at a fair sentence, consideration should be given the fact that he himself was guilty of no mistreatment of the flyer and left the scene before Gerstner fired the shot into the victim's head.

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.

Findings of guilty to Charges I and III are warranted by the evidence. The sentence is excessive.

Petitions: A Petition for Review was filed by Robert M. Donihi, Chief Defense Counsel, 29 May 1947. Petitions for Clemency were filed by the Archbishop of Freiburg, 8 July 1947, and Dr. Max Rau, defense counsel, 17 December 1947.

Recommendation: That the findings and sentence be approved, but that the sentence be reduced to imprisonment for 3 years, commencing 19 April 1945.

V. QUESTIONS OF LAW:

A. Jurisdiction:

1. Common Design as Separate Substantive Crime. The defense contends in its Petition for Review that the Court was without jurisdiction as to Charge I and the particulars thereunder, inasmuch as the charge and particulars allege a common design to commit certain described unlawful acts as a separate substantive crime. Tribunal III, Nurnberg, Germany, in an order, July 1947, concerning a defense motion attacking Count I of the indictment in Case No. 3, the United States of America v. Josef Altstoetter, et al., stated in pertinent part as follows:

"Count I of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully,

"It is the ruling of this Tribunal, that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense."

Without conceding that the jurisdiction of Military Government Courts is limited to the trial of those war crimes cases contemplated by Control Council Law No. 10, it is clear that this order has no application to the instant case because Charge I and the particulars thereunder do not allege a common design to commit a war crime as a "separate substantive crime." They allege that the accused "did. . . . participate in a common plan or design to commit. . . . violations of the Laws and Usages of War, and pursuant thereto did. . . . wrongfully. . . . participate in . . . the subjection of members of the Armed Forces of the United States of America, who were. . . . surrendered. . . . prisoners of war. . . . to cruelties and mistreatment, including killings, beatings, tortures. . . .", etc. Thus, the particulars under Charge I in this case charge as an offense, the execution of a common plan or design to commit described unlawful acts. They do not allege a common design as a "separate substantive crime".

The extent of the ruling relied upon by the defense is amplified by the next to the last paragraph of the order which provides:

"Count I of the indictment, in addition to the separate charge of conspiracy, also alleges unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of Count I from the indictment, but, insofar as Count I charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the tribunal will disregard that charge."

The contention of the defense is without merit.

2. Civilians as War Criminals: The defense objected to the jurisdiction of the Court on the ground that it did not have jurisdiction over the persons of the accused inasmuch as they were civilians (R 5, 6). The objection was properly overruled (R 6). This ruling was an appropriate application of the principle that the provisions of the law and

state and other public authorities, but to anybody who is in a position to assist in their violation.

The acts with which the accused in the present case were charged were the mistreatment and killing of surrendered American prisoners of war. The Court acted on the principle that any civilian who is an accessory to a violation of the law and customs of war is himself also responsible as a war criminal (United States v. Klein, et al. (Hadamar Murder Factory Case) opinion DJAWC, February 1946; Zyklon B Case, British Military Court, Hamburg, March 1946, Volume I, "Law Reports of Trials of War Criminals", by the United Nations War Crimes Commission, hereinafter referred to as "Law Reports", pages 53, 54, 103).

3. Universality of Jurisdiction Over War Crimes. A validly constituted court of an independent state derives its power from the state. A state is independent of all other states in the exercise of its judicial power, except where restricted by the law of nations (S. S. Lotus, France v. Turkey, 2 Hudson World Court Reports 23). Concerning punishment for a crime of the type involved in the instant case, it has been stated that the sovereign power of a state extends "to the punishment of piracy and other offenses against the common law of nations, by whomsoever and wheresoever committed" (Wheaton's "International Law", Sixth Edition, Volume I, page 269). Recognition of this sovereign power is contained in the provision of the Constitution of the United States which confers upon Congress power "to define and punish offenses against the law of nations" (Winthrop, "Military Laws and Precedents", Second Edition, Reprint 1920, page 831).

Any violation of the law of nations encroaches upon and injures the interests of all sovereign states. Whether the power to punish for such crimes will be exercised in a particular case is a matter resting within the discretion of a state. However, it is axiomatic that a state, adhering to the law of war which forms a part of the law of nations, is interested in the preservation and the enforcement thereof. This is true, irrespective of when or where the crime was committed. The belligerents

(See "Universality of Jurisdiction over War Crimes", by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pages 177-218; Law Reports, 1947, Volume I, pages 41, 42, 43, 103; United States v. Klein, et al., supra; United States v. Weiss, et al. (Dachau Concentration Camp Case), opinion DJAWC, March 1946; United States v. Becker, et al. (Flossenburg Concentration Camp Case), opinion DJAWC, May 1947; United States v. Brust, opinion DJAWC, September 1947; and United States v. Otto, opinion DJAWC, July 1947.) A British court sitting in Singapore tried Tomono Shimio of the Japanese army and sentenced him to death by hanging for illegally killing American prisoners of war at Saigon, French Indo-China (Law Reports, supra, Volume II, page 128).

B. Severance:

The defense moved for a severance of the accused as defendants (R 72, 73). The Court did not abuse its discretion in overruling the motion (R 73). 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. (Mauthausen Concentration Camp Case), opinion DJAWC, February 1947).

