CASE No. 25.

TRIAL OF LIEUTENANT-GENERAL SHIGERU SAWADA AND THREE OTHERS

UNITED STATES MILITARY COMMISSION, SHANGHAI,

27TH FEBRUARY, 1946—15TH APRIL, 1946

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

The charge against Major-General Shigeru Sawada, formerly Commanding General of the Japanese Imperial 13th Expeditionary Army in China, was that, on or about August, 1942, he did " at or near Shanghai, China, knowingly, unlawfully and wilfully and by his official acts cause" eight named members of the United States forces "to be denied the status of Prisoners of War and to be tried and sentenced by a Japanese Military Tribunal in violation of the laws and customs of war."

It was also charged that the second and third accused, Second-Lieutenant Okada Ryuhei and Lieutenant Wako Yusei, both of the Japanese Imperial 13th Expeditionary Army in China, as members of a Japanese Military Tribunal, "did at Kiangwan Military Prison, Shanghai, China, knowingly, unlawfully and wilfully try, prosecute and adjudge " the eight members of the United States forces "to be put to death in violation of the laws and customs of war."

Finally, a charge was brought against Tatsuta Sotojiro, Captain in the Japanese Imperial 13th Expeditionary Army in China, stating that he " did at Shanghai, China, knowingly, unlawfully and wilfully command and execute an unlawful Order of a Japanese Military Tribunal, and did thereby cause the death of ' three of the victims ' who were lawfully and rightfully Prisoners of War " and in his capacity as " Commanding Officer of the Kiangwan Military Prison, Shanghai, China " did between 28th August, 1942 and 17th April, 1943, at Kiangwan Military Prison, " deny the status of Prisoners of War to " all eight, in violation of the laws and customs of war.

The accused pleaded not guilty.

In greater detail the allegations made by the Prosecution concerned the following acts of commission and omission :

(i) That Sawada, as commanding general of the 13th Japanese Army in China, caused the eight captured American fliers to be tried and sentenced to death by a Japanese military tribunal on false and fraudulent charges ; that he had the power to commute, remit and revoke such sentences and failed to do so, thereby causing the unlawful death of four of the fliers and the imprisonment of the others ; that

he was responsible for the improper treatment of all the captured airmen, having denied them the lawful status of prisoners of war ; that in addition, he was responsible for the cruel and brutal atrocities and other offences, including the denial of proper food, clothing, medical care and shelter, committed against one of the eight.

(ii) That the two accused Okada and Wako unlawfully tried and adjudged the eight fliers under false and fraudulent charges without affording them a fair trial, interpretation of the proceedings, counsel, or an opportunity to defend, and sentenced them to death.

(iii) That Tatsuta commanded and executed an unlawful order of a Japanese military tribunal which caused the death of three of the fliers, and that as commanding officer of Kiangwan Military Prison he forcibly detained all eight in solitary confinement and otherwise unlawfully treated them by denying them adequate and proper shelter, bedding, food, water, sanitary facilities, clothing, medical care and other essential facilities.

2. THE EVIDENCE

Eight United States airmen, after taking part in a bombing raid on a Japanese steel mill, an oil refinery and an aircraft factory on 18th April, 1942, were forced to earth and captured by the Japanese and eventually held in Tokyo for about fifty-two days, during which time they were imprisoned in solitary confinement. There was evidence that, both during their period in Tokyo and previously, they were subjected to various forms of torture during interrogations.(1)

On 28th August, 1942, after spending approximately seventy further days at the Bridge House Jail, Shanghai, in small verminous and insanitary cells, all eight fliers were removed to the Kiangwan Military Prison, on the outskirts of Shanghai. At the time of their transfer, all the fliers were weak and underweight and one was very ill. On arriving, they were assembled in a room before several Japanese officers, who, they later learned, constituted their court-martial. The accused Wako and Okado were among the members of the court. The accused Tatsuta attended the trial voluntarily and not officially, as a spectator, for a short time. The fliers stood before the Japanese officers who conversed in their own language. The sick prisoner was carried in on a stretcher where he continued to lie during the proceedings. He was ill but was not attended by a doctor or a nurse. He did not, by his eyes or facial expression, appear to recognize the others ; nor did he make any statements. The fliers were asked a few questions about their life histories, their schooling and training. After they answered, one of the Japanese stood up and read from a manuscript in Japanese. The fliers made no other statement. There was an interpreter present, but he did not interpret anything except the fliers' names and ranks, and similar details. The proceedings lasted about two hours at the very most. The fliers were not told that they were being tried ; they were not advised of any charges against them ; they were not given any opportunity to plead,

(1) The accused were not charged with responsibility for this ill-treatment however.

either guilty or not guilty ; they were not asked (nor did they say anything) about their bombing mission. No witnesses appeared at the proceedings ; the fliers themselves did not see any of the statements utilized by the court that they had previously made at Tokyo ; they were not represented by counsel ; no reporter was present ; and to their knowledge no evidence was presented against them.

Prior to the trial, a draft of a Japanese law concerning the punishment of captured enemy airmen was sent from higher headquarters at Tokyo to the Headquarters of the China Expeditionary Forces in Nanking in July, 1942, and at the same time Tokyo requested the 13th Japanese Army Headquarters to defer its trial of the eight American fliers until the new military law had been enacted. Soon afterwards the supreme commander at Nanking (General Hata) issued this " Enemy Airmen's Act " to the 13th Army. This law stated in substance that it should take effect on 13th August, 1942 and be applied to all enemy airmen taking part in raids against Japanese territories ; that any one who should participate in the bombing or strafing of non-military targets or who should participate in any other violation of international law would be sentenced to death, which sentence might be commuted to life imprisonment or to a term of imprisonment not less than ten years ; and that imprisonment under the Act would be in accordance with the provisions of Japanese criminal law. A staff officer from Tokyo was sent to China to give instructions regarding the trial of the fliers and to demand that General Hata have the prosecutor require the death sentence and report the court's decision to Tokyo.

The evidence of the accused Sawada, Okada, and Wako showed that only a permissive death sentence existed under Japanese law prior to the enactment of the Enemy Airmen's Act.

The defence in the United States trial contended that the Japanese court was regularly appointed and consisted of Major Itsuro Hata as prosecutor, Lieutenant-Colonel Toyoma Nakajo, as chief judge, and the two accused, Wako and Okada, as associate judges ; that the proceedings in the trial of the fliers on 28th August, 1942, did not differ from the regular proceedings of other Japanese trials ; that no pleadings were authorized by Japanese law ; and that no defence counsel were authorized. Further contentions by the defence were that the court proceedings lasted at least two hours ; that documentary evidence, consisting of at least the gist of the air raid damage reports from Tokyo and the fliers' alleged confessions made to the Tokyo Gendarmerie admitting attacks on non-military targets, were read to the court. (The accused Wako, however, denied this).

