

CASE No. 77

TRIAL OF SUSUKI MOTOSUKE

NETHERLANDS TEMPORARY COURT-MARTIAL AT AMBOINA
(JUDGMENT DELIVERED ON 28TH JANUARY, 1948)

*Bearing of victim's nationality upon concept of war crimes—
Murder—Violations of the rule of fair trial and other
requisite lawful proceedings.*

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

The accused, Susuki Motosuke, was a First Lieutenant of the Japanese Army Engineer Corps, posted with the Hosikikan (Japanese Intelligence Service) in the island of Ceram, Netherlands East Indies.

He was charged with having, between August and November, 1944, that is "in time of war, contrary to the laws and customs of war, intentionally, by abuse of the authority he enjoyed over his subordinates . . . incited the latter" to execute Indonesian natives, subjects of the Netherlands East Indies, whilst knowing that the victims "had not been tried, at any rate in a legal manner."

The Court was requested by the prosecution to find the defendant guilty of the war crime of "murder, committed four times" and to sentence him to the death penalty.

2. FACTS AND EVIDENCE

According to the evidence admitted by the Court from the prosecution and collected from other sources, the crimes charged were committed in the following circumstances :

In August, 1944, as officer of the Japanese Intelligence Service, the defendant gave orders to subordinates to execute by shooting a Dutch subject by the name of Barends. During the Japanese occupation of Ceram the latter had joined the ranks of the "Gunkes," a corps of "volunteer combatants," composed mainly of Indonesians serving with the Japanese Army. As a Japanese soldier Barends was found guilty of having shot at a Japanese called Yamamoto, and the defendant ordered a summary execution. The execution was carried out in the presence of the accused, who gave the orders to fire to the execution squad.

In September, 1944, the defendant ordered the arrest of three Indonesians, by the names of Skalwik, Tarumasele and Mailoa, the last two being school teachers. Skalwik was accused of stealing a rifle from the Japanese; Tarumasele was accused of setting ambushes in the path of retreating Japanese; and Mailoa was charged with shooting at and robbing Japanese. In October, 1944, the accused gave the orders for their execution and again led the firing squad which killed the three Indonesians.

3. DEFENCE OF THE ACCUSED

While admitting that he gave the orders for the above executions, the accused pleaded not guilty.

Concerning the execution of Barends the defendant referred to the fact that the victim had volunteered to join the Japanese Army and was consequently subject to Japanese military laws and regulations at the time of the execution. The execution was therefore purely an internal matter of the Japanese Army and did not come within the sphere of war crimes. The Court was not competent to try him on this count.

Concerning the killing of the other three victims, the defendant alleged that their execution was lawful as it was made following a sentence of a Japanese Court-Martial (Gunritsu Kaigi), and was ordered by his superior officer, Lieut.-Colonel Hirunoga or Hirunaka.

4. FINDINGS AND SENTENCE

The Court dismissed the accused's pleas. In the case of Barends it decided that there was no war crime but the common law criminal offence of "intentional incitement to murder by abuse of authority," of which the accused was guilty. In respect of the execution of the other three Indonesians it decided that there were no proper trial by Japanese courts and that the accused was guilty of the "war crime of murder."

The accused was sentenced to imprisonment for life.

B. NOTES ON THE CASE

1. THE BEARING OF THE VICTIM'S NATIONALITY UPON WAR CRIMES

One of the most important findings of the Court was that made in the case of the execution of Barends.

The Court was satisfied that Barends had freely joined the Japanese Army in the Netherlands East Indies, and had therefore been in "foreign military service without the permission" of the Dutch Government. As a consequence the Court decided that Barends "was not a Netherlands subject at the time of his execution and therefore no longer a subject of the United Nations." The Court further referred to an official "Explanation of the Legislation drafted with regard to War Crimes," which was released as a supplement to the Netherlands East Indies Decrees and numbered 15031 of 1946. As evidence that war crimes trials were limited to cases involving victims of Allied nationality, the Court observed that, according to the above "Explanation," it was "the intention of the United Nations Commission for the Investigation of War Crimes⁽¹⁾ to undertake the investigation of *war crimes committed against subjects of the United Nations.*"⁽²⁾ As Barends had lost his nationality by joining the ranks of the Japanese Army, the Court took the view that "it could hardly be alleged that the act committed against him was contrary to the laws and customs of war," and that for this reason in his case no war crime had been perpetrated.

