

CASE NO. 63

TRIAL OF LIEUTENANT GENERAL KURT MAELZER

UNITED STATES MILITARY COMMISSION,
FLORENCE, ITALY, 9TH-14TH SEPTEMBER, 1946

A. OUTLINE OF THE PROCEEDINGS

(1) THE CHARGE

The accused was charged with " . . . exposing prisoners of war . . . in his custody . . . to acts of violence, insults and public curiosity."

(2) THE EVIDENCE

Some time in January, 1944, Field Marshal Kesselring, commander-in-chief of the German forces in Italy, ordered the accused who was commander of Rome garrison to hold a parade of several hundreds of British and American prisoners of war in the streets of the Italian capital. This parade, emulating the tradition of the triumphal marches of ancient Rome, was to be staged to bolster the morale of the Italian population in view of the recent allied landings, not very far from the capital. The accused ordered the parade which took place on 2nd February, 1944. 200 American prisoners of war were marched from the Coliseum, through the main streets of Rome under armed German escort. The streets were lined by forces under the control of the accused. The accused and his staff officers attended the parade. According to the Prosecution witnesses (some of whom were American ex-prisoners of war who had taken part in the march), the population threw stones and sticks at the prisoners, but, according to the defence witnesses, they threw cigarettes and flowers. The prosecution also alleged that when some of the prisoners were giving the "victory sign" with their fingers the accused ordered the guards to fire. This order, however, was not carried out. A film was made of the parade and a great number of photographs taken which appeared in the Italian press under the caption "Anglo-Americans enter Rome after all . . . flanked by German bayonettes." The accused pleaded in the main that the march was planned and ordered by his superiors and that his only function as commander of Rome garrison was to guarantee the safe conduct and security of the prisoners during the march, which he did. He stated that the march was to quell rumours of the German defeat and to quieten the population of Rome, not to scorn or ridicule the prisoners.

(3) FINDINGS AND SENTENCE

The accused was found guilty and sentenced to 10 years' imprisonment. The sentence was reduced to three years' imprisonment by higher military authority.

B. NOTES ON THE CASE

(1) THE CONSTITUTION OF THE COURT

The defence pleaded that the court was improperly constituted, as the accused was being tried by officers of inferior rank and that this procedure

violated the Article of War No. 16. This Article provides "... In no case shall an officer, where it can be avoided, be tried by officers inferior to him in rank." This plea was rejected by the court.

United States Military Commission derive their jurisdiction from the "Common Law of War⁽¹⁾." This law requires that the accused be given a fair trial without specifying in any way the nature of such trial. The power to set up a Military Commission to try war crimes is inherent in the powers of a commander in the field. Such Military Commission is bound by the rules and restrictions imposed by the sources of its authority, in this case these rules were the "Regulations for the Trial of War Criminals for the Mediterranean Theatre" 23rd September, 1945, circular No. 114. As these regulations contain no restrictions as to the composition of the court, Article of War 16 does not apply.

Chief Justice Stone dealt with the question of applicability of the United States Articles of War to War Crimes Trials in his judgment in *In re Yamashita*⁽²⁾. In this case the petitioner contended that Article 25 of the U.S. Article of War had been violated by the admitting of depositions in a capital case and Article 38 by the admitting of hearsay and opinion evidence. The Judgment says: "We think that neither Article 25 nor Article 38 is applicable to the trials of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates 'the persons . . . subject to these articles'. . . . In general, the persons so enumerated are members of our own army and of the personnel accompanying the army. Enemy combatants are not included amongst them." The judgment points out that military commissions are authorised to try two classes of persons "to one of which the Articles of War do, and to the other of which they do not, apply in such trials. . . . Being of this latter class petitioner cannot claim the benefit of the Articles which are applicable only to the members of the other class."

The Royal Warrant for the Trial of War Criminals before British Military Courts provides for trials by officers of equal or superior rank to that of the accused but does not make this compulsory. Regulation 5 says: "If the accused is an officer of the naval, military or air forces of an enemy or ex-enemy power, the convening officer should, so far as practicable, *but shall be under no obligation to do so*⁽³⁾, appoint or detail as many officers as possible of equal or superior relative rank to the accused." In fact many ex-enemy officers were tried by British and American Military Courts constituted of officers inferior in rank to the accused.

(2) INFRINGEMENT OF THE GENEVA CONVENTION

The march through Rome was a violation of Article 2, sub-paragraph 2 of the Geneva Convention which says "They" (prisoners of war) "shall at all times be humanely treated and protected particularly against acts of

(1) See Volume I, pp. 111.

(2) See Volume IV, pp. 45-46 of this series.

(3) Italics inserted.

violence, from insults and from public curiosity." The charge was obviously framed in accordance with this regulation. There can be no doubt that the prisoners of war were exposed to public curiosity. According to the defence witnesses they were protected from insults and violence by the German troops who lined the streets. According to the prosecution witnesses, the German troops failed to protect them from such insults and violence. The court found that the accused in whose care the prisoners were at the time, and who had ordered and attended the march, was guilty of a war crime.