CASE No. 33

TRIAL OF GENERAL TANAKA HISAKASU AND FIVE OTHERS

UNITED STATES MILITARY COMMISSION, SHANGHAI,
13TH AUGUST—3RD SEPTEMBER, 1946

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

The Charge against General Tanaka Hisakasu was that, as Governor General of Hong Kong and Commanding General of the Japanese 23rd Imperial Expeditionary Army in China, he " did, at Canton, China and/or Hong Kong knowingly, wilfully, unlawfully and wrongfully commit cruel, inhuman and brutal atrocities and other offences against " a named United States Major, " by authorizing, permitting, participating in and approving of the illegal, unfair, false and null trial and the unlawful killing " of the Major, in violation of the laws and customs of war.

Major-General Fukuchi Haruo was charged of violations of the laws and customs of war in that, as Chief of Staff of the Governor-General of Hong Kong he " did, at Hong Kong, wilfully, unlawfully and wrongfully commit " offences described in the same manner as those charged against Tanaka.

Lieutenant-Colonel Kubo Nishigai, Major Watanabe Masamori and Captain Yamaguchi Koichi of the Japanese Army of the Governor General of Hong Kong were charged of having " as members of a purported Japanese Military Tribunal," committed offences of the same description at Hong Kong by " acting in, participating in and permitting the illegal unfair false and null trial and the unlawful killing " of the same victim.

Captain Asakawa Hiroshi of the Japanese Army of the Governor General of Hong Kong was charged with committing a violation of the laws and customs of war in that " as Prosecutor of a purported Japanese Military Tribunal " he permitted, prosecuted in and participated in the same illegal trial.

The offence was said to have been committed during April, 1945.

The accused pleaded not guilty.

2. THE EVIDENCE BEFORE THE COMMISSION

The evidence showed that on 5th January, 1945, a United States Major, Commanding Officer of the 118th Tactical Reconnaissance Squadron (USAAF), took part in an air raid on shipping and docks in Hong Kong harbour. (Other pilots in the same mission stated that only military targets were attacked.) He was shot down and captured by the Japanese. During interrogations by the Japanese Prosecutor at Hong Kong, Shii (who

committed suicide while awaiting trial), the Major repeatedly stated that he had no intention of attacking any civilian vessel. On being approached by Shii, the legal bureau of the War Ministry in Tokyo replied that prosecution should take place " if it is clear that a civilian steamer was bombed."

Following this, the Major was placed on trial on 5th April, 1945, at Hong Kong. The Court was a Japanese Military Tribunal composed of the accused Kubo as chief judge, and Watanabe and Yamaguchi as associate judges, Yamaguchi being the law member, with the accused Asakawa as acting prosecutor. The Major was charged with having bombed and sunk a thirty-ton Chinese civilian vessel in Hong Kong harbour, on 15th January, 1945, resulting in the death of eight Chinese civilians. This was alleged to be in violation of the Japanese law commonly referred to as the " Enemy Airmen Act." This act had been promulgated in occupied Hong Kong in the year 1942 by the then Governor General Rensuke Isogai, whom the accused Tanaka succeeded in December 1944. In particular, it was charged that the Major had bombed and sunk the Chinese ship in violation of Article 2 of the Act :

> " Those having committed the following acts will be subjected to military punishment : (b) bombing, strafing or attacking in any manner, with *intention* of destroying, damaging or burning private property of non-military nature." (Italics added).

According to the prosecution witness, Nakazawa, who acted as interpreter at the Japanese trial, the Major testified in answer to questions by the law member of the court (Yamaguchi) that he was piloting his plane over Hong Kong harbour and " went into a dive to attack one destroyer," during which he released his bomb ; that the anti-aircraft fire was very intense and while in the dive, the plane was hit and crashed into the sea. He had denied *intentionally* bombing any civilian boat, or seeing such a ship sunk. The witness Nakazawa also testified that the Major had no defence counsel at his trial, and that there were no witnesses excepting the Major himself.

It was shown that the evidence before the Japanese tribunal consisted of three documents, a report on damage submitted by the Chief of Staff, the Gendarmerie report and the prosecutor's statement, in addition to the testimony of Major Houck. The report of the Chief of Staff contained information such as to the date, location, type of ship sunk, and the number of persons killed. This report was submitted over the signature of the Chief of Staff (Fukuchi) in answer to a request by the prosecutor. The report of the Gendarmerie consisted of a " statement of damages suffered in the air raid " and a statement from the Major. The prosecutor's statement consisted of two documents, one based on a questioning of Houck, in which he denied the correctness of the Gendarmerie report and the other a detailed " investigation of the case." Both of these documents were written in Japanese and were purportedly signed by the Major, with his thumb print affixed. These statements were prepared by the deceased Major Shii who investigated the case as prosecutor.

The accused Yamaguchi, however, testified before the Commission that in his opinion the entire trial was conducted properly according to Japanese law.

The acting prosecutor demanded the death penalty for the Major, the entire hearing having lasted not more than two hours. Following this case two Japanese cases were heard by the same court, which then adjourned for lunch.

In a deliberation held after the adjournment, Yamaguchi stated to the other two members of the court that " the facts of crime are clear," that the Major was guilty, and that he interpreted the " Enemy Airmen Act " to require imposition of the death penalty which could be commuted to life imprisonment or more than ten years imprisonment by Tanaka alone. All three judges voted that the Major was guilty and unanimously voted the death penalty, whereupon Yamaguchi prepared the " draft of the verdict " which was announced in open court.

Chief of Staff Fukuchi approved the death sentence and signed the order for the execution of the Major upon being assured by Prosecutor Shii that Houck had admitted attacking and sinking the civilian ship, " resulting in some casualties." Shii then personally directed the firing squad that carried out the order.

