

Highlights of the Yamashita and Homma Trials *

NEWSPAPERS, magazines and reviews, local and foreign, had been and still are commenting on War Crimes Trials, not only in the European Theatre of War, but also in the Pacific Theatre, such as Japan, China, Australia, Singapore and the Philippines. The Philippines may claim the privilege of being the stage of the biggest war crimes trials held almost before the rumbling of cannons had silenced and the smoke of powder had disappeared from the horizon. They have made history of international and lasting effects.

Considerable criticism have been heard questioning these trials. Some have put at issue the jurisdiction of the tribunals and others the criminal liability of the accused. No amount of intelligent discussion would result unless the background is known.

There are two types of courts, the International Military Tribunal and the Military Commissions. To the first belong those sitting in Nuernberg and Tokyo, created under the United Nations War Crimes Commissions, being the outgrowth of an inter-Ally Declaration signed at St. James' Palace in London on January 13, 1942. Emphasizing the reign of terror which Germany had planned in occupied

countries as part of her policy of aggression, the 1942 Declaration enumerated "imprisonment, mass exposures, the execution of hostages and massacres, as the manifest examples of terror."

At the time the Moscow Declaration was signed in November 1943 by President Roosevelt, Prime Minister Churchill and Premier Stalin, on behalf of thirty three united nations, more gruesome details of war criminality became known as a result of the liberation of some of the German-occupied countries. This Declaration contained a warning issued to the German officers and men and members of the Nazi Party, who were responsible for, or took a willing part in, atrocities, massacres and executions. They were to be sent back to the countries "in which their abominable deeds were done, in order that they might be judged and punished according to the laws of those liberated countries". Contemplating the magnitude and extension of the continuous criminal acts that were to be tried, it was also forewarned that there was a group of major criminals whose offenses have no particular geographical localization and who will be punished upon decision of the governments of the Allies.

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The twenty German major war criminals stood trial before the Nuernberg Court for orders and deeds that forced the deaths in Europe of fifteen million men, women and children, through other than military action. The establishment of extermination camps, of slave-labor systems, of starvation programs—all fall within the specified crimes. Violation of the Rules of War, such as wanton destruction of cities, mistreatment of prisoners of war and the plunder of private or public properties, were also included in the four major charges filed against those accused. The data assembled by the United Nations War Commission on crimes committed by the Japanese in the Pacific War was no less horrifying. China reported at least five instances in which Japan resorted to bacteriological warfare. All American flyers who were forced to land on the coastal areas of China were executed; but, worse still, all men, women and children in the areas where the flyers landed were slaughtered by the Japanese.

The Military Commissions that have tried and passed judgment on Japanese war criminals in Manila belong to the second group of courts. They have tried cases not only of murders and atrocities committed in the Philippines, but also of some perpetrated in Borneo, Morotai, Celebes and other South Pacific Islands. These commissions, which are similar in type and character to those established in Australia, Singapore, Hongkong, China and Japan, are not, however, of international character. They were established by the respective armies in the

countries where crimes were registered. In the Philippines they came under the United States Army, with the cooperation of the Philippine Army.

I have heard very often this question: If China, Australia and Great Britain had established military commissions to try war criminals in their respective territorial jurisdictions, why was it that the Commonwealth of the Philippines or Republic of the Philippines, being just as well a member of the United Nations Organization, did not establish similar commissions, instead of leaving the matter almost exclusively in the hands of the United States of America? I shall leave the answer to your judgment.

In consonance with the policies of the United Nations War Crimes Commission and the Moscow Declaration, and foreseeing perhaps the proximity of the end of the armed conflict, the United States War Department issued a letter on December 25 1944, creating the War Crimes Office under the Judge Advocate General Office of the United States Army. During President Osmeña's post-Liberation trip to Washington, D. C., in March 1945, he was urged by the Judge Advocate General of the United States Army to create the corresponding War Crimes Office of the Philippine Army. Several conferences were held during which he was assisted by our own Judge Advocate General. After President Osmeña returned to the Philippines, he was sent several radiograms by the United States Army, urging upon him the immediate establishment of such Office. Although the corresponding draft of the directive was

prepared and ready since late March or early April 1945, it was not actually signed and proclaimed until August 16, 1945, becoming known as Executive Order No. 64, creating the National War Crimes Office as a division of the Judge Advocate General Office of the Philippines Army. This Office had the mission of collecting, recording and evaluating evidence, trying and apprehending culprits, jointly with the United States War Crimes Office; it was further ordered to maintain a direct liaison with the United Nations War Crimes Commission.

No one could give any satisfactory reason for this apparent delay. I would say that President Osmeña probably realized the impracticability of accepting this tremendous work, conscious of the financial bankruptcy of the nation. It was to be a most costly proposition. No mathematical genius is required to estimate that for each of the Yamashita and Homma trials the United States Government has spent not less than ONE MILLION DOLLARS.

