

HEADQUARTERS  
UNITED STATES FORCES IN AUSTRIA  
APO 777, U.S. Army

MILITARY COMMISSION )

18 April 1947

ORDERS NUMBER 2 )

Before a Military Commission which convened at Salzburg, Austria, pursuant to paragraph 2, Special Orders Number 304, Headquarters, United States Forces in Austria, 31 December 1946, were arraigned and tried:

Franz Goetz, Norbert Gruber, Friedrich Huebner, Joseph Paulezynski, Johann Pressl, Josef Schuech, Friedrich Weinerth, Rudolf Bast, Ferdinand Edelinaun, Ernst Erhart, Rudolf Geyerhofer, Herta Hauswirth, Friedrich Kisch, Gretl Kubiska, Stefanie Karner, Elizabeth Perbel, Franz Schloegelhofer, Josefa Schmidhammer, Stefan Schwartz, Victor Ziegler, Karoline Hendl, Alois Lachinger, Rudolf Mayerhofer, Paul Niemiez and Franz Bruckboeck, Austrian nationals.

CHARGE: Violation of the Laws of War.

Specification: In that Franz Goetz, Norbert Gruber, Friedrich Huebner, Joseph Paulezynski, Johann Pressl, Josef Schuech, Friedrich Weinerth, Rudolf Bast, Ferdinand Edelinaun, Ernst Erhart, Rudolf Geyerhofer, Herta Hauswirth, Friedrich Kisch, Gretl Kubiska, Stefanie Karner, Elizabeth Perbel, Franz Schloegelhofer, Josefa Schmidhammer, Stefan Schwartz, Victor Ziegler, Karoline Hendl, Alois Lachinger, Rudolf Mayerhofer, Paul Niemiez and Franz Bruckboeck, did, at or near Amstetten, Austria, on or about 20 March, 1945, wilfully encourage, aid abet and participate in committing assaults upon fifteen unknown American airmen, members of the United States Army, who were then unarmed, surrendered prisoners of war in the custody of the then German Reich.

PLEAS

Franz Goetz:

To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty

Norbert Gruber:

To the Specification of the Charges:	Not Guilty
To the Charge :	Not Guilty

Friedrich Huebner:

To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty

Joseph Paulezynski:

To the Specification of the Charges:	Not Guilty
To the Charge :	Not Guilty

Johan Pressl:

To the Specification of the Charges:	Not Guilty
To the Charge :	Not Guilty

Josef Schuech:

To the Specification of the Charges:	Not Guilty
To the Charge :	Not Guilty

Friedrich Weinerth:

To the Specification of the Charges:	Not Guilty
To the Charge :	Not Guilty

Military Commission Orders Number 2, Hq USFA, 18 April 1947.

Rudolf Bast:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Ferdinand Edelineau:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Ernst Erhart:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Rudolf Geyerhofer:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Herta Hauswirth:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Friedrich Kisch:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Gretl Kubiska:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Stefanie Karner:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Elizabeth Perbel:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Franz Schloegelhofer:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Josefa Schmidhammer:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Stefan Schwartz:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Victor Ziegler:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Karoline Hendl:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Alois Lachinger:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty
Rudolf Mayerhofer:	
To the Specification of the Charge:	Not Guilty
To the Charge :	Not Guilty



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Paul Niemiec:  
 To the Specification of the Charge : Not Guilty  
 To the Charge : Not Guilty

Franz Bruckboeck:  
 To the Specification of the Charge : Not Guilty  
 To the Charge : Not Guilty

FINDINGS:

Rudolf Bast:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Ferdinand Edelineau:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Herta Hauswirth:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Friedrich Kisch:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Gretl Kubiska:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Stefan Schwartz:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Victor Ziegler:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Karoline Hendl:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Alois Lachinger:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Paul Niemiec:  
 Of the Specification of the Charge : Not Guilty  
 Of the Charge : Not Guilty

Franz Goetz:  
 Of the Specification of the Charge : Guilty  
 Of the Charge : Guilty

Norbert Gruber:  
 Of the Specification of the Charge : Guilty  
 Of the Charge : Guilty

Friedrich Huebner:  
 Of the Specification of the Charge : Guilty  
 Of the Charge : Guilty

Joseph Paulezynski:  
 Of the Specification of the Charge : Guilty  
 Of the Charge : Guilty

Military Commission Orders No. 2, Hq USFA, 18 April 1947:

Johann Pressl:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Josef Schuech:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Friedrich Weinerth:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Ernst Erhart:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Rudolf Geyerhofer:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Stephanie Karner:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Elizabeth Perbel:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Franz Schloegelhofer:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Josefa Schmidhammer:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Rudolf Mayerhofer:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty
Franz Bruckboeck:		
Of the Specification of the Charge	:	Guilty
Of the Charge	:	Guilty

ACQUITTALS

The Commission thereupon on 22 January 1947 acquitted the following named accused:

Rudolf Bast  
 Ferdinand Edelinaun  
 Herta Hauswirth  
 Friedrich Kisch  
 Gretl Kubiska  
 Stefan Schwartz  
 Victor Ziegler  
 Karoline Hendl  
 Alois Lachinger  
 Paul Niemiez



SENTENCES

Franz Goetz:

To be confined at hard labor, at such place as the reviewing authority may direct, for two years.

