

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

30 July 1947

SUBJECT: Review of Proceedings of a Military Commission in the Case of  
the United States versus Erich WANDREY

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 accused having been referred to me for review under the provisions of paragraph 14a, War Crimes Memorandum Number 3, this Headquarters, 23 April 1946, I submit herewith my review, with opinion and recommendations and reasons therefor.

2. Trial:

The accused, a German national, was tried in Salzburg, Austria, from 8 July 1947 through 15 July 1947, by a military Commission, appointed by Special Orders No. 136, paragraph 5, dated 2 July 1947, and Special Orders No. 138, paragraphs 11 and 12, dated 7 July 1947, Headquarters, United States Forces in Austria.

3. Findings:

The accused was tried on the following charge and particulars:  
Charge: Violation of the laws and usages of war.

Particulars:

In that Erich WANDREY, a German national, did, at or near SALZBURG, Austria, on or about 14 October 1944, wrongfully encourage, aid, abet, and participate in the killing of three members of the United States Army, who were then and there unarmed and surrendered prisoners of war in the custody of the then German Reich.

The 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 WANDREY guilty of both the charge and 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 WANDREY to be hanged by the neck until dead.



## 5. Evidence for the Prosecution:

On or about Saturday, 14 October 1944, sometime in the afternoon, a four-engine American bomber crashed near Lettenstatten District, Gemeinde Moos, close by the village of MLEIBURG, Austria (R11). Shortly before the crash, at least "three flyers, three parachutes" floated to the ground (R 11). Hubert FLAUTZ, visiting the scene of the crash, saw "a tall, blond man"... "an American flyer" being marched to prison (R 44). Two of the three flyers were apprehended by members of the 13th SS Polizei Regiment and taken to the Orderly Room of this unit, which was located in the old school house in MLEIBURG (R135). The third flyer had been apprehended by the Gendarmarie at AICH, five or six kilometers away (R 135). The two flyers were in the orderly room when the Accused returned from a patrol (R135). He was a Zugwachmeister, or Sergeant (English translation of Pros. Ex. No. 14, p3) in the Reserve Constabulary Police, 13th SS Polizei Regiment (R169). Upon his return, the Accused was ordered by the First Sergeant, SCHWINGER, to bring the third flyer back from AICH (R135). During the same afternoon, around 1630 hours, Alice THURN, a countess who resided in a nearby castle, came to the schoolhouse to act as interpreter (R 5). There she saw a "tall American officer surrounded by SS men" (R5). This officer refused to state his nationality, but gave his name as "John MOCKE" and his age, "22" (R 6), during the interrogation which lasted one-quarter hour (R 8). Somewhat later, at approximately 1730 hours, the Accused returned from AICH with the third flyer (R 135). Present in the Orderly Room when he came back with the third flyer were First Sergeant SCHWINGER, the Company Commander named BUENGER, two unnamed company clerks, and the two other prisoners (R 135). The accused left the Orderly Room and proceeded to his quarters (Pros. Ex. No. 14, p1). These were on the same floor, a few meters away (R 138). Ten to twelve men were in the same room with the Accused (R 167, 168). The flyers were brought here a little later and were given food and coffee (R 139). The three airmen remained in this room with the Accused and some other Germans for thirty minutes or one hour, when they were taken to the Orderly Room where they remained until it was dark. (English translation of Pros. Ex. No. 14, p2). Then "either the First Lieutenant (BUENGER) or the First Sergeant came" to the Accused, who was in his own room, and told him he "should get ready and participate in bringing the flyers away" (English Translation of Pros. Ex. No. 14, p3). The Accused stated, "When I received the order to get myself ready, I was told the flyers were to be shot." (Underscored portion supplied for further explanation; see English Translation of Pros. Ex. No. 14 p3). Two other official translations of the underscored portion were included in the Record: "the flyers ought to be shot", and "the flyers were supposed to be shot" (R92). When this comment of the First Sergeant (which appeared incapable of exclusively exact translation) was given to the Accused, he replied, "I cannot do that." He was "then told that First Lieutenant BUENGER would do that, that I did not have to do it." (English Translation, Pros. Ex. No. 14 p4). The Accused complied with the order, arriving in the Orderly Room when two of the prisoners already had their hands crossed and tied behind their backs, and the tying of the third one's hands was nearly completed (R 141). The flyers were immediately thereafter escorted out of the Orderly Room, downstairs, and into the schoolyard (Pros. Ex. No. 14, English Translation, p 3; R 141; R 155). All three guards were armed with machine pistols (R 160). While the group of three Americans and three guards proceeded downstairs and out of the building, SCHWINGER was at the head; the three Americans followed in single file; and they were followed by BUENGER and the Accused (R 141; Def Ex "D"). Shortly after the group left the exit of the schoolhouse, SCHWINGER changed his position (R 142, 167). As then situated, the group proceeded with the three Americans leading, single file 80 centimeters or so apart; with the Accused four to six meters in the rear of the last airmen; with BUENGER two to three meters on the right of the Accused and slightly in front of him; and with SCHWINGER on the left, but otherwise occupying the same relative position as BUENGER (R 142; Def Ex "E"). No one walked in front of the Americans after SCHWINGER altered his station (R 154), yet the formation proceeded in darkness a few meters straight out of the building, then turned to the right, then turned left on a narrow



