

Trial of War Criminals by
military Commission

(10)

(15)

TRIAL OF WAR CRIMINALS BY MILITARY COMMISSIONS

I

History

1. The trial of war criminals by military commission is not new. Military commissions were appointed by Generals Scott, Taylor, and Wool in 1847 during the Mexican War. These commissions tried persons accused of acts "in violation of the Laws of War" - chiefly guerillas. The commissions were created then because courts-martial had no jurisdiction over such offenses.
2. Such commissions functioned also during the Civil War. (Winthrop's Military Law and Precedents, pp. 832-833).
3. They have been recognized and sustained by the United States Supreme Court. (Ex Parte Vallandigham, 68 U. S. 243; Coleman v Tennessee, 97 U. S. 509; Ex Parte Quirin, 317 U. S. 1 - the case in which the Supreme Court, in 1942, sustained the conviction by a military commission of the German saboteurs who landed from a submarine on the East Coast.)

II

Nature of the Commission

1. A military commission is not a court; it is not part of the judicial system. (Ex Parte Vallandigham, 68 U. S. 243).
2. "The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-Chief in war.... In general, however, it (Congress) has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war and other offenses not cognizable by Court-martial." (Winthrop, p. 831).

3. "A military commission forms no part of the judicial system. Its proceedings cannot be reviewed by certiorari; a case tried before it is not, properly speaking, a 'criminal case'; in short, to regard it as a court of justice is 'quite illusory'." (Fairman, The Law of Martial Rule, pp. 262-263).
4. The commission, in a trial of a war criminal, is not applying American law; it applies the international law relating to the law of warfare, either law made by treaties or law created by international custom. (FM 27-10, Rules of Land Warfare, secs. 1-5).

III

Jurisdiction

1. A commission may be appointed either by the President, as Commander-in-Chief, or by a Military Commander representing him. (Winthrop, p. 831; Fairman, p. 262).
2. The commission has jurisdiction over all violations of the laws of war, regardless of where committed; custody of the offender suffices to give the commission jurisdiction over any offenses committed by him. (Opinion by the Judge Advocate General, SPJGW 1943/14218; Willard B. Cowles, Universality of Jurisdiction Over War Crimes, 33, Calif. Law Review (June 1945) pp. 204-205).
3. The commission may sit anywhere; the fact that civil courts are open and functioning in the area in which it sits has no effect on its jurisdiction. (Ex Parte Quirin, 317 U. S. 1; Fairman, pp. 265-271).

IV

Courts-martial rules do not govern trials of war criminals by Military Commissions

1. As stated above, military commissions were created because of the inadequacy of courts-martial jurisdiction. Article of War 15 provides:

"The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war be triable by such military commissions, provost courts, or other military tribunals."

Courts-martial are primarily for the trial of members of the Army; offenders against the laws of war - primarily civilians and members of the enemy forces - are tried by military commissions. (Winthrop, p. 831; Fairman, p. 272).

2. The Articles of War and the Manual for Courts-martial have no application to a military commission trying an enemy alien for violations of the laws of war. (Opinion of Myron C. Cramer, Major General, The Judge Advocate General (War Crimes Branch Brief No. 2A)).

In Ex Parte Quirin, part of the court held that the Articles of War did not apply to such trials; others thought that in any case, the Articles had not been violated. In fact, however, in that case, the U. S. Supreme Court sustained a conviction by a military commission in which the procedure violated AW 46, requiring review by the Judge Advocate General; on the contrary, the Judge Advocate General was permitted to act as a Prosecutor.

3. That the Articles of War do not apply is also confirmed by the following authorities:

a. Winthrop, p. 841:

"In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of War, and, as their powers are not defined by law, their proceedings, as heretofore indicated, will not be rendered illegal by the omission of details required upon trials by courts-martial, such for example, as the administering of a specific oath to the members..."

b. Fairman, The Law of Martial Rule, p. 262:

"This tribunal (military commission) is carefully to be distinguished from the court-martial, which enforces military law within the army. Courts-martial are authorized by statute and their procedure and the code which they enforce are prescribed in the Articles of War and the Manual for Courts-Martial. In contrast, a Military Commission generally has no higher origin than an order of the General and has no definite code by which it must be governed."

Ib., p. 273:

"Military Commissions are set up in much the same fashion as a Court-Martial and are thus composed of officers who are acquainted by military law. From choice they turn to that code as a guide for their conduct. But there is no obligation to do so. There are no requisite formalities, the omissions of which would entitle the accused to an acquittal."

c. Manual for Courts-Martial, 1928, par. 2:

"The agencies through which military jurisdiction is exercised include: Military Commissions and Provost Courts for the trial of offenses within their respective jurisdictions. These tribunals are summary in their nature, but so far as not otherwise provided have usually been guided by the applicable rules of procedure and of evidence prescribed for courts-martial."

