DEPUTY THEATER JUDGE ADVOCATE'S OFFICE
7708 WAR CRIMES GROUP
UNITED STATES FORCES, EUROPEAN THEATER

December 1946

UNITED STATES

vs

Herman NOACK and Karl Georg BOESS, German Nationals

Case No. 12-472

REVIEW AND RECOMMENDATIONS

1. TRIAL: The accused were tried at Dachau, Germany, on 29, 30, and 31 July, and 2 and 5 August 1946 before a General Military Government Court appointed by paragraph 20, Special Orders No. 184, Headquarters, United States Forces, European Theater, APO 757, dated 3 July 1946.

2. FINDINGS: The offense involved was:

	Pleas as to each accused	Findings as to each accused
CHARGE: Violation of the Laws of War	NG	G
Particulars: In that Herman NOACK, and Karl Georg BOESS, both German nationals, did at or near Hattenrod, Germany, on or about September 1944, wilfully, deliberately, and wrongfully encourage, aid, abet and participate in the killing of two unknown members of the United States Army who were then unarmed surrendered prisoners of war in the custody of the then German Reich.	NG	G

3. SENTENCE: The court by at least a two-thirds vote of the members present at the time the vote was taken concurring, sentenced the accused NOACK to death by hanging and the accused BOESS to be imprisoned for a term of eight years, commencing 30 August 1945.

4. DATA AS TO ACCUSED:

a. The accused Herman NOACK is a German national and was a resident of Berlin, 34 years old (R 4) and a former member of the Luftwaffe. He was married and the father of three children. In civil life he had been an athletic instructor. He enlisted in the German Army in 1931 and was discharged for physical disability in 1937. He was recalled to service in 1939 and in 1940 was commissioned a first lieutenant in the airborne infantry (R 105). He never had been a member of the NSDAP or the Hitler Youth (R 106). He participated in two combat parachute jumps at Corinth, Greece, and Crete, in 1940 (R 134).

During September 1944, he operated a Hitler Youth Camp in the vicinity of Harbach (R 106). His discharge from the Army in 1937 was caused by a concussion which left him subject to fits similar to epilepsy (R 105).

b. The accused Karl Georg BOESS is a German national, 42 years old and a resident of Gruenberg, Oberhessen (R 4). He was a butcher by trade and owned a butcher shop and inn (R 203). He became a member of NSDAP in 1927, left the party in 1929, and rejoined in 1933 (R 225). He never was a member of the Military service (R 229), but was a member of the Gruenberg Fire Brigade (R 39, 40, 208) and as such wore a uniform and carried a pistol. He was married and the father of a 12½ year old daughter. A son, 15 years old, had been killed while en route to a Hitler Jugend mobilization center when his train was strafed by allied planes only a short time before the events described in this review.

5. RECOMMENDATION:

That the findings and sentences as to accused NOACK and BOESS be approved.

6. EVIDENCE:

a. For the Prosecution: During the latter part of September 1944 two American officers were shot down and landed near the village of Hattenrod, Germany. One was discovered in the woods by Anna KUTSCHKE, a witness, who was walking with her infant son (R 10). She took him into custody, conducted him to town and turned him over to the burgomeister (R 11). She later heard that this flier had been shot while attempting to escape (R 15). She had heard two shots after she left the burgomeister's office and returned to the field (R [illegible]). She came back to the burgomeister's office a second time and saw the two accused enter a car and drive off, accompanied by two witnesses in the case, SMITH and DOLGEN, who were armed with spades (R 16). Both fliers were identified as being Americans (R 22, 23,60).

Another witness, one Otto FRITZ, a sergeant of rural police, testified that he saw both these fliers at the burgomeister's office. NOACK and BOESS drove off with one and witness was left in charge of the other. The two accused

returned in about 15 or 20 minutes. During this interval the prisoner in the office made no attempt to escape and gave his guard no trouble (R 24). After he returned, NOACK motioned the second prisoner to follow him. They then entered NOACK's car and drove off. A short time later the car returned with only NOACK and BOESS (R 25). NOACK requested the burgomeister to detail to him two men with spades, and BERTH and DOLDER were ordered out (R 26). They entered the car with NOACK and BOESS and drove off. The witness FRITZ followed the vehicle on his motorcycle at a distance of about 300 to 400 meters (R 27). They drove to a nearby shooting range (R 28). When FRITZ arrived the four were walking across an open field. An American was lying dead and the two men were ordered by NOACK to dig a grave (R 29). NOACK is reported to have said, "Revenge for the first sergeant" (R 30).

