

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

24 February 1948

UNITED STATES)

v.)

Case No. 000-50-5-42

Georg PIRNER, et al.)

REVIEW AND RECOMMENDATIONS

I. TRIAL DATA: The accused were tried at Dachau, Germany, during the period 15-19 September 1947, before a General Military Government Court.

II. CHARGES AND PARTICULARS:

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

Particulars: In that Georg PIRNER, Alois MADLMAYR (and Johann FOLGER, German nationals or persons acting with German nationals, acting in pursuance of a common design to subject the persons hereinafter described to killings, beatings, tortures, starvation, abuses, and indignities, did, at or in the vicinity of the Mauthausen Concentration Camp, at Castle Hartheim, and at or in the vicinity of the Mauthausen Sub-camps, including but not limited to Ebensee, Gros-Raming, Gunschirohen, Gusen, Hinterbrühl, Lambach, Linz, Loiblpass, Melk, Schwechat, St. Georgen, St. Lambrecht, St. Valentin, Steyr, Vienna, Wiener-Neudorf, all in Austria, at various and sundry times between January 1, 1942, and May 5, 1945, wrongfully encourage, aid, abet, and participate in the subjection of Poles, Frenchmen, Greeks, Yugoslavs, Citizens of the Soviet Union, Norwegians, Danes, Belgians, Citizens of the Netherlands, Citizens of the Grand Duchy of Luxembourg, Turks, British Subjects, stateless persons, Czechs, Chinese, Citizens of the United States of America, and other non-German nationals who were then and there in the custody of the then German Reich, and members of the armed forces of nations then at war with the then German Reich who were then and there surrendered and unarmed prisoners of war in the custody of the then German Reich, to killings, beatings, tortures, starvation, abuses and indignities, the exact names and numbers of such persons being unknown, but aggregating thousands.

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

Particulars: In that Georg PIRNER, a German national, and Alois MADLMAYR, an Austrian national, did at, or in the vicinity of Gusen, Austria, in or about September 1940, wrongfully encourage, aid, abet and participate in the killing of (approximately 20) non-German nationals, inmates of the Mauthausen Concentration Camp, who were then in the custody of the then German Reich, the exact names and number of said victims being unknown.

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

Particulars: In that Georg PIRNER, a German national, and

Alois MADLMAYR, an Austrian national, did at, or in the vicinity of Gusen, Austria, in or about October 1940, wrongfully encourage, aid, abet and participate in the killing of approximately 100 non-German nationals, inmates of the Mauthausen Concentration Camp, who were then in the custody of the then German Reich, the exact names and numbers of said victims being unknown.

III. SUMMARY OF EVIDENCE: Concerning Charge I, all of the accused are shown to have been former inmates of subcamp Gusen of Mauthausen Concentration Camp in Austria for considerable periods of time between the dates alleged in the particulars of Charge I, are shown to have occupied responsible positions and to have participated in the Mauthausen Concentration Camp mass atrocity. Concerning Charge II, accused PIRNER and MADLMAYR are shown to have participated during the fall of 1940 near Gusen, Austria, in the killing of some non-German nationals, inmates of the Mauthausen Concentration Camp. Accused PIRNER and MADLMAYR were found not guilty of Charge III and the particulars thereunder.

IV. EVIDENCE AND RECOMMENDATIONS:

1. Georg PIRNER

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| Nationality: | German |
| Age: | 45 |
| Civilian Status: | Automotive Metal Worker |
| Party Status: | None |
| Military Status: | None |
| Chgs. | NG Charge I; NG Charge II; NG Charge III |
| Findings: | G Charge I; G Charge II, except of the words "approximately 20"; NG Charge III |
| Sentence: | 20 years, commencing 2 July 1947 |

Evidence for Prosecution: The accused admitted in his testimony that he was an inmate of subcamp Gusen I of Mauthausen Concentration Camp in Austria from March 1940 to the end of March 1945 (R 203, 204). He was capo of a clearing detail and a room eldest of block 13 from March 1940 to the end of 1944 when he was assigned as block eldest of block 2 (R 204-206).

