

CASE NO. 60

TRIAL OF LIEUTENANT-GENERAL BABA MASAO

AUSTRALIAN MILITARY COURT, RABAU,
28TH MAY-2ND JUNE, 1947

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGE

The charge alleged that the accused "while commander of armed forces of Japan . . . unlawfully disregarded and failed to discharge his duty as a . . . commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes . . ."

2. THE EVIDENCE

The accused was General Officer Commanding the 37th Japanese Army in Borneo from December, 1944, until the cessation of hostilities. At the time when the accused assumed command of the 37th Army there were about a thousand British and American prisoners of war in a prisoner of war camp at Sandakan. These prisoners were moved from Sandakan to Ranau (a march of 165 miles over extremely difficult country) in two parties. One went in December, 1944, and the other in May, 1945. Owing to the very meagre rations that the prisoners had been receiving over a long period, their state of health in December, 1944, was very poor. The order for the march had been given before the accused took over command of the 37th Army, but the accused admitted that he was aware of the conditions of the prisoners and that he ordered a reconnaissance of the country through which the prisoners were to march. He failed to alter the orders for the march after this reconnaissance. During the march a great number of prisoners died as a result of the hardships they had had to suffer, many were severely ill-treated and some who could not keep up with the marching column were shot by the guards on orders from the officer in charge of the party, who was an officer subordinate to the accused.

The accused received a report of this march early in 1945, in spite of which report he ordered the evacuation of the remaining 540 prisoners over the same route in May, 1945. This second march proved even more disastrous than the first. Only 183 prisoners reached Ranau and of these another 150 died there shortly after their arrival. By the end of July, only 33 of the whole party were alive. They were killed on 1st August, on the orders of an officer who was under the command of the accused.

With regard to the two marches the defence pleaded that the evacuation of the prisoner of war camp at Sandakan was an operational necessity as the camp was near the seashore and an allied landing was to be anticipated. Allied troops did in fact land there in July, 1945, after the camp had been evacuated. The defence also pointed out that the Japanese army were themselves short of food and medical supplies and many of the guards died

on the march as a result of the same hardships which the prisoners had suffered. This was not denied by the prosecution.

The accused gave evidence of the measures he had taken to secure provisions and medical supplies for the second march and said that he had done his best to provide for the prisoners. With regard to the killing of the 33 survivors at Ranau on 1st August, he claimed that by that time Ranau was cut off from his headquarters as a result of the allied landings and that he therefore could no longer exercise any effective control over the officers there who had previously been under his command. He gave evidence that he did not hear of this murder until after the cessation of hostilities.

3. THE FINDINGS AND SENTENCE

The accused was found guilty and sentenced to death by hanging. The sentence was executed.

B. NOTES ON THE CASE

1. RESPONSIBILITY OF A COMMANDER FOR CRIMES COMMITTED BY TROOPS UNDER HIS COMMAND

The abstract of evidence contained three charges.⁽¹⁾ The first and second charged the accused with giving orders for the two marches in January and May, 1945, and the third with "failing to discharge his duty as a commander to control the members of his command whereby certain of the members of his said command murdered a number of . . . prisoners of war."⁽²⁾ The Prosecutor stated in his opening address that although these three charges had been superseded by one overall charge against the accused covering the period from December, 1944, to June, 1945, "the prosecution's case was based on the same facts underlying the three original charges, and the accused had to answer the same case no more and no less."

With regard to the accused's responsibility for the casualties that resulted from the two marches (charges 1 and 2 in the abstract of evidence) the prosecution could thus base their case on the fact that the accused had ordered these marches being aware of the prevailing conditions and must thus be held responsible for the natural consequences of his actions. It has been held in the trial of General Dostler by a United States Military Court⁽³⁾ and in many other war crimes trials that a commander who could be shown to have ordered a violation of the laws and usages of war was guilty himself of such a violation.⁽⁴⁾

(1) According to the Rules of Procedure for Australian Courts Martial a commanding officer must—if he decides after hearing a charge that this charge ought to be tried by a court martial—adjourn the case for the purpose of having the evidence reduced to writing. The evidence of all witnesses for and against the accused is then recorded in his presence and the accused can add to it his own testimony if he so wishes. This record is called summary of evidence or—in the case of an officer where there is no summary of evidence—an abstract of the evidence. (Rules of Procedure 4, paras. A to H and Rule of Procedure 9A).