to walk" on a path they did not know (R 155). At a spot on the route described, one hundred meters or so from the exit of the schoolhouse building, and some twenty to thirty meters from a latrine, the flyers were killed by two, three or more bursts of machine pistol fire (Proc. Ex. No. 14 p5; R 143). Hoone called "halt" or "stop" before the flyers were shot (R 162). Witnesses HECHER (R 13, 14), KLINGNER and KLADE heard these shots. These latter two witnesses declared that there was an interval of time between two bursts, sufficient in length to open a window, talk to a passing guard, and then close the window - before the second burst came (R 17, 18, 24, 25).

KUENGER is known to have fired several bursts (English Translation of Proc. Ex. No. 14, p 5; R 143), shooting almost at point blank range from his position to the right and rear of the three Americans. At a meeting that night, KUENGER, in a drunken state, reported to his Commanding Officer, MAJOR THORGE, and then declared that "he had shot the flyers while they were trying to escape" (R 173).

Gottfried KLADE, a pupil of the school, noted traces of blood from the school latrine to the path (Def. Ex. "B", positions "2" and "4" respectively; R 40, R 26). The path was that on which the Accused declared the flyers were shot (R 146), the distance from the latrine to the path being about twenty-five meters (R 39).

No direct evidence was presented to indicate the participation of the Accused in this shooting, other than that contained in his written admission Proc. Ex. 14; but the Accused was seen by one FINK, a gendarme who told the witness BRACH that he, FINK, had seen the Accused escorting the three flyers accompanied at that time by SCHWIEGER and BELACZY, a Hungarian Policeman; but whether that escort detail had immediately preceded the shooting was not definitely established (R 102).

Two days after the killings, SCHWIEGER met Maria PARTZ and told her, "Yes, we shot them"; SCHWIEGER also said "it was not his fault, that Major THORGE had ordered it --if he had not wanted to do it, he would have been shot himself." (R 42). SCHWIEGER also told Maria PARTZ that before the Americans were killed, one rose and shouted "Long live the American Nation", the second called to his mother; and the third merely cried (R 132).

Following the shooting, the Accused declared, the bodies of the Americans were placed close to the new school, which was one part of the general compound in which the old schoolhouse with its Orderly Room was located. The bodies were not placed in the schoolyard, but "on the outside" The Accused could not say whether he carried one of the deceased flyers to this position, nor whether KUENGER carried any of them. They were already dead when they were transported. At this time the Americans still wore all their clothing, and were dressed as they had been when they left the Orderly Room, wearing pants, boots, and jackets or blouses. At the time of the shooting, the Accused denied that "they" had fractures "on their skulls", but he did not know whether one of the Americans had a fracture. (Entire paragraph extracted from English Translation of Proc. Ex. No. 14).

About 2230 hours on the evening of the shooting, a police official came to Hubert PLATZ, the "community secretary of the buergermeister of BLUMBERG", whose official duties included maintenance of the burial register (R 44,45). The visiting official informed PLATZ that "the captured American flyers had attempted to escape and had been shot in that attempt; that a place for burial was to be prepared"(R 45); but "it was supposed to be concealed from the rest of the population" and should be "considered unknown or secluded" (R 45). PLATZ finally suggested a spot near the main entrance of the cemetery, covered by unused stones (R 45, 46).



The next morning, 15 October 1944, at 0430 hours, a burial party, including the Accused and SCHWIGER, picked up the three bodies (R 146). They were then located around the end of the new schoolhouse at a different position than that at which they had been when the Accused left them (R 146). The Americans were transported on a carriage to the cemetery approximately one kilometer away and apparently buried in the place suggested by SAUTZ; all three were buried in a common grave, without a marker. (English Translation of Pros. Ex. No. 14, p 7).

On 21 June 1945, Josef STEHL a photographer then attached to the British 8th Army, assisted in the exhumation of the three flyers (R 148). On the three bodies were found the following identification tags of the standard type used by the United States Army: "JOHN HONKE Jr, 3-712874 T43-44 A P"; "G. T. WOODBINE II 20234097 T43 A P"; and ROBERT E. SPICER 16381722 T43-44 C P". (Pros. Ex. Nos. 13,11,12).

