

CASE No. 6

THE JALUIT ATOLL CASE**TRIAL OF REAR-ADMIRAL NISUKE MASUDA AND FOUR OTHERS OF THE IMPERIAL JAPANESE NAVY**

UNITED STATES MILITARY COMMISSION, UNITED STATES NAVAL AIR BASE, KWAJALEIN ISLAND, KWAJALEIN ATOLL, MARSHALL ISLANDS. 7TH-13TH DECEMBER, 1945

Jurisdiction of the Commission and the Rules of Procedure and Evidence followed therein. Shooting of unarmed prisoners of war. Liability of custodian who released them to be shot. Hague Convention No. IV of 1907. Geneva Prisoners of War Convention of 1929. Plea of Superior Orders.

Masuda, who committed suicide before the trial, had ordered three subordinates in the Imperial Japanese Navy to shoot to death three United States airmen, who had become unarmed prisoners of war, and a fourth, who had custody of the prisoners, to hand them to the three executioners. These four were brought to trial for the part which they had played in the killing of the airmen. A plea to the jurisdiction of the Commission was made without success by the Defence. The plea of superior orders was effective only in reducing the sentence of the custodian of the prisoners to ten years' imprisonment. The other three accused were sentenced to death.

A. OUTLINE OF THE PROCEEDINGS**1. THE COURT**

By a message of 8th October, 1945, the Commander of the Marshalls Gilberts Area requested of the Commander-in-Chief of the Pacific Fleet the authority to convene a Military Commission for the trial of persons accused of War Crimes committed in that area prior to its occupation by United States forces. This authority was duly granted, and, in pursuance thereof, the Commander of the Marshalls Gilberts Area, as Convening Authority, ordered the setting up of a Military Commission on board the United States Naval Air Base at Kwajalein Island "for the trial of such war crime cases as may properly be brought before it." The Military Commission so appointed consisted of the following members, any five of whom were empowered to act: Commodore B. H. Wyatt, U.S.N. (President), Captain C. C. Champion, Jr., U.S.N., Captain J. R. Weisser, U.S.N., Colonel Thomas F. Joyce, Inf., Commander William W. White, U.S.N., Lieutenant-Colonel Basil P. Cooper, F.A., and Lieutenant John A. Murphy,

U.S.N.R., and Lieutenant William P. Mahoney, U.S.N.R., as Judge Advocate,⁽¹⁾ either of whom was authorised to act as such.

At the request of the accused, and pursuant to verbal orders from the Convening Authority, Lt. F. J. Madrigan, U.S.N.R., and Lt.-Comdr. Kozo Hirata, I.J.N., acted as Counsel for the accused. Lt. E. F. Field, U.S.N.R., acted as assistant to the Defence Counsel.

A plea to the jurisdiction of the Commission made by the Defence at the outset of the trial was over-ruled by the former, after the Defence and the Prosecution had presented arguments concerning the point (see later).

2. THE CHARGE AND SPECIFICATION

The accused were Rear-Admiral Masuda, Lieutenant Yoshimura, Ensign Kawachi, Ensign Tasaki, and Warrant Officer Tanaka, all of the Imperial Japanese Navy.

The charge against the five accused, as approved by the Convening Authority, was one of murder. The specification stated that they "did, on or about 10th March, 1944, on the Island of Aineman, Jaluit Atoll, Marshall Islands, at a time when a state of war existed between the United States of America and the Japanese Empire, wilfully, feloniously, with malice aforethought without justifiable cause, and without trial or other due process, assault and kill, by shooting and stabbing to death, three American fliers, then and there attached to the Armed forces of the United States of America, and then and there captured and unarmed prisoners of war in the custody of the said accused, all in violation of the dignity of the United States of America, the International rules of warfare and the moral standards of civilised society."

An objection made by the accused on the grounds that the inclusion in the charge of the words "moral standards of civilised society" was improper and non-legal was over-ruled by the Commission.

The charge as originally drafted contained the word "unlawfully" instead of "wilfully"; the change was authorised by the Convening Authority on the request of the Commission.

Rear-Admiral Masuda did not appear at the trial, and, during its course and on the direction of the Convening Authority, a *nolle prosequi*⁽²⁾ was entered by the Judge Advocate as to the charge and specification against him. He had committed suicide before the opening of the trial, and had before his death written a statement in which he confessed that he had ordered the execution of the airmen.

3. THE ARGUMENTS USED BY THE PROSECUTION IN SUPPORT OF THE CHARGE AND SPECIFICATION

The Prosecution brought forward a number of witnesses to show that the three American airmen on or about February, 1944, were forced to land

(1) It will be noted that the principal duty of the Judge Advocate in trials by United States Military Commissions is to prosecute. His function is thus widely different from that of the Judge Advocate in proceedings of British Military Courts, which is set out briefly in Annex I, pp. 106-7.