Kowalski, an inmate of subcamp Gusen I from 10 May 1940 to 5 May 1945, testified that he knew the accused since August 1940 (R 9); that the

accused was then orderly of block 13 (R 10); and that the inmates of this block were drilled daily by the accused and MADIMAYR after the evening roll call (R 10). In September 1940 during drill, after some sick inmates fell to the ground (R 10), the accused kicked one of them, who was a Pole (R 12), and beat him with a stick 70 centimeters long (R 10). Together with accused MADIMAYR, who was block clerk in the same block, the accused put the victim into a pit full of water which was near the washroom between blocks 13 and 14 (R 10). When taken out of the pit, the inmate was thrown near the block (R 10) where two other bodies were lying. The victim did not move and appeared to be dead (R 33, 34). On the same day this witness saw the accused and MADIMAYR beat inmates (R 10). In the evening between blocks 13 and 14, he saw about 8 to 10 corpses of Polish inmates who had been beaten and kicked by the accused and MADIMAYR (R 12). The witness further testified that in September and October 1940 he saw the accused and MADIMAYR beating inmates and throwing them near the washroom (R 11); that he saw the accused, while drunk, eat a Polish priest; that the accused looked into the priest's mouth and saw he had gold teeth; and that the accused took the priest into the orderly room. At about 2000 hours the witness saw the corpse of the priest lying near the block. The witness was told by another inmate that the priest was killed in the orderly room and his gold teeth had been pulled out (R 11). It was common knowledge that the accused exchanged the gold for liquor and food (R 13). The witness further testified that he saw the accused and MADIMAYR kill many inmates (R 11), and that in September or October 1940 there may have been five instances in which the accused and MADIMAYR killed groups of five to eight inmates and many more in individual cases (R 13). The witness often heard yells during the night from the direction of block 13. In the morning, when he went to wash, he saw piles of bodies, all of Polish inmates, in the anteroom or in front of the block (R 13).

Marciński, an inmate of subcamp Gusen I from 15 June 1940 to March 1944 (R 39), testified that he lived in block 9; that he often visited his cousin in block 13 (R 40); that on one occasion in the fall of 1940

(R 58) he saw a Polish priest faint during a drill conducted in front of block 13; and that the accused beat the victim with the leg of a stool which was two feet long and one and a half inches wide, until he killed him (R 40, 41). The body was taken into a small corridor. After an orderly brought some pliers, the accused pulled out the gold teeth from the priest's mouth and put them in his pocket (R 40). The witness was about five meters from the victim when the accused killed him (R 58).

Franke, an inmate of subcamp Gusen I from 1940 to 1945 (R 74), testified that in September 1940 he saw the accused drill Polish inmates in front of his block and beat them when they did not drill correctly. When some inmates fainted, accused placed their bodies near the block and later ordered those inmates who were still alive to wash themselves in the water hole between the blocks. The accused often pushed inmates into the water hole and sometimes drowned them. The witness testified that he saw five or six such cases (R 76). In the fall of 1940 he saw the accused beating inmates every evening. In possibly two cases it was not necessary for the accused to drown the inmates whom he had beaten because they were dead (R 77). The following morning the bodies of the dead inmates were taken to the roll call square apparently for accounting purposes during roll call (R 77).

Glowacki, an inmate of subcamp Gusen I from 28 May 1940 to the fall of 1944 testified that in October 1940 he went to block 13 to visit an inmate named Frycz; that on this occasion the accused and MADLMAYR severely beat Frycz with sticks. Five minutes later the witness saw the corpse of this inmate lying in the foreroom of block 13 with a deep wound in his skull (R 94, 95). The witness was later told by a priest that the accused and MADLMAYR took the gold teeth from the inmate's mouth (R 95). Frycz was a Polish national (R 110). In the fall of 1940 the witness saw the accused and MADLMAYR drown some inmates almost every evening in a hole at the end of a wash trough between blocks 13 and 14 (R 97).

Evidence for Defense: The accused testified that the incidents related by witness Kowalski in connection with the drilling of inmates

of block 13, abuse of the Polish priest, and the removal of gold teeth taken from inmates were not true (R 207, 208). Block 13 inmates were drilled in an open place at blocks 25 and 26 and the block eldest, not the accused, was in charge of the detail (R 208). The accused denied the accusations made by witness Marciniak (R 211, 214). He admitted that in the beginning, when he was in block 13, some inmates, instead of going to the toilet in the evening, would relieve themselves in the anteroom and, on four to six occasions, he slapped an inmate behind the ears in order to stop that practice (R 214, 215). In his testimony, the accused also denied the accusations made by witness Franke (R 216). He also denied that he participated in the incident related by witness Glowacki, concerning a Polish inmate named Frycz (R 223). He stated he was never drunk during the time he was block eldest of block 13 (R 224).