An Austrian Doctor named Hans AUSSCHER examined the bodies at the time of the exhumation, thereafter certified that "all three.. were killed by pistol shots, fired from a close distance.. In regard to the part fracture of the skull, physical power with some tools or clubs which were not sharp must have been used" (R 67; Pros Ex No. 13).

An original written statement in German by the Accused, was introduced. It was Prosecution Exhibit No. 14, which was provided with an official English Translation. Both of these documents have been referred to frequently in the above resume of the total evidence for the Prosecution.

#### 6. Evidence for the Defense

The Defense Counsel specifically waived all attempts "to defend this case on the basis of any attempted escape or the basis of superior orders"(R 182). The innocence of the Accused, defense counsel indicated, would be revealed through inquiry into two questions: "(1) Who fired the shots? and (2) Did the Accused accompany the flyers knowing that they were to be shot in his presence?" (R 182). Examination of the total evidence, however, divulged additional defenses or mitigative materials. Actually, the defense adduced a variety of testimony intending to prove that the Accused did not voluntarily accompany SCHWIGER and RUENGER when the Americans were killed; that in fact he refused to accompany them when first notified generally that at an undetermined time the "Americans should be, or ought to be, shot"; that he was peremptorily ordered to come quickly to guard the prisoners on the march; that as the lowest ranking man of the three guards he was militarily forced to obey; that it was personally and physically dangerous for the Accused to disobey his superiors; that he did not know the flyers were to be shot on the route to the district jailhouse, toward which he thought the flyers were then being taken; that to his complete surprise RUENGER immediately shot the flyers; that RUENGER alone did any shooting; and finally, that while falsely claiming the flyers had tried to escape, RUENGER proclaimed the deaths were the result of his own exclusive act in his oral report to Major FROGE, the Commanding Officer of the 13th SS Polizei Regiment.

#### a) Testimony of the Accused:

To establish his defence, the accused elected to testify under oath, after he had been properly warned of his rights (R 134). He testified that on 14 October 1944 he came back from a patrol and reported to the Orderly Room where he saw two prisoners; and was then ordered by the First Sergeant, SCHWIGER, to go to the Gendarmerie Post ALCH, about five kilometers away, to pick up a third prisoner (R 135). The accused did not employ compulsion to obtain custody of the third flyer for he was delivered freely (R 135). When the Accused returned to the Orderly Room, the two other prisoners were still there in the presence of the Company Commander, RUENGER; First Sergeant SCHWIGER, and two company clerks (R 135).



He did not witness any interrogation of the Americans (R 87). After returning to the Orderly Room, the accused left there and proceeded alone to his own room nearby, at about 1730 hours (R 136, 139). Somewhat later, the First Sergeant brought all three flyers into the room of the Accused, who thereupon offered the flyers something to eat, but they refused, preferring items they had in their pockets, although they did accept some coffee (R 139). Other US men were in the same room (R 87, 140) during the half hour that the flyers were eating (R 87, 139). After this period, the First Sergeant came and took the flyers back to the Orderly Room (R 139, 148). About one hour and a half later SCHWIEGER entered the Accused's room (R 140). During this interval, the Accused had not left his room insofar as he could recall, nor was he in the Orderly Room (R 140). When SCHWIEGER returned "he ordered" the accused "to dress and report with arms in the Orderly Room" (R 140). At this time SCHWIEGER said, "something like the flyers shall probably be shot" (R 140). Thereupon the Accused answered "Without me, I could not do any such thing" (R 140). The Accused declared that he did not believe SCHWIEGER "because in every trifle they talked about court martial and shooting; that was every second word they said" (R 140). SCHWIEGER had added "Come on, Come on" to his order, so that from the time that SCHWIEGER came into his room until the Accused reported to the Orderly Room, "it can have been only one minute" (R 140). When the Accused arrived, two of the prisoners already had their hands tied behind their backs and the third one's hands were just being finished (R 141). It was "not even three minutes" the Accused next declared, from the time he arrived in the Orderly Room until he departed (R 141). No instructions were given to him outside of an order from his Company Commander who said "You walk in back of them" (R 141). The accused was merely told that the three prisoners would be marched away and he "did not hear anything being said to anybody" (R 141). On the way from the floor in which the Orderly Room was located, one floor above the ground floor, the group had to go downstairs through a doorway and into a courtyard (R 138). On the way downstairs, the First Sergeant, BUENGER, was in front, then the three flyers came in single file, followed by both the accused and his Commanding Officer in the rear (R 141, 142, Def Ex "D"). All three German guards were armed with machine pistols or sub-machine guns (R163). Near the exit from the building the positions of the party changed so that the three flyers then proceeded ahead of their guards, in single file formation, about eighty centimeters in back of one another, with the Accused four to six meters directly in the rear of the last flyer and with SCHWIEGER on the left and BUENGER on the right of the Accused, although both were slightly ahead of him (R 142). While in this formation, the party proceeded to the right of the exit of the schoolhouse, then made an abrupt left turn and proceeded up a nearby path or road (R 143).

