

CASE NO. 59

TRIAL OF TANABE KOSHIRO

NETHERLANDS TEMPORARY COURT-MARTIAL,
MACASSAR, 5TH FEBRUARY, 1947

Unnecessarily subjecting prisoners of war to danger. Employing prisoners of war on prohibited work.

A. OUTLINE OF THE PROCEEDINGS

The accused, Tanabe Koshiro, was a 1st Lieutenant of the Japanese Navy, and at the time of the alleged crimes, officer commanding the Suki (Coast Guard) of 23 Special Naval Base Forces at Macassar, Netherlands East Indies. He was tried for violations of the rules of warfare concerning the treatment of Dutch and other Allied prisoners of war at Macassar.

1. THE CHARGES

The prosecution charged the accused with having "as a subject of the enemy power, Japan, at Macassar, about August, 1944, therefore in time of war," committed two types of offences :

- "(a) unnecessarily exposed about twelve hundred Dutch, American British and Australian prisoners of war to acts of war";
- "(b) Employed prisoners of war in war work" in that the accused "had an ammunition depot built by prisoners of war at a distance "of approximately 50 yards from the prisoners-of-war camp" and "ordered the depot to be filled with ammunition".

The prosecution asked the court to find the accused guilty of "intentionally and unnecessarily exposing prisoners of war to acts of war", and of "employing prisoners of war on war work", and to convict him to 5 years' imprisonment.

2. FACTS AND EVIDENCE

The accused pleaded not guilty. According to the evidence submitted to the court, which included the testimony of Dutch and Japanese witnesses heard during the proceedings, the facts were as follows :

In July or August, 1944, a large ammunition depot was built opposite the prisoners-of-war camp at Macassar, and was located about 50 yards from the fence surrounding the camp. The depot was built by the prisoners from the camp on the order of the accused. The witnesses heard on this last point included the Japanese commandant of the prisoners-of-war camp. The ammunition stored in the depot was brought by Japanese soldiers belonging to the Sukei (Coast Guard) under the accused's command.

In view of the proximity of the depot, air-raid shelters were built in the camp, but were inadequate. They were made of rotten trunks of coconut palms and old timber, with a covering of thin sheets of old zinc.

3. THE JUDGMENT

The accused was found guilty of both charges, namely, of "unnecessarily subjecting prisoners of war to danger" and of "employing prisoners of war in an unlawful way". He was sentenced to 7 years' imprisonment.

B. NOTES ON THE CASE⁽¹⁾

1. THE NATURE OF THE OFFENCES

With regard to the offences for which the accused was sentenced, the court applied rules of international law, as contained in the existing treaties and conventions.

On the count of "employing prisoners of war in an unlawful way" in that they were used on "war work", the court specially applied Art. 6 of the Hague Regulations respecting the Laws and Customs of War on Land, appended to the IVth Hague Convention concerning the Laws and Customs of War, and Art. 31 of the Geneva Convention relative to the Treatment of Prisoners of War.

The relevant passages of Art. 6 of the Hague Regulations provide as follows :

"The State may employ the labour of prisoners of war, other than officers, according to their rank and capacity. The work shall not be excessive and *shall have no connection with the operations of the war.*"⁽²⁾

In Art. 31 of the Geneva Convention the latter part of the above rule is repeated, and it is specified that it is "in particular" forbidden "to employ prisoners in the manufacture or transport of arms or munitions of any kind, or on the transport of material destined for combatant units."

By applying the above provisions to the facts of the trial and finding the accused guilty of using prisoners on prohibited work, the court decided that the building of ammunition dumps or depots constituted "work connected with the operations of war". It thus contributed to defining this concept in regard to cases which were not specifically mentioned in Art. 31 of the Geneva Convention as prohibited in particular.⁽³⁾

Regarding the charge of exposing prisoners to danger, the court specifically applied Art. 7 of the Geneva Convention, whose relevant passages run as follows :

"As soon as possible after their capture, prisoners of war shall be evacuated to depots sufficiently removed from the fighting zone for them to be out of danger.

Prisoners shall not be unnecessarily exposed to danger while awaiting evacuation from a fighting zone."

⁽¹⁾ For the Netherlands law relating to war crimes, see Annex.

⁽²⁾ Italics are inserted.

⁽³⁾ On this question, see further, Vol. VII of these Reports, pp. 43 and 47 and the notes to the *High Command Trial* report in Vol. XII.