Although these purported confessions were supposed to have had the signatures and thumb prints of the several American fliers on them, there is no evidence that any attempt was made to verify or prove that these were genuine or actually those of the fliers. After a two hour session the court adjourned for lunch, and then deliberated for another hour and unanimously decided on the death sentences for all eight fliers. There was some evidence that a record of the trial proceedings was made at the trial, and either was

filed with the 13th Army or was transferred to Headquarters at Tokyo in December 1944, where it was destroyed in a fire.

After the trial a telegram was sent to Tokyo through Nanking announcing the sentence of the court, and later a written report was sent. Headquarters of the 13th Army had been instructed to withhold any action on the sentences until Tokyo acted on them. Later instructions were received from Tokyo to execute three of the victims, including the prisoner who had been ill throughout the trial. The sentences passed on the other five were commuted to life imprisonment.

The executions were carried out on 15th October, 1942. The five surviving fliers were returned to confinement in the Kiangwan prison.

The accused General Sawada was in command of the 13th Army, with headquarters at Shanghai, at the time when the fliers were captured. He remained in command until he received orders relieving him on 8th October, 1942 or thereabouts. From 7th May, 1942 until 17th September, 1942 Sawada, though still the Commanding General of the 13th Army with his headquarters functioning for him at Shanghai, was absent at the front about three hundred miles away. Nevertheless, though he was not in Shanghai at the time of the trial, the tribunal that sentenced the fliers was appointed under his command authority as Commanding General of the 13th Army. Colonel Ito, Sawada's chief legal officer, did not accompany Sawada to the front but remained behind at Headquarters with Sawada's delegated authority to act for him on all legal matters, and the authority to use General Sawada's name was given him prior to the former's departure for the front.

On General Sawada's return to Shanghai on the 17th September, 1942, after the trial of the fliers which took place in his absence, he was personally informed of all the proceedings involving the fliers that took place during his absence. Colonel Ito informed General Sawada of the proceedings he had directed under his delegated authority before trial, during the trial, and immediately following the trial and told him that a report thereof had been sent on to Tokyo. He also gave Sawada a copy of the record of the trial and the " statement of judgment," and Sawada placed his own mark thereon. Sawada stated that he felt that the death sentences were too severe and went to Nanking and protested to the Commanding General of the China Forces but that he, General Hata, said that nothing could be done about the matter as it was exclusively up to Tokyo to make a decision. Thereafter, General Sawada did not make further attempts to have the sentences changed. The accused General Sawada, prior to his leaving Shanghai on 12th October, 1942, made no attempt to exercise any powers with respect to suspension, remission or mitigation of the sentences given by the court. Sawada stated that he did not have the authority to do so or to disapprove any of the court's proceedings. Sawada testified that he personally was familiar with the rules of the Geneva Convention on the treatment of prisoners of war, and that whatever Colonel Ito did in connection with the American fliers, he, Sawada, assumed responsibility for. Sawada stated in evidence that he had jurisdiction over Kiangwan Prison.

He admitted that although this prison was only three hundred yards from his personal headquarters he never went inside it or concerned himself about its prisoners.

The accused Lieutenant Yusei Wako was an officer in the judicial department of the Japanese Army and was assigned to the judicial department of the 13th Army in Shanghai in May, 1942. His immediate superior was Colonel Ito, the head of the legal department of the 13th Army. Wako, who was a lawyer, was told by Colonel Ito that he (Wako) would be a judge in the trial of the fliers and that the trial was considered to be an important case. Wako testified that Colonel Ito and Major Hata discussed the case with him prior to the trial, that these discussions began about 15th August, 1942, when the 13th Army received the Enemy Airmen's Act from Nanking Headquarters, and, further, that the court received instructions from Colonel Ito that under the Enemy Airmen's Act the death sentence was mandatory if the fliers were found guilty. Wako read all the evidence prior to the trial. He claimed that " since the entire charges were long we told the Americans they would be tried for bombing of Tokyo and Nagoya." He stated also that only a gist of the documentary evidence was read in court, that the fliers denied firing on schools, and that the statements personally given by the fliers in Tokyo were not read in court. At the trial, Wako was not only a judge ; since the judicial section of the 13th Army was required to have one of its members on the court, he acted also in the capacity of its legal adviser.

The accused Captain Okada was an officer with the 13th Japanese Army in Shanghai, China, and in August 1942, he was ordered to sit as one of three judges at the trial of the fliers. About three days prior to the trial when he received his orders to sit as a judge he was given advance notice as to the nature of the proceedings. He had sat as a judge on other courts and was not unfamiliar with trial procedure. On the morning of the trial, 28th August, 1942, he spoke to the accused Wako about the case. Also prior to the trial of the eight fliers he heard about the evidence in the case, namely, the Tokyo Gendarmerie interrogation and damage reports. He " looked through " two reports and Wako explained them to him prior to trial. Major Hata, the prosecutor, also talked to Okada about the case prior to trial. Okada testified that during the trial the sick prisoner appeared weak and lay on a blanket or mattress of some kind throughout the trial. Although he acted as a judge he heard only the gist of the documents comprising the interrogation report from the Gendarmerie in Tokyo. He also stated that "it was not possible to prove which bomber dropped what bomb on what part of the city according to the report," that no witnesses were brought before the court, that no defence counsel was provided for the fliers, that only documentary evidence was presented, that Wako alone asked the fliers questions about the raid, their training, etc., and that half of the trial, or about an hour, was spent in this line of questioning. He also testified that only the gist of the reports were read to the court ; no member of the court asked the fliers to write out their signatures for comparison with the purported signatures on the statements obtained from the fliers in Tokyo ; no real evidence of the Nagoya and Tokyo raids was offered by the prosecution, and the prosecution did not require any witness

to come into court from the Tokyo Gendarmerie to substantiate the documentary evidence from Tokyo. Okada said that he personally based his finding of guilty and the death sentences on the Gendarmerie investigations, the damage report, the reading of the charges and the statements made in court by the fliers.

The accused Tatsuta became warden of the Kiangwan Military Prison in Shanghai on 24th December, 1938, and remained its head until it was closed in March 1944. Captain Ooka at the Nanking Prison was his superior who gave him orders in regard to Kiangwan Prison. Tatsuta confined the fliers after trial on a writ of detention issued by Lieutenant Colonel Toyoma Nakajo, the chief judge of the 13th Army military tribunal and so informed Captain Ooka, his superior.