Norbert Gruber:

To be confined at hard labor, at such place as the reviewing authority may direct, for four years.

Friedrich Huebner:

To be confined at hard labor, at such place as the reviewing authority may direct, for two years.

Joseph Paulezynski:

To be confined at hard labor, at such place as the reviewing authority may direct, for two years.

Johann Prossl:

To be confined at hard labor, at such place as the reviewing authority may direct, for two years.

Josef Schuech:

To be confined at hard labor, at such place as the reviewing authority may direct, for four and one-half years.

Ernst Erhart:

To be confined at hard labor, at such place as the reviewing authority may direct, for one and one-half years.

Friedrich Weinerth:

To be confined at hard labor, at such place as the reviewing authority may direct, for one and one-half years.

Rudolf Geyerhofer:

To be confined at hard labor, at such place as the reviewing authority may direct, for two years.

Stephanie Karner:

To be confined at hard labor, at such place as the reviewing authority may direct, for three months.

Elizabeth Ferbel:

To be confined at hard labor, at such place as the reviewing authority may direct, for one and one-half years.

\* Josefa Schmidhammer:

To be confined at hard labor, at such place as the reviewing authority may direct, for one and one-half year.

Rudolf Mayerhofer:

To be confined at hard labor, at such place as the reviewing authority may direct, for one year.

Franz Bruckboeck:

To be confined at hard labor, at such place as the reviewing authority may direct, for two years.

\* Franz Schloegelhofer:

To be confined at hard labor, at such place as the reviewing authority may direct, for five years.

Military Commission Orders No. 2, Hq USFA, 18 Apr 47.

The sentences were adjudged on 22 January 1947.

ACTION OF REVIEWING AUTHORITY

**Franz Goetz:**

The sentence is approved, but owing to the length of time the accused has been in confinement, eighteen months of the confinement imposed are remitted. As thus modified the sentence will be duly executed. The Commanding General, Zone Command, Austria, is directed to effect the commitment of the said accused to such confinement at hard labor in the custody of the Austrian authorities.

**Norbert Gruber:**

The sentence is approved, but the period of confinement is reduced to two years; and owing to the length of time the accused has been in confinement, eighteen months of the confinement imposed are remitted. As thus modified the sentence will be duly executed. The Commanding General, Zone Command, Austria, is directed to effect the commitment of the said accused to such confinement at hard labor in the custody of the Austrian authorities.

**Friedrich Huebner:**

The sentence is approved, but owing to the length of time the accused has been in confinement, eighteen months of the confinement imposed are remitted. As thus modified the sentence will be duly executed. The Commanding General, Zone Command, Austria, is directed to effect the commitment of the said accused to such confinement at hard labor in the custody of the Austrian authorities.

**Josef Paulezynski:**

The sentence is approved, but owing to the length of time the accused has been in confinement, fifteen months of the confinement imposed are remitted. As thus modified the sentence will be duly executed. The Commanding General, Zone Command, Austria, is directed to effect the commitment of the said accused to such confinement at hard labor in the custody of the Austrian authorities.

**Johann Pressl:**

The sentence is approved, but owing to the length of time the accused has been in confinement, twenty months of the confinement imposed are remitted. As thus modified the sentence will be duly executed. The Commanding General, Zone Command, Austria, is directed to effect the commitment of the said accused to such confinement at hard labor in the custody of the Austrian authorities.

**Josef Schuech:**

The sentence is approved, but owing to the length of time the accused has been in confinement, eighteen months of the confinement imposed are remitted. As thus modified the sentence will be duly executed. The Commanding General, Zone Command, Austria, is directed to effect the commitment of the said accused to such confinement at hard labor in the custody of the Austrian authorities.

**Friedrich Weinerth:**

The sentence is approved, but owing to the length of time the accused has been in confinement, the sentence is remitted.

**Ernst Erhart:**

The sentence is approved, but owing to the length of time the accused has been in confinement, the sentence is remitted.



Military Commission Orders No. 2, Hq USFA, 18 Apr 47

Rudolf Geyerhofer:

The sentence is approved, but owing to the length of time the accused has been in confinement, twenty months of the confinement imposed are remitted. As thus modified the sentence will be duly executed. The Commanding General, Zone Command, Austria, is directed to such confinement at hard labor in the custody of the Austrian authorities.