While the formation was still in the schoolyard, the Accused asked his Commanding Officer, "where do we go?" whereupon BUENGER answered "You mind your own business" (R 143). As to any additional information or instructions relative to the purpose of the mission, the Accused testified "furthermore nothing else was said to me" (R 143). The Accused thought he heard BUENGER talking to the Americans (R 154) but the testimony on this point is extremely hazy. The Accused could not recall anything said during the walk from the Orderly Room to the site of the firing (R 152). He could not say who gave the Americans the instructions where to walk over a course in the dark with at least two sharp turns in it (R 155). But he thought BUENGER "said something to the Americans" or made himself understood about the directions", although he could not remember that BUENGER had done either (R 155), nor did the Accused hear the Americans say a word, talk, or cry (R 156). The Accused testified that he did not believe the flyers were to be shot, but that they were to be placed in custody in the district courthouse jail, a few hundred meters away (R 143).



"Suddenly and unexpectedly for us", the Accused insisted, his Company Commander shot from the side of the flyers" while "we were walking along the walk (R 143). He did not notice any attempt on the part of the flyers to escape (R 143) and no one called "halt" or "stop" (R 162).

The Company Commander, BUENGER, was the only one who fired, using a machine pistol or sub-machine gun, his usual weapon, firing in such a way that persons in the school as well as SCHWIEGER "might" have been endangered (R 166, 167). The shooting occurred "five minutes, at most six minutes" from the time when SCHWIEGER came to the Accused in his room, and ordered him to report (R 145). After the shooting had taken place, the Accused remained at the spot where the shots were fired "perhaps five minutes" (R 145). He recalled that BUENGER told the First Sergeant "he was going to send men down to carry the bodies away and he wanted me to stay here that long" (R 144). During the five minutes while the Accused was waiting for other men to arrive, he did "nothing" since "I was puzzled as to what had happened, I did not do anything" except "go a few paces forth and back"; the Accused also did not speak to SCHWIEGER, who was likewise pacing to and fro (R 145). When the Accused left the scene, the bodies still lay where they had been shot (R 142, 143, 146).

The Accused did not see Lt. BUENGER again that night. However, SCHWIEGER came into his room and ordered him to be ready at 4:30 the next morning to help bury the corpses (R 146). The next morning at 4:30 the accused went to a place to the rear of and around the gymnasium where these three dead bodies had been removed from the scene of the shooting, a distance of approximately 75 meters (R 146, Def. Ex. "C", positions A and B, respectively). On the burial party, a few men were present in addition to SCHWIEGER and the accused, but he did not remember their names (R 146; English Translation Pros. Ex. 14, p7).

The Accused disclaimed any knowledge that the flyers were to be shot, stating that he "took it to understand that the flyers should be shot through a court decision and that" he thought "he should carry out the order of the court's decision" (R 150). When cross examined and asked, "You knew when you left the room you weren't going to do any shooting," the accused retorted, "I didn't know at all that the flyers were to be shot" (R 150). The purpose of his going with the prisoners, the Accused thought, was to escort them to the jail and to prevent their escape (R 151); however, "nobody said where we were going", "I did not know where we had to go" (R 151). When, upon cross examination he was asked how he arrived at the conclusion that they were going to jail, the Accused replied, "because all prisoners we turned over there" (R 151). By prisoners he referred to partisans, no Americans having been captured prior to this time (R 151).

There was a variation in the accused's statement (Pros. Ex. No. 14) from what he testified to on the stand with reference to his helping to carry the dead Americans from the place of the shooting to the place where he found them the next morning at 4:30. As to this point, the Accused stated that after he had thought for ten days about the matter subsequent to his interrogation, he was certain he had not helped carry the bodies (R 157).

In further explanation of any differences in his testimony on the stand from that given in his statement (Pros. Ex. No. 14), the accused stated that during the interrogation he sometimes "made an attempt to answer the questions more in detail or to explain some questions" but he was told that he "should answer the questions only short" (R 163). The Accused also explained that when he examined his own typewritten admission, he did not



"make any bigger corrections" (R 163).

b. Other Defense Witnesses

To prove that the shooting of the three Americans was done exclusively by RUENGER, the defense presented several witnesses. Joseph WENGER, who had been a Gendarmerie official in BLEIBURG, remembered that upon the night in question he had gone to the "Gasthaus Lamm" in BLEIBURG, with various members of fellow Gendarmerie men, Major MOLL, 1st Lt. GRADISCHNIK, Meister LINTSCHINGER and Meister HABERL (R 114), and he saw several SS policemen there, including Major TROEGE, 1st Lt. RUENGER and Hauptwachmeister KRACH (R 114). WENGER saw Lt. RUENGER address himself to Major TROEGE, complaining that Major MOLL, the Gendarmerie leader, had reproached him in connection with the shooting of the three Americans (R 115). Shortly thereafter "a slight hand-to-hand fight" arose between MOLL and TROEGE and 1st Lt. GRADISCHNIK (R115).