The evidence showed that a leading part in arranging the trial was taken by Prosecutor Shii. Further evidence regarding each of those actually brought before the Commission is set out in the following paragraphs.

Tanaka admitted that the court which tried and sentenced the Major to death was under his jurisdiction and that all persons connected with the trial and execution were subordinate members of his commands as Governor-General of Hong Kong and Commanding General of the 23rd Japanese Army at Canton. As early as February he knew that the case was under investigation. He also admitted again hearing of the matter on 20th March, and said that, before returning to Canton on 21st March, he gave Fukuchi full authority to act on his behalf in all matters of the Hong Kong command, leaving with him a number of sheets of paper signed in blank for this purpose. This action was permitting under military regulations and was done to empower the chief of staff to take proper defence measures in the event of Hong Kong being isolated by reason of enemy action. Tanaka was the only person who could have legally approved (or commuted) the death sentence or order the execution.

Before leaving Hong Kong on 21st March, Tanaka appears to have given Fukuchi a " general caution " about taking action in the case. Despite this knowledge of Tanaka, however, there was no evidence that he ordered the holding of the trial or knew in advance that the Major would not receive a fair trial or that he knew or had reasonable grounds to believe that, if the Major should be convicted, the execution of sentence would be carried out without his personal order. The evidence was undisputed that

the record of trial was not submitted to him and that he did not personally order the execution, as was required by Japanese law. His first information as to the verdict and execution of death sentence, was obtained when he returned to Hong Kong about the " middle of April " after the execution had been carried out on 6th April.

Fukuchi admitted hearing of the case shortly after his arrival at his post in Hong Kong as Chief of Staff of the Governor-General, on 22nd February, 1945. Fukuchi transmitted Shii's request to Tokyo for permission to hold the trial, over his own signature, and at his direction a report was prepared on the case which was offered in evidence at the Japanese trial. Prior to appointing the court, he had discussed the matter with Prosecutor Shii on numerous occasions. On the day of the trial, by his own admission, he approved the death sentence and ordered the execution. He did not submit the record and sentence for approval, as was required by the applicable Japanese military law, but acted independently but under the general authority to conduct military and judicial administrative matters, as delegated in a " general order " by Tanaka. Fukuchi seemingly relied to a great extent on the statements made to him by Shii to the effect that the victim had admitted his guilt.

Kubo and Watanabe, a Lieutenant-Colonel and a Major respectively, were members of the court that sentenced the victim to death but were men of little or no legal training. Kubo had had no previous experience in serving on courts and Watanabe had only once served on a military tribunal previously. It appeared from the evidence that they based their verdict and sentence on the views of Yamaguchi, the law member, and on his interpretation of the law. Nevertheless they were under no compulsion to find the Major guilty and both conceded that they could have voted " not guilty".

In a statement taken before his trial, Watanabe said : " Yes, I think that was a very unfair trial ", explaining that he thought that the trial was not fair because the Major had no defence counsel, no witnesses and no opportunity to produce witnesses. In his testimony, Watanabe attempted to retract this part of his former statement.

Yamaguchi was a member of the Judicial Affairs Section attached to the 23rd Japanese Army, with wide court-martial experience, and, in acting as legal officer on the court which sentenced the Major to death, he apparently controlled and directed the actions of Kubo and Watanabe. It appeared that it was his interpretation of the law and his insistence that the victim was guilty that led the other two members of the court to agree to the finding of guilty and to the death sentence.

Asakawa was the acting prosecutor at the trial, but his actions were directed by Shii, although the latter did not actually prosecute.

3. THE FINDINGS AND SENTENCES

All of the accused were found guilty with the exception of Asakawa Hiroshi, and with the deletion of the word " purported " in the charges against the members of the Japanese Military Tribunal.

Tanaka and Fukuchi were sentenced to death by hanging.

Kubo and Yamaguchi were sentenced to imprisonment for life, and Watanabe for a period of 50 years.

The Confirming Authority approved the sentence of life imprisonment passed on Yamaguchi ; but disapproved the sentence passed on Tanaka, and commuted those meted out to Fukuchi, Kubo and Watanabe to periods of imprisonment for life, for ten years and for ten years respectively.

The findings and sentence on General Tanaka were disapproved for the reason that, although Tanaka had final authority in the matter, he was absent from command at the time of the trial, the passing of sentence and the execution of Major Houck, and there was not sufficient evidence of wrongful knowledge on his part of the acts of his subordinates upon which to predicate his criminal responsibility for their acts.

B. NOTES ON THE CASE: THE CRIMINAL ASPECTS OF THE DENIAL OF A FAIR TRIAL

The charges brought against the accused in the present trial were framed in very general terms ; it was said that they wilfully committed violations of the laws and customs of war against a certain United States prisoner :

(i) by authori ing, permitting, participating in and approving of the illegal, unfair, false and null trial and the unlawful killing of the prisoner ; or

(ii) as members of a purported Japanese Military Tribunal, by acting in, participating in and permitting the illegal, unfair, false and null trial and the unlawful killing of the prisoner ; or

(iii) as Prosecutor of a purported Japanese Military Tribunal, by permitting, prosecuting and participating in the same illegal, unfair, false and null trial and unlawful killing.