Stefanie Karner:

The sentence is approved but one month of the confinement is remitted. As thus modified, the sentence will be duly executed. The War Crimes Prison at Camp Marcus W. Orr is designated as the place of confinement.

Elizabeth Perbel:

The sentence is approved, but owing to the length of time the accused has been in confinement, the sentence has been remitted.

Franz Schloegelhofer:

The sentence is approved, but owing to the length of time the accused has been in confinement, eleven months of the confinement imposed are remitted. As thus modified the sentence will be duly executed. The Commanding General, Zone Command, Austria, is directed to effect the commitment of the said accused to such confinement at hard labor in the custody of the Austrian authorities.

Josefa Schmidhammer:

The sentence is approved, but owing to the length of time the accused has been in confinement, the sentence is remitted.

Rudolf Mayerhofer:

The sentence is approved, but owing to the length of time the accused has been in confinement, the sentence is remitted.

Franz Bruckboeck:

The sentence is approved, but owing to the length of time the accused has been in confinement, eighteen months of the confinement imposed are remitted. As thus modified the sentence will be duly executed. The Commanding General, Zone Command, Austria, is directed to effect the commitment of said accused to such confinement at hard labor in the custody of the Austrian authorities.

BY COMMAND OF LIEUTENANT GENERAL KEYES:

OFFICIAL:

/s/ B.W. Saurel  
/t/ B W SAUREL  
Lt Colonel AGD  
Acting Adjutant General

THOMAS F HICKEY  
Brigadier General GSC  
Chief of Staff

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

WCT Report  
470

24 February 1947

SUBJECT: Review of Proceedings of a Military Commission in the Case of  
the United States versus Alois Gris: Case No: 5-88

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

1. The record of the proceedings of the Military Commission appointed by this headquarters for the trial of Alois Gris having been referred to me for review under the provisions of paragraph 14 a, War Crimes Memorandum Number 3, this headquarters, 23 April 1946, I submit herewith my review, with opinion and recommendations and reasons therefor, as required by paragraph 14b, War Crimes Memorandum Number 3,cs.

2. Synopsis of Charges, Findings, and Sentence

The accused, Alois Gris, an Austrian National, was tried by a Military Commission at Salzburg, Austria on 24-26 June 1946 on the following charge and specifications:

Charge: Violation of the Laws of War

Specification: In that Alois Gris, a public official of the then German Reich, acting for and on behalf of the then German Reich, did, on or about 26 July 1944, at or near MOLLN, Austria, wilfully, deliberately and wrongfully encourage, aid, abet and participate in the denial of proper medical attention to FRANK G. ROGAN, a member of the United States Army, who was then an unarmed, wounded, surrendered prisoner of war in the custody of the German Reich.

The commission in closed session and upon secret written ballot found the accused guilty of the charge and guilty of the specification.

The commission, in closed session and upon secret written ballot, sentenced the accused to be confined at hard labor for the term of his natural life.

3. Evidence for the Prosecution

At about 1130 hours, on or about 26 July 1944, an American bomber plane was shot down over GROSS BUCHBERG near MOLLN, Kreis Kirchdorf, Austria (US Zone), and several airmen, including one FRANK G. ROGAN, parachuted from the plane before it crashed. (R 6) ROGAN was found by one JOSEF MULLER, a civilian, with a serious wound of undetermined origin in his left thigh. (R 6). Aided by two other men, MULLER cut off the flier's parachute, administered rough, emergency first aid, and carried him a short distance to a first-aid station near the road. (R 7) MUELLER then went to his home for lunch, and returned sometime later in the afternoon to the first-aid station where the flier still remained. (R 7) Previous to this, the accused, Dr ALOIS GRISL, the Health Commissioner for Kreis Kirchdorf, a public official and physician, had arrived at the Jaidhaus, a building about two kilometers from the place where the flier was lying. (R 50) Word had been sent to the Jaidhaus about the wounded flier, and Dr. GRISL was told by JOHANN POSCHER, chief of the Gendarmerie, "there is a badly wounded flier laying out there." (R 51) According to POSCHER, the accused replied, "That is out of question, the dog should perish or die." (R 51) In the meantime, back at the first-aid station, word having been received from the Jaidhaus that the flier would receive no medical attention, he was loaded on the truck of one TIBITANZL and taken away.