FRITZ identified the body as that of the prisoner whom he had previously been guarding in the burgomeister's office (R 31). The victim was placed in the grave by the four men present, and FRITZ departed on his motorcycle for Reiskirchen (R 32). NOACK and BOESS then were seen at Reiskirchen talking to the burgomeister of that town (R 33). Two other men entered the car with them and drove off. One was armed with a shovel. FRITZ again followed the car out along the road toward Burgartsfelden, to a point on top of a hill near a hedge row, where it stopped (R 34). The party left the car and walked along a path across a field, where they began to dig. Another dead American flier was seen here. Blood was flowing from a wound in the back of the neck (R 35). After this body was interred FRITZ mounted his motorcycle and returned to his headquarters at Grossen Busseck. He made no official report of what he had seen (R 37).

Another witness testified that BOESS had stated to him that he had shot one of the prisoners during an escape attempt (R 59). Three other captive American fliers were taken to the airport at Giessen and turned over safely to the authorities there (R 60). As commanding officer of the Herbach field NOACK was alleged to have posted an order on the bulletin board to the effect that all captured, grounded, Allied fliers were to be shot on the spot (R 65). BERTH

and DOLGER testified how they were detailed to BOEBS and NOACK, how they drove out into the country, found a corpse, and buried it (R 72-84). The victim was wearing an American uniform (R 74, 80). After being returned to their homes they were told to keep quiet about the occurrence (R 75, 82).

As is usual in this type of case, the details of the alleged crime are filled in by the statements of the accused. BOEBS made three pre-trial statements (Pros. Ex. 5, 6, 7; R 90, 99, 100), and NOACK one (Pros. Ex. 10; R 101). In his first statement (Pros. Ex. 5; R 90) BOEBS described how he had taken his car to NOACK on the day in question, at the latter's order. They picked up the first captive and set out, ostensibly for the air field at Diepsen. About 300 meters before arriving at Holzkirchen NOACK ordered BOEBS to turn right into a side road. He then directed BOEBS to turn to the right, up a more subsidiary road, and stop. NOACK and the captive alighted and the latter was ordered to precede the former by about 5 or 6 meters. NOACK was seen to fire one shot, approach the victim and shoot twice more. BOEBS then alighted and saw the dead flier on the ground. NOACK said he had been trying to escape and it became necessary to shoot him. NOACK claimed it was necessary to take the victim up the secluded path in order to search for his parachute. He (NOACK) took the aviator's shoes and the pair departed for Hattenrod. Here they picked up another captured flier and set out in the direction of Lich. NOACK said the prisoner was going to show them where his parachute was lying. About half a kilometer from Hattenrod NOACK and the prisoner got out of the car. BOEBS started the car and turned around. During that operation he heard two shots. When he had finished turning the car around he saw the flier lying on the ground about 15 meters off the road in the direction of the woods. NOACK was standing beside the body with a pistol in his hand. NOACK said that the prisoner had also tried to escape.

The second statement (Pros. Ex. 6; R 100) differs from the first only in minor details. In this one BOEBS claims he did not hear the shots allegedly fired by NOACK.

The third statement (Pros. Ex. 7; R 99) states the same facts as the other two except in more detail. It gives some additional information relative to the facts concerning the burial of the two victims, which have heretofore been described in detail.