The accused who were found guilty by the Commission, and against whom such finding was confirmed, were, however, only those who had been charged of offences committed by them *as members of the Japanese Military Tribunal.*

An examination of the evidence admitted by the Commission throws light upon what the latter may have regarded as constituting the offence committed by the members of the Japanese Military Tribunal. In particular the following facts may have been taken as illustrating the " illegal, unfair, false and null " character of the proceedings taken against the Major :

(i) no Defence Counsel was provided for the accused, who was in no position to secure one himself,

(ii) the Major had no opportunity to prepare his defence or secure evidence on his own behalf,

(iii) no witnesses appeared at the trial apart from the Major, and his evidence in which he denied intentionally attacking a civilian boat was ignored by the Tribunal, since, despite that evidence, they found him guilty of an offence against the " Enemy Airmen Act," (1)

(iv) the entire proceedings lasted not more than two hours.

In the first and the third of the United States trials reported in this volume,(2) the Prosecution put in evidence that Japan had agreed to abide by the provisions of the Geneva Prisoners of War Convention ; this evidence took the form of a copy of a letter from the United States Legation in Berne, Switzerland,(3) to the United States Secretary of State saying that, according to a telegraph message from the Swiss Minister in Tokyo, the Japanese Government had informed that Minister, first, that Japan was strictly observing the Geneva Red Cross Convention as a signatory State, and secondly, that " although not bound by the Convention relative treatment prisoners of war Japan will apply *mutatis mutandis* provisions of that Convention to American prisoners of war in its power". The telegraph message had been dispatched on 30th January, 1942.(4)

In the trial of Shigeru Sawada and others,(5) the Defence pointed out that Japan had only undertaken to apply the Prisoners of War Convention *mutatis mutandis*, though no attempt was made to clarify the meaning of this expression. Further, the following statement from Wheaton's *International Law*, Seventh Edition, page 180, was quoted by Defence Counsel in the trial of Shigeru Sawada and Others and in the trial of Harukei Isayama and Others (6) : " If men are taken prisoners in the act of committing or who had committed violations of international law, they are not properly entitled to the privileges and treatment accorded to honourable prisoners of war."

Whatever the legal origin of the rights envisaged, however, it is clear from an examination of the relevant charges, specifications and findings that the court trying certain of the cases reported in the present volume assumed that the victims of the offences alleged were entitled to some kind of prisoner of war status. In particular, the charges on which Shigeru Sawada and others were found guilty in the trial reported first in the present volume are so worded as to make it clear that the denial of the status of prisoner of war was involved, and the Military Commission saw fit not to alter this wording in finding these accused guilty.(7)

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(1) See p. 67.
(2) See pp. 1-8 and 66-70.
(3) Switzerland was the Protecting Power for United States interests in Japan.
(4) Japan signed but did not ratify the Prisoners of War Convention.
(5) See pp. 1-8.
(6) See pp. 1-8 and 60-4.
(7) See pp. 10-12. See also pp. 39, 45, 60 and 66.

In the *Yamashita Trial*, the Supreme Court of the United States held that Part 3, entitled *Judicial Suits*, of Part III, Section V, Chapter 3 of the Geneva Prisoners of War Convention applies " only to judicial proceedings directed against a prisoner of war for offences committed while a prisoner of war." (1) Of the provisions made in Part III, " Captivity," that is to say Articles 7–67 of the Convention, the Supreme Court stated that : " All taken together relate only to the conduct and control of prisoners of war while in captivity as such."

The Allied victims for whose killing the accused were tried in the three United States trials reported upon in the present volume (2) could not therefore have claimed the protection of Part 3, *Judicial Suits*, of the Geneva Convention, since their alleged offences were said to have been committed before captivity ; and this is true whether or not it is accepted that their status was that of persons accused *bona fide* of being war criminals and whether or not the acts alleged against them actually constituted war crimes.(3)

It is arguable that the fact that Articles 60-67 of the Convention (which make up Part 3 referred to above) do not include within their scope the trial of prisoners of war accused of offences committed before capture does not exhaust the protection afforded to such persons by the Convention ;(4) and it must be noted that, even apart from the question of ratification, the Geneva Prisoners of War Convention, at least in those of its provisions which express broad humane principles, is now generally accepted as being only a restatement of customary International Law which binds all States.

The accused in the three United States trials reported in this Volume were not in fact tried and found guilty of offences against Articles 60–67 of the Geneva Prisoners of War Convention. No stress was placed for instance on the fact that the Protecting Power was not notified of the commencement of the trial (cf. Article 60 of the Convention), and it was not claimed that the victims had not been sentenced " by the same tribunals and in

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(1) See Vol. IV of this series, p. 78, where supporting judgments by other Courts are also mentioned. Part 3 comprises Articles 60-67 of the Convention ; for an indication of their contents see Vol. I of this series, pp. 29-30.

(2) See pp. 1-8 and 60-70.

(3) In the trial of Harukei Isayama and others (see pp. 60-4), the Defence argued that the Japanese Enemy Airmen Act was not without some justification in International Law, since indiscriminate bombardment would be a violation of that law. In the trial of Shigeru Sawada, the Defence claimed that it was unlawful to make indiscriminate bombing attacks on non-combatants without aiming at military objectives, and that the United States flyers, in consequence of whose death the trial was held, had acted in this unlawful manner ; the Prosecutor on the other hand maintained that it was inevitable in warfare that some civilians should be injured or killed and that some civilian property should be hit, but that no evidence had been produced in the trial to show that the civilians hit " were not within the factories or the industrial plants."

(4) For instance it would be difficult to deny that such accused are entitled to the protecton of Article 2 : " Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them.

" They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity.