(R 7, 8) The truck stopped for approximately a quarter of an hour at the Jaidhaus, but according to some testimony, Dr GRISL was no longer there, having gone out on a patrol searching for other fliers from which he did not return until later. (R 52) At about 1500 hours that afternoon, the truck left the Jaidhaus and went to the village of MOLLN, where the wounded flier was left at about 1600 hours at the poorhouse. (R 33) Immediately after this, Dr BLAHA, a local physician in MOLLN, came to the poorhouse and examined the flier. (R 33) He gave the flier an injection of morphine and put some sterile gauze on his wound. (R 38) He then went to the Gendarmerie post and asked the chief of the Gendarmerie, KOEHLER, to telephone to Dr GRISL. (R 38) According to Dr BLAHA'S testimony, KOEHLER talked to Dr. GRISL, and was told by the latter that an ambulance would not be sent for the flier and that the affair did not concern Dr. BLAHA. (R 39) KOEHLER testified, however, that Dr BLAHA himself talked on the phone to someone at the Jaidhaus who he understood to be Dr GRISL and was told in substance that no medical care was to be given to the flier. (R 31) Also the prosecution witness, RECHSBERGER, stated he was at the Jaidhaus and he believed that Dr GRISL talked on the phone to Dr BLAHA. (R 22) Dr BLAHA then returned to the poor house, but did not have the facilities to render the necessary treatment to the flier. (R 39) Dr BLAHA was of the opinion that the flier needed a blood transfusion, and for this purpose an ambulance was needed to take him to the hospital. (R 39) There was a hospital with such facilities at KIRCHDORF, but only Dr GRISL had the authority to direct the use of the ambulance. (R 43) When asked whether timely medical or surgical assistance would have saved the life of the flier, Dr BLAHA replied "maybe". (R 41) At 1800 hours that afternoon, the flier died, and Dr BLAHA pronounced him dead. (R 40)

The first witness called by the prosecution was JOSEF MUELLER, who testified that he found the wounded flier and brought him to the aid station: that after two or three hours word came from the Jaidhaus that the flier would "not get any medical treatment"; and that shortly thereafter the wounded man was taken away on a truck. (R 6-15) The prosecution next called MICHAEL RECHBERGER, a Lieutenant of the Gendarmerie post at KIRCHDORF, who stated that he saw Dr GRISL at the Jaidhaus, and asked him about the wounded flier, and was told that he, GRISL, had not come as a physician and that the wounded flier did not interest him. (R 18) After that the prosecution called Anton KOEHLER, commander of the Gendarmerie post at MOLLN, who testified in reference to the telephone conversation between Dr BLAHA and the accused, as stated above. (R 29-32) The next witness was Sister HINTERLEITNER, an attendant at the poorhouse in MOLLN, who testified concerning the flier's wounds and death, and that Dr BLAHA said that Dr GRISL forbade him to treat the American. (R 34) ALOIS FLIEHER, a priest at MOLLN, then testified that he administered last rites to the flier before his death at the poorhouse, and that Dr BLAHA said that he had been forbidden by Dr GRISL to render medical attention. (R 37) The next witness was Dr BLAHA, the substantial portions of whose testimony have already been stated above. (R 39-49) The last witness called by the prosecution was JOHANN POSCHER, a gendarm from Kirchdorf, who stated that he was guarding two other American flier prisoners at the Jaidhaus when Dr GRISL came up to them and said "You dogs, you ought to go to the assistance of the wounded flier who was then about two kilometers away, as stated above."

#### 4. Evidence for the Defense

The essence of the case for the defense was that Dr GRISL at no time spoke to Dr BLAHA and at no time gave instructions to anyone that medical treatment would be denied to the flier; and further, that GRISL came to the Jaidhaus as an agent of the Landrat and not as a physician, that he had no medical equipment or supplies with him and

that he did not go to the wounded flier because he had no means of rendering assistance to him.

The defense called as its first witness FRIEDRICH STAUFFER, of the Allgemeine SS, who testified that he was sent to the Jaidhaus on the day in question by the chief of the Gendarmerie post at Kirchdorf, and escorted two American prisoners to MOLLN. (R 61) He started out on foot with the prisoners, and a little later TIBITANZL came along in a truck with other American prisoners. (R 61) He got on the truck with his prisoners and went to the Gendarmerie post in MOLLN. (R 59) There he heard the chief of the Gendarmerie, KOEHLER, say to Dr BLAHA, that he had called up Kirchdorf about the wounded prisoners and was told that they were to get no medical treatment, not even a dressing. (R 59) He further stated that KOEHLER told Dr. BLAHA in reference to this: "Doctor, you can ask yourself again in Kirchdorf or in the Jaidhaus where Dr GRISL is." (R 62) He did not stay at the Gendarmerie post long enough to know whether or not Dr BLAHA made a call to Dr GRISL. (R 62) Then he took the wounded flier to the poorhouse. (R 62)