NOACK, in his statement, (Pros. Ex. 9, R 101) gives no details of the affair. He says that during the latter part of September five captured American fliers were brought to him at the Harbach Airport. All of these with one exception were forwarded to Giessen. This flier was taken by him personal and turned over to the authority at Giessen. He says that the burgomeister at Hattenrod refused him a car to transport this flier, so he took him in his own personal vehicle. He admits that a few days later he took a detail of boys from the Hitler Youth school and reburied the bodies of two American fliers in the cemetery at Harbach. He claims to have been informed of these two corpses by either the adjutant or a sergeant in his command.

b. For the Defense:

The accused Herman NOACK was the first defense witness to take the stand. After some preliminary examination he stated that toward the end of September 1944 he was ordered by the commander of the airport, one Major ROSCH or HOESCH, to take some captured fliers to Giessen (R 107). Since his own vehicles were in bad repair he procured one from the burgomeister at Gruenberg through the local kreisleiter. It was driven by his co-accused BOESS (R 110). The party of three, NOACK, BOESS and the prisoner set out for Hattenrod (R 113). They stopped for a short while at Hattenrod and then start in the direction of Reiskirchen (R 115). They then made an attempt to locate the flier's parachute which the latter had said was in a nearby wood (R 115). While en route the prisoner made known by signs that the parachute was lying at a point they were passing (R 117). NOACK ordered BOESS to take the flier to the spot and procure the parachute. He was suffering from an old injury and had difficulty in moving. BOESS got out of the car from the left side and the prisoner got out from the right. After an interval of about two minutes NOACK heard some shots, maybe three or four. He got out of the car and proceeded with

difficulty to the point from which the sound had come. BOESS was standing there with his pistol in his hand, pointing at the prone body of the prisoner (R 118). NOACK became quite angry and called BOESS severely to account for having shot a defenseless prisoner. BOESS stated that he had shot the prisoner in order to prevent his escape (R 120). BOESS attempted to justify himself further and after six or seven minutes the pair departed (R 121). They drove to Hattenrod and NOACK told the burgomeister that BOESS had shot one of the fliers and that he (NOACK) had put him under arrest (R 123). The other pilot was taken into the car and they set out anew. He took out his pistol, laid it on the seat and told BOESS he would be shot if he started "any dirty business with this flyer" (R 124).

While driving along he felt one of his fits coming on. These fits were preceded by numbness in the hands and feet. He ordered BOESS to hurry to the airport so that they might arrive there before the fit actually came up on him (R 125). He then appears to have lost consciousness because when he came to, the car had stopped and he was in it alone. BOESS was standing in a path in the forest alongside the car. NOACK attempted to strike BOESS but his physical and mental condition prevented this, as he had not completely recovered from the effect of his fit (R 126). He had to be satisfied with giving BOESS a tongue-lashing (R 122).

The burgomeister of Hattenrod sent two laborers to bury the last victim, and NOACK took them to the scene. His memory on this point is faulty (R 128) The two accused then returned to the airport with BOESS ostensibly under arrest. Three additional American prisoners were there. NOACK made a report of the killings to his immediate superior, Major HOESCH, and reported that he had BOESS under arrest. This report met with approval (R 130). A further report to the local Kreisleiter resulted in BOESS' release. This was brought about because BOESS, as a civilian, was under the Kreisleiter's control (R 131) A telephone call to Berlin confirmed this latter fact, and the Kreisleiter's wishes were carried out (R 132). The three other prisoners were sent to Giessen in the custody of one Sergeant SAITE (R 132). NOACK claimed that he remembers practically nothing about the burial due to his mental condition (R 140). On

cross-examination he explained in detail his physical and mental condition. He also told that he had had a suit made from some American uniforms but claimed this latter was made up of miscellaneous articles left by the three prisoners who had been delivered to Giessen unharmed as aforementioned (R 156) The fact was further brought out on cross-examination that from 1939 until the end of the war NOACK served continuously in the German Armed Forces. During that time he obtained a commission and advanced to the rank of Captain (Hauptmann); this was in spite of the fact that he claims that his mental and physical condition was not good and that he was subject to fits (R 165, 166).

The next defense witness was Karl EMMERICH. He testified that toward the end of September 1944 he had occasion to be in the vicinity of Reiskirchen He stated that on one occasion he heard three or four shots alongside the road Upon investigation he saw a parked car, and immediately subsequent to hearing these shots, a Luftwaffe officer emerged from the car (R 188). The witness proceeded on his way and the car overtook him. After forty-five minutes he arrived at the airport and an hour later the same car arrived. NOACK and BOESS got out (R 189). NOACK took witness into his office. While EMMERICH was there he heard NOACK speak indignantly over the telephone relative to the killing of the American flier. He then heard NOACK put through a call to Berlin, but did not hear the subject of this latter telephone conversation (R 190) although NOACK explained to him later what it was (R 191).

