

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

27 October 1947

SUBJECT: Review of Proceedings of a Military Commission in the Case
of the United States v. RUDOLF STAREK and AUGUST BARTH
(Case No. 12-348)

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 the two accused has been referred to the undersigned for review under the provisions of paragraph 14a, War Crimes Memorandum Number 3, this Headquarters, dated 23 April 1946. The review, with opinion and recommendations, is submitted herewith.

2. Trial.

The two accused, RUDOLF STAREK, an Austrian national, and AUGUST BARTH, a German national, were tried in SALZBURG, Austria, during the period extending from 17 September 1947 through 30 September 1947, by a Military Commission, appointed by Special Orders Number 179, paragraph 10, dated 15 September 1947, Headquarters, United States Forces in Austria.

3. Findings:

Both accused were tried on the following charge and particulars:
Charge: Violation of the Laws and Usages of War.

Particulars: In that Rudolf STAREK, an Austrian national, and AUGUST BARTH, a German national, did, at or near OBERNDORF, Austria on or about 22 November 1944, willfully, deliberately and wrongfully encourage, aid, abet and participate in the killing of a member of the United States Army, believed to be Jack M. JOHNSON, who was then an unarmed, surrendered prisoner of war in the custody of the then German REICH.

The two accused pleaded not guilty to both the charge and the particulars.

The Commission in closed session, by secret written ballot, and with the concurrence of at least two-thirds of its members present at the time of the voting, found AUGUST BARTH guilty of both the charge and the particulars, and found RUDOLF STAREK not guilty of the charge and of the particulars.

4. Sentence:

The Commission, in closed session, by secret written ballot, and with the concurrence of at least two-thirds of its members present at the time of the voting, sentenced AUGUST BARTH to confinement at hard labor for a period of twenty (20) years.

a. In General:

About 1300 hours on 22 November 1944, six flyers parachuted out of a four-engined bomber (R 6, 47). The one flyer who was finally killed landed on a hill near BURCHELLEIDIN, Austria (R 5), next to the SALZACH River, which separates Austria from Bavaria (R 48). The man was an American, a fact that could be determined at once by his uniform (R 8). He wore a jumping suit (R 17, 62); his name was Jack JOHNSON; his army identification tag number was 33 896 541 (R 36); and he said he came from CHICAGO (R 7, 42, 44, 84). This American airman was not armed (R 5, 7, 48, 73), and he "was completely defenseless" (R 100).

Within a short time after the flyer came down, a crowd gathered; it contained 15 to 20 Wehrmacht soldiers in uniform, one sailor (STARREK), and 100 to 200 civilians including some foreign laborers from the camp in LAUFEN (R 6, 12, 13, 48, 123). Soon an SS Untersturmfuehrer in uniform named LARSEN, either walked or came running over the hill with his pistol drawn (R 6, 42, 48). LARSEN, who was also a GESTAPO man, ordered STARREK to search the flyer, and STARREK wrote that "during the search the flyer leaned upon the Untersturmfuehrer (who) said something like, 'How can you dare lean upon a German officer!' and LARSEN hit the flyer on his nose which started to bleed." (R 41, 42, 48, 73). The witness PUFFER said that during the searching, a German soldier "from the rear pulled the boot out so that he had to fall on the shoulder of LARSEN who then slapped him" (R 7, 152).

The crowd was divided in its attitude toward the flyer (R 109): The witness FICHLER did not hear anyone make a threatening statement to the flyer, and he said that the "crowd was grumbling when the SS Untersturmfuehrer slapped him in the face" (R 59). Two girls said, "It is a shame to treat a flyer who is not armed in such a way", whereupon one NOBIS, who later became a witness, argued, "These gangsters and criminals should be taken away and that will also happen to you if you try to help them" (R 150, 155). STARREK claimed he made some comment to LARSEN about the slapping, and then, "because other people were excited about this mistreatment", LARSEN explained that "his children and wife had been killed" in a bombing (R 73, 89).

At no time did the American attempt to resist (R 17, 69); and far from attempting escape, he declared that he "was willing to wait for his comrades at this place" (R 53).