(2) The term *nolle prosequi* signifies the abatement of prosecution.

near Jaluit Atoll, Marshall Islands, and subsequently became unarmed prisoners of war on Emidj Island, on which was established the Japanese Naval Garrison Force Headquarters under the command of Rear-Admiral Masuda. Approximately one month later, on the orders of Masuda, and without having been tried, the airmen were taken to a cemetery on Aineman, an adjoining island, where they were secretly shot to death and then cremated. Yoshimura, Kawachi and Tanaka had admitted to having killed the prisoners by shooting; one had also used a sword. Tasaki had admitted that, having been in charge of the prisoners, he had arranged their release to the executioners, knowing that they were to be killed. Signed statements to the above effect were produced before the court.

One of the two Judge Advocates, in his opening argument, stated that one of the basic principles which had actuated the development of the laws and customs of war was the principle of humanity which prohibited the employment of any such kind or degree of violence as was not necessary for the purposes of war. Among the many and numerous restrictions and limitations imposed by virtue of this principle was "the universally recognised and accepted rule" provided in Article 23 (c) of the 1907 Hague Convention which states: "It is particularly forbidden . . . to kill or wound an enemy who, having laid down his arms, or no longer having means of defence, has surrendered at discretion." If this rule did not suffice, a variety of additional rules had been universally recognised and accepted, protecting prisoners of war from outrages, indignities and punishment.

His colleague relied instead on Article 2 of Part I of the Geneva Convention of 1929 relative to the Treatment of Prisoners of War which states that: "Prisoners of War are in the power of the hostile Government, but not of the individuals or formations which captured them. They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity. Measures of reprisals against them are forbidden."

4. THE CASE FOR THE DEFENCE

(i) *The Plea to the Jurisdiction*

The plea, made by the Defence to the jurisdiction of the Commission, was set out in four sections, and may be summarised as follows:

- (a) The Congress of the United States had not delegated authority to Military Commissions, such as the present, to try enemy nationals for war crimes;
- (b) The Commission had no jurisdiction to try the defendants on charges or specifications founded on laws which were *ex post facto* in that they did not exist at the time of the commission of the acts for which the accused were charged;
- (c) The "SCAP" rules, issued by command of General MacArthur, by virtue of which the Commission was established and the trial held, violated established rules of United States law, both substantial and procedural. In particular, Section 16 thereof permitted the introduction of hearsay and secondary evidence; and

(d) Even if the "SCAP" rules were applicable the venue^(*) of the trial was incorrectly laid. Under Section 5 (b) of the Rules, trials were to be held in Japan, with the exception that "persons whose offences have a particular geographical location outside Japan may be returned to the scene of their crimes for trial by competent military or civil tribunals of local jurisdiction." Accordingly the trial should have been held either in Japan or in Jaluit, the scene of the alleged crimes.⁽⁴⁾

The Defence finally claimed that the defendants had the power under Section 5 (b) to elect to be tried by civil tribunal, and stated that they did so elect.

(ii) *The Defence of Superior Orders*

The accused pleaded not guilty. They admitted their part in the execution of the American Prisoners of War, but claimed as a defence that, as military men of the Japanese Empire, they were acting under orders of a superior authority, which they were bound to obey.

One of the defending Counsel, himself a Lieutenant-Commander in the Imperial Japanese Navy, described the absolute discipline and obedience which was expected from the Japanese forces, and quoted an Imperial Rescript which included the words: "Subordinates should have the idea that the orders from their superiors are nothing but the orders personally from His Majesty the Emperor." The Japanese forces were exceptional among the world's armed forces in this respect and, therefore, he claimed, it was impossible to apply therein "the liberal and individualistic ideas which rule usual societies unmodified to this totalistic and absolutistic military society." The strategic situation was so critical in early 1944 that the characteristic referred to was displayed in the Jaluit unit to an exceptional degree. Furthermore the order was given direct by a Rear-Admiral to "mere Warrant Officers and Petty Officers." If they had refused to obey it, "everyone would have fallen upon them."

As the accused had no criminal intent, it was clear that they had committed no crime.

The other defending Counsel pointed out that the executioners each requested that they should not be assigned the task of carrying out the killing, but when emphatically ordered by Masuda, a man of strong character, they had obeyed, in accordance with their training. Their actions were not of their own volition; they were the will of another.