C. Dossier:

Shortly before the conclusion of this case the defense objected to the prosecution's having furnished the Court prior to trial with a so-called "dossier". The dossier was a document which contained a copy of the charges and particulars and a statement in summary form of the evidence. The defense contended that this dossier included certain facts which were not proved by the prosecution and, therefore, was highly prejudicial to the accused (R 637). The applicable procedure required that the Chief Prosecutor "assure that the court receives a dossier of the case against the accused" containing a summary of the evidence in

pertinent provisions are not susceptible to the construction that the prosecution must, at its peril, fully support all data therein by evidence adduced.

D. Procurement of Extrajudicial Statements:

Various of the accused testified that prior to giving their extrajudicial statements they were subjected to threats and various forms of mistreatment. These claims, in at least some instances, appear to be not without foundation. This type of practice is condemned. It should be noted that none of the accused claimed American personnel to have been responsible.

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 (20 American Jurisprudence, 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 (Section 5-329, Title 5, "Legal and Penal Administration" of "Military Government Regulations", published by Office of Military Government for Germany (US), 27 March 1947; Section 270, "Manual for Trial of War Crimes and Related Cases", supra). 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 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

witnesses requested by the defense (R 636; D-Ex 7). The Court refused to admit it in evidence (R 637). The reason for offering this exhibit was undoubtedly to show that the accused were deprived of their fifth formal right, viz., to present material witnesses on their behalf "or to have them summoned by the court---, if practicable" (Section 501, page 404, "Manual for Trial of War Crimes and Related Cases", supra). No showing was made by the defense as to what it expected to prove by these witnesses. Not only was there no showing that the evidence which would have been elicited from these witnesses had a material bearing on the case, but in addition their availability at the time of the trial was not established. Moreover, there was no showing that there was a failure to make every effort to procure the requested witnesses. In the light of these facts, no injustice resulted to the accused.

F. Sanity of Accused No. 10:

As pointed out in the discussion under paragraph 10, Section IV, supra, the defense contended that accused KRIEG was insane both at the time of commission of the offenses charged against him and at the time of trial (R 22). It could not well be contended by the defense that the burden of proof rests upon the prosecution to prove the accused sane. Such position on the question of burden of proof would be unsound (Wharton's Criminal Law, Section 80, page 119, et seq.). When, prior to the arraignment, the defense alleged that KRIEG was insane it had the burden of proving this fact by a preponderance of the evidence. This it clearly failed to do inasmuch as nowhere in the record is there any evidence that this accused was incapable of distinguishing between right and wrong and adhering to the right at the time of the offenses..

It is a long established rule that if insanity of a permanent type existed prior to the commission of an act it will be inferred to have continued down to the time of the act unless the contrary is shown (Wharton's Criminal Law, Section 81, page 122).. Conversely, a temporary or spasmodic type of mental disorder carries no such presumption. In the present case KRIEG's mental illness did not affect his ability to

is no basis for concluding that it had such an effect at the time he participated in killing the flyer. On the contrary the evidence shows that he lived and acted as any normal individual, conducting a business of his own and providing for his family.

G. Superior Orders:

Accused EIERMANN, GOTZMANN, HAITZLER, KIRCHER, KRIEG, SCHNEIDER, and STICHLING 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, Orpenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, supra; United States v. Klein et al., supra; 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,

cited therein; "Manual for Courts-Martial", supra; "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U. S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The Air Terror of Our Enemies", found in footnote, page 53, "Military Occupation and the Rules of the Law", by Ernst Fraenkel; United States v. Bury, et al., opinion DJAWC, September 1945; United States v. Thomas, supra; United States v. Beck, et al., opinion DJAWC, December 1946; United States v. Becker, et al., supra; and United States v. Stroop, et al. (Superior Orders Case), opinion DJAWC, September 1947)).

H. Absence of Accused:

From time to time during the course of the trial several of the accused were absent from the courtroom. The reason for the absence of these accused was that they were sick or that their absence had been requested by their counsel for some other reason. During their absence they were represented by the regularly appointed American defense counsel and by German counsel. Their interests during this absence were adequately represented.

Although not utilized to date, the applicable procedure permits of a trial in absentia (Section 5-327.7, Title 5, "Legal and Penal Administration" of "Military Government Regulations", supra). Martin Bormann was actually tried in absentia as indicated at pages 340, 341, Volume I, "International Military Tribunal, Nuremberg". It does not appear that any of the accused who were absent from portions of the trial because of illness were materially hindered in denying the charges against them. British rules also permit of proceeding with war crimes trials during the temporary absence of an accused (Law Reports, supra, Volume II, page 147).

VI. CONCLUSIONS:

An examination of the entire record fails to disclose any error or omission in the conduct of the trial which resulted in injustice to the accused. Accordingly, it is recommended that the findings and sentences

approved, but the sentence as to accused KRIEG be commuted to imprisonment for life, the sentence as to accused MERKEL be reduced to imprisonment for 15 years, commencing 29 May 1947, and the sentence as to accused WIELAND be reduced to imprisonment for 8 years, commencing 19 April 1945; that as to accused EIERMANN the Findings under Charge II be disapproved and the findings under Charges I and III and the sentence be approved; that as to accused GOTZMANN the findings under Charge II be disapproved, and the findings under Charges I and IV and the sentence be approved, but the sentence be commuted to imprisonment for life; that as to accused RATZKE the findings under Charge IV be disapproved, and the findings under Charge I and the sentence be approved, but the sentence be reduced to imprisonment for 4 years, commencing 12 February 1947; that as to accused STICHLING the findings under Charge III be disapproved, and the findings under Charges I, II and IV and the sentence be approved; and that the findings and sentences as to accused ROTHACKER, GOTZ and HAITZLER be disapproved.

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 _____ 1948.

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