After the flyer was slapped, he was ordered to go in the direction of OBERNDORF (R 7, 42, 49, 77). The whole crowd accompanied him (49). Then Captain BARTH came riding on a bicycle and joined LARSEN (R 8, 49, 50). LARSEN and BARTH talked or whispered together; BARTH then made a motion with his hand and -- at a time when the witness FICHLER was only three to four meters away and therefore overheard BARTH -- he said, "Down to the woods" (R 50, 61). There is ample evidence that BARTH told the civilians to leave (R 8, 30, 42, 43, 50, 55, 74, 75). They partially dispersed, although reluctantly (R 50). Thereafter, LARSEN did not continue toward OBERNDORF but went toward the woods with BARTH and the soldiers who had come with him (R 50). On the way toward the wooded area next to the SALZACH River, the flyer was in front, then came BARTH and LARSEN and five or six German soldiers (R 50, 101). This group had to travel about 600 meters to

the woods, but before the entire group arrived there, Captain BARTH and the soldiers left (R 42). After BARTH departed (R 90) and when civilians were only 50 meters away (R 91), LARSEN kicked the American several times (R 42, 43, 89). Only LARSEN, the flyer, and STAREK finally reached the woods (R 42, 77). On the entire route of the final march, STAREK had his right hand on the left shoulder of the American (R 42, 73, 77, 97). On the route of march, STAREK and the American conversed together, and the American told STAREK that he was still very young (42,43). About five to eight minutes after the last trio started its march, (R97) two shots rang out in a little gully on the edge of the forest (R 42, 43, 78, 85). The flyer was shot behind the left ear (R 42, 44), while he was walking (R 94), and when STAREK still had his hand on the American's shoulder (R 42, 43, 97).

Before the shots rang out, LARSEN had been following a few steps behind the other two (R 42). After the shots were fired, STAREK looked back and saw LARSEN with a pistol in his hand and knew he had done the shooting (R 78). STAREK was so "scared" he could not recall two shots (R 42, 44), although two were actually fired (R 51; Pros. Ex No. 2).

Next, LARSEN said to STAREK, "If anybody asks you--you are a soldier--shot while escaping" (R 78). STAREK however testified that he had his hand on the American's shoulder at all times and any plan of escape was impossible (R 42). Later the same day, STAREK told the witness NOBIS that the American had not been shot for trying to escape (R 79).

On the day of the shooting LARSEN came to JOSEPH HOLLIN, the gendarmerie chief at OBERNDORF; pretended that the American had tried to escape; and requested that the body be buried without delay (R 34). HOLLIN and a grave digger named HUBER took the dead American into the morgue and identified him through his identification tags as JACK JOHNSON, 33*96541 (R 35).

b. Against the Accused RUDOLF STAREK:

STAREK admitted that on 22 November 1944, he was in OBERNDORF on furlough visiting an aunt, and that on this day he saw six American flyers parachuting, whereupon he went to a place where a group of people were standing around the American flyer (R 73). STAREK searched the American for arms and found that he had none (R 73). While STAREK was searching the American, LARSEN slapped the flyer in the face and made his nose bleed (R 73). After BARTH gave the order to the civilians to disperse, and after BARTH and LARSEN had conversed among themselves, LARSEN came back to STAREK and said, "we go to the SALZACH and take the others" (R 75). Prosecution Exhibit Number 4 (R 44) contains STAREK's admission that "the Captain of the Wehrmacht came and gave the order to return with the flyer to the wood and ordered all civilians to leave the place."

Prosecution Exhibit Number 3 (R 42) contains these further admissions of STAREK: "Then I was ordered by the SS officer to accompany them across the field to the edge of the wood.....While we went along I had my hand on the shoulder of the flyer as I was ordered by the SS officer" (R 42). "During the walk (towards the wood) the Untersturmfuehrer kicked the flyer several times with his foot. Nobody followed us....." "Then we reached the edge of the hill which led to the wood. The flyer and I went along beside each other. My

hand was still on his shoulder. The SS officer followed a few steps behind us. A shot was fired from behind and the bullet hit the flyer behind the left ear (R 42). The only ones who saw the killing were the SS officer and I" (R 42). "Nobody else came near enough the flyer to have been in a position to shoot the flyer. The next person was at a distance of 400 meters and out of sight" (R 42). "On the way (from the scene of the shooting) LARSEN told me that in case I would be asked I should say that the flyer was shot in his escape" (R 42).