The defense called finally the accused, Dr FRISL, who, after being duly apprised of his rights, testified under oath in his own behalf. (R 66). He stated that he was the public health officer in Kirchdorf (R 68); that he did not engage in general practice or surgery (R 69); that on the 26 July 1944 the Landrat sent him to the Jaidhaus to help capture the fliers that had been shot down (R 69); that although his car ran out of gasoline on the way, he finally arrived there (R 70); that he presumed that the flier was so severely wounded that no help could be given him (R 71); that he decided to comply with his orders from the Landrat and go search for other fliers (R 71); that he had no medical supplies or surgical instruments, but only some packages of bandages with him (R 71); that he never talked to Dr BLAHA on the telephone on that day, and never gave instructions for Dr BLAHA in regard to the wounded flier (R 72) When asked why he had changed his plea from not guilty to guilty, he replied, "Because I see now that I should have gone to that wounded flier." (R 72)

On cross-examination, certain inconsistencies were brought out in the accused's story. For example, he stated that he came to the Jaidhaus armed with a pistol intending to search for fliers (R 73), but then stated that he intended to look for wounded fliers for the purpose of treating them. (R 73)

##### 5. Proceedings

The Military Commission was appointed pursuant to authority delegated by the Commanding General, United States Forces, European Theater, to the Commanding General, United States Forces in Austria, by letter, Headquarters, United States Forces, European Theater, AG 250.4 GAP-AGO, 10 October 1945, subject: "Authority to appoint Military Commissions". The commission was appointed by paragraph 5, Special Order Number 115, Headquarters, United States Forces in Austria, 17 May 1946, and amended by paragraphs 1-4, Special Order Number 138, Headquarters, United States Forces in Austria, 14 June 1946. The provisions of paragraph 3d, War Crimes Memorandum Number 3, Headquarters, United States Forces in Austria, 23 April 1946, were complied with, in that the commission was composed of more than three commissioned officers, and that a Trial Judge Advocate and Defense Counsel and assistants for each were appointed. The charges were properly sworn to, and were referred for proper indorsement to the Trial Judge Advocate, for trial. The charges were served on the accused more than five days prior to the date of trial. The accused was represented by a Major and a Captain in the United States Army, both of whom were experienced attorneys. The accused stated at the trial that he was satisfied with counsel. A fair and impartial trial was had. Four competent interpreters were sworn, and the entire proceedings were interpreted in the German language for the benefit of the accused.



## 6. Jurisdiction

That a Military Commission has the power to try an enemy national for an offense against the laws of war is settled. There is no question but that the Commission had jurisdiction over the accused and the offense charged.

## 7. Procedure.

The proceedings of the commission were, in general, conducted in accordance with the rules of procedure prescribed for general courts-martial, which is in accord with paragraph 4, War Crimes Memorandum Number 3, cs, which provides that Military Commissions will have regard for, without being bound by, such rules.

The accused was arraigned at the beginning of the trial in the usual manner and pleaded not guilty to the specification and not guilty to the charge. (R 5) Subsequently, before the prosecution had completed its case, the accused, through the defense counsel, requested that his plea of not guilty to the charge and to the specification be withdrawn and a plea of guilty be entered to both. (R 49) The President of the Commission explained to the accused the meaning of such a plea and told the accused that he exposed himself thereby to a sentence up to and including the death penalty. (R 49) The accused having said that he understood this, the commission accepted the changed plea. Later, after the accused had taken the stand under oath as a witness in his own behalf, the President made the following statement: "Your testimony and evidence offered by your counsel is inconsistent with your plea of guilty and this commission must regard your plea as improvidentially entered.....this commission will proceed to trial and judgement as if you had not pleaded guilty and your plea of guilty will not be commented upon or considered by the commission in its deliberations." (R 82) The defense counsel then offered to have the accused explain the reason for his plea of guilty, but the commission, having made its ruling directed the counsel to proceed with redirect examination of the witness. Defense counsel then promptly asked the accused why he had pleaded guilty and accused replied, "Because I feel guilty of having refused the help." (R 82) No further comment appears in the record, and the commission proceeded thereafter on a plea of not guilty.

The Manual for Courts-Martial (1928), paragraph 70 (page 54) states as follows: "Whenever it appears to the court that a plea of guilty may have been entered improvidently or through lack of understanding of its meaning and effect, or whenever an accused, after a plea of guilty, makes a statement to the court, in his testimony or otherwise, inconsistent with the plea, the president of the law member, if so directed by the president, will make such explanation and statement to the accused as the occasion required. If, after such explanation and statement, it appears to the court that the accused in fact entered the plea improvidently or through lack of understanding of its meaning and effect, or if after such explanation and statement the accused does not voluntarily withdraw his inconsistent statement, the court will proceed to trial and judgement as if he had pleaded not guilty."

In changing the accused's plea from guilty to not guilty, the commission was thus following the prescribed procedure. The accused had just testified under oath at length in such a way as to exonerate himself completely, and his testimony was inconsistent with a plea of guilty. Why the accused and the defense counsel saw fit to enter such a plea in the first place, or why they attempted to cling to it after the commission's ruling, is unknown; but in any event the commission took the proper action and fully protected the rights of the accused notwithstanding the error or ignorance on his or his counsel's part.