In his official capacity as warden or chief of the guards Tatsuta was also in charge of the execution of the three fliers and signed the report of execution. The evidence indicated, however, that the order which Tatsuta received to carry out the unlawful sentences was of apparent legality, that is to say, on its face it appeared to be legal to one who neither knew or was bound to inquire whether the order was in fact illegal. Tatsuta visited the courtroom for a short time while the so-called trial was in progress and he observed the sick condition of one of the prisoners. There was no conclusive proof, however, of either actual or constructive knowledge on Tatsuta's part of the illegality of the Enemy Airmen's Act, the trial under it, or the sentences passed at the trial.

Following the executions the other five fliers continued to remain in the prison serving their life sentences until they were transferred to the military prison at Nanking, China on 17th April, 1943. Excepting the sick flyer who was returned to Bridge House Prison, the fliers were kept in solitary confinement from 28th August, 1942 to 5th December, 1942. They were given the same facilities for exercise as other prisoners which was about thirty minutes a day. When they remained in their cells they were not permitted to talk or walk around. No heat was provided in the cells although it was cold enough to freeze water on many nights. They were never given any additional clothing or any change of clothing, except one pair of stockings. The cells were infested with lice and fleas. The only furnishings were grass mats on the floor ; there were no beds, chairs or tables. The only latrine facility was a hole in the floor of each cell with a can in it. Several requests were made to Tatsuta for additional food and clothing that he either refused or ignored. The fliers were never visited by the Red Cross or any representative of a neutral government.

The fliers received about six ounces of rice three times a day and some soup or a few greens. There were no medical facilities at Kiangwan, and when the fliers left the prison for Nanking all of them were in a weak condition. At Nanking a fourth prisoner died of malnutrition, beriberi, dysentery and general lack of care.

3. THE VERDICT AND SENTENCES

At the close of the trial of the case the Commission announced to the accused in open court its conclusions as follows :

" *Conclusions*. After deliberation for two days, the Commission in arriving at its findings and sentences, from the evidence presented, draws the following conclusions :

" The offences of each of the accused resulted largely from obedience to the laws and instructions of their Government and their Military Superiors. They exercised no initiative to any marked degree. The preponderance of evidence shows beyond reasonable doubt that other officers, including high governmental and military officials, were responsible for the enactment of the *Ex Post Facto* ' Enemy Airmen's Law ' and the issuance of special instructions as to how these American prisoners were to be treated, tried, sentenced and punished.

" The circumstances set forth above do not entirely absolve the accused from guilt. However, they do compel unusually strong mitigating consideration, applicable to each accused in various degrees.

" As for Shigeru Sawada : Although he was Commanding General of the 13th Japanese Army, he was absent at the front and had no knowledge of the trial and special instructions issued by his superiors until his return to Shanghai three weeks after the results of the trial had been sent to the Imperial Headquarters in Tokyo over his ' Chop.' Although he did not make strong written protests to Imperial Headquarters in Tokyo, he did make oral protest to his immediate superior, the Commanding General of the Japanese Imperial Expeditionary Forces in China to the effect that in his opinion the sentences were too severe. Although he was negligent in not personally investigating the treatment being given the American prisoners, he was informed by his responsible staff that they were being given the treatment accorded Japanese officer prisoners.

" As for Yusei Wako : He, as Judge and law member of the Military Tribunal, had before him purported confessions of the American fliers and other evidence obtained and furnished by the Military Police Headquarters in Tokyo. Although he held this position and was legally trained, he accepted the evidence without question and tried and adjudged the prisoners on this evidence which was false and fraudulent. However, in voting the death penalty he was obeying special instructions from his superiors.

" As for Ryuhei Okada : Although he sat as a Judge at the trial and enjoyed freedom of conscience in determining as to the guilt or innocence of the prisoners, he adjudged them guilty. This officer however had no legal training and did register a protest to being a judge on any court. In voting the death penalty, as in Wako's case, he was obeying special instructions from his superiors.

" As for Sotojiro Tatsuta : Although he did act as executioner at the execution and was directly in charge of these prisoners at the Kiangwan Military Prison, he did this in his official capacity as warden. Although he did not accord them the treatment provided for Prisoners of War, he was obeying special instructions from his superiors, and there is no evidence to show that he personally mistreated these prisoners or treated them in a manner other than that which was provided for in this instructions."

Shigeru Sawada was found guilty of the charge with the exception of the words " knowingly " and " and wilfully ", but in pronouncing upon the individual specifications, the Commission found the accused General Sawada not guilty of having the power and failing to use it to commute, remit and revoke the sentences given the fliers. He was sentenced to be confined at hard labour for five years.

Yusei Wako and Ryuhei Okada were found guilty and were sentenced to hard labour for nine and five years respectively.

Sotojiro Tatsuta was found guilty of the charge against him, except as regards one of the victims and excepting the words " command and " and " commanding officer ", substituting for the latter words " Warden ". He was sentenced to hard labour for five years.

The findings and sentences were approved by the Reviewing Authority, with the exception of the finding that Tatsuta had acted unlawfully in being in charge of the execution of three prisoners.

B. NOTES ON THE CASE

1. A PLEA TO THE JURISDICTION OF THE COURT

Before the hearing of the evidence, the defence entered motions to dismiss the charges against the four accused for lack of jurisdiction by the Commission alleging :

(i) that the Commanding General who appointed the Commission was without the legal authority to do so as he received his purported authority from the Joint Chiefs of Staff, who in turn had no jurisdiction to appoint military commissions in China,[1]

(ii) that China had jurisdiction superior to the appointing authority and had not waived it by any governmental act, and

(iii) that the mere administrative acts of local Chinese agencies could not grant the Republic of China's consent to a foreign power to set up " territorial courts " in China.

In replying to the arguments of the Defence, the Prosecutor pointed out that the Supreme Court of the United States, in its judgment in the *Yamashita Trial* [2] had said :

> " General Styer's order for the appointment of the Commission was made by him as Commander of the United States Armed Forces, Western Pacific. His command includes, as part of a vastly greater area, the Philippine Islands, where the alleged offences were committed . . ."

(1) Acting pursuant to the authorization of the Joint Chiefs of Staff, given on 18th January, 1946, General Wedemeyer, Commanding General U.S. Armed Forces, China Theatre, set up the Commission on 16th February, 1946, and instructed it to follow the China Regulations which have been described in Vol. III of this series, pp. 105-113. The same Regulations governed the proceedings of the Commissions which tried the other two United States cases reported in the present volume (see pp. 68-81).

(2) See Vol. IV of this series, p. 1.