The accused further testified that he was not arrested until 2 July 1947 (R 216); that from May to November 1945 he worked for the Americans (R 217); and that from that time until his arrest he was with the bacteriological research department in Erlangen (R 218). Following his arrest the accused was interrogated only regarding the activities of accused MADIMAYR and, up to the time the charges were served upon him, he had not been aware that he was accused of any crime (R 221).

Boessel, who was an inmate of subcamp Gusen I from March 1943 to the capitulation and a block clerk in block 1 sharing his room with the accused, who was then room eldest of the same block, testified that the accused was decent toward him and toward the inmates in the block (R 287, 288).

Geiger, who was in subcamp Gusen from May 1943 (R 318), testified that he was one of the leaders of the resistance movement among the inmates of the camp; that the accused was one of his assistants in that movement (R 319); and that he never heard any complaint about the accused (R 320).

Sufficiency of Evidence: As to Charge I, the evidence merely shows that, as an inmate during at least a portion of the period covered by the charge, the accused served as a block eldest. It does not establish that

he, in cooperation with the SS, furthered and participated in the execution of the common design. The findings of guilty under Charge II are warranted by the evidence. The sentence is not excessive.

Petitions: No Petition for Review was filed. A Petition for Clemency was filed by the accused's wife, Mrs. Anny Firner, 1 November 1947.

Recommendation: That the findings as to Charge I be disapproved, and that the findings as to Charge II and the sentence be approved.

2. Alois MADLMAYR

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| Nationality: | Austrian |
| Age: | 37 |
| Civilian Status: | Furniture Polisher |
| Party Status: | None |
| Military Status: | None |
| Charges: | NG Charge I; NG Charge II; NG Charge III |
| Findings: | G Charge I; G Charge II, except of the words "approximately 20"; NG Charge III |
| Sentence: | 15 years, commencing 15 June 1945 |

Evidence for Prosecution: The accused stated in his unsworn pre-trial statement that he was an inmate of subcamp Gusen of Mauthausen Concentration Camp in Austria from 1940 (R 327; P-Ex 5-5A), and served there as a block clerk from June 1941 to the spring of 1942; that then he worked as a carpenter and later performed duties in the material receiving office to June 1943; and that in the same month he was assigned as block clerk for block 24. A few weeks later he became a dispensary clerk and barber for block 24. From February 1945 to 5 May 1945 he served as a block clerk in the dispensary at subcamp Gusen II (R 327; P-Ex 5A).

Kowalski, an inmate of subcamp Gusen from 10 May 1940 to 5 May 1945, testified that he knew the accused since August 1940 (R 9); that the accused was block clerk in block 13 in August 1940 (R 10); and that the inmates of this block were drilled by the accused and accused FIRNER after evening roll call (R 10). In September 1940, the accused and the block

orderly FIRNER placed a Polish inmate in a pit full of water, which was near the washroom between blocks 13 and 14 (R 12). The victim had fallen while drilling and had been beaten by accused FIRNER. When taken out of the pit, the inmate was thrown near the block^(R 10) where two other bodies were lying. The victim did not move and appeared to be dead (R 33, 34). On the same day the witness saw the accused and FIRNER beat inmates (R 10). In the evening he saw 8 to 10 corpses between blocks 13 and 14, of Polish inmates who had been beaten and kicked by the accused and FIRNER (R 12). The witness further testified that in the same month or in the following month he saw the accused and FIRNER beat inmates and throw them near the washroom; and that on 15 August 1940 he saw the accused kill a Polish inmate who was carrying stones. The accused then threw the body near the block (R 11). The witness further testified that he saw the accused and FIRNER kill many inmates but he was unable to state the exact dates (R 11); and that in September and October 1940 there may have been five instances in which the accused and FIRNER killed groups of five to eight inmates and many more in individual cases (R 13).