Tasaki, the custodian of the prisoners of war, who arranged their handing over to the executioners, also merely acted in accordance with the orders of the Rear-Admiral. Certainly the latter had told him why he was to surrender the prisoners, but this fact in no way placed him in the position of a participant in the commission of a crime.

(*) The word "venue" is a Common Law term for the local area for which the Court is commissioned and sits, and in which, as a rule, the offence was committed.

(4) The term "SCAP rules," used here and on pp. 75 and 78, refers to the Regulations Governing the Trial of War Criminals in the Pacific Theatre, of September 24th, 1945. See Annex II, p. 113.

5. THE ARGUMENTS OF THE PROSECUTION USED IN COUNTERING THE PLEAS OF THE DEFENCE

(i) *Concerning the Jurisdiction of the Court*

The Judge Advocate, in countering the Defence's plea to the jurisdiction of the Commission, began by stating that this jurisdiction had already been upheld. Nevertheless he would reply briefly to the objections raised by the defence.

His arguments, which he arranged so as to meet those of the Defence point by point, were as follows :

- (a) The power to conduct Military Commissions was part of the executive power of the President of the United States, and was delegated to subordinate commanders. The necessary formalities had in this case been fulfilled.
- (b) "The statute laws are dated 1929. The laws of humanity also set forth in the specification have no dates, the laws are set back as far as civilisation."
- (c) The "SCAP" rules had been approved by the Judge Advocate for the United States Navy, and their use was in accordance with the directions of the Commander of the Marshalls Gilberts Area. The Commission was not trying United States citizens but those of a foreign country.
- (d) A similar objection to the venue of a trial had been over-ruled previously on the grounds that the trial was held as close to the scene of the alleged crime as was convenient. The same applied to the present case.

(ii) *Concerning the Defence of Superior Orders*

One of the two Judge Advocates quoted three authorities with the intention of securing the rejection by the Commission of the plea of superior orders. The Judge Advocate General, he said, had made reference, in Court Martial Orders 212-1919, to the following dictum in *U.S. v. Carr* (25 Fed. Cases 307) : "Soldier is bound to obey only the lawful orders of his superiors. If he receives an order to do an unlawful act, he is bound neither by his duty nor by his oath to do it. So far from such an order being a justification, it makes the party giving the order an accomplice in the crime."

In another case, involving the killing of a Nicaraguan citizen by a member of the United States forces, the Judge Advocate stated : "An order illegal in itself and not justified by the rules and usages of war, or in its substance clearly illegal, so that a man of ordinary sense and understanding would know as soon as he heard the order read or given that it was illegal, will afford no protection for a homicide, provided the act with which he may be charged has all the ingredients in it which may be necessary to constitute the same crime in law" (CMO 4-1929).

In the opinion of the Judge Advocate, however, the statement of the law most clearly in point was contained in "the rules promulgated by the Supreme Command of the Allied Powers for use in war crime cases. This body of international law, briefly known as the SCAP rules and adopted

by the Commission at the direction of the Judge Advocate General of the Navy, has the following provision applicable to the defence raised by the accused, quoting sub-paragraph (f) of paragraph 16 :

‘The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused’s superior, or of his government, shall not constitute a defence but may be considered in mitigation of punishment if the commission determines that justice so requires.’ ”

6. THE EVIDENCE

The evidence is not here set out at length, since, in the main, the facts were not disputed, and the case turned essentially on a question of law. The facts derived from an examination of the witnesses for the Prosecution are set out in brief under heading 3 (*supra*). These witnesses comprised a legal officer who had acted as war crimes and atrocities investigator for the Marshalls Gilberts Area, an islander who had witnessed the capturing of the prisoners, one of the captors, a Japanese Lieutenant who had interrogated them, an interpreter who was present during the interrogation, a Japanese truck-driver who had been ordered by Kawachi to take the airmen to the cemetery, the seaman who cremated their bodies, a Japanese Major who testified to the authenticity of Masuda’s written statements on the killing of the prisoners, a United States soldier who translated from the Japanese various documents before the Court, and one of the two Judge Advocates in the trial, who testified that the statements by the four accused which were before the Commission had actually been signed by them.

The three accused of having been the actual executioners gave evidence on their own behalf. Tasaki’s evidence was given only by way of a signed statement.

7. THE VERDICT

All four accused were found guilty.

8. THE SENTENCE

Yoshimura, Kawachi and Tanaka were sentenced to death by hanging.

Tasaki was sentenced to ten years’ imprisonment. His punishment was lighter than that of the others because of the “ brief, passive and mechanical participation of the accused.”

The proceedings, findings and sentences were approved by the Commander of the Marshalls Gilberts Area, Rear-Admiral Harrill.