The Prosecutor claimed that this dictum was " directly in point with General Wedemeyer's authority to appoint a Commission regardless of any authority he may have received or sanction of the permission from the Joint Chiefs of Staff. General Wedemeyer exercises general court martial jurisdiction. He is Commander of the United States Armed Forces in China. The offences alleged were committed in China. The prisoners are in China under the control of the U.S. Army, therefore I think the motion is not well taken as to the authority of the Theatre Commander."

As to the legal relationship between the Chinese and the United States Governments in this instance, the Prosecutor said that: " extra-territoriality as far as civil courts and criminal courts and federal courts, by agreement between our government and China are out, but as far as a military commission we are here in China by consent of the Chinese government and I submit that the only authority to challenge this Commission is the Chinese government and not the accused in this case. These accused are in China; the court is constituted in China; we have received no objection from the Chinese Government, therefore I request the President of the Commission to deny the motion."

The motions were overruled by the Commission.

The power of the United States Commanding General to appoint the Commission cannot be doubted; the powers of such a general to set up war crime courts has already been thoroughly discussed in the pages of these Volumes.(1) Nor can it be claimed that the place where the war crime was committed could affect in any way the jurisdiction of the Commission. The laws of war permit a belligerent commander to punish by means of his military courts any hostile offender against the laws and customs of war who may fall into his hands wherever the place the crime was committed.(2)

The setting up of a United States Commission on Chinese soil, however, presents an interesting legal situation. The Commission did not give its reasons for rejecting the Defence motions, but it should be noted that the trials held before United States Military Commissions within the territorial jurisdiction of China were in fact undertaken pursuant to an understanding between the respective military authorities and that this understanding was confirmed by the proper agencies of the National Government of the Republic of China. Furthermore the action of the Commission could be justified on the grounds that the punishment of war criminals was an activity properly incidental to the military operations carried on by the United States forces on Chinese soil with the consent of the Chinese Government. The offences involved were committed in enemy-held territory

(1) See especially the judgment of the Supreme Court of the United States in the Yamashita Trial in Vol. IV, pp. 38-49.

(2) In the trial of Tanaka Hisaksu and others (see p. 66 of this volume), the Commission overruled a plea to the jurisdiction of the Commission based on the fact that the offence took place in Hong Kong, a British Crown Colony. And compare Vol. 1 of this series, p. 42.

of China during active hostilities and the appointing authority was the supreme commander of the United States military forces in China. Although at the time of the trial active hostilities had ceased, the residual military objectives of the United States forces had still to be followed up, including the punishment of war criminals. As was stated by the Judgment of the Supreme Court in the Yamashita Trial:

> " The trial and punishment of enemy combatants who have committed violations of the laws of war is . . . a part of the conduct of war operating as a preventative measure against such violations . . . The war power, from which the Commission derives its existence is not limited to victories in the field, but carries with it the inherent power to guard against immediate renewal of the conflict, and to remedy, at least in ways Congress has recognised, the evils which the military operations have produced . . . We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government."

The United States forces had been present in China at the invitation of the Republic of China as an Allied force to aid in the active prosecution of war against the common enemies. Until such time as the invitation of the Chinese Government had been withdrawn or the mission of the United States forces in China was completed and they had departed, the right to carry out residual war measures was still vested in the commander of the United States forces in China.(1)

2. DENIAL OF A FAIR TRIAL (2)

The United States Military Commission which tried this case had to decide exactly how far evidence of the denial of a fair trial to prisoners of war may be considered incriminating, and the fact that the trial was among the earliest of the war crime trials which followed the second World War, with few recorded precedents available, only increased the difficulty of their task.

An examination of the decisions arrived at by the Commission on the charges and on the specifications which elaborated the charges reveals the general nature of the acts which the Commission regarded as constituting war crimes, while a study of the relevant evidence shows in greater detail the character of those offences.

The charge of which Shigeru Sawada was found guilty (as amended by the Commission) stated that he caused certain captives (but not " knowingly and wilfully ") to be denied the status of Prisoners of War and to be tried

(1) The *Almelo Trial* provides another example of a trial held by a Military Court of one ally on the territory of another ally. In this instance also, a special agreement had been entered into. See Vol. I of this series, p. 42.

(2) This question is dealt with further in the notes to various other cases in this volume, see pp. 30-1, 34-6, 38, 64-5 and (particularly) 70-81.

and sentenced by a Japanese Military Tribunal in violation of the laws and customs of war. In greater detail, the offences of which he was found guilty were the following:

(i) that he constituted and appointed (but not " knowingly and wilfully") a Japanese Military Tribunal and directed this Tribunal to try certain " United States Army Personnel on false and fraudulent charges " (Specification 1, as amended by the Commission);

(ii) that the Tribunal set up by him tried and sentenced to death certain United States Army Personnel and Prisoners of War, upon false and fraudulent evidence, all under Sawada's authority " in this official capacity as Commanding General of the Japanese Imperial 13th Expeditionary Army in China " (Specification 2);

(iii) that he, between August and October, 1942, " did deny the status of prisoner of war " to one particular prisoner and did authorize him (but not " knowingly and wilfully ") " to be imprisoned as a war criminal, to be denied proper food, clothing, medical care and shelter, and did allow cruel and brutal atrocities and other offences to be committed against " the said victim (Specification 3 as amended by the Commission);

(iv) that he, between August and October, 1942, caused the other seven victims " to be denied the honourable status of Prisoners of War and wrongfully caused them and each of them to be treated as war criminals " (Specification 5 as amended).

Of more particular interest in a study of the denial of a fair trial are the findings of the Commission on the first and second specifications.

Sawada was found not guilty of knowingly and wilfully failing to commute, remit or revoke the sentences of the Japanese Tribunal, while having power to do so, thus causing the unlawful imposition of death and other sentences. The action of the Commission in finding the accused not guilty on this, the fourth specification, cannot, however, be taken necessarily as meaning that inaction in such circumstances would not constitute a war crime had it been proved, since there was evidence that the accused had made some protest against the sentences and had been told that the matter was in the hands of the Tokyo authorities.(1)

Even though Sawada's wrongful acts or omissions may have been the result of his negligence rather than design on his part, this would not necessarily affect the finding of his guilt. In the *Yamashita Trial* it was held that a Commanding General has the affirmative duty to take such measures as are within his powers to protect prisoners of war from violations of the laws of war.(2)

The offence of which Okada and Wako were found guilty was described in the specifications appearing under the charges brought against them:

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(1) See p. 4.

(2) See Vol. IV of these Reports, pp. 1 ff.

that each did, as a member of the Japanese Military Tribunal " knowingly, unlawfully and wilfully try, prosecute and, without a fair trial adjudge certain charges against " the prisoners involved " then Prisoners of War, and without affording the above named Prisoners of War a fair hearing or trial and without affording them the right to counsel and the interpretation of the proceedings into English, and without affording them an opportunity to defend themselves, did on or about the above date, sentence the aforesaid Prisoners of War to death."