On cross-examination he was asked to point to the spot on Prosecution's Exhibit 3, which was a map of the general area, where he had seen the car and heard the shots. He located the scene of his testimony on this map about two inches south of the village of Reiskirchen (R 194).

Counsel for NOACK asked for a sanity hearing in behalf of his client. The court ordered that the trial proceed, but that a medical officer should be detailed to examine the accused and turn in a report of his findings to the court (R 200).

Defense Exhibit No. 3 (R 202) was introduced. This was a statement signed by one STURM who appears to have been a police sergeant. In this statement he says that on 25 September 1944 he was riding his bicycle to the airfield of

ETTINGHAUSEN when he saw a black Opel P 4 parked on the road. He heard two shots and looked into the car. There he saw a Luftwaffe officer apparently asleep or unconscious. About 20 meters away from the left side of the car he saw a man clad in the uniform of the police or the civilian defense police. The whole thing seemed so peculiar he felt obliged to report it.

The accused Karl Georg BOESS then took the stand. He described how he set out with NOACK and a captured American flier from Harbach. The party first went to Hattenrod and stopped in front of the burgomeister's office (R 204). NOACK went into the office, returned, and ordered the witness to drive to Weiskirchen. Just before arriving at this latter town NOACK ordered him to turn off the main road on to a narrow dirt road which led up a hill. After going about 150 meters he was ordered to stop (R 204). Previously NOACK had said they were going to search for the flier's parachute, which had been left at this place. NOACK and the prisoner got out of the car and proceed about 20 meters from the car when the flier was seen to make a "funny, slinkin, movement in the direction of the hedges". BOESS was in the act of turning the car around and heard two shots. He stopped the car, got out, and saw the pilot lying on the ground, shot to death. NOACK said the victim had attempted to escape and that he had shot him. The witness believed NOACK (R 205). The two men reentered the car and returned to Hattenrod. NOACK went into the burgomeister's office and came back with another American prisoner. They the set out in the direction of Lich. After entering a forest NOACK again ordere the witness to stop the car. NOACK and the prisoner got out. NOACK then ordered BOESS to turn the car around and said something about the prisoner having to find his parachute. BOESS drove the car ahead a short distance and turned it around. When he returned to NOACK the flier was lying on the ground shot to death. NOACK gave another story about an escape attempt, which BOESS did not believe (R 206). The car returned to Hattenrod. NOACK went into the burgomeister's office again and returned with two men equipped with shovels. They all returned to the scene of the second shooting, where a grave was dug and the victim buried. They then drove to Weiskirchen where two more men with

shovels were obtained and the process repeated with the first victim's remains (R 207). BOESS then directly accused NOACK of having killed each flier (R 208, 209).

BOESS further stated that he had known NOACK for some time and never knew of his being physically or mentally impaired and never heard of his having fits (R 209). He was questioned relative to his four written pre-trial statements, and related how he had confronted NOACK with his last statement (Pros. Ex. 7) at Zuffenhausen on 16 April 1946 during an investigation. He claims NOACK made no reply to this accusation at this time and did not directly accuse BOESS of the killings until he actually took the stand in this trial. He then denied the truth of NOACK's testimony (R 211). He further denied ever having driven on the day in question to the point to which the witness EMMERICH testified (R 212). He substantially corroborated the testimony given by the witnesses KUTSCHERA, FRITZ, and HOFFMAN, for the prosecution (R 213). He stated, however, that HOFFMAN was hard of hearing and denied that he ever heard him (BOESS) say anything relative to having avenged the death of his (BOESS') son. He likewise corroborated the testimony of the prosecution's witness ZAPPE (R 214) and gave a somewhat dramatic account of how his son met his death (R 215).

Karl Heins WILHELMI then took the stand in behalf of the accused BOESS. He testified that at the time of the two homicides he was seventeen years old and a member of NOACK's command at Harbach (R 246). He testified that NOACK had had him arrested because of some statements he had made concerning the killing of the two captured fliers. He was subsequently turned over to the Gestapo. While in the custody of the Gestapo he was shown a statement signed by NOACK in which the latter stated that he himself had shot the two fliers. Prior to these killings he (NOACK) had asked how captured aviators should be treated, as prisoners or gangsters and the command had voted that they be treated as gangsters (R 247, 248, 249).