B. NOTES ON THE CASE

1. CONCERNING THE PLEA TO THE JURISDICTION OF THE COMMISSION

Comment upon the plea to the jurisdiction of the Commission made by the Defence may conveniently be arranged in the same manner as were the remarks of Counsel.

(i) *The Legal Basis of the Commission*

The Defence claimed that no legislative act had ever enabled the holding

by such Courts of trials of enemy nationals for war crimes. The contention of the Prosecution was that the authority to hold such trials derived from the executive power of the President.

The same question came before the Supreme Court of the United States in two cases, *Ex Parte Quirin*, 317 U.S.1, and *In the Matter of the Application of General Tomoyuki Yamashita*, No. 61 Miscellaneous and 672, October Term, 1945.

In these cases, the Supreme Court, *per* Mr. Chief Justice Stone, upheld the legality of trials by Military Commissions of enemy combatants for perpetrating war crimes. The Court pointed out that Congress, in the exercise of the power conferred on it by Article I, paragraph 8, cl. 10 of the Constitution to "define and punish Offences against the Law of Nations . . .," of which the law of war was a part, had, by the statute entitled the Articles of War (1920, amended in 1937 and 1942), recognised the "Military Commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offences against the laws of war. Article 15 declared that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offences that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." Article 2 included among those persons subject to the Articles of War the personnel of the United States military forces. The Court pointed out, however, that this, as Article 12 indicated, did not exclude from the class of persons subject to trial by Military Commissions "any other person who by the law of war is subject to trial by military tribunals," and who under Article 12 may be tried by Court Martial, or under Article 15 by Military Commission.

Congress had not attempted to codify the laws of war, continued the Chief Justice, but had, by Article 15, incorporated within the pre-existing jurisdiction of Military Commissions created by the appropriate military command "all offences which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction."

The power to convene Commissions of the nature referred to continued after hostilities had ceased, and at least until peace had been "officially recognised by treaty or proclamation of the political branch of the Government."

The conclusion of the Court in the *Yamashita Case* was that the Joint Chiefs of Staff of the American Military Forces were acting legally when, by direction of the President, on September 12th, 1945, they instructed General MacArthur, Commander in Chief, United States Army Forces, Pacific, to proceed with the trial before appropriate military tribunals of such Japanese War Criminals "as have been or may be apprehended."

The opinion of the Supreme Court in *Ex Parte Quirin* was delivered on October 29th, 1942, while that in the *Yamashita Case* was delivered on February 4th, 1946.

The Judge-Advocate prosecuting in the Jaluit Atoll case, in his reply of December 7th, 1945, to the Defence's plea to the jurisdiction of the Commission, did not specify in what "previous case" that jurisdiction had been

upheld. The authorities cited above are, however, wholly in line with the decision of the Commission to reject the plea and with the statement of the Prosecution that "The jurisdiction of the military commission to try offences against the law of nations derives from the President of the United States, who, as Commander in Chief of the Armed Forces, exercises the power of military government over territories occupied by our country. His representative in the Pacific, the Commander in Chief of the Pacific Fleet, has, as the deputy military governor, conferred specific authority to convene this commission on the Commander Marshalls Gilberts Area."

It will be noted that the Judge Advocate did not state how far the power of the President in this matter was derived from the Constitution and how far from Congressional legislation. In *Ex Parte Quirin*, the Supreme Court pointed out that the Constitution of the United States conferred on the President the "executive power" (Article II, paragraph 1, cl. 1) and imposed on him the duty to "take care that the Laws be faithfully executed" (Article II, paragraph 3). It also made him the Commander in Chief of the Army and Navy (Article II, paragraph 2, cl. 1). The Court decided, however, that it was not necessary to determine to what extent the President as Commander in Chief had constitutional power to create Military Commissions without the support of Congressional legislation. Nor did the Court in the *Yamashita Case* need to investigate that problem.

(ii) *Ex post facto legislation*

The Judge Advocate's claim that the rules of International Law, with whose infringement the accused were charged, were binding on them at the time of the commission of the alleged war crimes gives rise to no comment. It will be noticed, however, that, for the purpose of refuting the arguments of the Defence on this point, the Judge Advocate made no reference to what may be called the municipal law ingredients included in the charge and specification. Further comment on this inclusion is made later, under heading 2, "Concerning the charge and specification."

(iii) *The legality of the rules applied in the trial*

The Commander of the Marshalls Gilberts Area directed the President of the Commission "to use SCAP Rules governing the trials of War Criminals as a guide, not only for the rules of evidence, but also as a guide for substantive law and procedure on all issues arising in the trial of war criminals." The Defence claimed that these rules violated "established substantive and procedural law known to American jurisprudence." The Judge Advocate, on the other hand, claimed that their use was legal, and secured the concurrence of the Commission on the point.