(2) These three Charges in the abstract of evidence were replaced at the beginning of the trial by the one charge quoted on page 56.

(3) See Volume I, pp. 22-34.

(4) For a classification of such trials and of trials where a commander was held responsible for violations of the laws and usages of war not ordered by him, see Volume IV of this series, pp. 84 *et seq.*

With regard to the accused's responsibility on the third charge in the abstract of evidence, i.e. the killing of the 33 survivors at Ranau, on 1st August, 1945, the position is different, as in this case there was no evidence that these murders had been ordered by the accused.

The Judge Advocate said in his summing up : " It can be argued that the killings were the result of the marches. Indeed, they could not have occurred without the movement of the prisoners but they were not, I feel, a natural result of these marches. It is therefore for the court to consider whether they were due to the failure of the accused in his duties as a commander."

The prosecution based their case on this issue on the general duty incumbent upon a commander to control his troops and his particular duties *vis-à-vis* prisoners of war. The Prosecutor said in this closing address :

" It is a well-settled rule of international law that a commander of Armed Forces at War has a duty to control the conduct of the members of his command, and that if he deliberately, or through culpable negligence, fails to discharge that duty, and as a result of such failure members of his command commit war crimes, he is guilty of a violation of the laws and usages of war."

" In this case the accused had an undoubted duty to ensure that prisoners of war were treated in accordance with the requirements of international law."

" . . . No individual commander has any right to do what he likes with prisoners of war who may for the time being be in his control. He has a positive legal duty to ensure that all members of his command treat them according to law. In view of the evidence tendered by the prosecution I submit that it has been proved beyond any possible doubt that the accused failed to discharge that duty."

" In these circumstances the only defence open to him is that the failure resulted from circumstances beyond his control or from a mere inadvertence not amounting to culpable neglect. I submit that in view of the evidence such a defence is impossible."

The Judge Advocate advised the court in his summing up that the duties of a commander which the accused was charged with having violated, were laid down in the following articles of the Hague and Geneva Conventions :

- (1) Article 1 of the Annex to the Hague Convention (1907) laying down as a condition which armed forces must fulfil in order to be accorded the rights of lawful belligerents. " They must be commanded by a person responsible for his subordinates "
- (2) Article 4 of the same convention laying down that " . . . prisoners of war must be humanely treated "
- (3) Article 2 of the Geneva Convention (1927) which says that " prisoners of war are in the power of the hostile government but not in the individual 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."

Having thus described the law upon which the duties of a commander rests, the Judge Advocate quoted the majority judgment delivered by Chief Justice Stone in *In re Yamashita* : " It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violations are to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."

It is obvious that before finding the accused guilty of having failed in his duty to control his troops, a court must decide what are the duties of a particular commander with respect to the exercise of control over troops under his command. With regard to the extent of these duties, the Judge Advocate again quoted *In re Yamashita* : " These provisions plainly impose on petitioner who . . . was military governor . . . as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."

The court, by finding the accused guilty, may have held that he did not " take such measures as were within his power and appropriate in the circumstances " to protect the 33 prisoners of war who were killed by troops under his command. On the other hand, as the prosecution preferred only one charge covering three distinct sets of facts, and the finding of the court could therefore be supported by holding the accused responsible for either or both of the two marches resulting in the death of many prisoners without holding him responsible for the killing of the 33 prisoners at Ranau on 1st August.

It seems, however, from the speeches and the above quoted passage of the Judge Advocate's summing up that in this case, as in other cases before Australian courts, the existence of the duty of a commander as outlined in *In re Yamashita* was looked upon as well established in international law, and the failure to discharge this duty as a war crime. No hard and fast rule can be said to have been established with regard to the extent of this duty, and future courts will have to be guided by the nature of the accused's military command as well as by the strategical situation and the circumstances in which he had to exercise his command. These two considerations seem to be indicated by the Yamashita judgment in the words " such measures as were *within his powers and appropriate in the circumstances*".⁽¹⁾

In another trial before an Australian Military Court at Mortai in January, 1946, Major-General Endo Shimichi was convicted of " neglecting to issue or enforce . . . proper orders . . . to provide for the treatment of prisoners of war . . . held by force under his command . . . by reason of which neglect the prisoners of war were unlawfully killed . . . by forces under his command. . . ."