The bullet which first struck the American hit him behind the left ear (R 42, 44). STAREK claimed that he had been walking beside the American, with his right hand on the American's left shoulder (R 97), and that he had his hand there at the time the shot rang out (R 98).

Either STAREK's home (R 41), or the home of his father (R 92), had been bombed out.

c. Against the Accused AUGUST BARTH:

When Captain AUGUST BARTH joined the crowd around the flyer, he was recognized by witnesses who said that BARTH put his bicycle on the ground, went to LARSEN, whispered or said something to him, and told the civilians to leave the place immediately (R 8, 9, 13, 15, 29, 30, 42). BARTH was very nervous and he made a motion with his hand with the remark "Down toward the wood" (R 50, 61). Five or six soldiers had come with BARTH to act as guards, and BARTH and LARSEN and the soldiers went toward the woods (R 50). LARSEN, who had at first been going towards OBERNDORF, did not continue that way but went with BARTH and the soldiers (R 50). The witness FICHLER, then recovering from a leg injury, could not follow the party, but he heard two rounds fired, with four or five seconds intervening between the shots, and later saw the same flyer dead in the morgue (R 51).

Captain BARTH had the duty to deliver this prisoner to his higher headquarters immediately (R 60). He was the ranking officer on the field, although it was possible that LARSEN, as an SS officer and Gestapo official, might have disobeyed him, apparently with immunity (R 60). WILHELM DRUM was the adjutant of the same local PW camp of which BARTH was an officer, and he was sometimes BARTH's superior (R 69). DRUM testified in writing that "Captain BARTH called and ordered the shooting of one American flyer who had been captured. When I reproached him about this illegal killing...BARTH said that the commander of his battalion by the name of KAISER had ordered him not to turn over any parachutists alive"...."BARTH furthermore admitted (he had) turned over the American prisoner to Untersturmfuehrer with the remark not to bring him back alive" (R 69). "BARTH also said, 'I would have liked to kill also the other five.' " (R 69). On the stand DRUM testified that he thought BARTH had not opposed LARSEN because of the order of KAISER (R 169), and that he thought that "Barth had made a big mistake to let LARSEN have the man" (R 165). DRUM also testified that BARTH had told him that the flyer was captured by BARTH's men, and that the Untersturmfuehrer had joined them (R 165). If that was true, BARTH had original jurisdiction over the flyer, since DRUM declared --contrary to what BARTH claimed -- that BARTH had authority to give orders in OBERNDORF Austria "as far as guard detail was concerned" (R 169). DRUM further testified that "Today it is my memory... that BARTH did not oppose when LARSEN took over the flyer" (R 169).

The witness FICHLER was certain that BARTH was with the group containing the American flyer when it moved into the direction of the wood. (R 101).

6. Evidence for the Defense:

A. For the Accused RUDOLF STAREK:

RUDOLF STAREK, a German sailor, was in OBERNDORF, Austria, on 22 November 1944 on leave (R 41). On that day, when STAREK went to the area where an enemy flyer had parachuted, LARSEN noted that STAREK wore his uniform, and ordered STAREK to search the flyer (R 42). When the flyer was slapped by LARSEN, STAREK commented upon the mistreatment; and this evoked the excuse from LARSEN that his wife and children had been killed in a bombing (R 73, 89). There was no evidence that STAREK assisted LARSEN in the slapping.

The witness PICHLER, who seemed to remember clearly the active parties in the situation, was unable to recall a sailor (R 48, 56).