Emil HABERL, also from Gendarmerie, was in the "Gasthaus Lamm" in BLEIBURG, and he also saw the argument between RUENGER and Major MOLL, and he recalled that RUENGER slammed his hand on the table and said "even if you are a major of the Gendarmerie, you do not have to reproach me" (R 120). "Then Major TROEGE arose and they started arguing, and then 1st Lt. RUENGER told Major TROEGE that Major MOLL had reproached him" (R 120). "Afterwards", the witness HABERL testified, "Major MOLL made the remark that Lt. RUENGER had asked him why the Gendarmerie did not turn over their prisoners to the detachment". Upon that, Major MOLL called, "so that you could have shot those also" (R 120).

Joseph LINTSCHINGER had been in front of the Gendarmerie Post in BLEIBURG on the evening of the 14 October 1944, and had at that time heard sounds which seemed to be "machine pistol fire" (R 129). Later, he also was at the "Gasthaus Lamm" where he heard RUENGER report to Major TROEGE, as follows, "major, I report three American flyers shot when escaping on their way to the district guard" (R125). LINTSCHINGER said, "RUENGER made the report for his own person, there was no other name mentioned" (R 125).

In an intimation that personal physical danger would have resulted to the Accused if he had dared to refuse to obey an order handed down by one of Major TROEGE's officers, the Defense brought back Maria PARTE, previously a prosecution witness. She testified that SCHWIEGER "said that the Major had ordered that they had to be shot" (R 131); that "if he, SCHWIEGER, had not wanted to do it that he would have been shot himself" (R 42). SCHWIEGER also said that "the major had shot one of the men because he had refused to kill a Partisan" (R 130,131). The Accused, however, when he was on the stand could "not make any statement about that" (R 152). SCHWIEGER, in speaking to PARTE never mentioned the Accused in connection with the shooting, but he said "RUENGER was... present, and the major (TROEGE) was guilty of the whole thing" (R 130; 40-43).

Around 2100 hours of the night of the shooting, SCHWIEGER came to the home of PARTE and at that time "had jewels he did not have any other time" and "a wallet in his hand with foreign money" (R 42). On this occasion he told the witness PARTE "Other people have more money than we" (R 42). KRACH, a prosecution witness, saw Lt. RUENGER with a gold wrist watch, a ring, and a silk handkerchief on which a map was drawn, which had been taken from the flyers (R 110). The record bears no evidence that the Accused had anything belonging to the American flyers.

Fritz MOLL, formerly a Gendarmerie major in charge of the Post in AICH in BLEIBURG, appeared as a defense witness to describe the argument between himself and RUENGER; he gave testimony to the effect that he had learned about the shooting of the flyers; that he thereupon "did not intend to turn" (any more flyers) "over to the SS"; and that he



A main defense point to which MOLL testified was that RUEBGER, when he first came to the "Gasthaus Lamm" on the night of the shooting, "saluted Major TROEGE and then reported that he had shot the flyers while they were trying to escape" (R 173).

#### 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, United States Forces, European Theater, AG 250.40AF-200, 10 October 1945, subject: "authority to appoint Military Commissions", as amended by radiogram, Headquarters, United States Forces, European Theater, Reference Number 8-7395, 27 December 1946. The Commission was appointed by paragraph 5, Special Orders No. 136, Headquarters, United States Forces in Austria, 2 July 1947, and by paragraphs 11 and 12, Special Orders Number 138, Headquarters, United States Forces in Austria, 7 July 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 was represented by two U.S. War Department Civilian attorneys. He did not desire to introduce any other special civilian defense counsel, and had been fully advised of his rights as to legal representation. A fair and impartial trial was held. Five competent interpreters were sworn, and the entire proceedings were interpreted into the German language for the benefit of the 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 law of war and has, under international law, jurisdiction of offenses against the laws of war (SPJGW 1943/17671) and over individual perpetrators thereof (Articles 2 and 3 of the Geneva (Prisoners of War) Convention, 27 July 1929; Article 23, paragraph (c) of the Annex to the Hague Convention Number IV of 18 October 1907; Change 1, 15 November 1944, paragraph 345.1, FM 27-10, Rules of Land Warfare). It is beyond questions that the offense in this case — the murder of three unarmed, surrendered American prisoners of war — was a violation of the laws of war, properly triable by a 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, which is in accord with paragraph 4, War Crimes Memorandum No. 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 he pleaded not guilty to the particulars and not guilty to the charge. The record revealed no errors or irregularities of importance or which affected adversely any of the substantial rights of the accused. The trial was held with impartiality and a full opportunity was given to the accused to present any matter in his defense which he might desire to. The Commission explained fully to the Accused his right to remain silent, to testify as a witness, or to make an unsworn statement. Although hearsay evidence was admitted in several instances, this is clearly admissible under paragraph 5 War Crimes Memorandum No. 3, cs, the only condition being that it have probative value to a material