No irregularities of importance or prejudicial to the substantial rights of the accused are noted. The law member ruled on interlocutory questions and the admissibility of evidence, the Trial Judge Advocate offered a document into evidence and the Defense Counsel objected. Before the ruling of the Law Member was made, the Trial

Judge Advocate improperly read a part of the statement to the commission. (R 78) The Law Member ruled that the document was admissible and the Defense Counsel took exception. The Law Member then ruled that the improper statement of the Trial Judge Advocate would be stricken from the record, whereupon the Trial Judge Advocate withdrew the document from evidence.

In several instances, hearsay evidence was admitted, sometimes over objection. (R 16, 19, 78) This is clearly permissible under paragraph 5, War Crimes Memorandum Number 3, cs, the only condition being that it must have probative value to a reasonable man.

During the direct examination of prosecution witness Anton KOEHLER, the Trial Judge Advocate made a comment regarding the witness' mentality and manner of testifying. (R 30) The remark was made improperly at that time and constituted a violation of the rule against a party attempting to discredit his own witness. There was no objection by Defense Counsel, however, and it cannot be said that the error was prejudicial to the rights of the accused. In several other instances attempted violations by the Trial Judge Advocate of the normal rules of procedure were corrected by the Law Member. (R 27, 73-74)

#### 8. Sufficiency

Article 1, Geneva Convention of July 27, 1929, for the amelioration of the condition of the wounded and sick of armies in the field, as cited in paragraph 174, Field Manual 27-10, Rules of Land Warfare, states as follows:

"Officers, soldiers, and other persons officially attached to armies who are wounded or sick shall be protected under all circumstances; they shall be treated with humanity and cared for, without distinction of nationality, by the belligerent in whose power they are."

Article 2, Geneva Convention of 27 July 1929, cs, as cited in paragraph 175, Field Manual 27-10, further states:

"Subject to the care that must be taken of them under the preceding article, the wounded and sick of any army who fall into the power of the other belligerent shall be prisoners of war, and the general rules of international law in respect to prisoners shall be applicable to them".

In discussing these articles of the convention, one authority states the following:

"The important point in this Article is to determine the meaning of 'sick and wounded', in order to know when protection is demanded. It is clear that the expression applies only to those who, through sickness or wounds, are no longer able to continue fighting. Those who continue despite wounds are considered as active combatants, and are liable to be attacked as such." Wharton's International Law, Ed 1944, p 191

There can be no question that the American flier, Rogan, falls into the category of persons mentioned in the above articles. He had parachuted from a disabled plane, had been captured and disarmed, and was severely wounded. He was entitled to the protection afforded by these articles, and the general rules of international law in respect to prisoners were applicable to him.

The treatment he should have received is stated in Article 14, Geneva Convention of 27 July 1929, relative to the treatment of prisoners of war, as cited in paragraph 87, Field Manual 27-10, Rules of Land Warfare:

"Prisoners affected with a serious illness or whose condition necessitates a major surgical operation must be admitted, at the expense of the detaining power, to any military or civil medical establishment qualified to treat them."

The basis of the charge against the accused in this case was that he encouraged, aided, abetted and participated "in the denial of proper medical attention" to which the deceased flier was entitled respects: first, he refused to render any medical treatment to the flier himself; second, he refused to send the flier to a hospital in an ambulance for proper treatment; third, he refused to give permission to Dr BLAHA to render proper treatment



In regard to the first point, it is necessary to consider what duty or obligation the accused owed to the flier under the circumstances. The law does not ordinarily attach criminal responsibility for non-feasance in the absence of a legal duty to take specific action. It appears from the record that the accused was the public Health Commissioner for Kreis Kirchdorf (R 80). It further appears that he represented the Landrat on the day of the alleged crime, and that the Landrat had the duty of evacuating wounded fliers (R 83). In the words of Dr GRISL himself, the Landrat was responsible for taking care of wounded American fliers (R 84), and furthermore the Landrat had issued no orders or instructions to the accused not to treat or render medical attention to wounded fliers (R 81). As the representative of the Landrat, therefore, the accused may be considered fully responsible for the performance of these duties. As further supporting this conclusion, it appears that RECHBERGER, who was actually ordered to capture the fliers, subsequently reported to the Landrat that the accused had rendered no medical attention in this instance, and said further that "Dr GRISL and myself at the time did not act as we should have acted." (R 28) Finally, during the course of the trial, the accused attempted to change his plea to guilty because, as he said, "I feel guilty of having refused the help." (R 82) Standing alone, this latter point might be considered to be of limited probative value on the basis that the accused may have felt that he had merely violated the ethics of the medical profession, but when considered in relation with the other testimony, it appears more probable that he felt that he had failed to perform a specific duty on this occasion. It thus appears from the evidence that the accused at the time of the alleged offense was under a duty to render medical attention to the flier, and his failure to do so is an offense for which he may legally be held responsible. "It is non-feasance and a crime for any public officer wilfully to neglect to perform any duty for which he is bound to perform....." Miller, Criminal Law, 1934, page 477.