" Measures of reprisal against them are forbidden."

accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power " (Article 63).(1)

The accused were in fact found guilty of the denial of certain basic safeguards which are recognized by all civilized nations as being elements essential to a fair trial, and of the killing or imprisonment of captives without having accorded them such a trial. Whether the rights which they denied to the captive airmen are regarded as arising from Article 2 of the Geneva Convention or from that customary international law of which that Article is commonly regarded as being declaratory, it is clear that these three United States trials constitute valuable precedents as to the precise nature of the rights which international law requires to be afforded in the trial of prisoners of war accused of having committed offences before capture, just as the Australian trials (2) illustrate the rights which must be granted in the trial of civilian inhabitants of occupied territories accused of committing war crimes.(3)

In the notes to most of the reports in the present Volume, an attempt has been made to set out the facts which the Courts *may* have regarded as

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(1) It was apparently claimed by the Defence in, for instance, the trial of Harukei Isayama and others (see pp. 60-4 of this volume) that the victims were tried under the same procedure as would a Japanese soldier (see p. 62 and see also p. 3). Even this plea, if it were true, would not constitute a complete defence, however, if the trial did not fulfil certain fundamental requirements ensuring elementary justice to the accused. The principle, in so far as peace time is concerned, is well established. Speaking no doubt with peace-time conditions more particularly in mind, Professor Verdross has said that the general principle of international law that foreigners must be granted equality of treatment with nations in matters of judicial procedure may " suffer an exception in favour of the foreigner if the judicial procedure established by the State of sojourn does not achieve the standard to be expected of a normally organized State. . . . The tribunals must, therefore, be organized and function according to a normal standard of civilized States " (*Les Règles Internationales Concernant le Traîtment des Etrangers*, in the Hague *Receuil les Cours*, 1931, III, Vol. 37, pp. 334 *et seq.*). Similarly, it has been said that : " It is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations. For essentially the same reason a State, when charged with a breach of its international obligations with regard to the treatment of aliens, cannot validly plead that according to its Municipal Law and practice the act complained of does not involve discrimination against aliens as compared with nationals. This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum standard of civilization, and that a State which fails to measure up to that standard incurs international liability." (Oppenheim-Lauterpacht, *International Law*, Vol. I, Sixth Edition, p. 316.)

The language used by these two authorities seems wide enough to cover denial of justice to a foreigner, not only in the capacity of a litigant but also in that of an accused, and here will be agreement, at any rate as far as war crime trials are concerned, with the claim of the Prosecutor in the trial of Willi Bernhard Karl Tessmann and others before a British Military Court at Hamburg, 1st-24th September, 1947 :

> " Countries that exist at peace and in comity with each other in general respect the decisions of each other's Courts. In the part of international law that deals with the conflict of laws there is the doctrine known as " denial of justice," which is a method whereby the national of one country who is thwarted by the methods available of litigation in another country may eventually claim reparation or compensation from the country in the courts of which he has been so thwarted. That is, of course, an exception to the general rule of the respect of the courts of one country and the recognition of their verdicts by another. Is not there something analogous to the doctrine of denial of justice in a conflict of laws when one is dealing with foreigners in a country who are punished after being subjected to a criminal jurisdiction which is either nugatory or at any rate extremely inadequate ? "

(2) See pp. 25-38.

(3) There can be no doubt that inhabitants of occupied territories are entitled to at least he same degree of protection when accused of committing any other kind of offence.

constituting evidence of the denial of a fair trial, and, where possible, the circumstances which an examination of the judgments of the Courts in relation to the charges made has shown the courts to have *definitely* regarded as incriminating. It may be of value to recapitulate the account of these circumstances and facts. Light will thus be thrown on the common features possessed by the trials reported upon in this volume, and on the rights thereby vindicated.

The following circumstances have definitely been held by a Court to be incriminating :

(i) that captured airmen were tried " on false and fraudulent charges " and " upon false and fraudulent evidence ".(1)

(ii) that the accused airmen were not afforded the right to a Defence Counsel.(2)

In this connection it should be noted that the judgment of the Supreme Court in the *Yamashita Trial* stated that : " Independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defence." (3)

(iii) that the accused airmen were not given the right to the interpretation into their own language of the trial proceedings ; (4)

(iv) that the accused fliers were not allowed an opportunity to defend themselves.(5)

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(1) See p. 12, regarding the findings of the Commission in the trial of Shigeru Sawada and others. In that trial, it was shown that accused allied airmen were tried for offences against a Japanese enactment which was not law at the time of the alleged offence and that the evidence brought against the victims had consisted mainly, if not entirely, of statements made by them before trial, but under torture ; it may be added that, in the trial of Harukei Isayama and others, it was shown that the evidence brought against the victims was falsified and that little or no evidence connecting the victims with the alleged illegal bombing was produced apart from these falsified statements (see p. 65) ; and that, in the trial of Tanaka Hisakasu and others, the evidence proved that no witnesses had appeared at the purported trial of the victims apart from the Major himself, and that his evidence, in which he had denied intentionally attacking a civilian boat was ignored by the tribunal, since, despite that evidence, they found him guilty of an offence against the " Enemy Airmen Act " (see p. 71). In the *Wagner Trial*, held before a French Permanent Military Tribunal, it was alleged that various accused had been implicated in the passing and carrying out of a death sentence on 13 Alsatians on a charge of shooting a German frontier guard, when in fact there was no evidence to support the charge ; Wagner and three others were found guilty of premeditated murder for their parts in the death of the 13 victims (see Vol. III of this series, pp. 31-32 and 40-42).

(2) See p. 12. It will be recalled that the failure to provide a Defence Counsel in the purported trial of allied victims was also proved against various of the accused in the trials by Australian Military Courts of Shigeru Ohashi and others (see p. 31), and of Eitaro Shinohari and others (see p. 36), and in the trials by United States Military Commissions of Harukei Isayama and others (see p. 65) and of Tanaka Hisaku and others (see p. 71).