Captain Sidney M. COHEN, M.C., was then called as a witness for the court. He qualified as an expert psychiatrist and stated that as such an expert, he had conducted an examination of the accused Hermann NOACK (R 253). A full written

report of this examination was made a part of the record. A perusal of the record fails to disclose this as an exhibit but the same is attached hereto for the information of the reviewing authority. The witness testified that NOACK had had hallucinations a short time before the examination. His speech flowed rapidly and clearly with occasional bursts of activity when emotionally charged ideas were listed. He appeared uncooperative, hostile and taciturn. Physical symptoms were also described. The witness concluded that NOACK showed no evidence of organic brain disease or psychosis (R 254, 255). He was shown to be mentally and physically fit to stand and finish his trial. The witness did not believe the accused would have been subject to the spasms he described at the time they were alleged to have occurred (R 256).

The court then made a finding that at the time of the alleged offense the accused NOACK was sane, that he was sane on 2 August and that he was sane at the time of the trial (R 258).

7. JURISDICTION:

It is believed that the subject of jurisdiction should be discussed at length in this case in order that any controversial matters may be settled and a precedent established for the trial of future cases. The first question to be discussed involves the subject matter of the charge. What is a war crime? International Law itself is largely a matter of treaty between independent state. The substantive law on the case in question involves the treatment of a prisoner of war. The basis for this law was attempted in 1907 when the great powers promulgated the Hague Convention. This convention was amended, modified, and brought up to date in 1929 by the Geneva Convention of which most of the great powers were signatories. The belligerents in the recent war ratified or announced their adherence to this convention and were therefore bound by its terms. As such, the citizens of these states, both members of the armed forces as well as civilians are individually bound by the terms of this treaty as if they were provisions of their own criminal code.

Article 2 of the Geneva Convention reads as follows:

"Prisoners of war are in the power of the hostile Power, but not of the individuals or corps who have captured them."

" Measures of reprisal against them are prohibited."

Clearly if any of these provisions have been violated by an individual he

may be prosecuted. Does the charge sheet state such a violation? We believe it does. The specification states that "Hermann NOACK and Karl Georg DOEGE, both German nationals, did. . .aid, abet and participate in the killing of two unknown members of the United States Army who were then unarmed surrendered prisoners of war in the custody of the then German Reich". A more cursory perusal of the cited terms of the Geneva Convention will thus show that paragraph 2 had been violated. The perpetrators may thus be prosecuted.

Where a captive entitled to be treated as a prisoner of war is put to death, or where unlawful, unreasonably harsh, or cruel treatment of prisoners is practiced or permitted by one belligerent, the other may, as far as legally permissible retaliate; and any individual officer resorting to or taking part in such an act is guilty of a grave violation of the laws of war, for which, upon capture, he may be made criminally answerable. (Winthrop's Military Law and Precedents, Second Edition Vols. 1 and 2, Reprint 1920, p. 791).

It is stated supra, that prisoners of war are in the power of the hostile power, and not of individuals. Such being the case it would ordinarily devolve upon the German Reich to punish the perpetrators of such a crime. The generally unsatisfactory results of the series of Leipsig Trials subsequent to 1918 showed the world that substantial justice cannot be expected from prosecutions carried on under such conditions. A school of thought has developed relative to the handling of such cases by military commission which will undoubtedly become firmly established in international law. Trial by a military commission has a long history. It was first resorted to by General Winfield Scott during the invasion of Mexico and was used against non-military personnel who had committed depredations against American troops. It was again resorted to subsequent to the Civil War in the United States when military commissions were used to try military personnel and former citizens of the Confederate States for what would now be termed War Crimes. The alleged conspirators who perpetrated in the assassination of President Lincoln were so tried as well as the predecessor of what would now be termed the commander of a concentration camp, Captain Henry WIRZ, who commanded the Andersonville (Georgia) Prison Camp. (See Winthrop op. cit. p. 792). All these accused were convicted and hanged.