Tatsuta was found guilty of:

(i) serving as an executioner at the execution of three of the prisoners (Specification 1);

(ii) denying the status of prisoner of war to the eight captives, and causing them " to be treated as War Criminals, by forcibly detaining the above named Prisoners of War in solitary confinement without adequate or proper quarters, or shelter, bedding, food, water, sanitary facilities, clothing, medical care, and other essential facilities and supplies, and by deliberate failure and refusal, without justification, to provide such facilities and supplies." (Specification No. 2).

The first finding regarding Tatsuta was not however confirmed.

It is impossible to draw up with certainty a complete catalogue of the aspects of the trial which were regarded by the Commission as contributing to its criminal character, but the findings of the Commission set out above show that the following facts were regarded by it as incriminating:

(i) the airmen were tried " on false and fraudulent charges " and " upon false and fraudulent evidence." Even had a war crime been shown to have been committed, the evidence before the Japanese Tribunal connecting the airmen with any such crime was slender and appears to have consisted mainly if not entirely of confessions alleged to have been made by the airmen while in Tokyo. The evidence before the United States Commission showed, however, that the statements made in Tokyo, whatever their contents, were made under duress,(1) and further that no attempt was made by the Japanese Judges to ascertain whether the documents put in as evidence against the airmen were actually the statements made by them in Tokyo.(2)

(ii) the airmen were not afforded " the right to counsel ";

(iii) the airmen were not given the right to " the interpretation of the proceedings into English ";

(iv) the airmen were not allowed " an opportunity to defend themselves."

Furthermore the following facts of greater or lesser importance which were admitted in evidence may have been taken into account by the Commission in deciding that the victims were not given " a fair hearing or trial ":

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(1) See p. 2.

(2) See pp. 5-6

(i) the fliers were not told that they were being tried, or told of any charges against them ;

(ii) the airmen were not shown the documents which were used as evidence against them.

The Commission may also have found on the facts that the sick airman was too ill to stand trial, and that the trial proceedings were not of such length as to enable a full investigation of the charges made against the airman.

3. THE PLEA OF SUPERIOR ORDERS

The plea that the accused acted on superior orders was put forward several times by Defence Counsel, and an examination of the Commission's conclusions (1) indicates that the latter placed a certain degree of weight on the plea that the accused were obeying the instructions of their military superiors in conducting the trial of the airmen. " Other officers, including high governmental and military officials ", stated the Commission, " were responsible for the enactment of the *Ex Post Facto* ' Enemy Airmen's Law ' and the issuance of special instructions as to how these American prisoners were to be treated, tried, sentenced and punished." (2)

The Commission continued : " The circumstances set forth above do not entirely absolve the accused from guilt. However, they do compel unusually strong mitigating considerations, applicable to each accused in various degrees." The Commission then proceeded to apply this general statement to the facts relating to each accused.

The sentences meted out to the accused were relatively light, and, in view of the Commission's conclusions, it may safely be said that this arose from the feeling of the Commission that the fact that the offences were committed under orders and in pursuance of a Japanese law constituted a mitigating circumstance.(3)

The plea of superior orders has been raised by the Defence in war crime trials more frequently than any other. The most common form of the plea consists in the argument that the accused was ordered to commit the offence by a military superior and that under military discipline orders must be obeyed. A closely related argument is that which claims that had the accused not obeyed he would have been shot or otherwise punished ; it is sometimes also maintained in court that reprisals would have been taken against his family. A variation is to be found in the argument of

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(1) See p. 7.

(2) In so far as this statement makes reference to the " Enemy Airmen's Law," see pp. 22-4.

(3) It may be noted that the Japanese Commanding General who ordered the trial of the American airmen and his successor in command who ordered the execution of the American airmen were not defendants in this case. They were being held in Tokyo in connection with the proceedings before the International Military Tribunal and their release, or transfer, to Shanghai, for trial as defendants in this case was refused.

Counsel for Dr. Klein, one of the accused in the *Belsen Trial* ;(1) Counsel claimed that if a British soldier refused to obey an order he would face a court-martial, where he would be able to contest the lawfulness of the order, whereas Dr. Klein has no such protection.

Not unnaturally, then, the plea has received treatment or reference on many previous occasions in the pages of these volumes.(2) In view of such difference of opinion as may once have existed as to the validity of the plea of superior orders, it may be of interest and value at this point to summarise without comment the material relating to the plea which has been culled from the records of war crime trials in recent years, and from the relevant international and municipal law enactments and other texts on which reliance has been placed during war crime trials. This is of two kinds :

(i) *Material setting out the circumstances in which the plea may be or has been successfully put forward*

Quotations from the various authorities which make the illegality, the obvious legality or knowledge or presumed knowledge of the illegality, of the order given in some way the criterion falls into this category, as for instance the revised paragraph 433 of Chapter XIV of the British *Manual of Military Law* :(3)

> " The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime ; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, *not obviously unlawful*, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. The question, however is governed by the major principle that members of the armed forces are bound to obey *lawful orders only* and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity." (Italics inserted.)

This passage from the Manual has frequently been relied upon as expressing the true state of international law as to superior orders. It was for instance accepted by the Judge Advocate in the *Peleus Trial*.(4)

A second authority on which great reliance has been placed by counsel and which has been quoted as stating correct law by Judge Advocates

(1) See Vol. II, p. 79.

(2) See Vol. I, pp. 4, 8, 9, 10, 11, 12, 16-20, 27-29, 31-34, 37, 40, 41, 44, 54, 60, 62, 63, 64, 74, 75-76 and 120 ; Vol. II, pp. 38, 75-76, 79, 95-96, 103-4, 107, 108, 117-118, 122, 148 and 152 ; and Vol. III, pp. 6, 18, 19, 22, 38, 42, 47, 54, 58, 64 and 77.

(3) See Vol. I, p. 19 ; and see Vol. II, pp. 77-78 and 108.

(4) See Vol. I, p. 19.

in British Trials [1] has been the celebrated work, *International Law* (Oppenheim-Lauterpacht), of which Volume II (6th Edition) contains on pp. 453–5 a passage which is identical with the amended version of paragraph 443.