Certain situations require comment. First, as is noted, the pertinent to authority contained in paragraph 6, War Crimes Memorandum Number 3, War Department, Adjutant General's Office Form Number 115, was used as the Charge Sheet. On page 3 of this form in the "Affidavit" of the Charge, the Accuser swore that he had "personally signed the foregoing charges and specifications (underscoring supplied). The word "specifications" however, had been crossed out on page 2 of this Charge sheet and the word "PARTICULARS" substituted therefor. In War Crimes cases, the word "particulars" is usually employed in preference to "specifications", but in legal effect the two words are almost synonymous. Reference to Wharton's Criminal Law, #1655, page 1931, reveals that "Whenever the Court deems it necessary, a bill of particulars will be ordered to supply the defendants with the facts on which the prosecution relies to establish the general offense". In this case, the facts which the Accused was required to answer were clearly specified in the portion of the charge sheet entitled "Particulars"; and the use of a substantially synonymous word in the Affidavit did not mislead the Accused. Indeed, no issue was made of it by either Counsel or by the Commission. Although the Accuser should have perhaps sworn that he personally signed the "foregoing charge and particulars", his affidavit complied substantially with the formal legal requisites of a proper charge; and as signed, the Charge possessed full legal effect.

Next, the bitter contentions of opposing counsel compel consideration of questions relating to the admissibility of Prosecution Exhibit No. 14 (R 68, 69), particularly to that portion of it which had been erased with typing showing over the erasure (R 69, Pros. Ex. No. 14, page 3, 7th answer). The Law Member ruled (R 69, 73, 83, 84) correctly that the document itself was admissible under the prescriptions of War Crimes Memorandum No. 3, since it contained evidence of probative value to a reasonable man. As to that portion which had been erased and which had then been retyped over the erasure, the rule announced in Wharton's Criminal Evidence, #307, applies. This rule declares "where suspicion is raised as to the genuineness of an altered document, the party producing the document is bound to remove the suspicion by accounting for the alteration". The Trial Judge Advocate, who had conducted the interrogation, took the stand himself to account for the alteration and explained that the document was submitted to, read, and signed by the accused in the same form as it was presented to the Court (R 71, 72, 73, 79, 80). Mrs. Gunkel, who had reported this statement of the Accused in German shorthand, testified that the transcription had been made in the office of the War Crimes Investigation Team (R 77, 78). Since the Accused read and signed the document as erased and retyped, the admission of this portion of his statement did not injuriously affect his rights.

The proceedings satisfied all of the requirements of a fair trial.

### 13. Sufficiency:

The record is legally sufficient to support the findings and the award of a sentence against the accused.

When the Prosecution completed the presentation of its evidence, the Defense moved that the Commission acquit the Accused, contending there was no "showing of an unlawful killing" and no evidence to link the Accused with the actual shooting, except hearsay testimony from one FINK who had seen the accused leave the building with the prisoners. No other witnesses connected the Accused with the killings except the Accused himself in his statement. This, both counsel termed a "confession" (R 111, 112).

Following able argument by the Prosecution, the Law Member ruled "The evidence before the Court is substantial enough, considered with all its inferences and presumptions, to establish the necessary elements of the crime charged" (R 112).

This ruling was sound. The "showing of an unlawful killing" was clearly (but not exclusively) demonstrated in the case of "John NUSKE", one of the victims. The Witness, Countess THURN recalled clearly that on



2300 and 2400 hours in the evening of the day Countess THOMAS had seen "John NOCKE". Around 2230 hours that night, a police official visited the burial official, Hubert PLAUTE and obtained the location of an "unknown" or "secluded" burial spot "supposed to be kept from the rest of the population" which was to become the grave of the American flyers "who had been shot while trying to escape" (R 45). On 21 June 1945, Josef STELZL helped exhume a grave in the spot previously suggested to the police official by PLAUTE (R 49). There three bodies were unearthed (R 49). One of them bore a standard type U.S. Army Identification Tag on which was stamped the name "John NOCKE", a name which STELZL remembered "perfectly" (R 54, 55). A doctor, Hans KUSCHMAN, who assisted in the exhumation, who saw the three bodies laid out, certified that all three men had died from pistol fire at close range (R 67). No marker was found on the common grave (R 49).