By the foregoing it can be concluded that the subject matter is a subject for judicial review and that a military commission is the proper body to handle the case. It now becomes necessary to consider the procedure.

This is a matter for the state conducting the trial. We have seen it would be entirely impractical to allow this to be done by the state to which the suspect owes allegiance. Moreover in the present case as well as in the former Confederate States subsequent to the American Civil War we find a state of complete collapse in the conquered territory. This collapse has extended to all parts of the nation's economic and social system, including the judiciary. There is no place to look for any initiative in the establishment of even a temporary judiciary except among the armies of the conquering state. To establish such a system becomes merely a matter of promulgating an order by the armed forces, in this case the United States or its allies. It is thus seen to be an internal matter of the United States Army and the procedure will be outlined in current directives. The directive was dated 16 July 1945, File AG 000.5-2 GAP, subject, "Trial of War Crimes Cases" and stated:

"1. General

a. As a matter of policy, cases involving offenses against the laws and usages of war or the laws of the occupied territory or any part thereof commonly known as war crimes, together with such other related cases within the jurisdiction of Military Government courts as may from time to time be determined by the Theater Judge Advocate, committed prior to 9 May 1945, shall be tried before the specially appointed courts provided for in this directive. Such trials in the United States Army zone of occupation will hereafter be conducted before Military Government courts, except where otherwise directed by the Theater Commander".

A statement of policy was thus laid down. This directive was amended and later revoked, being replaced by a directive issued 11 July 1946, AG 000.5 (CB-AGO, Subject: "Trial of War Crimes Cases" which was in effect at the time of the trial of the present case. Such authority is contained in the following paragraphs:

"5. General

As a matter of policy, such cases involving offenses against the laws and usages of war or the laws of the occupied territory or any part thereof, commonly known as war crimes, committed prior to 9 May 1945, as may from time to time be determined by the Deputy Theater Judge Advocate for War Crimes, will be tried before specially appointed Military Government Courts, except where otherwise directed by the Theater Commander.

6. Procedural Matters Before Trial

a. Charges. Charges in the cases contemplated will be prepared under the direction of the Deputy Theater Judge Advocate for War Crimes in the form prescribed for Military Government Courts.

b. Reference for Trial. The charges will be referred to special Military Government Courts by the Deputy Theater Judge Advocate for War Crimes.

c. United Nations Observers. At the time of referring such charges for trial the Deputy Theater Judge Advocate for War Crimes will determine those United Nations, if any, which in his judgment should be invited to send observers to the trial and will extend such invitations on behalf of the Theater Commander.

d. Appointment of Courts. The courts will be appointed by this headquarters and will be composed of officers within this command. General Military Government Courts and Intermediate Military Government Courts appointed as contemplated herein will consist of not less than five and not less than three members, respectively, and the senior member present at each trial will be the president and presiding officer of the court. The orders appointing such courts will detail at least one officer with legal training as a member of such courts. The Deputy Theater Judge Advocate for War Crimes will assign one of more prosecutors and defense counsel but they will not be formally designated in the orders appointing the courts."

From the foregoing it is thus concluded that to have jurisdiction the court must be appointed as provided in paragraph 6, d, supra. This court was appointed by paragraph 20, Special Order 18, dated 3 July 1946, Headquarters United States Forces, European Theater, APO 757. The procedure is thus complied with.

Paragraph 6, b, supra requires that the charges will be referred to special Military Government Courts by the Deputy Theater Judge Advocate for War Crimes. This was done. (See R 1, Pros. Ex. 1).

It may thus be concluded that the court had jurisdiction of the subject matter and the accused.

8. DISCUSSION:

A close perusal of the record fails to show any material error which may be considered to have prejudiced the case of the accused. There are number of interlocutory rulings by the court which call for at least some comment by the reviewing authority. This will be done as briefly as possible.

a. At the beginning of the trial counsel for the defense moved that the court not consider the dossiers of the accused for the reason that there were inflammatory statements in these records which would prejudice the minds of the court. In making this motion counsel for HOACK was not joined by his co-accused BOESS. The court denied the motion.