The accused pleaded that he had issued orders to treat the prisoners of war correctly, but that in spite of these orders nine members of the Royal

(1) Italics inserted. For a report on this trial see Volume IV, of this series, pp. 1-96.

Australian Air Force, who were prisoners of war, were murdered by his troops. It seems that he was convicted of having failed to enforce the orders he had given. He was sentenced to five years' imprisonment.

Lt.-General Artachi Hatazo was convicted on a similar charge by an Australian Military Court at Rabaul in April, 1947, and sentenced to imprisonment for life. Offences committed by his troops with which he was charged as the responsible commander included the murder of Australian and Chinese prisoners of war as well as the murder and ill-treatment of members of the native population of occupied territory.

2. *Mens Rea*

It appears that in cases of criminal liability of a commander for offences committed by his troops, *mens rea* may be evidenced in one of two ways :

- (a) *Intention.* There may be direct evidence of such intention of the commander if he directly participated in the crime or commanded it to be perpetrated⁽¹⁾ or such intention may be inferred from some orders issued by him.
- (b) *Criminal Negligence.* This may appear as wilful negligence if the commander is aware of atrocities being committed by his troops and fails to prevent them,⁽²⁾ or it may be constituted by the performance of a field commander's duties with such culpable neglect as to display indifference as to whether or not offences are committed by the troops.⁽³⁾

The Judge Advocate said in his summing up : " In order to succeed the prosecution must prove . . . that war crimes were committed as a result of the accused's failure to discharge his duties as a commander, either by deliberately failing in his duties or by culpably or wilfully disregarding them, not caring whether this resulted in the commission of a war crime or not."

3. AFFIDAVIT EVIDENCE

It is of interest to note that all the evidence for the prosecution was documentary. Most of the documents handed to the court by the prosecution were extracts from the proceedings of courts which had tried officers under the command of the accused general who were charged with offences committed as a result of his orders. The evidence for the defence was also mostly documentary. The accused elected to give evidence but his evidence consisted mainly in handing to the court a written statement of his case. He was not cross-examined.

4. THE BINDING FORCE OF THE GENEVA CONVENTION

It was suggested by the defence that the regulations of the Geneva Convention did not apply to the accused as Japan was not a signatory of this convention. The Judge Advocate advised the court that this was

⁽¹⁾ An example is the accused's responsibility for the second march (originally the 2nd charge in this case).

⁽²⁾ An example is the first march (originally the first charge in this case).

⁽³⁾ The murder of the 33 survivors (originally the third charge in this case) is an example of this degree of negligence.

immaterial "as the law applied in this court is that of England as embodied in Australian law". According to the view usually taken on this question the rule which forbids the ill-treatment and killing of prisoners of war is much older than the Geneva Convention and recognised by the usage of all civilized nations and that the relevant Articles of the Geneva Convention were, therefore, only declaratory of existing law by which the Japanese forces were bound, regardless of whether their government had ratified the Geneva Convention or not.⁽¹⁾

A similar argument was put up by the defence in the trial of the major German war criminals by the International Military Tribunal at Nuremberg. In this case not the invader but the invaded country was not a signatory to the Geneva Convention and it was pleaded that thus the invader was not bound by it in his actions towards the members of the forces of the invaded country. The International Military Tribunal pointed out in its judgment⁽²⁾ that "... the argument in defence of the charge with regard to the murder and ill-treatment of Soviet prisoners of war that the U.S.S.R. was not a party to the Geneva Convention is quite without foundation".⁽³⁾

⁽¹⁾ In certain United States trials the prosecution put in evidence that Japan had agreed to abide by the Geneva Convention in its dealings with *United States* prisoners of war ; see Volume V, p. 71.

⁽²⁾ *British Command Paper*, Cmd. 6964, p. 48.

⁽³⁾ See also Volume VII, pp. 43-4.