Another witness, PUFFER, stood ten meters from LARSEN and BARTH when they were whispering (R 15). PUFFER said that "STAREK was probably standing right at (my) side or behind (me)". PUFFER did not hear what BARTH said to LARSEN, and declared that it was "impossible" for STAREK to overhear that conversation (R 16, 75). After LARSEN talked to BARTH, LARSEN came back to STAREK; he did not say anything about the conversation with BARTH (R 76, 76), but said, "We go to the SALZACH and take the others", which caused STAREK to believe that the other flyers had also been captured (R 75, 90).

When the American was led away by LARSEN in the direction of OBERNDORF (R 14), STAREK understood that the rest of the flyers were to be brought to this town also, and that was the reason they were going down towards the woods (R 77). STAREK claimed he was ordered by LARSEN to go with him and the flyer (R 42). There was no evidence before the court that STAREK had any part in determining the direction in which the party went.

When, on the march into the woods, STAREK held the American's left shoulder with his right hand, he thought he was carrying out the Wehrmacht instructions as to the proper manner in which to maintain custody over a captured prisoner of war (R 77, 97).

On the way toward the woods the American asked STAREK if he could smoke (R 78), and STAREK indicated he saw no reason he could not, yet the Untersturmfuhrer denied it (R 78). "During the whole time" (on the last march), STAREK claimed, "the American told me things and I told him things as far as he could understand me and as far as I could understand him" (R 78). STAREK declared, "he told me how old he was; where he came from; he asked me what the name of the country here was; and the nearest town. I also asked him whether he was belonging to the boy scouts, and he told me he has also been with the boy scouts, and I had been also. On account of that he also had no reason (to fear)" (R 94). "He asked me whether I was with the navy" (R 94). "His home was in the States, in CHICAGO" (R 94). "He was 23 or 24 years old" (R 94).

LARSEN, at first, gave STAREK no reason to believe that he would shoot the American, for at the time of the slapping LARSEN did not have a pistol in his hand; at that time he was carrying his pistol in a holster on his belt (R 89). And while on the march, STAREK was talking with the flyer during the entire time and did not pay any attention to LARSEN (R 89). It was LARSEN who gave the order to march (R 90), and he said they would go with the flyer in the direction of the SALZACH river (R 90). At first, the party did not go toward the

particular point at the edge of the wood where the killing had occurred (R 90). But "they changed their direction during the walk, because the soldiers had been asked where the other parachuted flyers had been located exactly" (R 90). The shot which killed the American flyer was completely unexpected by STAREK (R 90). He did not hear LARSEN cock the pistol "because it was a 7.65 automatic" and "you don't cock that" (R 90). The American was shot "while he was walking" - not standing still (R 94).

Later in the day RUDOLF STAREK went back to his aunt's house. On the stand, his aunt declared that STAREK had then given her the impression that he was scared, particularly because he had realized that "very easily LARSEN could have hit his hands when LARSEN fired" (R 107). STAREK told his aunt that he was still talking to the young man when LARSEN shot him. The aunt also remarked that STAREK seemed to lament the death of the American flyer and that STAREK had said, "the poor boy, he was 19 years old" (R 107).

B. For the Accused AUGUST BARTH:

AUGUST BARTH, a Captain in charge of a PW and Labor camp at LAUFEN (R 113), was responsible for guard detail in an area which included LAUFEN but did not include OBERNDORF (R 112). The latter town came under the command of SALZBURG (R 134, 136, 137).

On 22 November 1944, BARTH received a telephone "call that parachuters have come down in the vicinity of OBERNDORF and that the company had already left for the searchings" (R 108). When BARTH arrived on the scene where the American airman was surrounded by people, he heard various threats to the flyer, such as, "these guys have to be killed" (R 109). Others differed, saying, "It is not possible because they are prisoners of war" (R 109). When BARTH saw the flyer accompanied by LARSEN, BARTH told the civilians, "The Wehrmacht is here and civilians have to go back" (R 109). "The crowd cried very loud and put up quite some resistance. They also cursed about the flyer" (R 109). Then BARTH declared, "If you do not go back I am going to use my weapon" (R 109).

All this evidence was introduced to prove that BARTH had initially protected the flyer. BARTH furthermore denied he then, or later, had any knowledge of LARSEN's intentions, stating that he had never seen LARSEN before or since that day, and did not know what LARSEN was then doing in OBERNDORF (R 109).