It is believed that this was a correct ruling. Trials held under the war crimes group are not held according to the Anglo-American system of jurisprudence, but are guided by continental procedure. It must also be realized that the court

sits in the dual position of judge and jury and is thus not protected from hearing incompetent evidence as is a lay jury. As has been stated before, members of these courts are men of experience and can presumably consider any evidence brought before them and give it the proper weight. The same holds true for the witnesses it hears. It is granted that a dossier may contain prejudicial matter but the court must not allow this information to prejudice its mind. This is considered good continental practice. Military Government Regulations - Title 5 - is quoted herewith at length, wherein it will be seen that a situation similar to the present one was contemplated and provision has been made for its treatment.

> "5-354.1. General. The Rules of Military Government Courts were designed with the intention of applying to their procedure certain of the principles of continental practice, for the dual purpose of avoiding technicalities and conducting the proceedings in a manner which would be familiar to the majority of the persons brought before the Court.
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> "5-354.2. Roles of the Judge. The practice in continental countries for the presiding judge to conduct the examination of the accused and witnesses and generally to take a leading part in the proceedings. When it appears that the prosecutor, defending counsel or the accused are not familiar with common law procedures, the presiding judge in a Military Government Court will take it upon himself to conduct the proceedings to the extent necessary to protect the interests of the accused and to bring out all the facts relating to the issue being tried.
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> "5-354.3. Interrogation of and Testimony by Accused. Because the process of pleading to a charge is unfamiliar to the citizens of continental countries, and is not known in continental practice the interrogation of the accused by the Court at the time of pleading is permitted at discretion for the purpose of obtaining from the accused sufficient information to determine whether he has the intention of admitting the elements of the charge or denying it, the Court will arrange to be provided prior to the trial with a dossier containing all documentary and written evidence, and a summary of the testimony to be given by the prosecutor's witnesses. This dossier will be studied by the court prior to its examination of the accused. It will be used as a basis for such examination but not regarded as proof of the statements it contains which will have to be established in evidence in the usual way. If the accused appears unable to plead guilty or not guilty, the Court will enter a plea on the basis of the accused's statements made during the interrogation provided that a plea of guilty will only be entered if the accused expressly admits each and every element of the offense. Otherwise, a plea of not guilty will be entered. The accused's statements made upon the interrogation will form part of the record, and anything he says may be used as evidence for or against him. If the case is at all complicated, the interrogation will enable the Court to appreciate the issues involved and assist in determining what evidence will be relevant and what witnesses or documentary evidence will be procured for the trial." (Underscoring supplied)

b. During the course of the trial pre-trial statements of the accused were offered and introduced into evidence. Objections were made on the part of the

accused, especially by counsel for NOACK. Particularly strong objections were made to the introduction of Prosecution's Exhibit No. 5 (R 91) by this accused, which were overruled. This finding was proper. As pointed out supra this is in line with continental practice and the guides for war crimes procedure. It is not believed that a lengthy discussion is necessary here and a quotation is herewith given which is self-explanatory.

> "Admissibility of extra-judicial confession or admission against co-accused.
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> "The Deputy Theater Judge Advocate for War Crimes had adopted the following opinion concerning the admissibility in evidence in war crimes cases of the statements of one accused, made out of court against his co-accused (Letter, Deputy Theater Judge Advocate for War Crimes subject, 'Admissibility before a Military Government Court of extra-judicial Statement of co-accused', dated 10 November 1945).
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> 'The rules of procedure in Military Government Courts provide that "Military Government Courts shall in general admit all written and physical evidence having a bearing on the issues before it, and may exclude any evidence which in its opinion is of no value as proof". (Rule 12 (1) Section 305, page 37, Military Government Germany, Technical Manual for Legal and Prison Officers, 2nd Edition.) This rule permits the admission of any evidence "which in the opinion of the court is of probative value." The Guide to Procedure in Military Government Courts provides that hearsay evidence, including the statements of the witness not produced, is admissible in Military Government Courts. These authorities most certainly permit the admission of hearsay evidence.
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> 'The general rule, applicable in courts-martial, that the confession or admission of one accused, made out of court, is admissible only as against such accused, is simply an application of the hearsay rule. A confession or admission made out of court is admissible against the maker as an exception to such rule, (M.C.M. par. 114, FM 27-255, par. 94) and, of course that exception is not applicable when the statement is used against another accused. The fact that the basis for the admissibility of an extra-judicial statement of one accused against another accused is simply the application of the hearsay rule is demonstrated by the fact that one co-accused may testify in court against his co-accused.
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> 'It is clear that a statement made out of court by one accused is admissible before a Military Government Court against all accused to the same extent as any other hearsay evidence.'"
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> (1 108-Manual for Trial of War Crimes and Related Cases.)