Franks, an inmate of subcamp Gusen I from 1940 to 1945 (R 74), testified that on 13 August 1940 behind block 13, he saw the accused hit a Polish inmate repeatedly until the inmate did not move any more. He later saw the same inmate lying near block 13, dead (R 77, 78). In the evening the inmate's body was taken to block 23 where the witness was quartered (R 79). On 14 August 1940 this witness, while looking out of a window at the end of block 23, saw the camp eldest kick an inmate, causing him to fall into a barrel of water, and then he saw the accused hold the victim's head in the barrel of water for 10 minutes, thus drowning him (R 80).

Glowacki, an inmate of subcamp Gusen I from 28 May 1940 to the fall of 1944, testified that in October 1940 he went to block 13 to visit an inmate named Frycz, and that on this occasion the accused and FIRNER severely beat Frycz with sticks. Five minutes later the witness saw the corpse of this inmate lying in the foreroom of block 13 with a deep wound

in his skull (R 94, 95). The witness was later told by a priest that the accused and PIRNER took the gold teeth from the inmate's mouth (D 05). Frycz was a Polish national (R 110). In the fall of 1940 the witness saw the accused and PIRNER drown some inmates almost every evening in a hole at the end of a wash trough between blocks 13 and 14 (R 97).

Krause, a former inmate, stated in his extrajudicial sworn statement that in February 1945 in subcamp Gusen II about 200 inmates were transferred to block 26 to be exterminated by starvation, and that the accused, who was then block eldest and clerk of this block, reported after the first night that about 70 inmates were dead. The accused and his block personnel beat these Polish, Russian, and French inmates, who were already half dead, with spade handles and rubber clubs, after which they were thrown into a place heaped with dead bodies. The witness did not know whether the victims were dead, but they appeared to be dead. When one of the victims appeared to be alive by making a sound, the accused hit him on the head with a club. The witness concluded that the accused's mis-treatments caused the death of these inmates (R 115; P-Ex 2A).

Evidence for Defense: The accused testified that he was block clerk at subcamp Gusen I from June 1940 to January or February 1941; that he was then assigned a job polishing the furniture of the camp commander; that afterwards he was clerk for the construction material section; that he was in the hospital from the fall of 1941 to the spring of 1942; and that afterwards he remained in the hospital as a clerk until 27 March 1945 when he went to subcamp Gusen II (R 136, 165). The accused further testified that during the time he was block clerk in block 13 no inmate by the name of Karl Frycz appeared on his roster (R 143). He disclaimed responsibility for the death of any inmates while he was at Gusen I (A 161). The drills referred to by prosecution witnesses took place between blocks 25 and 26 or rather on grounds where those blocks were later constructed. He, as a block clerk, had nothing to do with them. The block eldest was in charge of the drilling and the room eldest was required to be present (A 163). The accused testified that there was a

pool of water between blocks 13 and 14 (R 175), probably two meters by
meter, but that the hole referred to by prosecution witnesses did not
exist (R 176-189). The accused further testified that the date of his
transfer to subcamp Gusen II appearing in his statement (P-Ex 5A) was not
correct. Instead of February 1945 it should have been 27 March 1945
(R 185, 186).

Witness Glowacki, who testified for the prosecution, never left
subcamp Gusen I (R 126). There were never more than 20 blocks in subcamp
Gusen II (R 124, 128, 129, 133).

Reiger, who was in subcamp Gusen I from May 1943 (R 318) and a leader
of the resistance movement among the inmates, testified that no complaint
was ever received about the accused (R 320).

Sufficiency of Evidence: The accused was a co-belligerent of Germany.
The findings of guilty both as to Charge I and Charge II are warranted
by the evidence. The sentence is not excessive.

Petitions: No Petitions for Review nor Petitions for Commutation were
received.

Recommendations: That the findings and sentences be sustained.

5. Johann FOLGER

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| Nationality: | German |
| Age: | 41 |
| Civilian Status: | Construction Worker |
| Party Status: | None |
| Military Status: | None |
| Plea: | NG Charge I |
| Findings: | G Charge I |
| Sentence: | 10 years, commencing 4 June 1945 |

Evidence for Prosecution: The accused was an inmate of subcamp
Gusen I of Mauthausen Concentration Camp in Austria from August 1940 to
8 April 1945 and following March 1942 served as capo (R 238, 328; P-Ex
9A).