(3) See Vol. IV of this series, p. 49.

(4) See p. 12, and also compare p. 65.

(5) See p. 12. A similar denial was proved in the trial by an Australian Military Court of Eitaro Shinohara and others (see p. 36) and in the trials by United States Military Commissions of Harukei Isayama and others (see p. 65) and of Tanaka Hisakasu and others (see p. 71).

Here it may be remarked that among the principles laid down as the essentials of a fair trial by the Judge Advocate in the trial of Shigeru Ohashi by an Australian Military Court appeared the following: " [The accused] should have full opportunity to give his own version of the case and produce evidence to support it."(1)

The following facts have been admitted in evidence in the trial of war criminals and may have been taken into account by the Allied Courts in deciding on their verdicts and sentences:

(i) accused prisoners of war were not told that they were being tried,(2)
It will be recalled that the Judge Advocate acting in the Australian trial of Shigeru Ohashi and others, in the course of summarizing the essential elements of a fair trial, said that " The accused should know the exact nature of the charge preferred against him."(3)

(ii) accused prisoners of war were not shown the documents which were used as evidence against them,(4)
Here again it is relevant to quote the words of the Judge Advocate referred to above: " The accused should know what is alleged against him by way of evidence."(5)

(iii) the trials of accused prisoners of war and civilians from occupied territories occupied a space of time which may have been thought too brief to allow of an adequate investigation of the facts, particularly in view of the need for proper interpretation of the proceedings.(6)

The Judge Advocate whose words have just been quoted stated, further, that: " The Court should satisfy itself that the accused is guilty before awarding punishment . . .", but there must be " consideration by a tribunal . . . who will endeavour to judge the accused fairly upon the evidence . . . honestly endeavouring to discard any preconceived belief in the guilt of the accused or any prejudice against him."(7) In the trial of Eitaro Shinohara and others by an Australian Military Court, the accused Shinohara, who had been President of the Japanese tribunal which tried certain civilians of war crimes, confessed to having been convinced of the guilt of the captives even before their trial,(8) but it will be recalled that the Confirming Authority did not confirm the findings and sentences of the Australian Court.

The Judge Advocate's final rule was that: " The punishment should not be one which outrages the sentiments of humanity "(9), and this advice should be compared with the decision of the French Permanent Military Tribunal in Strasbourg in finding ex-Gauleiter Wagner and two others

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(1) See p. 30.
(2) See p. 13.
(3) See p. 30. It will also be remembered that in the *Wagner Trial*, the Prosecution thought it worth while to allege in their Indictment that the charge against the 13 Alsatians who were accused of shooting a frontier guard was not communicated to the defendants until the afternoon of their trial (see Vol. III of this series, p. 31).
(4) See p. 13.
(5) See p. 30.
(6) See pp. 13, 31, 65 and 71; and see p. 32 of Vol. III.
(7) See p. 30.
(8) See p. 36.
(9) See p. 30.

guilty in complicity in the murder of Theodore Witz ; the act which was deemed to constitute murder was the passing on this young Alsatian of the death sentence (which was carried out) for the illegal possession of a gun of a very old type.(1)

In the three British trials(2) and the Norwegian trial(3) reported on in this volume the Courts were concerned with the legal responsibility of persons shown to have taken part in the execution of Allied nationals rather than with a detailed examination of what would have constituted a fair trial. In two of the British trials, the Defence pleaded unsuccessfully that the victims were first given an interrogation which could be regarded as a trial.(4) In the Norwegian trial, Judge Holmboe stated that it was not correct to say that international law laid down that an occupation power had no right to undertake the execution of citizens of an occupied country except according to sentence by an appropriate Court ; international law did not seem to go beyond the requirement that no execution should take place before proper investigation of the case and a decision passed by an authority legally vested with appropriate powers.(5) This point was not expanded upon, however, since the decision of the Supreme Court rested on other grounds, and it is hoped to report in a later volume in this series upon a further Norwegian trial which is relevant to this issue.(6)

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(1) See Vol. III of this series, pp. 30-31 and 40-42.
(2) See pp. 39-59.
(3) See p. 82.
(4) See pp. 43 and 57. Similarly in the trial of Colonel Satoru Kikuchi before an Australian Military Court at Rabaul, 28th-29th March, 1946, it was shown that in October, 1944, a Chinese prisoner held by Japanese was beheaded by Sgt.-Maj. Inagaki on a written order from Colonel Kikuchi. No court-martial or other formal trial had been held but it was claimed by the Defence that there had been an investigation by Inagaki of alleged war crimes and acts of hostility by the Chinese victim against the Japanese. The accused admitted that he had ordered the death of deceased but maintained there was sufficient evidence for him to be satisfied of the guilt of the Chinese and that he had carefully examined that evidence. He alleged that the serious war situation justified his order, though no court-martial was held and that the investigation made by Inagaki and his decision constituted a summary trial which was legal under Japanese military law. This plea was also unsuccessful, and the accused was sentenced to death, his penalty being commuted to seven years' imprisonment by higher military authority.
(5) See p. 91.
(6) In the trial before a British Military Court at Hamburg, 1st-24th September, 1947, of Willi Bernhard Karl Tessmann and others, it was stated in the second charge that four of the accused were guilty of committing a war crime in that they, " in violation of the laws and usages of war," were concerned in the killing of eleven Allied nationals, formerly interned in Fuhlsbuttel Prison." In his summing up, the Judge Advocate stated : " Mr. Barnes for the Prosecution has advanced very clearly, and, if I may be allowed to say so, most helpfully, an argument as to what constitutes a legal killing, what preliminary formalities must in a civilized society be established : a fair trial, legal assistance and an impartial tribunal. That will help the court. But he has also invited the court to view this matter in the way of commonsense. I feel that the Court will be anxious to view this matter humanely and practically and to ask themselves : On that early morning of February or March, 1944, had those who were parties to this shooting any right to question ? Had they any power to decline to do that which they were required to do ? " After quoting the well-known passage from the *Manual of Military Law*, which has already been quoted (see p. 14), he added : " An application of those principles in the second charge, I suggest is this. If this were an illegal execution—and I do not think you will regard it as a deliberate murder—then were the orders received by the subordinates so plainly unlawful that they should, whatever the consequences, have declined to act upon them ? " The words of the Prosecutor to which the Judge Advocate was making reference were the following :—