Also under this heading falls the quotation from Sheldon Glueck, *War Criminals, the Prosecution and Punishment* which appeared originally in Volume III of these Reports.[2] Glueck, seeking to reconcile the dilemma in which a subordinate is placed by an order manifestly unlawful, compliance with which may later subject him to trial for a war crime, and refusal to comply with which may immediately subject him to disciplinary action, perhaps death, suggests that the following rule be applied : " An unlawful act of a soldier or officer in obedience to an order of his government or his military superior is not justifiable if when he committed it he *actually knew, or, considering the circumstances he had reasonable grounds for knowing that the act ordered is unlawful* under (a) the laws and customs of warfare, or (b) the principles of criminal law generally prevailing in civilized nations, or (c) the law of his own country. In applying this rule, whenever the three legal systems clash, the last shall be subordinate." (Italics inserted).

Again, one of the two Judge Advocates in the *Masuda Trial*,[3] in presenting the case for the Prosecution, quoted, *inter alia*, one court decision which falls within this category in his attempt to secure 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."[4] (Italics inserted.)

In his summing up, the Judge Advocate who acted in the trial of Robert Holzer and two others before a Canadian Military Court at Aurich, Germany, 25th March to 6th April, 1946, during which the accused had put forward a plea of superior orders and duress to a charge of being concerned in the illegal killing of a Canadian prisoner of war, advised the Court to follow the passage from Oppenheim-Lauterpacht *International Law* to which reference has already been made.[5] He claimed that the decision of the German Supreme Court in the *Llandovery Castle* case decided at Leipzig in 1921 perpetuated this exact principle by laying down the following : " The defence of superior orders would afford no defence if the act was *manifestly and indisputably contrary to international law* as for instance the killing of unarmed enemies." (Italics inserted.)

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[1] For instance the Judge Advocate in the Belsen Trial advised the court to follow the law laid down in this text on the question of Superior Orders. See Vol. II of this series, pp. 117-118, and p. 43 of the present volume.

[2] See Vol. III, p. 64.

[3] See Vol. I, pp. 71-80.

[4] *Ibid.*, p. 75.

[5] See pp. 14-15.

Regarding the accused Holzer, who had claimed to have acted under superior orders which amounted to coercion or duress, the Judge Advocate said: " The Court may find that Holzer fired the shot at the flyer under severe duress from Schaefer, actually at pistol point, although there is conflicting testimony in this regard. The threats contemplated as offering a defence are those of immediate death or grievous bodily harm from a person actually present but such defence will not avail in crimes of a heinous character or if the person threatened is a party to an association or conspiracy such as the Court might find existed in this case. As to the law applicable upon the question of compulsion by threats, I would advise the Court that there can be no doubt that a man is entitled to preserve his own life and limb, and on this ground he may justify much which would otherwise be punishable. The case of a person setting up as a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified." Lord Hale lays down the stern rule: " If a man be desperately assaulted and in peril of death and cannot otherwise escape, unless to satisfy his assailant's fury, he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he committed the fact; for he ought rather to die himself than kill an innocent man."(1)

The plea of superior orders was put forward in further trials in the present volume, in which the arguments of counsel, as also the advice of the Judge Advocate, again made the validity of the plea turn upon the illegality, the obvious illegality, or the knowledge or presumed knowledge of the illegality of the order given.(2)

Trials in which the plea has had some effect also illustrate the circumstances in which the plea may be successfully put forward. Such trials include that reported upon on pages 1–8 of the present volume and the *Wagner Trial*, which was reported in Volume III of these Reports.(3)

Readers of the latter volume will recall that the French Permanent Military Tribunal of Strasbourg, sitting from 23rd April to 3rd May, 1946, tried ex-Gauleiter Wagner and certain of his underlings for offences committed by them in Alsace during the German occupation. One of the accused, Ludwig Luger, formerly Public Prosecutor at the *Sondergericht* of Strasbourg, was charged with having been an accomplice in murder. The charge was made in the Indictment that, during the trial of a group of 13 Alsatians accused of murdering a frontier guard during an attempted escape to Switzerland, Luger acknowledged that there was no evidence of the guard having been killed by any of the accused yet demanded the death sentence, which was passed on all 13 accused. Nevertheless Luger was acquitted, the Permanent Military Tribunal finding that he had acted under pressure from Wagner, then Gauleiter and Reich Governor of Alsace.

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(1) See also p. 21.
(2) See pp. 31, 43, 49-51 and 58.
(3) See Vol. III, pp. 23-55.

(The Indictment alleged that it was Wagner's normal routine to examine an Indictment before a trial was held before the Sondergericht, and to communicate to Luger his orders concerning the penalty which the latter was to demand.)

This French case is interesting also because it represents an instance in which the defence of superior order was pleaded, and successfully, not by a member of the armed forces but by a civilian, a member of the German administration of an occupied territory.

The Supreme Court of Norway provides another example. Hauptsturmführer Wilhelm Artur Konstantin Wagner was charged before the Eidsivating Lagmannsrett (one of the Five Courts of Appeal) with having committed war crimes in that he, in violation of the laws of humanity, was concerned in the deportation and death of 321 Norwegian Jews. The Lagmannsrett found him guilty and sentenced him to death. He appealed to the Supreme court on the ground, *inter alia*, that the punishment decided by the Lagmannsrett was too severe, the majority of the judges having failed to consider that he had acted on superior orders and that in his capacity of a subordinate he could not have prevented the carrying out of the decision of the German and Quisling Governments.

When discussing the severity of the punishment decided upon by the Lagmannsrett, the President of the Court agreed with the minority of that court that it had been established that the defendant held a very unimportant position in the Gestapo and that there was nothing to show that he had taken any initiative in the action. His part had been to pass on the orders from Berlin to the Chief of the State Police and to execute the orders of his superiors. He was sure that if the defendant had refused to obey orders, he would have had to pay for the refusal with his life.

On the other hand, it had been ascertained that the defendant, when superintending the embarkation of the Jews, had personally gone to see to it that more provisions were handed out to them.

He therefore proposed to fix the punishment to 20 years penal servitude. The sentence was approved by a majority of three to two.

Two more examples of trials in which the court considered as a mitigating factor the circumstances that an accused acted under superior orders may be quoted, each relating to trials by United States Military Commissions. On 24th January, 1946, a General Military Government court sitting at Ludwigsburg found two German civilians, Johann Melchior and Walter Hirschelman, guilty of aiding, abetting and participating in the killing of two prisoners of war by shooting them, but sentenced them to life imprisonment; the records make it clear that the death sentence was not inflicted because the accused had acted under the orders of a Kreisleiter. Karl Neuber was found guilty on 26th April, 1946, by a General Military Government court at Ludwigsburg, of aiding, abetting and participating in the killing of prisoners of war by leading them to execution and standing by while they were shot. He had acted on the orders of Criminal Commissar

Weger, in whose office he was a filing clerk. The sentence passed was one of imprisonment for seven years, and an examination of the record shows that the court, in fixing the sentence, bore in mind the fact that Neuber acted under pressure of superior orders.