Kowalski testified that the accused held several positions in sub-

camp Gusen I. He was auxiliary capo, then capo, and in 1945 capo of the basement construction (R 13). Following January 1942 the witness saw the accused almost every day. In May or June 1943 he saw the accused beat Polish inmates because they were unable to push a cart out of a field. He beat them so severely that they were bleeding from the face and the head (R 14). This occurred in a meadow near the stone quarry. The victims were thrown on a cart by other inmates and taken to the camp (R 14).

Mariniak, an inmate of subcamp Gusen I from June 1940 to March 1944, met the accused in 1943 or 1944. The accused was capo of a work detail that took rubbish out of the camp with a cart and brought back vegetables (R 39). In February 1943 the accused beat with a stick, 50 or 60 centimeters long and one and a half or two centimeters thick, and killed a Spanish inmate who had stolen one turnip (R 41-43). The witness and another inmate started to carry the victim to the stone quarry but he died on the way (R 43).

Franko testified that in 1943 he was a capo in the SS barber shop which was outside the camp; that, in 1943 in subcamp Gusen I, he often saw the accused who had a detail of about 15 inmates with a French cart (R 82); and that five or six times he saw the accused beat inmates of different nationalities with a stick. The greater percentage of the inmates in Gusen at that time were Poles, Spaniards and Russians (R 83).

Glowacki testified that in January 1945 the accused beat to death three inmates, a Frenchman, a Russian, and a Pole, who worked in the cellar construction detail, of which the accused was capo, after having accused them of causing some earth to cave in (R 97, 98). The witness saw the killing from a distance of about four meters. The corpses of these inmates were taken to the camp in the afternoon (R 99).

Majenski stated in an extrajudicial sworn statement that the accused was capo in block 13 in subcamp Gusen I; that in the beginning of 1944, the accused, together with the camp capo, took a Russian inmate to the washroom and beat him severely with a rubber hose; and that the next morning the Russian inmate was lying in the washroom dead. This witness

also saw the accused beat Polish and Russian inmates with a stick in front of the entrance to the air raid shelter (R 118; P-Ex 4A).

The accused admitted in his extrajudicial sworn statement that at subcamp Gusen, upon order of the detail leader he administered to inmates 25 lashes on their backs; and that he beat inmates who stole bread or slept (R 328; P-Ex 9A).

Evidence for Defense: The accused testified that on 4 June 1945 after the liberation he reported to subcamp Gusen I in order to be discharged (R 239); that a former Polish inmate accused him of having given another inmate 25 blows with a rubber hose for stealing potatoes (R 240); and that another Polish inmate accused him of having been a capo in the cellar construction detail and having beaten many inmates to death. However, none of these charges were ever brought up against him (R 241).

The accused further testified that while in Gusen I he worked in the stone quarry Kassenhofen in August and September 1940; in the pumping station and drainage installation from October 1940 to February 1942; in the sand pit Fitsch at St. Georgen from February to May 1942; in the Danube canal construction transport from May 1942 to February 1943; building a transformer station in St. Georgen during February-March 1943; in charge of the sand pit Fitsch of St. Georgen from March 1943 to the end of January 1944; in the detention detail Katzdorf, 12 kilometers from the camp, to April 1944; in charge of the tunnel construction detail at St. Georgen during April 1944; and as capo of the cellar construction detail number 3 from 2 May 1944 to 8 March 1945 (R 245, 246).

The accused denied that the incident related by witness Glowacki ever occurred (R 248, 252); and also denied that he ever performed duties on a work detail as testified by witnesses Franke and Marciniak (R 254, 258). At the time of the incident related by witness Franke, the accused was with a work detail at least four kilometers away from the camp (R 254). The accused himself had been punished with 25 blows (R 259). While he admitted that he sometimes slapped inmates behind the ear a few times, he did so because the inmates had violated some camp rules. He

also admitted administering 5 or 10 strokes to some inmates but he did this on order of the work detail leader (R 202-204).

A witness testified that he received food from the accused (R 267, 268). Another witness testified that the accused distributed food in block 22 in a fair manner (R 264, 285), and that the witness looked upon the accused as a good comrade (R 287).