c. At the end of the Prosecution's case counsel offered a motion for a finding of not guilty as to BOESS on the ground that there was not sufficient evidence for a finding of guilty (R 103). The motion was overruled. This ruling was proper. A complete perusal of the record indicates that a prima facie case had been made out by the prosecution in the case of both the accused. Such being the case it would have been error to have sustained this motion. It is not

believed necessary to discuss the subject at any length.

d. At the end of NOACK's testimony his counsel offered in evidence a sworn statement made by him. The timely objection of the prosecution was sustained and the exhibit was not admitted. This was a proper interlocutory finding (R 179). When asked what this prospective piece of evidence contained NOACK answered, "All statements I have made here before the court" (R 177). Such being the case any testimony would have been merely cumulative on the part of this witness and would have offered nothing new for the consideration of the court. Furthermore, the statement, whatever its contents, was a selfserving declaration and would consequently have had very little probative value. Since the accused was on the stand he had an opportunity to make any such statement directly to the court as he might desire. It is thus seen that a statement of this nature would have added to the record and would have had very little weight.

9. SUFFICIENCY:

This case involves two defendants accused of what appears to be a particularly atrocious and cold blooded murder. On the witness stand each directly accused the other of committing the crime and sought to absolve himself. It thus became incumbent upon the court to separate the tangled skeins of evidence, give to each its proper weight, and draw the true conclusions of fact therefrom. BOESS's pre-trial statement was closely followed by his testimony on the stand. NOACK's statement contained nothing incriminating and was directly contradicted when he took the stand. His oral testimony seemed to show a somewhat unlikely story which was not very well corroborated by his supporting witnesses. It is not believed necessary to give a detailed discussion of the evidence in this review. If the court believed the testimony given by BOESS clearly NOACK was guilty. If the converse is held BOESS should have been guilt and sentenced to hang. By its findings and sentence the court gave full credence to the evidence testified by BOESS. This latter's part in the two homicides did not indicate his being guilty of premeditated murder and he might not be said to have done any more than aid NOACK, perhaps unwittingly, in his actions. It is therefore recommended that the charge against BOESS be changed to read "aid". Th

court by its findings and sentence evidently found his part in the killings a very minor one.

10. CLEMENCY:

The only material relative to clemency in this case is a telegram dated 9 August received from one Mrs. Ellen WILHELMI, mother of the witness Karl Heinz WILHELMI. This witness was turned over to the Gestapo for some infraction of the rules of the camp commanded by the accused NOACK. He was held in custody by the Gestapo until liberated by the advance of the American troops. She requests clemency on purely humanitarian grounds and offers no new evidence which might have any bearing in changing the findings and sentence of the court. No new matter is thus adduced and no clemency is therefore recommended.

No requests for clemency have been filed in the case of the accused BOESS. A perusal of the record fails to show where any further such clemency is required. It appears that the court was particularly lenient with this accused and no further clemency is recommended.

11. RECOMMENDATIONS:

After a complete review of all the evidence presented to the court relative to each individual accused it is recommended that the findings as to accused NOACK be approved, that the findings as to accused BOESS be approved with the exception of the words in the particulars, "encourage", and "abet and participate", and that the sentences of each accused be approved. These sentences are set out in full as follows:

Herman NOACK	Death by hanging
Karl Georg BOESS	Imprisonment for 8 years (beginning 30 August 1945).

Forms of action designed to carry the foregoing recommendations into effect, should they meet with approval, are submitted herewith.

DAVID F. HERVEY
Attorney,
Post Trial Section

Having examined the record of trial, I concur:

C. R. STRAIGHT
Colonel, JAGD
Deputy Theater Judge Advocate
for War Crimes