In regard to the second and third points mentioned above, the evidence is so clear and the record so complete as to call for little comment. The accused himself admitted that he alone had authority to dispatch ambulances within Kreis Kirchdorf, that he had an ambulance available on 26 July 1944, and that he did not dispatch it on this occasion. (R 83) Also as indicated in paragraph 3, supra, there was ample testimony to sustain the conclusion that Dr BLAHA talked to the accused on the telephone and was told that no medical attention was to be given to the wounded flier, and that Dr BLAHA could not render the appropriate treatment without the permission and assistance of the accused.

Whether the conduct of the accused caused the death of the flier is a matter of conjecture, but it seems fairly obvious that it did contribute to his death at the time. He, no doubt, through professional training, could have slowed the bleeding of the wounded flier had he tried, rather than to leave the flier in untrained hands. And, if the view of the evidence taken by the commission is correct, he could greatly have expedited more substantial treatment. In any event, this was a question of fact for the commission to determine. It should be noted that it was not essential to prove that the accused's conduct caused the death of the flier, because there was adequate proof of the positive denial of medical attention, which is the essence of this charge under the rules of war. Proof that such denial caused the death of the flier would merely constitute an aggravation of the offense to be taken into consideration by the commission in determining the sentence.

The findings of guilty are sustained by evidence which was competent within the meaning and intent of paragraph 5a, War Crimes Memorandum Number 3, namely, that it had probative value to a reasonable man. There are no irregularities affecting the fairness and impartiality of the trial or which are prejudicial to the substantial rights of the accused in proceedings such as these.

9. Petition for Reopening of Proceedings on the Grounds of Newly-Discovered Evidence.

Approximately six months after the trial had been completed, the findings made, and the sentence adjudged, the wife of the accused, by letter dated 28 December 1946 and addressed to the Commanding General, USFA, requested, in effect, that proceedings be reopened for the purpose of hearing the testimony of one Anton MOSER who was not a witness at the trial and who, she indicated, would be able to give evidence which would be of benefit to the accused.

Upon the receipt of that letter by this office, an officer investigator, duly authorized to administer oaths was instructed to locate MOSER and take his sworn statement concerning his knowledge of the events which took place on the day of the alleged offence, for the purpose of determining whether such statement might have any bearing upon the guilt or innocence of the accused. Such a statement was taken and it, together with a translation of the above mentioned letter from the wife of the accused, is attached to the record of trial.

A careful analysis of MOSER's statement indicates that although he was with the accused the better part of the afternoon in question, he was not in his presence during the commission of, and that he otherwise has no knowledge of, the particular acts of the accused which constituted a violation of the laws of war.

The rule of law applicable to questions of this nature, has been stated as follows: "The words 'material evidence' are aptly applied to the force of testimony, upon the application for a new trial after verdict, upon the ground of newly discovered evidence. Such evidence must be material and it does not satisfy the condition if it is cumulative, corroborative, or impeaching in character only. In defining the word 'material' as thus used, a statement is said to be 'material' when it has a bearing directly or indirectly upon the matter in question so as to influence its determination." Wharton, Criminal Evidence, Vol I, p 590 (Underscoring supplied.) The evidence that has, or could be, contributed to this case by MOSER will be considered on the bases of this rule.

As stated in paragraph 8 supra, the record shows that the accused participated in the denial of proper medical attention in three different ways; first, he refused to render any medical treatment to the flyer himself; second, he refused to send the flyer to a hospital in an ambulance for proper treatment; and third, he refused to give permission to Doctor BLAHA to render proper treatment.

The record would not seem to permit of any question but that his first offence, that is, his refusal to render any medical treatment himself, was committed between the time he first arrived at the Jaidhaus and the time the wounded flyer was transported to MOLLN. At no other time did he have an opportunity to treat the flyer himself. Furthermore the record clearly indicated that the flyer was transported to MOLLN prior to the return of the accused to the Jaidhaus after his search for other flyers who might have landed in the vicinity. The witness MOSER states, however, that "the first time Dr GRISL and I heard something about the wounded man" was after they had returned to the Jaidhaus from their search for the other flyers. All of the other witnesses who were in a position to know agree, and the accused himself admits (R 70), that he was advised of the presence of the wounded flyer in the vicinity immediately after he first arrived at the Jaidhaus and prior to his leaving there to search for the other flyers. Certainly the determination of no court could be influenced by such obviously unimpaired testimony as MOSER would give on this issue.