A third witness, who had been construction detail leader in subcamp Gusen I, testified that the accused was a skilled worker (R 303), and during the greater part of the time between 1940 and 1944 the accused worked under the witness' orders (R 304); that the accused treated the workers under him in a fair manner; and that in one instance the accused was beaten for not forcing inmates to work when they were unable to do so (R 304, 305). A fourth witness testified that the accused was beaten three times for protecting the interests of the inmates (R 312).

Geiger, an inmate of Gusen I from May 1943 to liberation and a leader of the resistance movement among concentration camp inmates (R 319), testified that no complaint was ever received by members of the movement concerning the accused (R 320).

Sufficiency of Evidence: Concerning superior orders, the accused failed to meet the burden of proof required by pertinent authorities discussed in Section V, post. The findings of guilty are warranted by the evidence. The sentence is not excessive.

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

Recommendation: That the findings and sentence be approved.

V. QUESTIONS OF LAW:

Jurisdiction: The jurisdiction of the Court to try accused FIRNER and MADLMAYR on Charges II and III was questioned by the defense. It appears that the defense intended to attack the jurisdiction on the ground that the offenses were committed prior to entry of the United States into the war.

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 belligerency status of the punishing power, or the nationality of the victims. ("Universality of Jurisdiction Over War Crimes", by Cowles, California Law Review, Volume XXXIII, June 1945, No. 2, pages 177-218; "Law Reports of Trials of War Criminals", by United Nations War Crimes Commission, 1947, hereinafter referred to as "Law Reports" Volume I, pages 41, 42, 43, 102; United States v. Klein, et al., Hadamar Murder Factory Case, opinion DJAWC, February 1946; 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, Volume II, page 128).

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

Superior Orders: Accused FOLGER sought to justify some of his actions by offering evidence to show that he was 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 512; Vol. II, Sixth Edition, Oppenheim, "International Law", paragraph 253, page 453; Llandovery Castle Case, 16 American Journal of International Law, page 708; United States v. Thomas, opinion DJAWC, December 1945; and United States v. Klein, et al., (Hadamar Murder Factory Case), opinion DJAWC, February 1946; and French Republic v. Wagner, et al., Court of Appeals (France), July 1946). This rule is followed in Anglo-American jurisprudence (Mitchell v. Harmony, 13 Nov. 115, and "Manual for Courts-Martial, U.S. Army", 1928, paragraph 148).

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

Martial", supra; "Report to the President of United States", 7 June 1945, by Mr. Justice Jackson, U.S. Chief Counsel for the Prosecution of Axis Criminality; Extract from Goebbels' "The 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; and United States v. Beck, et al., opinion DJAWC, December 1946.)

Legal Sufficiency of Charges and Particulars: A question not specifically raised during the course of the trial, but which merits discussion is whether Charges II and III and the particulars thereunder are legally sufficient.

Paragraph b, Section 8-323, Title 5, "Legal and Penal Administration" of "Military Government Regulations," published by Office of Military Government for Germany (US), 27 March 1947, requires that each charge disclose one offense only. Each charge in the instant case alleges violation of the laws and usages of war. Regardless of the expression "laws and usages" of war, only one offense is alleged, i.e., a violation of the "law" of war. In the case of *In re Yamashita*, 66 Supreme Court Reporter 340, the charge alleged violation of the "laws of war," yet Mr. Chief Justice Stone, in referring to the charge, used the expression that it alleged "a violation of the law of war" (underscoring supplied). Thus it is clear that the more appropriate expression is "a violation of the law of war."

As to the question of whether each charge and the particulars thereunder allege more than one offense, inasmuch as more than one illegal act is involved, the following language in the *Yamashita* case, supra, is pertinent:

The Charge. Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully

disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war".

"Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command during the period mentioned. The first item specifies the execution of 'a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity.' Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments."

Another aspect of the question as to legal sufficiency of the respective charges and particulars not raised during the trial is whether each charge and the particulars thereunder are stated with sufficient particularity and definiteness. In the Yamashita case, supra, with respect to the broad allegations involving numerous criminal acts, the Supreme Court stated:

"Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. *Collins v. McDonald*, supra, 420. But we conclude that the allegations of the charge, tested by any reasonable standard, adequately alleges a violation of the law of war and that the commission had authority to try and decide the issue which it raised. Cf. *Dealy v. United States*, 152 U. S. 839; *Williamson v. United States*, 207 U. S. 425, 447; *Glasser v. United States*, 316 U. S. 60, 66, and cases cited."