There was considerable confusion as to where the other parachutists had landed, and BARTH claimed that while talking to LARSEN and the soldiers, he pointed in the direction of the nearby woods as one possibility (R 110).

BARTH also claimed that he said, "The flyer will be taken to LAUFEN" (R 110). Then LARSEN and BARTH got into an alleged argument (R 110). LARSEN said "I captured the flyer and I intend to deliver him to the gendarmerie in OBERNDORF" (R 110). LARSEN also pointed out to BARTH, "We are in SALZBURG" to prove that BARTH had no command function in the area where he then stood (R 110). BARTH explained all six parachutists should be delivered together, in LAUFEN, and that all the other American flyers would be delivered there, so LARSEN agreed to BARTH's idea (R 110).

On the stand, BARTH emphasized that he did not say anything to anyone concerning the taking of the American into the woods to search for the other flyers (R 125).

BARTH then got on his bicycle and went away, explaining to the soldiers "I am looking for the other (flyers)" (R 110). BARTH looked back and noted that LARSEN, contrary to their agreement, was walking with the soldiers and the flyer towards OBERNDORF, but BARTH was not worried about that, stating, "I did not see any danger for the flyer, because the civilians (had) partly left, and (those remaining) did not take any hostile attitude" (R 110).

After travelling about one kilometer while searching for another flyer, BARTH heard a shot and turned back (R 111). He then met a soldier who notified him that "the flyer has been shot" (R 111). BARTH next met LARSEN who explained "the flyer tried to escape" (R 111). BARTH asked, "why did you shoot him" and also pointed out "You had a lot of people with you!" BARTH added another question, "What do you have to do in this vicinity anyway?" (R 111). At this, LARSEN bridled and retorted, "It does not concern you; it is my responsibility" and then stated that he (LARSEN) would report the shooting to the Gendarmerie in OBERNDORF. (R 111).

Later that day the question of the proper delivery place for the other five flyers came up. They had been captured. In a conversation with Wilhelm DRUM, BARTH recalled that BAD AIBLING, an air base, was the proper place (R 113), and he sent them there at night for their own protection (R 114). This precaution aided the flyers to escape harm, since some civilians had tried to attack the five flyers at a railroad station. BARTH had previously provided billets, medical care and food for these flyers (R 114).

BARTH's battalion commander, KAISER, reprimanded BARTH for delivering the five flyers to BAD AIBLING (R 114), and said he should have turned them over to the Nazi Party's Ortsgruppenleiter or Kreisleiter (R 115). This procedure had been ordered (R 115), and the inference was clear that BARTH had disobeyed it to protect the five flyers. This point of the defense became confused however, for BARTH also said that he was expected to turn the flyer over to the Ortsgruppenleiter or the battalion and that if he had obeyed that order he would have notified "the battalion or the Kreisleiter" (underlining supplied) (R 116).

MARTIN KOCHENBERGER, formerly a Lt. Colonel, and the supervisor of BARTH, stated that BARTH had told him that when he, BARTH, had arrived at the place where the flyer was surrounded, that the flyer was already a prisoner of the Gestapo man LARSEN (R 137). BARTH had also told KOCHENBERGER that he wanted to take the flyer to LAUFEN, but LARSEN insisted on keeping custody over the flyer (R 140). KOCHENBERGER doubted that an SS officer would have obeyed any order of BARTH, even if he had been a full colonel (R 143). KOCHENBERGER heard DRUM say that BARTH had given an order to shoot the flyer, but KOCHENBERGER doubted DRUM's statement (R 136, 140).

WILHELM DRUM, the former adjutant of BARTH's organization, said that BARTH had told him "that the flyer was captured by BARTH's men, and ... that LARSEN had joined them", yet DRUM "got the impression that LARSEN was the one who originated the shooting" (R 168). DRUM further testified that, of his own free will, BARTH had supplied food for the five live flyers on their transport to BAD AIBLING (R 170).