In the face of this chain of events, all established by direct, positive evidence, the contention of the defense counsel that an "unlawful killing had not been shown" was without foundation.

The connection of the accused with this killing is more difficult to establish. The witness KRACH was told by a Gendarm named FINK that he had seen the accused guarding the flyers. That fact alone was sufficient to require an explanation from the accused, but in itself, was not enough to prove that he had personally aided, abetted, or participated in the crime.

The accused, however, made a statement. This has been referred to as a "confession" in the Record, but an inquiry into its nature reveals that it is not such, but is an "admission." Wharton's Criminal Evidence, Sec. 589, p 954, asserts: "A confession is an acknowledgment in express terms by a party in a criminal case, of his guilt of the crime charged". The accused's statement was an admission; that is, as in Wharton's Criminal Evidence, page 954, defined: "A statement by the accused, direct or implied, of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt".

There was nothing in the Record to indicate that fear or hope induced the accused to give his statement, and therefore it must be considered his voluntary act, according to the customary rules even in civilian practice. The authenticity of this statement having been established, it was properly admitted into evidence.

This statement clearly established the presence of the accused at the scene of the crime, participating in it at least to the extent that he guarded bound prisoners while they were murdered.

The defense counsel argued seriously that the accused had not been notified of his rights prior to his giving of his statement, and thereby contended that the "confession"-- which in fact was an admission, and not a confession -- was not voluntary or admissible. The determining answer to the contention, which was properly disposed of by the law member, is that any admission against interest by an accused, may be used against him, according to the weight of opinion. Since no evidence was offered by the defense to prove that the statement was procured through fear or hope, and since accused himself declared that he had examined, read, and signed the document, the court was justified in admitting this admission into evidence. Yet, had this not been a mere admission against interest and therefore admissible under normal procedure; and had it contained explicit declarations of guilt -- which it did not-- the rules pertaining to evidence for the trials of war crimes cases, as set forth in War Crimes



Memorandum No. 3, would have rendered the document admissible providing it contained evidence of probative value to a reasonable man. Indeed, it may be remarked that the propriety and justice of this rule for evidence in War Crimes cases is demonstrated in this instant situation. The rule permits the introduction of any evidence having probative value to a reasonable man, with the Court to give it such weight as it deserves. Without such a rule, some monstrous crimes committed in secret places, committed in part by persons long since dead, as RUENGER is now, and known only to former enemies and others presently hostile to all inquiry, would go unexplored and unexplained and unpunished.

Because of the facts in evidence and law applicable thereto in the instant case, the Commission was justified in its holding that a prima facie case had been established against the Accused at the close of the prosecution's evidence in chief.

An analysis of the totality of evidence presented in the case, also disclosed that a wealth of evidence existed for the Commission finally to determine the issue. After the prosecution evidence and after the Accused took the stand, there could be no doubt that the Accused had "participated" in the crime, at least to the extent that he was a guard at the time of the murders. The critical issues of fact for the Commission to determine were: 1) What was the extent of his participation? and 2) Did he have knowledge that the flyers were to be killed?

Upon the extent of the Accused's participation, there was an abundance of evidence. He himself stated that upon returning from a patrol he saw two prisoners in the Orderly Room (R 135); that he was ordered to go to AICH and pick up a third flyer (R 135); and that after returning from this detail, he left his prisoner and went to his room where he later ate with the flyers (R 139); that approximately one and one-half hours later, he was ordered to "get ready and participate in bringing the flyers away" (Pros. Ex. No. 14 p3); that he was then told "the flyers were to be shot" or "the flyers ought to be shot" or "the flyers were supposed to be shot" (Pros. Ex. No. 14 p3); that the Accused thereupon said "I cannot do that" and he was "then told that First Lt. RUENGER would do that, that I did not have to do it" (English Trans. Pros. Ex. No. 14 p4); that he complied with the order, reported within one minute to the Orderly Room, and was there until all three Americans had their crossed hands tied behind their backs (R 141); that he was the guard in the rear when the flyers were marched downstairs (R 141, R 154), and that he, as well as the other two guards were armed (R 160); that he was the rear guard when SCHWIBGER and RUENGER changed their positions and the group proceeded (R 141, 142, 167); that no one walked in front of the Americans in the darkness, yet no instructions were given and two sharp turns were made on ground unfamiliar to the three flyers (R 155); and that while the Americans were walking with the Accused as a guard in the rear, the Americans were all killed; that he did not remember whether he helped carry the dead men to a resting place (Pros. Ex. No. 14, English Trans., p6); that he assisted in the burial detail the next morning at 4:30 (R 146).