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It may be added that, whatever the legal status of the victims of the offences proved in the trials reported on in this volume, they were not accorded those rights, essential to a fair trial, which have been generally afforded to alleged war criminals in their trial by Allied courts after the Second World War.(1)

Finally, it may also be useful to say some words in recapitulation regarding the different capacities in which various of the accused involved in trials reported in the present volume were acting when they became responsible for the acts or omission with which they were later charged as war criminals.

Most of these accused had acted as judges in purported trial of Allied victims, and it is not proposed to repeat the names, relevant activities and sentences of these defendants. They present few border-line problems; none of those proved to have acted as judges were declared not guilty by the Allied Courts which tried them, though the sentences passed on two were not confirmed.(2)

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" I put what I conceive to be the three minimum requirements of a fair criminal court, a criminal court the decisions of which international law will respect as being worthy of legal validity. The first requirement is that there shall be an impartial judge or tribunal. I say ' or tribunal ' because it does not matter whether the judge is a single individual or a panel of judges. The second requirement is, in my submission, a hearing at which the accused must be present and at which he must be allowed to make out his own defence and possibly to call witnesses. The third requirement is facilities for the preparation of his defence and for the calling of witnesses in his defence, and those facilities include expert legal advice.

" If one compares the kind of legal proceedings which are alleged to have taken place regarding the victims of charge 2 to persons charged with capital crimes in England, there is, of course, an enormous contrast: the proceedings for committal to trial, the immediate allocation of defence counsel and solicitors, and eventually, after a lot of time and a lot of formality, a full dress trial before judge and jury.

" Dealing with international law, I do not suggest that the details of any domestic criminal jurisdiction should be required. One requires only the basic minima which would show that the verdict of the court in question may have been a fair one. But these three minimum requirements (and I am omitting now the detail of whether there is a jury or a committal for trial and all those other procedural matters), an impartial judge, a hearing at which the accused is present and is allowed to make out his own defence, and facilities for the preparation of his defence, are in my submission the minimum requirements for any trial the legal validity of which should be recognized by a tribunal which, like this tribunal, is administering international law."

(1) This avenue cannot be explored to the full in these pages but reference should be made to *Information Concerning Human Rights arising from Trials of War Criminals*, a Report prepared by the United Nations War Crimes Commission in accordance with a request by the Human Rights Secretariat of the United Nations, November, 1947, Chapter III, pp. 317-329. Here, the Charters of the International Military Tribunals of Nuremberg and Tokyo, together with the law and practice of the various Allied nations whose courts have tried war criminals after the Second World War, have been analysed to show how accused war criminals have in general been guaranteed, as aspects and illustrations of the general right to a fair trial, the following: the right to know at a reasonable time before the commencement of trial the substance of the charge made against them; the right to be present at their trial and to give evidence; the right to enjoy the aid of Counsel; the right to have the proceedings made intelligible by interpretation; and the right of appeal or of review by some higher authority. Much of the information set out in these pages of the Report is also available in the volumes of the present series, and particularly in the annexes dealing with the war crimes laws of individual States.

(2) These were Jitsuo Date and Ken Fujikawa, two of the accused in the trial of Haruke Isayama and others. For the evidence regarding these two see pp. 62-4.

It may be worth adding that not all of the judges found guilty had acted in quite the same capacity. For instance, Yamaguchi(1) and the accused Wako Yusei(2) had both acted as Law Members of the Japanese Courts on which they sat. Again, in the trial of Harukei Isayama and others, the accused Sugiura was shown to have acted as Chief Judge and thus to have held a position presumably of greater responsibility than some of his colleagues.(3) It is not, however, proposed to attempt here to show the possible correlation between these various degrees of responsibility and the sentences meted out to the accused, though such an analysis would constitute an instructive field of study.(4)

Fewer than the accused judges were those defendants who had acted as prosecutors before the enemy courts which tried Allied victims. These accused included Masaharu Matsui and Tadao Ito, who were among those found guilty in the trial of Harukei Isayama and others ; it was shown, however, that they had also acted as judges in others of the trials referred to in the charges made, and a study of these charges together with the findings of the court shows that each of these two accused was in fact found guilty of offences committed " as a member of a Japanese Military Tribunal."(5) Another accused who was found guilty in the same trial was Seiichi Furukawa, who had been in a position to give orders to those who acted as prosecutors at the trial of the Allied victims ; the evidence showed, however, that he had been involved in several other ways in the passing of the death sentences on the latter.(6) Finally, in the trial of Tanaka Hisakasu and others, it was shown that the accused Asakawa Hiroshi had been the acting prosecutor in a trial which resulted in the death of an Allied victim ; he was shown to have acted under the dominant influence of Prosecutor Shii, however, and was found not guilty by the United States Military Commission which tried him.(7)

Among the accused in the trials reported on in this volume there appeared two higher officers having an overall responsibility for the proceedings taken against the Allied victims by persons under their command. Reference