When the Yamashita and Homma cases were in the process of trial, different United States Army organizations were in cooperation. AFWESFAC, which is in short for American Forces in the Western Pacific, had charge of scientific laboratories, photostat work, photographers, movie directors, sound technicians, radio commentators, press relation officers, etc.

Directly also under AFWESPAC, there were the War Crimes Commissions. We had at time five or six commissions of five members each, headed

at least by a full Colonel. General and Flag Officers are always tried by Commissions headed by a General, either of the United States or Philippine Army. Assisting these Commissioners, there is an Office Staff, composed of the Chief, which is a full Colonel, his aides, court recorders, reporters, interpreters, attendants and a big detachment of Military Police, in charge of the orderly conduct of trials and the custody of the prisoners in the stockade.

There is moreover the OCCW, in short for Office of the Coordinator for Civilian Witnesses, established with the the exclusive mission of bringing to Manila civilian witnesses from all over the country.

The group of defense counsel is also operated under the Judge Advocate of AFWESPAC. This set-up gives them an apparent edge over the prosecution, because the original review of cases decided is conducted by the said Judge Advocate Office of AFWESPAC. To avoid this apparent advantage, the defense counsel was assigned and given quarters wherein the defense lawyers were housed, together with their staff of investigators, reporters, agents, stenographers, as well as the witnesses for the defense who were brought from the United States, Japan and all over the Philippines.

One of the biggest items is the so-called LUPOW Camp established at Los Baños, abbreviation for Luzon Prisoners of War Camp. There was a time in which the American personnel, in charge of the Camp, was as big as two full United States Army Divisions; there were other camps and stockades such as those in Leyte, Mindanao.

and North Luzon, the expenses of which could be chargeable to war crimes. War Crimes Branch has screened not less than one hundred sixty thousand prisoners of war kept in those different camps.

On the top bracket of all these different Army units and organizations, there is the War Crimes Branch. AFPAC, which stands for American Forces in the Pacific, was originally in charge of investigation, apprehension and prosecution of war crimes. Attached to AFPAC, and assisting in many technical ways, there was the WCID, which is the abbreviation for War Crimes Investigating Detachment, composed of a Commanding Officer and his staff, and of enlisted men made up generally of Technical Sergeants, some being Doctors of Philosophy, Masters of Arts, etc.

Incidentally, after GHQ, AFPAC was transferred to Tokyo. Legal Section of GHQ, SCAP, took over, so that the present work is conducted directly under the General Headquarters of the Supreme Commander for the Allied Powers.

It was, therefore, a high tribute to the Philippine Army, directly, and to the Philippine Government, indirectly, for SCAP, or General MacArthur, to have appointed at a time two Philippine Army officers as Heads of sections of this organization highly technical and top unit belonging exclusively to the United States Army. I refer to the positions of Chief of Prosecution and Chief of Review Section, headed by me and by Major Eleuterio P. Fojas.

A spectator at those trials would, nevertheless, be misled by the array of prosecutors and defense counsel. Take as an specific instance the trial of General Homma. The team of prosecutors was composed of six members. The Chief Prosecutor was an American Lieutenant-Colonel belonging to F. A., two were of the USNR, one of CAC, and one INF. I was the only officer of JAGD, which, as you know, is the Legal Section of the Army. Those are the Army judges, and some retain this title for life, in preference to their Army ranks. The battery for the defense was headed by a Major of INF and assisted by five other officers belonging to FA, AC, CAC, and QMC. There was also a Captain belonging to JAGD, who later became Acting Judge Advocate for AFWESPAC.

Unfair, would be the natural exclamation. But, this is the Army. Behind this confusion of service insignias, you will find that all of these officers are lawyers, some of them with experience of more than thirty years in law practice. Others were Federal Judges, former District Attorneys or Law Assistants in big federal departmental offices.

The investigation and subsequent prosecution of local war crimes would have been more complete and accurate, to my opinion, if they had been conducted from the very start either under experienced personnel of the Philippine Army or at least with their close cooperation. Let me draw one example from the Homma Case.