As to the second respect in which the accused denied the victim proper medical attention, namely his refusal to call an ambulance, it is obvious from the record that the conclusion of the court was based substantially on testimony by the accused himself (R 83) that he alone had authority to dispatch ambulances from Kreis Kirchdorf, that he had an ambulance available on that day, and that he did not, in fact, dispatch it. MOSER has said nothing about this, and offers no new evidence in this connection.



As to the third point, namely the accused's refusal to give permission to Dr BLAHA to render proper treatment, it appears from the record that the conclusion of guilt in this connection was based upon testimony that this permission was refused during a telephone conversation in which he, the accused, participated. MOSER admits that he did not overhear, and that he was not told about, any such conversation. He concedes, however, that a telephone call was in fact received by the accused, and in this respect his testimony tends to corroborate the statements of the other witness. In any event, MOSER admittedly has no knowledge of the substance of the telephone call in question, and can say nothing in connection therewith which would be of any benefit to the accused.

It is concluded for the reasons stated above that MOSER's evidence could not have influenced a determination of any court on any of the matters which were in question at this trial and, therefore, by denying the request of Mrs GRISL to reopen this case.

#### 10. Sentence

According to the provisions of paragraph 13a, War Crimes Memorandum Number 3, this headquarters, 23 April 1946, the commission could adjudge any type of punishment referred to in paragraph 45, War Department Field Manual 27-5, subject: "Military Government and Civil Affairs", dated 22 December 1943, up to and including the death penalty. It is further stated in paragraph 13a, War Crimes Memorandum Number 3, cs, that commissions may be guided by, but are not limited to, the penalties authorized by the Manual for Court-Martials, the laws of the United States, and of territory in which the offense was committed or the trial is held. No specific penalty is prescribed for an offense such as is charged in this case, and therefore the commission is entitled to adjudge such sentence as it deems appropriate based on the facts. The provisions of paragraph 3e, War Crimes Memorandum Number 3, cs, were complied within that there was concurrence of at least two-thirds of the members of the commission present in the findings and the sentence.

The sentence adjudged, however, would appear to be somewhat excessive in view of certain mitigating circumstances which appear in the record and in view of the nature of the offense which was committed. Although the accused had a clear duty to render what aid he could to the flier and although he clearly violated that duty, the evidence does not establish beyond a reasonable doubt that his conduct in fact caused the flier's death. The principal testimony in this connection is Dr BLAHA's statement (R 41) that "maybe" timely medical or surgical assistance would have saved the life of the flier. Furthermore, considering the charge against this accused, and his actions as developed by the testimony, it does not appear that he committed such positive acts of violence as are normally associated with a sentence of the severity administered here. For instance, it seems worthy of comment that the accused was never, according to the testimony, in the immediate presence of the victim, and to reach him he would have had to travel a distance of over one kilometer. While this comes far from excusing his actions, nevertheless it should be taken into consideration by way of mitigation. It is accordingly recommended that the sentence be approved and mitigated to one of imprisonment at hard labor for fifteen years.

The following petitions for clemency have been made by members of the accused's family and are appended to the record of trial: 14 October 1946, by Else GRISL, his wife; 23 October 1946, by Else GRISL, his wife; 25 October 1946, by Josef and Josefine GRISL, his parents; 26 October 1946, by Johann SCHANTL, his father-in-law; 28 December 1946, by Else GRISL, his wife. These petitions in general refer to the good character of the accused, his kind and considerate nature, and the concern of his family over his conviction. They do not add any new material evidence to the case, other than as commented on in paragraph 9, supra,

in connection with the statement of Anton MOSER, and furnish no sound basis for clemency beyond the mitigating circumstances and recommendation set forth in the preceding paragraph.

11. Opinion

It is my opinion that:

- a. The Military Commission was legally constituted,
- b. The Military Commission had jurisdiction over the offense and the person charged,
- c. The record of trial is legally sufficient to support the finding of guilty and the sentence,
- d. No errors injuriously affecting the substantial rights of the accused were committed during the trial

12. Recommendation

It is accordingly recommended that:

- a. The sentence be approved, but that in view of the extenuating and mitigating circumstances the sentence be reduced to confinement at hard labor for a term of fifteen years, and that
- b. The Commanding General, Zone Command, Austria, be directed to effect the commitment of the said accused to such confinement at hard labor in the custody of the Austrian authorities.

13. Action

No confirmation of the sentence is required where the Commanding General, United States Forces in Austria, is the appointing authority, as is the case here. (Par 3h, War Crimes Memorandum Number 3, this headquarters, 23 April 1946) Accordingly an action designed to carry the foregoing recommendations into effect, should they meet with your approval, is submitted herewith.

s/ Russell O Pettibone  
t/ RUSSELL O PETTIBONE  
U. S. Civilian  
Chief, War Crimes Branch

I have read the record of trial in this case and concur in the above review.

s/ David S. McLean  
t/ DAVID S. McLEAN  
Colonel, JAGD  
Judge Advocate