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(1) See pp. 67 and 69.
(2) See p. 5.
(3) See p. 62.
(4) Before leaving the question of the criminality of the accused judges, it should be mentioned that in the *Wagner Trial* the accused Huber who had been President of the Special Court at Strasbourg, was sentenced (in his absence) to death, having been found guilty of complicity in the murder of 14 victims, on whom he had passed unjustified death sentences which were carried out (see Vol. III of this series, pp. 31, 32 and 42).
(5) See pp. 60, 62 and 64.
(6) See pp. 61-3.
(7) See pp. 67, 68 and 69. In the trial of Wagner and others by a French Permanent Military Tribunal, Luger, who had been Public Prosecutor at the Special Court at Strasbourg and as such had demanded an illegal sentence of death on the 13 Alsatian victims, was found to have been an accomplice in the murder of the latter ; in view of the fact that he had acted on the orders of Gauleiter Wagner, however, the French Tribunal acquitted him (see Vol. III of this series, pp. 31-32, and 42). The position of Wagner himself, and that of the head of his "Civil Cabinet," Gädeke, are not analogous to those of any of the categories mentioned in the text above. Wagner was found guilty of complicity in the murder of in all 14 Alsatians wrongly sentenced to death by the Special Court at Strasbourg, since he had, while Gauleiter and Head of the Civil Administration in Alsace, and in abuse of his authority ordered the sentences awarded to the victims and carried out. Gädeke was also found guilty of complicity in the same murders, since he had passed on Wagner's orders that the illegal sentences be carried out (see Vol. III, pp. 31, 32, 40 and 41).

should be made in this connection to the evidence relating to Major-General Shigeru Sawada(1) and General Tanaka Hisakasu.(2) Both were found guilty, but the Confirming Authority disapproved the sentences passed on the second accused. It will be recalled that both generals were away from the scene at the time when the purported trials were held. Whereas Shigeru Sawada was personally informed of the proceedings on his return,(3) however, Tanaka Hisakasu did not return to his command headquarters until after the execution of the victim and was not proved to have known in advance that the trial would not be fair or to have known or had reasonable grounds to believe that, if the prisoner should be convicted, the execution of the sentence would be carried out without his consent, which was required by Japanese law.(4)

Lieutenant-General Harukei Isayama(5) and Major-General Fukuchi Haruo,(6) who were among the accused found guilty in two of the trials reported upon in the present volume, had each acted as Chief of Staff to a Commanding General under whose authority a trial of Allied victims had been held. Both were thoroughly acquainted with the nature of the proceedings which were being taken against the Allied prisoners, and their being found guilty is evidence of the responsibility of a Chief of Staff, as distinct from a Commanding General, in cases of denial of a fair trial to prisoners.

Finally, several of the accused in the trials reported on in this volume had acted as executioners or had in some way been implicated in the carrying out of the sentences passed by enemy courts or supposed courts upon Allied

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(1) See pp. 1, 4-5 and 8.
(2) See pp. 66, 68 and 70.
(3) See p. 4. Sawada also admitted having had jurisdiction over the prison where certain of the victims had been incarcerated under the conditions described on p. 6. Counsel for Sawada attempted to distinguish the charge against that accused from the charges that had been made against General Yamashita (see Vol. IV of this series, pp. 1 *et seq.*); in the course of his argument appear the following passages: "The Commission will notice an extreme difference in the way Yamashita was charged and the way General Sawada was charged. General Sawada is charged that he did appoint a Commission, that he did direct a Commission, that he did direct and authorise cruel and brutal atrocities, that he did confine and deny the status of prisoners of war. In other words, it is charged in this case that General Sawada himself did these acts; not that he permitted others to do it. If we now try to find him guilty of permitting others to do these things, we find him guilty of an entirely different offence than what he is charged with in the specifications. I will go farther, however, and say even if charged with permitting it should not make any difference. The Yamashita case involves as I mentioned some 123 different atrocities involving the death of 25,000 innocent people. This case involves a trial and a conviction. There is no comparison as to the extensiveness of the Yamashita charges and the charges in this case. None whatsoever. In the Yamashita case it was pointed out that the atrocities were and the words are from the decision itself—"widespread and extensive." We cannot say the acts that took place in Shanghai regarding these fliers were widespread and extensive. It was not the type of act that shows complete negligence of General Sawada to perform his duties. He did not completely fail as commander. . . . I submit, therefore, the Yamashita case is no authority for this case. The Yamashita case fails, and I know of no other authority or decision of any type which says that command responsibility is the same as criminal responsibility."
It will be noted, nevertheless, that in its findings the Commission which tried Sawada struck out the words "knowingly" and "and wilfully" from the charge made against him, and its conclusions also show that it regarded the accused's guilt as arising from negligent omission rather than deliberate action. (See pp. 7-8.)
(4) See p. 69.
(5) See pp. 60, 62, 63 and 64.
(6) See pp. 66, 67, 68, 69 and 70.

nationals. In the trial of Shigeru Ohashi and six others by an Australian Military Court(1) all of the accused were shown to have taken part in the execution which followed the trial of 18 civilians in occupied territory, but the only accused to be found guilty of the murder of these victims were the two who had also acted as their judges ; these found not guilty comprised the person who had acted as interpreter at the trial and four others who were not shown to have been present at the proceedings or to have had knowledge of their nature.(2)

Sotojiro Tatsuta, one of the accused in the trial of Shigeru Sawada and others (3) was found guilty, *inter alia*, of causing the death of three United States prisoners of war by " knowingly, unlawfully and wilfully " executing the orders of a Japanese Military Tribunal. The writ of execution, however, appeared on its face to be legal, and while it was true that Tatsuta visited the courtroom for a short while during the so-called trial, there was no conclusive proof that he had either actual or constructive knowledge of the illegality of the Enemy Airmen's Act, the trial held under it or the sentences passed at the trial. The Reviewing Authority disapproved the finding of guilty against Tatsuta on this point.(4)