The team of five prosecutors for this trial was grouped since

September 1945, on which date the numerous incidents and cases were distributed to the individuals. I was not transferred from the Philippine Army and actually assigned to War Crimes Branch until the end of November 1945. I was originally assigned as a mere technical adviser and sort of supervisor. I found that all the charges and specifications against General Homma had not only been prepared but also approved and returned from Tokyo. No mention whatever was made of the more than three hundred Filipinos that were tortured and decapitated inside the San Beda College compound, of the atrocities committed inside and outside the Rizal Stadium, of the mistreatment and killing of the personnel of the Manila Police, of the inhuman treatment inflicted on the members composing the underground broadcast properly known as "Voice of Juan de la Cruz," caught somewhere in Singalong Subdivision, the raping of women throughout Greater Manila, and worse still, the assassination of Jose Abad Santos. He was one of the most brilliant professors that honored our College of Law. And strange to say, he was our best mentor in international Law. But, his name was not even known to the whole Prosecution Section. An examination of the records of the whole War Crimes Branch, which counted with more than thirty two thousand individual statements and affidavits, did not disclose any single document referring to his death. The opportunity of bringing to light his heroic death could not be by-passed. I willingly accepted the job of being an Investigator

aside of that of being a Prosecutor. The charges and specifications had to be amended and reforwarded to Tokyo for approval. When the trial was started I was assigned sixteen specifications out of a total of forty seven.

Cases before the United States Military Commissions, in parallel with cases before military court-martials, are initiated by way of charges, which are allegations of general character, followed by specifications indicating the particular acts of which the accused are being held responsible. Both Generals Yamashita and Homma were charged in that they have "unlawfully disregarded and failed to discharge his (their) duty as commander to control the operations of the members of his (their) command, permitting them to commit brutal atrocities, and other high crimes, and thereby violated the laws of war."

The specification in both cases would fall under four major classifications, namely:

- (1) Crimes involving interpretation of International Law;
- (2) Crimes attributable to the Kempeitai;
- (3) Crimes concerning the care and treatment of prisoners of war; and
- (4) Crimes charging specific atrocities perpetrated against civilian and military personnel unconnected with war operations.

The commissions were created as fact finding bodies, with specific instructions of admitting evidence that "would have probative value to a reasonable man and is relevant and material to the charges before the Commission". Membership was chosen

among high-ranking officers of the United States Army. Generals presided whenever the accused were Generals or Flag Officers. Cases against Field Officers of lower rank were presided by full colonels.

Remember that Japan surrendered in August 14, 1945, while V-J took place on September 1, 1945. Two days after, on September 3, General Yamashita surrendered in the North, but on the 25th of the same month, he was served a copy of the charges against him. He was arraigned on October 8, 1945. The trial was started on October 29, 1945 and his death sentence was read to him on December 7, 1945, which was incidentally the anniversary of the treacherous attack on Pearl Harbor.

It was because of this apparent swiftness of the trial against Yamashita that Justices Murphy and Rutledge, of the United States Supreme Court, dissented from the majority decision of February 4, 1946, penned through former Chief Justice Stone. One point of their criticism was that the case was filed against General Yamashita without a proper and mature investigation. This could be true from the position of the Philippine Army, but it was unfounded as far as the United States Army was concerned.

The official records disclose that as early as May 1945 the Judge Advocate General of the United States Army had created what was then known as the War Crimes Branch under the Theatre Judge Advocate. On June 9, 1945, USAFFE, one of the major units under General Mac-Arthur, created WCID,

with the mission of cooperation with WCB, to work under the direct administrative supervision of AFPAC. When the handful of Philippine Army officers assigned to WCID reported for duty, as mere investigators, they found out that the investigation was far advanced. The intelligence services of the numerous military units that landed in different parts of the Philippines converted themselves into investigating teams of war crimes as soon as landing operations were completed. Moreover, evidence had been flowing in by radio and by airmail from the United States War Department, which had been sorting it from all over China, Manchuria and the United States, consisting of statements of prisoners of war released or escaped from the Pacific Theatre of operations.

Similarly, defenses counsel were appointed for General Homma, long before his arrival from Japan, and they had been served extra-officially copies of the charges against their prospective client. The official service of such charges was made upon him on December 15, 1945, he was arraigned on December 19, 1945, and his trial started on January 3, 1946, and it lasted up to February 9 of the same year. Two days after, on February 11, 1946, the verdict sentencing him "to be shot to death by musketry" was read to him.

Command responsibility was demanded, for Article 1, of the IV Hague Convention of October 18, 1907, expressly provides that all Army units should be "commanded by a person responsible for his subordinates." The command of military troops

is accompanied by a broad authority and a corresponding heavy responsibility. It is naturally absurd to consider a commander a murderer or a rapist, because one of his soldiers commits murder or rape. Nonetheless, when murders and rapes are vicious and widespread, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawlessness of his troops.

The evidence in both the Yamashita and Homma trials, through one hundred twenty three specifications in the former, and forty seven in the latter, established conclusively that crimes were so extensive and wide-spread, both as to time and area, that they must either have been wilfully permitted by such Commanders, or secretly ordered by them.