On the stand DRUM repudiated or modified almost all he had said against BARTH in his written statement. He had written that BARTH had told him that he, BARTH, had delivered the prisoner over to LARSEN with the remark notto bring the prisoner back alive (R 69); but when asked about this statement, DRUM answered, "It is not in my

memory" (R 172). DRUM also avoided confirmation of his statement in writing that BARTH had said, "I would have liked also to kill the other five" (R 172). Repeatedly DRUM admitted he had had "big differences with BARTH" (R 175), and DRUM also declared, "When I read the statement today, I have the impression I have treated him very harshly. I could have expressed it in another way, but at that time I was still angry with him" (R 177). DRUM also testified that BARTH was in the habit of exaggerating very much (R 175). Also significant was DRUM's testimony that he had written his statement against BARTH at a time when he thought BARTH was dead (R 175). Finally, DRUM testified that in his own official report on the shooting, DRUM had not accused BARTH of taking any part in the shooting, but had merely been present (R 178).

7. Proceedings:

The Military Commission which tried this case 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, European Theater, AG 250.4 GAF-AGO, 10 October 1945, subject: "Authority to Appoint Military Commissions", as amended by radiogram, Headquarters, United States Forces, European Theater, reference Number S-7395, 27 December 1946. The Commission was appointed by paragraph 10, Special Order Number 170, Headquarters, United States Forces in Austria, 15 September 1947. 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 by proper indorsement to the Trial Judge Advocate for trial. The charges were served on the accused five days prior to the date of the trial. The accused were represented by two United States War Department Civilian attorneys; this representation was a matter of personal choice on the part of the accused (R 1, 2). A fair and impartial trial was held. Three competent interpreters were sworn and the entire proceedings were interpreted in the German language for the benefit of the two accused.

8. Jurisdiction:

That a Military Commission has the power to try enemy nationals for offenses against the laws and usages of war is settled. Such a Commission is a tribunal created under the common laws of war, and has, under international law, jurisdiction of offenses against the laws of war (SP3GW 1943/17871) and over individual perpetrators thereof (Articles 2 and 3 of the Geneva (Prisoners of War) Convention, 27 July 1929; Article 33, paragraph (c) of the Annex to the Hague Convention Number IV of 18 October 1907; Change 1, 15 November 1944, paragraph 345.1, FC 27-10, Rules of Land Warfare). It is beyond question that the offense in this case -- the murder of an unarmed, surrendered American prisoner of war -- was a violation of the laws of war, properly triable by Military Commission having custody of the offenders against those laws.

9. Procedure:

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

Both the accused were arraigned at the beginning of the trial in the usual manner and each pleaded not guilty to the particulars and not guilty to the charge. The record reveals no errors or irregularities which affected adversely any of the substantial rights of the accused. The trial was held with impartiality. A full opportunity was given each of the accused to present any matter which he desired to bring forward for the consideration of the Commission.

The Law Member of the Commission explained to each accused his rights to take the stand and testify either under oath or not under oath, or remain silent (R 72, 107-108). The Law Member warned each that if he took the stand to testify, he could be subjected to cross examination, whether he elected to testify under oath or not under oath. The Law Member further warned the accused BARTH that if he remained silent, the Prosecution was at liberty to comment upon his silence, but the Law Member failed similarly to warn STAREK.

The risk of objection to cross examination when testifying not under oath, and the risk of adverse comment in event of election to remain silent, are two deviations from the traditional courts martial procedure. In the case of the accused STAREK, the possible damage to his substantial rights was cured completely by the Commission's finding that he was not guilty. In the case of the accused BARTH, the Reviewer scrutinized the record and discovered that prior to notification to BARTH of his rights and risks as a witness, that BARTH had advised the Court through Counsel that he "desired to take the stand and make a sworn statement". (R 107). BARTH was then warned that he would be subjected to cross examination if he chose to testify under oath (R 107), and he was fully aware of that risk (R 107). BARTH was then notified of his alternative rights, those which, as stated, deviated from the accused's rights under traditional procedure, but he maintained he was "going to make a sworn statement" (R 108). In the face of these facts, it is impossible for the Reviewer to contend or believe that BARTH's substantial rights were affected in any way by the deviations expressed by the Law Member, and it is unnecessary to enter into a discussion of the merits of these expressions. The Reviewer also notes that War Crimes Memorandum Number 3, paragraph 4, specifically exempts War Crimes Commissions from the rules which bind Courts martial. However, it is the Reviewer's opinion that War Crimes Memorandum Number 3 need not be invoked in this situation, since the accused himself determined to make a sworn statement, subject to cross examination.