(1) This was the original name of the United Nations War Crimes Commission.

(2) Italics inserted.

While discarding the charge of having committed a war crime on account of the victim's national status at the time of the crime, the Court decided that the accused was guilty of a common law crime under the terms of the Netherlands East Indies Penal Code. This decision was reached after consideration of the accused's defence that the execution was a purely internal matter of the Japanese Army, and constituted a lawful act under Japanese laws. The accused referred to two provisions of the Japanese Military Penal Code and claimed that, under Article 62 of the Code Barends had been guilty of insubordination, with the use of arms, in the face of the enemy, which offence was punishable, among other penalties, with death. Under Article 22 of the same Code every commander of a military unit was entitled to acts of summary justice, including the imposition of death penalty, and was not liable to punishment for such acts if they were carried out "in cases of necessity for the maintenance of discipline among army units face to face with the enemy." When giving the orders to execute summarily Barends he, the defendant, had proceeded within these powers.

The Court dismissed this plea on the following grounds :

The accused's unit, to which Barends belonged, had "never once been during the whole war face to face with the enemy," as "no Allied landings ever took place on the island of Ceram in war-time." The accused was therefore not entitled to use the powers given in Article 22 of the Japanese Military Penal Code to army unit commanders. In this connection the application of Article 62 of the same Code was, in the circumstances, "reserved to the judiciary" and could not be carried out by the accused on his own authority.

As a result the accused was found guilty of the common law crime of "intentional incitement to murder by abuse of authority," as provided against in Art. 55, para. 2^o of the Netherlands East Indies Penal Code. The relevant passages of this Article read as follows :

"The following shall be punished as the authors of a punishable act :

- 2^o They who by gifts, promises, *misuse of authority*, or of the esteem in which they are held, by force, threats, or deceit, or by providing the opportunity, means or information, intentionally incite the act."⁽¹⁾

The Court's finding that, in the case of Barends, there was, technically, no war crime as the victim was no longer, at the time of the crime, a national of one of the United Nations, deserves special attention. The Court referred to the terms of reference of the United Nations War Crimes Commission. From the way this reference was made it is apparent that the Court took into account the War Crimes Commission's terms of reference as they were originally determined in the first stages of its existence. The subject of whether or not the concept of war crimes applied only to victims of Allied nationality, was considered by the United Nations War Crimes Commission as early as 20th October, 1943, the very day of its establishment at the diplomatic conference in London. The majority had taken the view that it

(1) Italics inserted.

was applicable only to such victims. Soon after this, however, in April, 1944, the question was raised again with regard to reported killings of many Italian hostages by the Nazis after the Armistice with Italy was signed, as well as to offences perpetrated by the Nazis against inhabitants of Hungary, Roumania, and other enemy countries. A proposal was made that, in the circumstances, the concept of war crimes should be applied irrespective of the nationality of the victims or of the place of the crime, as such offences were also deserving of punishment.⁽¹⁾ The principle previously adopted was maintained, but the concept of "Allied" nationals was at the same time interpreted in a wider sense so as to meet the situation created by the fact that, after her capitulation, Italy had been accepted by the Allied Governments as a co-belligerent Power and had fought against the Germans with military units of her own. A number of cases concerning Italian victims of Nazi crimes perpetrated after Italy had become a co-belligerent Power, were considered by the Commission and charges against perpetrators put on record in the Commission's files as *prima facie* evidence of "war crimes." After the end of the war British military courts in Italy conducted as "war crime" trials, proceedings against Nazi officers, such as Field Marshal Kesselring, for the killing of Italian victims. In this manner the rule that the concept of war crimes applied only to "Allied" nationals was relaxed so as to include nationals of a "co-belligerent" Power.