An attempt was made to question the applicability of those rules of International Law, as well as the imposition of sanctions for their violation. Twenty-five years ago, when I took my bar examinations, I was given full credit by my examiner when I answered that the only sanction of International Law was moral in character. I admit that we were all wrong. Our Supreme Court rightfully held that these laws have been assimilated by our Constitution of 1935 as part of the law of the land.

The IV Hague Convention of 1907 also provided that inhabitants and belligerents shall remain under the protection and rule of the "the principles of the law of nations, as they result from the usage established

among civilized peoples, from the laws of humanity and the dictates of the public conscience."

International Law is the sum total of the different laws, conventions, treaties and customs adopted from time immemorial. It is also composed of those precedents established by one or two nations in her dealings with other states, which have found acceptance among the rest of the states.

It has been urged that these trials for war crimes have no precedent. It was contended that these accused should have been tried by their own people. But, the Leipzig trials, held at the close of the First World War, became a mockery of justice and ended in frustration of the law, because the parties accused were tried by tribunals composed of their own countrymen.

As the fields of war extend beyond one's own boundaries, the unperturbed dignity of reason must not fail. Reasons of expediency must not defeat fundamental exigencies of humanity. Justice and equity require that the peoples in occupied regions be treated in the same manner as the occupying power would wish to see its own citizens treated. Precedent will have to be set or established one time or another. Lack of precedent does not imply absence of the rule or does not deny the rightfulness of an action, if such action comes within "the laws of humanity and the dictates of the public conscience." It is absurd to pretend that because of the lack of precedent, a commander of a military troop should not be held

responsible for the atrocities committed by his personnel when such crimes were so extensive and wide-spread, both as to time and area, that indicated either wilfull permission or at least a secret order, if not military tolerance. Similarly, after aggressive war was outlawed in several international treaties, of which Germany and Japan were signatories, it cannot be logically pretended that the leaders of such aggressive war should go scot-free.

The trials in Manila followed the general trend of a universal feeling that out of this war should come unmistakable rules and workable machinery from which anyone who might contemplate another era of carnage and brigandage, would know that he would be held personally responsible and would be punished accordingly.

We were set to determine the innocence or guilt of the accused after a hearing as dispassionate as the times and the horrors we have to deal with will permit and upon a record that will leave our reasons and motives clear. It was determined, however, as it was previously in the European Theatre, that these hearings must not be regarded in the same light as a trial under our system, where defense is a matter of constitutional right. Fair hearings for the accused were, of course, required. To make sure that we punish only the right man and for the right reasons, the procedure adopted in these hearings was adequate to bar obstructive and dilatory tactics resorted to by defendants in our ordinary criminal trials.

It is about time to reject the paradox that legal responsibility should be the least where power is the greatest. This latter is just a relic of the doctrine of the divine right of kings. As Lord Coke said to King James three centuries ago: "Even a king is still under God and the Law". The common mission, both in the Yamashita and in the Homma trials, was to prosecute and secure the conviction, if possible, of the top men of the occupation and invasion armies, respectively, for only by doing so can there be just retribution for many of the most brutal acts. The years that had transpired, the changes that had occurred in the physical appearances of the perpetrators, the natural accidents of a shaky occupation, made a most difficult task for anybody to secure adequate identification of individual perpetrators of atrocities and crimes. Witnesses are rarely able satisfactorily to identify particular soldiers in uniform whose acts they had witnessed.

Mr. Justice Murphy, our former American High Commissioner, dissented against the two majority decisions rendered by the Federal Supreme Court in the Yamashita and Homma cases. He was more subjective and sentimentalist than anything else. In accordance with his dissenting opinion, he objected against Yamashita's trial because under the procedure established, his fate as a vanquished General was in the hands of his conqueror. On the other hand, in his dissenting opinion in the Homma case, he claimed that Homma's fate, as a former victorious conqueror of the Philippines, was placed in

the hands of the vanquished and the conquered. with external and material means of force.

Time will judge whether we have accomplished our major objective. We have strived to humanize the methods of war and to alleviate the sufferings of conquered peoples. I consider this to be a step towards the moralization of International Law, for its preservation against egotistical deviation and its special significance for those peoples who are less provided

A precedent has been established that any wanton disregard for the dignity, liberty and life of man by a series of acts irreconcilable alike with the precepts of positive International Law and those of the law of nature, as well as with the elementary rights of humanity, is not beyond the sanction of law and justice.



THE *right to due process of law is more than a prerogative. It is an imminent and inalienable right of every man, woman, and child living under a government of laws. It cannot be dispensed with or brushed aside either in time of war or in time of peace. In time of war martial law may be declared. But even under martial law appropriate tribunals such as courts-martial are set up to hear and decide the case before anybody can be punished.* — JUSTICE ROMAN OZAETA, Dissenting Opinion, Lily Raquiza v. Bradford, 41 Off. Gazette 626, 638.