Here, again, the decision of the Supreme Court in the *Yamashita Case* is relevant. One of the grounds upon which the petitioner sought writs of habeas corpus and prohibition against the Military Commission which tried him was: "that the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 38th

Articles of War and the Geneva Convention, and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment."

Article 25 prohibits the reception in evidence by a Military Commission of depositions on behalf of the Prosecution in a capital case, while Article 38 empowers the President to prescribe by regulations the procedure for cases before Military Commissions and states that these regulations "shall, in so far as he shall deem practicable, apply the rules of evidence generally recognised in the trial of criminal cases in the district courts of the United States: *Provided*. That nothing contrary to or inconsistent with these Articles shall be so prescribed . . ."

In the opinion of the Supreme Court, however, neither Article was applicable to the trial of an enemy combatant by a Military Commission for violations of the laws of war. Chief Justice Stone, delivering the majority judgment, stated that Article 15 had been added in 1916 to the Articles in order to preserve intact the traditional jurisdiction of "the non-statutory military commission." The Article read: "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offences that . . . by the law of war may be triable by such military commissions." Article 2 of the Articles of War enumerated "the persons . . . subject to these articles" and enemy combatants were not included among them. The Court concluded that the benefits of the Articles were not conferred upon such persons, and that the Articles left the control over the procedure in their trials where it had previously been, that is to say with the Military Command. The Commission's rulings on evidence and on the mode of conducting the proceedings were not subject to review by the civil courts but only by the reviewing military authorities. It was therefore unnecessary to consider what, in other situations, the Fifth Amendment might require.

It may be added here that the Supreme Court had already decided in *Ex Parte Quirin* that the Fifth and Sixth Amendments laying down the right to a trial by jury in a civil court for capital crimes did not extend to trials in military tribunals. Since, however, this decision is not relevant to the Masuda trial, it is not analysed in these notes. The *Yamashita Case* is relevant since it shows that a defendant in a trial before a Military Commission is not entitled to object if the rules of evidence applied therein are not those "generally recognised in the trial of criminal cases in the district courts of the United States."

(iv) *The venue of the trial*

The ruling tacitly approved by the Commission on the question of venue gives rise to no comment. No defendant could have reasonably been allowed to plead, for instance, that no liability rested on him had the island on which he had committed his crimes disappeared as the result of a volcanic upheaval.

2. CONCERNING THE CHARGE AND SPECIFICATION

It will have been noticed that the charge against the prisoners was one of murder and that the specification mentioned both a breach of "the Inter-

national rules of warfare" and wilful felonious killing "with malice aforethought without justifiable cause, and without trial or other due process." While one Judge Advocate quoted Article 23 (c) of the 1907 Hague Convention and made a general reference to related rules of customary International Law, he also recalled that the charge against the accused was one of murder and proceeded to analyse in detail the elements of a definition of murder as "the unlawful killing of a human being with malice aforethought."

His colleague pointed out that the specification had been "patterned carefully after the samples set forth in *Naval Courts and Boards*." He gave more attention than his colleague to the International Law governing the case, however, and expressed the opinion that the rules of Conventional Law which were the most relevant were the rules laid down in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, from which he quoted Article 2. It might be argued, he continued, that the Japanese Government was not a signatory to the Convention. Against this, however, he said: "Although Japan has not ratified or formally adhered to the Prisoners of War Convention, it has, through the Swiss Government, agreed to apply the provisions thereof to prisoners of war under its control, and also, so far as practicable, to interned civilians."

Even if Japan were not legally bound, the shooting of unarmed prisoners who are behaving in an orderly fashion is clearly a war crime under customary International Law.

At first sight it may appear that the introduction of the definition of murder, based on Anglo-Saxon rules of Municipal Law, was not strictly justifiable in a case where breaches of International Law on an island under Japanese mandate were alleged. The intention of the Prosecution, however, was not to charge the accused with breaches of United States law *as well as* of International Law. The use of the words in the specification, "all in violation of . . . the International rules of warfare," as applying to the charge of murder, clearly shows that the introduction of the terms used in United States law was intended merely to amplify and define the specification. In the present state of vagueness prevailing in many branches of the law of nations, even given the fact that there are no binding precedents in International Law, such introduction therein of tested concepts from municipal systems is all to the good, provided that they are recognised to be in amplification of, and not in substitution for, rules of International Law. This is so, even if it involves the use of tautology, inherent in some Common Law definitions, such as is exemplified in the phrase, "wilfully, feloniously, with malice aforethought without justifiable cause . . ." in the specification.