In the trial under review the victim had joined the ranks of the enemy of an Allied nation and had thereby, according to Netherlands East Indies law, become assimilated to an enemy national.

2. MURDER AS A WAR CRIME

In the case of the other three victims the Court decided that, in view of their national status, the accused was guilty of the "war crime" of murder.

Murder is one of the offences which have been recognised as a criminal violation of the laws and customs of war ever since these violations were defined: It was included on top of the list of war crimes of the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, and was dealt with in the same manner by the United Nations War Crimes Commission in regard to violations committed during the Second World War. In the Netherlands East Indies legislation it is punishable as a war crime under the terms of Article 1 of Statute Book Decree No. 44 of 1946.

In this trial the important point is that the accused's guilt was determined in connection with his plea that the execution was lawful as it allegedly took place in consequence of a sentence passed by a Japanese court after trial of the three victims. The Court heard a Japanese witness who, at the time of the alleged trial, was prosecutor of the Japanese court concerned. He testified that some preparations for a trial were undertaken, but could not remember that the case was actually tried. The Court took this as sufficient evidence that the execution "took place without sentence being passed by any competent judge," and that for this reason it was "contrary to the laws and customs of war" and constituted a "war crime."

⁽¹⁾ See *History of the United Nations War Crimes Commission and the Development of the Laws of War*, H.M. Stationery Office, London 1948, Chapter VIII, pp. 172-174.

3. VIOLATIONS OF THE RULE OF FAIR TRIAL AND OTHER REQUISITE LAWFUL PROCEEDINGS⁽¹⁾

The Court's decision that the accused was guilty of a common law crime in the case of Barends, and of the "war crime of murder" in respect of the other victims, was reached after consideration of yet another important point.

The Court investigated the question as to whether the victims had in fact been guilty of any offence against the Japanese authorities, as claimed by the defendant. In both cases it decided that they were.

Thus, for example, in the case of Barends the following was stated in the Judgment :

"The Court . . . deems proved that the accused . . . ordered a number of Indonesians under his command to kill by rifle fire Barends, who was the head of a group of Gunkes and *who had committed a punishable offence.*"⁽²⁾

In the case of the other three victims the Court stated :

"The Court . . . deems proved that the accused . . . ordered a number of Japanese under his command to kill by rifle fire Tarumasele, Mailoa and Skalwik *who had committed punishable offences.*"⁽²⁾

These findings are important as they define the true nature of the offences for which the accused was convicted.

In both cases they bring in the foreground the issue of fair trial and of proper exercise of powers vested in members of the authorities of a belligerent State in occupied territory. In both cases the accused's culpability consisted in that, although the victims were guilty of offences and were liable to punishment by the occupying authorities, they were punished in an unlawful manner. It is on account of this lack of lawful proceedings that the executions were criminal, and that the defendant had become guilty of a crime.

The execution of the three Indonesians is a case in point concerning the right of inhabitants of an occupied territory to be tried by an occupation court before being subjected to a penalty. On the other hand, the circumstances of Barends's death are illustrative of cases in which victims are, technically, not nationals of the State whose territory is occupied, but are nonetheless entitled to the same right of being subjected to lawful proceedings before punishment. In this latter case the Court's decision is the more remarkable as it, technically, concerned an "enemy" subject. The accused's conviction on this course is, therefore, evidence of the jurisdiction of an occupied Power over offences committed in its territory, during the occupation, between members of the occupying authorities themselves. In this respect another remarkable feature is that the rule of fair trial or of any other requisite lawful proceedings was considered and implemented from the viewpoint of the law of the occupying Power, and that the defendant was found guilty on the grounds that he had transgressed his powers under the terms of his own country's law.

In this manner the Judgment in this trial goes deeply into the issue of the obligations of an occupying State to exercise its powers within given standards of justice, and is a confirmation of the principle that the latter includes in the first instance the duty to extend the right of fair trial to inhabitants of occupied territory.

(1) On the criminal aspects of the denial of a fair trial see also Vol. V of these Reports, pp. 70-81, and Vol. VI, pp. 96-104.

(2) Italics introduced.