One other procedural point became significant during the trial. After two fruitless attempts to secure Wilhelm DRUM as a witness, his statement was admitted into evidence as Prosecution Exhibit Number 5, (R 88). Then DRUM was found and became a witness (R 163). Defense counsel argued that either DRUM or DRUM's written statement should be rejected (R 163), pointing out that War Crimes Memorandum Number 3 required the production of the best evidence available. The Commission denied the motion, and ruled that both DRUM's written statement and DRUM's oral testimony, would be admitted (R 163). In view of the facts that DRUM's written statement had already been heard by the Commission, that it was used by the prosecution as a means of refreshing the memory of the witness, and that the defense took advantage of DRUM's presence as a live witness to cross examine him on points specified in DRUM's written statement, it cannot be held that the ruling adversely affected the rights of the accused. Moreover, War Crimes Memorandum Number 3 does not limit the testimony of any witness to that which he can independently recall nearly three years after the event. Any document any witness has prepared, which has a bearing on the issue, is itself admissible, providing it has probative value to a reasonable man (War Crimes Memorandum Number 3, paragraphs 5a and 5d).

10. Sufficiency:

The record is legally sufficient to support the finding that RUDOLF STAREK was not guilty of either the charge of the particulars; and it was legally sufficient for the further finding by the Commission that AUGUST BARTH was guilty of both the charge and particulars.

There was ample evidence before the Commission that RUDOLF STAREK did not participate in any way in the planning or ordering of the killing of JACK JOHNSON, and that the part he played was carried out while he was innocent of guilty knowledge or desire to join or assist in the murder of the American airman.

The young sailor, STAREK, appeared to be, and was found by the Commission to be, innocent, although he was present at the killing. However, the other accused, AUGUST BARTH, was with reason found guilty of participation in the killing, although he was not present at the shooting. The evidence which supported that finding was established by witness after witness. BARTH was heard to state to LARSEN, "Down to the wood". BARTH accompanied the group part of the way towards the wood; and BARTH knew that his own battalion commander, KAISER, wanted all parachuted flyers killed. Furthermore, BARTH was the senior officer present and had authority as to guard detail in the area. Yet, he permitted the American to be taken away under circumstances in which the inferences almost inevitably led to the conclusion that BARTH knew the flyer was to be killed by LARSEN. Such facts provide sufficiency of evidence for the finding that BARTH was guilty of the particulars and charge.

11. Sentences.

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. This is in accordance with the general principles of international law that all war crimes are subject to the death penalty, although a lesser penalty may be imposed (see paragraph 357 FM 27-10, Rules of Land Warfare, page 89).

The accused AUGUST BARTH was sentenced to be confined at hard labor for a period of twenty (20) years.

The record discloses a wealth of evidence to support a strong penalty. The sentence awarded by the Commission to BARTH is authorized under the Rules of Land Warfare, and the Reviewing Attorney can see no reason for that sentence to be vacated, modified, or reduced.

12. Opinion:

It is my opinion that:

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

13. Recommendation:

It is accordingly recommended that the sentence of AUGUST BARTH be approved. No confirmation of sentence is required where the Commanding General, United States Forces in Austria, is the appointing authority, as is the case here (paragraph 3h, War Crimes Memorandum Number 3, this headquarters, 23 April 1946). Accordingly, action designed to carry the foregoing recommendation into effect, should it meet with your approval, is submitted herewith.

/s/ Richard A. Ruppert
/t/ RICHARD A. RUPPERT
Review Attorney
War Crimes Branch

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

/t/ G. R. BARD
Lt. Colonel JAGD
Judge Advocate