Finally, readers of Volume I of these Reports will recall that, in the *Masuda Trial* (1) where four Japanese accused were found guilty of the illegal killing of prisoners of war, Defence Counsel provided the Commission which conducted the trial with a typical exposition of the defence of superior orders.(2) It will be remembered that, whereas the actual executioners suffered death, a lesser sentence of imprisonment for ten years was meted out to the accused Tasaki, the custodian of the prisoners of war, who handed over the latter to their executioneers in obedience to the orders of Rear-Admiral Masuda, who had decided on the illegal killing of the prisoners and had actually told Tasaki why he was to deliver up the victims. Tasaki's punishment was lighter than that of the others because of the " brief, passive and mechanical participation of the accused." (3)

During this last trial, four possible criteria for determining the circumstances in which the plea of superior orders might be effective were touched upon by counsel, and it may be of interest to place these on record :

(*a*) The degree of military discipline governing the accused at the time of the commission of the alleged offence. Defending counsel laid great stress on the exceptionally strict obedience to orders which was expected from a Japanese soldier. On the other hand the Judge Advocate expressed the opinion that : " The Japanese Army must observe the same rules that the United States fighting man, the man from Russia and the man from Great Britain must observe. The law is no respector of individual nations. If it is to be an effective law, it must govern the actions of all nations."

(*b*) The relative positions in the military hierarchy of the person who gave and the person who received the order. Counsel for the defence pointed out that the order was given by a Rear-Admiral, to " mere Warrant Officers and Petty Officers."

(*c*) The military situation at the time when the alleged offence was committed. The defence pointed out that discipline at Jaluit was the stricter because of the nearness of the United States forces. This defence is not the same as that based on military necessity, when using which the accused pleads that, irrespective of any superior orders, he acted as he did because the military situation made it necessary for him to do so.

If this argument were to be admitted, it would be for the defence to prove that the situation had actually altered the accused's attitude towards his superiors so as to make him feel that his obligation to obey them had become stricter.

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(1) See Vol. I, pp. 71-80.

(2) *Ibid.*, p. 74.

(3) *Ibid.*, pp. 73, 74 and 76.

(*d*) The degree to which " a man of ordinary sense and understanding " would see that the order given was illegal. This test was suggested by the Judge Advocate,(1) and its use is for Anglo-Saxon lawyers, reminiscent of the frequent references to the hypothetical " average reasonable man," and of a passage of Dicey's in reference to the analogous conflict between a soldier's duty to obey orders and his allegiance to the general law of the land : " . . . a soldier runs no substantial risk of punishment for obedience to orders which a man of common sense may honestly believe to involve no breach of law " (Professor Dicey, *The Law of the Constitution*, 8th Edition, p. 302, quoted by Professor Lauterpacht in *British Yearbook of International Law*, 1944, p. 72).

The first three of these suggested criteria demonstrate an awareness of the heavy pressure under which an accused may be acting in obeying an order. It is difficult, however, to say precisely how far such criteria as the four set out above are followed by Courts and how far they constitute suggestions *de lege ferenda*. The International Military Tribunal at Nuremberg, commenting in its judgment on Article 8 of its Charter apparently had the same consideration in mind when it said : " The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible." (2)

(ii) *Material defining the legal effect of the plea when successfully put forward*

International agreements and municipal enactments regarding the punishment of war crimes have shown a great reluctance to regard the plea of superior orders as a complete defence, and have preferred to admit that the fact that a war crime was committed under orders may constitute a mitigating circumstance and to leave to the court the power to consider each case on its merits.

Thus, Article 8 of the Charter of the Nuremberg International Military Tribunal provided that :

> " The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

Substantially the same provision is made in Article 6 of the Charter of the International Military Tribunal for the Far East, in paragraph 4 (b) of Article II of Law No. 10 of the Allied Control Council in Germany,(3) and in Regulation 9 of the United States Mediterranean Regulations, Regulation 16 (f) of the Pacific Regulations, September 1945, Regulation 5 (d), (6) of the Pacific Regulations, December 1945, and Regulation 16 (f) of the China Regulations.(4)

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(1) *Ibid.*, p. 75.
(2) British Command Paper, Cmd. 6964, p. 42.
(3) See Vol. III, pp. 101 and 114.
(4) *Ibid.*, p. 105.

Similarly Article 5 of the Norwegian Law of 13th December, 1946, on the Punishment of Foreign War Criminals provides that:

> " Necessity and superior order cannot be pleaded in exculpation of any crime referred to in Article 1 of the present law. The court may, however, take the circumstances into account and may impose a sentence less than the minimum laid down for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted."

Other provisions which leave it to the court to decide what weight to place on the plea are the following:

> " The fact that an accused acted pursuant to the order of a superior or of his government shall not constitute an absolute defence to any charge under these Regulations ; it may, however, be considered either as a defence or in mitigation of punishment if the military court before which the charge is tried determines that justice so requires." (Article 15 of the Canadian War Crimes Act of 31st August, 1946).
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> " The fact that the criminal deed was performed by a person acting under orders or in a subordinate capacity does not exempt the criminal from responsibility, but may be taken into consideration as an extenuating circumstance, and in specially extenuating circumstances the punishment may be waived altogether." (Article 4 of the Danish Act on the Punishment of War Crimes of 12th July, 1946).
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> " In the case of trials instituted under the provisions of Article 2 of the present law, the fact that the accused acted in accordance with the provisions of enemy laws or regulations, or at the orders of a superior officer cannot be regarded as a reason for justification, within the meaning of Article 70 of the Criminal Code, when the act committed constituted a flagrant violation of the laws and customs of war, or the laws of humanity. The plea may be taken into consideration as an extenuating circumstance." (Article 3 of the Belgium Law of 20th June, 1947, relating to the Competence of Military Tribunals in the matter of War Crimes).
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> " Laws decrees or regulations issued by the enemy authorities, orders or permits issued by these authorities, or by authorities which are or have been subordinated to them, cannot be pleaded as justification within the meaning of Article 327 of the *Code Pénal*,(1) but can only, in suitable cases, be admitted as extenuating or exculpating circumstances." (Article 3 of the French Ordinance of 28th August, 1944, Concerning the Prosecution of War Criminals).

Article 5 of the Polish Law, promulgated on 11th December, 1946, concerning the punishment of war criminals and traitors, provides that:

> " The fact that an act or omission was caused by a threat, order or command does not exempt from criminal responsibility.

(1) *Ibid.*, p. 96.

" In such a case the Court may mitigate the sentence taking into consideration the circumstances of the perpetrator and the deed."