The court's findings were "that the presence of the ammunition depot" in the immediate vicinity of the prisoners' camp "constituted a double danger" for the camp and its inmates. It was established that "from the middle of 1944 the Allied air activities in Macassar increased" and that from the beginning of 1945 "the bombing became more frequent and more intensive". The district of the camp and the depot "was several times the immediate target of allied bombers and fighters". As a consequence "during the allied air activities the said ammunition depot could have been hit with . . . disastrous results" for the prisoners. The second danger, according to the court, was caused by Japanese anti-aircraft artillery guns. They were "placed round and even in the prisoners-of-war camp," so that "the Japanese intentionally incited the allied forces to activity there". As a result of both allied bombing and Japanese defence "wounds caused by splinters" among the prisoners "were a regular thing". One prisoner was killed by having his "head smashed by bomb-splinters". On one occasion a field where "hundreds of prisoners of war were daily employed, was only missed by some tens of yards".

The court decided that the above circumstances constituted a breach of the rule that prisoners should not be "unnecessarily exposed to danger".

2. VALIDITY OF RULES OF INTERNATIONAL LAW IN DUTCH LEGISLATION

The legal basis for the Netherlands East Indies courts to implement rules of international law in the sphere of war crimes, derives from Art. 1 of the Netherlands East Indies Statute Book Decree No. 44 of 1946. This provision defines the notion of war crimes and treats it as an offence under international law in the following terms :

"Under war crimes are understood acts which constitute a violation of the laws and usages of war committed in time of war by subjects of an enemy power or by foreigners in the service of the enemy."

This definition is followed by the enumeration of all the offences contained in the list of war crimes drawn up by the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: In the Decree No. 44, these offences were enumerated only as an example of what constitutes a war crime, so that the latter concept is not limited to them. The 1919 list includes the "employment of prisoners of war on unauthorised work".

The reference to the "laws and usages of war" is at the same time a reference to the international treaties and conventions or agreements which contain the rules concerning these laws and usages, and was the formal basis on which the court in this case proceeded by applying the relevant provisions of the Hague Regulations and the Geneva Convention.

It should be noted that this legal method of proceeding in war crimes trials carries with it the generally recognised principle that violations of international treaties and conventions entail or may entail individual penal responsibility and penal sanctions.

As explained elsewhere, in Dutch metropolitan law the method is, legally speaking, different. There, as in other continental countries, the questions

of guilt and punishment of war criminals are formally decided on the basis of common law provisions as contained in the penal codes or other texts of municipal law.⁽¹⁾

When applying provisions of the Hague Regulations and the Geneva Conventions the court considered the question of their validity in respect of Japan and Japanese subjects. It decided that the provisions of the Hague Regulations were applicable because "the enemy power, Japan, as co-signatory to the Hague Convention of 18th October, 1907" which it ratified, "was bound" by its provisions. As to the Geneva Convention of 1929, concerning the treatment of prisoners of war, which Japan only signed but did not ratify, the court decided that "the said convention must be regarded as containing generally accepted laws of war" to which "Japan is also bound, even without ratification". In this respect stress was laid on the fact that the Convention contained "a confirmation of general and already existing conceptions of international law" and was the "prevailing international law" accepted by other nations.

3. EVIDENCE OF THE ACCUSED'S PERSONAL GUILT

When deciding upon the accused's personal guilt for both offences, the court proceeded on the ground of circumstantial evidence. It established that there was "no direct proof that he gave the order" for building the ammunition depot by the prisoners in the immediate vicinity of their camp. It found, however, that such orders were to be "deduced" from the following facts :

- (a) That the prisoners employed on the construction were drafted at the request of the accused's unit, the Sukei (Coast Guard) ;
- (b) That the Japanese officer in charge, as well as all the Japanese engaged in the construction, belonged to the accused's unit ;
- (c) That all the Japanese who handled the ammunition were also from the accused's unit.

4. DEGREE OF THE ACCUSED'S RESPONSIBILITY

When considering the punishment to be imposed, the court took into account two circumstances : that the ammunition depot was not actually hit as a result of the allied bombing, and that "the accused's object was not to subject the prisoners of war to danger" but only "to safeguard the combat supplies of his own forces". It is fair to say that his guilt was, consequently, found to reside in the objective circumstances created by his acts, and not in his criminal intentions.

⁽¹⁾ On this difference, see the Annex to this volume.