It is apparent that the allegations in the instant case specify the criminal acts and identify the time, the place, and the victims thereof with considerably more particularity than did the allegations in the Yamashita case.

Evidence as to Independent Illegal Acts: As appears from the evi-

ence for the prosecution as to accused PIRNER and MADLMAYR, the record contains evidence as to the commission of certain illegal acts not covered by the allegations. Thus the question is raised as to the legal significance of the admission of evidence as to the commission by the accused of such independent illegal acts.

Section 5-354.4, Title 5, "Legal and Penal Administration" or "Military Government Regulations," published by Office of Military Government for Germany (US), 27 March 1947, provides that "all evidence which will aid in determining the truth will be admitted." Subparagraph a, Section 270, "Manual for Trial of War Crimes and Related Cases," 15 July 1946, as amended, provides that a war crimes tribunal may admit any evidence which in its opinion has probative value. Subparagraph c(2) of said Section 270 provides that a war crimes tribunal may admit any evidence believed to be of probative value or, to apply a similar test, evidence which would be helpful in arriving at a true finding.

The Staff Judge Advocate, Headquarters, United States Forces in Austria, in his review of a war crimes case, United States v. Karolyi, et al., Case No. 5-100, September 1946, tried by a military commission appointed by that headquarters, stated with regard to evidence concerning independent crimes committed by the accused, that it could be disregarded only in the event that there is sufficient admissible evidence to sustain the findings as to the crime charged. He further stated that the sentences involved in that case should not be disapproved merely because of the admission of evidence relating to separate independent crimes, if there is sufficient evidence, exclusive of that relating to such independent crimes, to sustain the findings as to the crime charged. The Judge Advocate cited in his review, in support of his position, paragraph 87b, page 74, "Manual for Courts-Martial, U.S. Army," 1928, which paragraph is based upon Article of War 37.

A like rule is contained in the regulations specifically applicable to Military Government Courts:

"The proceedings shall not be invalidated, nor any finding or sentence disapproved, for any error or omission, technical or otherwise occurring (sic) in such proceedings, unless in

the opinion of the Reviewing Authority, after an examination of the entire record, it shall appear that the error or omission has resulted in injustice to the accused."

(Section 5-338, Title 5, supra.)

In view of the foregoing, the admission of the evidence as to the separate independent crimes does not, in and of itself, constitute grounds for disapproving the actions of the Court.

Application of Parent Case to Charge I: It does not affirmatively appear from the record of trial that a certified copy of the charge, particulars, findings and sentences pronounced in the parent Mauthausen Concentration Camp case (United States v. Altfuldisch, et al., Case No. CCO-50-5, opinion DJAWC, February 1947, hereinafter referred to as the "Parent Case") was furnished to the Court (Paragraph 12, letter, Headquarters, United States Forces, European Theater, file AG CCO.5 JAG-AGO, subject: "Trial of War Crimes Cases," 14 October 1946, set forth at length in Section 120, "Manual for Trial of War Crimes and Related Cases, 15 July 1946, as amended). The better practice would have been to offer such copies in evidence. However, a failure to do so did not preclude the Court from taking judicial notice of the "decision rendered in the parent case, including the finding of the court * * * that the mass atrocity operation was criminal in nature and that the participants therein, acting in pursuance of a common design, did subject persons to killings, beatings, tortures, etc."

With the exception of accused PIRNER, all of the accused were shown to have participated in the mass atrocity, and the Court was warranted by the evidence adduced, either in the Parent Case or in this subsequent proceedings, in concluding as to them that they not only participated to a substantial degree but that the nature and extent of their participation were such as to warrant the sentences imposed.

Examination of the entire record fails to disclose any error or omission in the conduct of the trial which resulted in injustice to the accused.

VI. CONCLUSIONS:

1. It is recommended that the findings as to Charge I be approved, except that those as to accused PIRNER be disapproved; that the findings as to Charge II be approved; and that the sentences be approved.

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

CLAUDIO DELITALA
Attorney
Post Trial Branch

Having examined the record of trial, I concur, this _____ day
of _____ 1948.

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