In approving the appeal of Oscar Hans, a former executioner, the Supreme Court of Norway held that the question to be decided was whether the appellant had been aware that the Norwegian victims, of whose murder he had been found guilty by the Eidsivating Lagmannsrett, had not been

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(1) See pp. 25-31.
(2) See p. 26.
(3) See pp. 1-8.
(4) See pp. 1, 2, 6, 7 and 8. During the course of the trial the Defence claimed that the Commission should not require Tatsuta to have questioned his orders to execute the prisoners ; Counsel argued as follows : " What about Tatsuta ? He was an executioner and a jailer. Is he supposed to go behind the court sentences, behind the orders of the 13th Army, Nanking Headquarters, on up to Tokyo ? " Here is what the American Law says of a person who acts pursuant to a court sentence : In Law Reports Annotated, page 4199, para. 68, the case of Erskine v. Huhnbach, a U.S. Supreme Court case is cited, and I quote : " An order or process issued by an officer or tribunal having jurisdiction over the subject matter upon which judgment is passed, and with power to issue the same, if regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, will give full and entire protection to a ministerial officer in its regular enforcement, against any prosecution which the party aggrieved thereby may institue against him.

" In 26 American Jurisprudence, para. 110, we find this statement : ' The execution of a death sentence pursuant to official duty and in obedience to law can constitute no offence, since it is in the advancement of justice, it is deemed justified.'

" In the case of Stutsman County v. Wallace, Vol. 142, U.S. Reports 293, 12th Supreme Court Reports 227, I quote this Supreme Court decision : ' Ministerial officers acting in obedience to process regular on its face, and issued by an officer or tribunal having jurisdiction of the subject matter and power to issue the process, are not liable for its regular enforcement, although errors may have been committed by the officer or tribunal which issued it.'

" What does all this mean ? It means that Tatsuta, if he had done the same acts in the United States, no U.S. court could have touched him because he acted pursuant to a lawfully appointed constituted tribunal of his own country. We have to protect such persons in our country in order to advance justice, in order that a court's sentence, or court's decision can be put into effect and force right away. It could never be a binding decision of the court otherwise. We are asking Tatsuta to be held to higher standards than we are asking our own people to abide by."

The Defence claimed that the Japanese tribunal had been lawfully constituted and had had the requisite jurisdiction, and that, even if its decision was improper, Tatsuta had no authority to examine whether it was proper or not.

tried and sentenced according to law. Judge Holboe pointed out that it was not sufficient for a conviction for wilful murder to show that the accused ought to have known the circumstances which made his act illegal.(1) The validity of this argument seems, however, to arise from the fact that Hans had been tried for an offence against Article 233 of the Norwegian Civil Criminal Code, which requires that an accused must be shown to have acted wilfully(2) and it may be noted that a minority of judges on the Lagmannsrett were prepared to consider whether the accused could be held guilty of inadvertently causing the victims' death, under Article 239 of the Civil Criminal Code(3) but that on the facts they found Hans not guilty of such an offence.(4)

In the British trials reported upon in the present volume(5) a number of accused were found guilty of being concerned in the execution of Allied victims. On behalf of the defendants, it was pleaded that the victims had received a fair trial or that at any rate the accused could reasonably assume that this was so and were not in a position to enquire into the legality of the executions which they had been ordered to carry out. In each of the three trials the Judge Advocate expressed the opinion that there was no evidence of a real trial ever having been held(6) and in finding most of the accused guilty the Courts may have been influenced by the conditions of secrecy in which the killings were carried out. It will be recalled that in the trial of Karl Buck and Ten Others, the Prosecutor submitted that the obliteration of all traces of the crime and the steps taken by the accused to suppress all knowledge of the crime belied any contention that they thought that they were performing a legal execution. Lawful executions did not take place in woods, nor were those shot buried in bomb craters with their valuables, clothing and identity markings removed.(7)

It should be added in conclusion that Volume VI of this series contains reports on further trials involving charges of denial of a fair trial, particularly the trial of Josef Altstötter and Fifteen Others, by a United States Military Tribunal at Nuremberg, 3rd March–4th December, 1947 (*The Justice Trial*). The defendants in this latter trial had been judges, prosecutors and/or Ministry of Justice officials under the Third Reich and were charged, *inter alia*, of war crimes and crimes against humanity committed in the course of their participation in the debasement of the German legal system to the ends of Nazism. The legal notes appearing in Volume VI will, consequently, deal further with the state of international law on the question of the denial of a fair trial and other related aspects of the denial of justice.

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(1) See p. 91.
(2) See p. 82.
(3) See p. 89.
(4) See p. 89. According to Article 233 of the Norwegian Civil Criminal Code, a person who wilfully causes another person's death or is an accomplice to such an act, is punishable with imprisonment for up to six years. If the act was done not only wilfully but with premeditation, or if it was committed in order to facilitate or conceal another crime or to avoid punishment for such other crime, life imprisonment may be inflicted. The same applies in cases of repeated violations and when other particularly aggravating circumstances are present. Article 239, however, provides as follows: "He who inadvertently causes another person's death, shall be punished by imprisonment for a period of up to three years. In particularly aggravating circumstances, imprisonment for a period of up to six years may be imposed. In particularly mitigating circumstances fines only may be imposed."
(5) See pp. 39-59. (6) See pp. 44, 52 and 58. (7) See p. 43.