The second issue of fact, whether the Accused had foreknowledge that the flyers were going to be killed, was more difficult to decide. The evidence before the Commission was clear that the Accused was either with the flyers or in his nearby room for nearly two hours (R 140); that he was notified the flyers were to be, ought to be or were supposed to be shot (Pros. Ex. No. 14, p3); that he was an armed guard on a detail which proceeded downstairs out into the darkness and around two sharp bends-- all apparently without directions over ground unfamiliar to the victims; and that while bringing up the rear of this detail, the three Americans were shot and killed by bursts of machine pistol fire (R 140-143).



It cannot be denied that the Accused participated in this crime at least to the extent that he was physically present, and either voluntarily, or as a result of a military order, guarded the Americans while they were in the process of being murdered. The evidence is such that it cannot be found that the Accused did not have foreknowledge, which the Commission, by its verdict, determined he possessed prior to the shootings.

Supported by this type of evidence, the determination of the Commission that the Accused was guilty of the charge and particulars is found to be legally correct, and the award of an appropriate sentence was justified.

## 11. Sentences

According to the provisions of paragraph 13a, War Crimes Memorandum No. 9, 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 principle 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 was sentenced to be hanged by the neck until dead.

The Defense Counsel submitted on 28 July 1947 a petition for reduction and mitigation of the sentence, mentioning factors in the evidence which are discussed in the following inquiry into the validity of any reasons for the exercise of clemency.

The facts adduced in the trial clearly and sharply depicted the killing of the three American flyers as a wanton, merciless act. Insofar as the Accused was concerned, however, the record did not disclose that he had personally desired to participate and, or abet in this crime.

The evidence for the prosecution revealed that the Accused "picked a flyer up" and "left him at the orderly room" (Proc. Ex. No. 14). The Accused stated that he had gone after this flyer pursuant to an order from the First Sergeant (R 135). Somewhat later, along with other men in his room, he offered food and coffee to the Americans (R 139; Proc. Ex. No. 14, English Translation, p 1). Later SCHWISGER (or REJNER) entered his room, ordered him to arm himself and come to the orderly room, and declared "the flyers were to be shot", "ought to be shot", or "were supposed to be shot" (Proc. Ex. No. 14 English Translation p 3). Thereupon, according to Proc. Ex. No. 14, p4, English Translation, the accused answered, "I cannot do that". When on the stand, the accused testified he had said, "Without me, I couldn't do any such thing" (R 140; 150). Following his objection, the accused "was told that First Lt. REJNER would do that; that I did not have to do it" (Proc. Ex. No. 14, p 4, R 150). Whoever told him to report to the Orderly Room added, "Come on, Come on" according to the accused (R 140).

There was evidence before the Court therefore that the Accused was notified the Americans were to be killed, and that he refused to participate, and that he was then told he did not have to shoot; and that he was ordered by either his First Sergeant or his Company Commander to "Come on, Come on".



In the Orderly Room, the only evidence presented was that he was ordered by his Company Commander to stay at the rear, which he did throughout the short death march (R 141). He was also ordered by his first sergeant to participate in the burial party (R 146).

There is a considerable amount of evidence to prove that the accused acted under orders throughout, and a study of the records fails to reveal that he ever acted independently of orders.

In a study of the evidence extraneous to the shooting, it is seen that both SCHWIEGER and RUENGER had loot taken from the flyers, while no one mentioned that the accused ever possessed anything belonging to the flyers (R 42, 110). SCHWIEGER talked shamefacedly to Maria PARTE about the shooting (R 40-43) and RUENGER drunkenly, loudly declared he had shot the flyers (R 173). The record fails to disclose that the accused mentioned the shooting to anyone except other SS men. SCHWIEGER never blamed nor mentioned the accused when he talked to Maria PARTE (R 40-43) and said that Major TROEGE ordered the whole thing (R 40-43, 130).

From this evidence in the record, it is therefore believed that the accused may have participated exclusively or largely because he was ordered by military superiors to do so. This is, of course, no defense but it is useful solely as a mitigating factor.

In the instant case it is believed that clemency should be exercised, and that the death penalty should be commuted to life imprisonment at hard labor.

#### 12. Opinions

It is my opinion that:

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

#### 13. Recommendations

It is accordingly recommended that the sentence of Erich WANDREY be approved, but in view of the extenuating circumstances be commuted to imprisonment at hard labor for the term of his natural life. 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 (paragraph 3h War Crimes Memorandum No. 3, this Headquarters, 23 April 1946). Accordingly, action designed to carry the foregoing recommendations into effect, should they meet with your approval, are submitted herewith.

RICHARD A. RUPPERT  
Review Attorney  
War Crimes Branch

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

C. R. BARD  
Lt. Colonel JAGD  
Judge Advocate