Article VIII (in paragraphs 1–2) of the Chinese Law of 24th October, 1946, simply provides that:

" The following circumstance under which offences have been committed shall not exonerate war criminals :

1. The fact that crimes were committed by order of Superior Officers.

2. The fact that crimes were committed as result of official duty."

So also Article 4 of the Luxembourg War Crimes Law of 2nd August, 1947, provides, *inter alia*, that orders or permission given by the enemy authority or by authorities depending on the latter shall not be regarded as justifying circumstances within the meaning of Article 70 of the Luxembourg *Code Pénal.*

Again, Article 13 (3) of the Czechoslovak Law No. 22 of 24th January, 1946, provides that:

" (3) The irresistible compulsion of an order from his superior does not release any person from guilt who voluntarily became a member of an organization whose members undertook to carry out all, even criminal, orders."

No special provision relating to the plea of superior orders has been made in the Netherlands War Crimes Law of July 1947 (Statute Book H.233), since the existing provisions of the Netherlands Penal Code concerning superior orders are deemed sufficient. Article 43 of that Code states that:

" A person is not punishable who commits an act in the execution of an official order given him by the competent authority.

" An official order given without competence thereto does not remove the liability to punishment unless it was regarded by the subordinate in all good faith as having been given competently and obeying it came within his province as a subordinate."

The Judge Advocate acting in the Canadian war crime trial to which reference has already been made, after citing Lord Hale,[1] continued:

" Sir J. Stephens expresses the opinion that in most if not all cases the fact of compulsion is matter of mitigation of punishment and not matter of defence. This principle is older than Bacon's maxims, ' Urgent necessity no matter how grave is no excuse for the killing of another ', and to the same effect, in the case of *Regina* v. *Stephens*, where three shipwrecked sailors drew lots, killed and ate the loser to preserve their own lives. This was held to be murder—a crime. Accordingly, if the Court do find that Holzer fired after having been subjected to dire threats on his own life, on which there is conflicting testimony, even then he is not excused upon the above-mentioned fundamental principles, but it more properly goes in mitigation of punishment."

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(1) See p. 16.

The Judge Advocate interpreted the defence plea that superior orders might, in the circumstances of the case, have constituted a defence under German law not as a claim that German law was applicable in proceedings before the Canadian Court but as a submission that the Court take that fact into consideration in coming to their decision.

Despite the fact that most of the regulations governing trials by United States Military Commissions have included provisions defining the applicability of the plea of Superior Orders, reference has often been made during trials before such Commissions, to the United States Basic Field Manual F.M. 27-10 (*Rules of Land Warfare*) which is similar in scope and purpose to the *British Manual of Military Law*, and has the same persuasive authority.(1) The United States *Manual* contains in its paragraph 345, the following words:

> " Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."(2)

The enactments and other authorities set out above make it clear that, while the Defence can never claim that superior orders represent an absolute defence which would remove the legal guilt of the prisoner (as would, for instance, a successful plea of insanity), the Court may consider the fact that an offence was committed under orders as a mitigating circumstance and may therefore inflict a lighter penalty than would have been imposed, or may impose no penalty at all. The words of Professor Michel de Jüglart in *Répertoire Méthodique de la Jurisprudence Militaire* are indeed true not only of the French approach to the plea but also of that generally adopted by those responsible for the legislation for, and judging of, war crime cases arising out of the second world war. After pointing out that it would have been possible for the legislator either to lay down that the plea of superior orders always represented a complete defence or to prescribe in advance the exact circumstances in which it would or would not constitute such a defence, Professor de Jüglart continues:

> " There exists an intermediate approach which the legislators of the Ordinance of 1944 have adopted; it consists in excluding in general the command of the law or the orders of legitimate authority as a justifying circumstance, while retaining them as an extenuating factor or excuse. The criminal character of the act therefore always remains but an individualization of the penalty, imposed more or less severely according to the case, permits a modification of the consequences. . . ."

4. THE PLEA OF LEGALITY UNDER MUNICIPAL LAW

It has been seen that the fact that the accused were bound under Japanese Law to obey the " Enemy Airmen's Law," which permitted the passing of

(1) See Vol. I, p. 19.

(2) The provisions of the Field Manual on this point were quoted for instance by the Defence in the Trial of General Anton Dostler, by a United States Military Commission in Rome (8th-12th October, 1945). See Vol. I, pp. 22-34.

the death sentence on certain captured fliers, was regarded by the Commission as representing a mitigating circumstance.(1) The legislators and the judges who have had the task of dealing with war crime cases in recent years have taken much the same attitude towards the plea that an accused's act was legal under his own municipal law as towards the plea of superior orders, although it should be remembered that the former plea is usually put forward in the form of a claim that an accused's act was *permitted* by the law of his country, not that it was *compulsory* under that law.

The texts which have been quoted under the previous heading (2) are, in the sense that laws may be regarded as a type of superior orders, all relevant in this connection, and in fact, the Belgian law of 20th June, 1947, relevant to the competence of Military Tribunals in the matter of war crimes actually includes the words : " The fact that the accused acted in accordance with the provisions of enemy laws or regulations " in setting out the circumstances which cannot be regarded as a reason for justification of crimes when the act committed constituted a flagrant violation of the laws and customs of war, or the laws of humanity.(3)

Article 3 of the French Ordinance of 28th August, 1944, also places the plea of alleged legality under municipal law on the same footing as the plea of superior orders,(4) and a similar provision is contained in Article 4 of the Luxembourg War Crimes Law of 11th August, 1947.

Again, Article 13 (1) of a Czechoslovak Law of 24th January, 1946, relating to the punishment of war criminals and traitors, states that :

> " Acts punishable under this law are not justified by the fact that they were ordered or permitted by the provisions of any law other than Czechoslovak Law or by organs set up by any state authority other than the Czechoslovak, even if it is claimed that the guilty person regarded these invalid provisions as legal."

The defence that the accused's acts were justified in their own municipal law received consideration in the *Belsen Trial*, but was rejected by the Military Court which tried the case.(5) Again, the Judgment of the Military Tribunal before which *The Justice Trial* (6) was conducted pointed out that : " The defendants contend that they should not be found guilty because they acted within the authority and by the command of the German laws and decrees." After quoting the provisions of Control Council Law No. 10 as to the plea of superior orders,(7) and also the provision therein for the punishment of crimes against humanity whether or not in violation of the domestic laws of the country where perpetrated, however, the Judgement went on to point out that : " The very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and

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(1) See p. 7.
(2) See pp. 13-22.
(3) See p. 20.
(4) See p. 20.
(5) See Vol. II of this series, pp. 34-35, 77 and 107-108.
(6) See p. 81.
(7) See p. 19.

perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignity participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defence to the charge."