Here, General MacArthur has "otherwise provided", in his Regulations.

V

The Constitutional Guarantees Do Not Apply to Enemy Aliens

The provisions of the U. S. Constitution, as to trial by jury, right of confrontation, privilege against self-crimination, etc., do not apply in favor of an enemy alien being tried by a Military Commission for a war crime:

1. "It is traditional American constitutional law that enemy belligerents are without the protection of the constitutional guarantees." - Opinion of Myron P. Cramer, Major General, The Judge Advocate General, citing cases.

2. "While, as to property rights and life and liberty, all aliens domiciled in the United States, or temporarily therein, are accorded the equal protection of the law, and due process of law, such is not the case as to alien enemies. Alien enemies have no rights and no privileges, unless by special favor, during time of war." (De Lacey v. U. S., 249 F 625).
3. See also: Ex Parte Quirin; Raquiza v Bradford, Philippine Supreme Court, 13 Sept 45; Ex Parte Zimmerman, 132 F2d 442; Ex Parte Duncan, 146 F 2d 276; Innes v Hiatt, 3CGA, 15 Mar 44.

VI

Rules of Evidence Generally

The Regulations Governing the Trials of War Criminals, dated 24 Sept 45, issued by General MacArthur, CG, AFPAC, provide:

"16. EVIDENCE.- a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

- (1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.
- (2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.
- (3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.
- (4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.
- (5) A copy of any document or other secondary evidence of its contents, if the commission believes that the original is not available or cannot be produced without undue delay.

b. The commission shall take judicial notice of facts of common knowledge, official government documents of any nation, and the proceedings, records and findings of military or other agencies of any of the United Nations.

c. A commission may require the prosecution and the defense to make a preliminary offer of proof, whereupon the commission may rule in advance on the admissibility of such evidence.

d. If the accused is charged with an offense involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial of any other member of that unit, group or organization, relative to that concerted offense, may be received as prima facie evidence that the accused likewise is guilty of that offense.

e. The findings and judgment of a commission in any trial of a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein.

f. The official position of the accused shall not absolve him from responsibility, nor be considered in mitigation of punishment. Further, action pursuant to order of the accused's superior, or of his government, shall not constitute a defense, but may be considered in mitigation of punishment if the commission determines that justice so requires."

VII

AFFIDAVITS

1. Since the Articles of War do not apply, and since an enemy is not within the protection of the U. S. Constitution in this respect, AW 25 prohibiting the use of depositions in capital cases, and the Sixth Amendment to the U. S. Constitution giving the right of confronting witnesses do not apply; affidavits are properly admitted in evidence.

2. Par. 16 (a)(3) of the Regulations prescribed by General MacArthur expressly authorize the admission of "affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority."

3. The use of affidavits in tribunals enforcing international law is common. (See Fairman, pp. 276-277; Ernst Robel, Criminal Procedure and International Law, The Judge Advocate Journal, Summer, 1945; Louis McKerman, Special Mexican Claims, 32 American Journal of International Law p. 462).

Opinion, JAGD, SPJGW 1945/5465.

"The most striking feature of proceeding before international tribunals is that technical rules of evidence, such as have been developed in the Anglo-Saxon Law, are not observed. Restrictive principles which might strait-jacket the quest for truth in a web of formalistic procedure have uniformly been ignored (Sandifer, Evidence before International Tribunals, pp 3 ff; I Wigmore, Evidence, sec 4 m;.... Here the rules of evidence are much more liberal than they are at common law. I know no rule of international law which prevents a party giving evidence of the second degree because there is evidence of the first degree in existence. There is no rule to exclude one class of evidence because, peradventure, better evidence might be in existence... But it is nonetheless true that a specific grant of authority to admit such evidence as affidavits, unsworn statements and the like, is not essential. Under a well-established customary rule of the law of nations such materials are admissible, it being left to the tribunal... to determine what weight shall be attributed to them (Ralston, Law and Procedure of International Tribunals, p. 216; Wigmore, Evidence, p. 153). In this the widest latitude has been enjoyed..... International courts are not bound by national rules of evidence."

VIII

Hearsay Evidence

1. As stated above, the rules of evidence provided in the Manual for Courts Martial do not govern these trials by military commissions. Therefore, the military commission is not obliged to apply the strict rules of evidence customary in jury trials or court martial proceedings. It is not, for example, obliged to apply the traditional hearsay rule. Indeed, the Regulations

prescribed by General MacArthur for the conduct of these trials by military commission (quoted above) specifically provide for the admission of many types of evidence contrary to the hearsay rule.

2. The historic function of the hearsay rule has been to protect juries from evidence which was not subjected to cross-examination and which, owing to their inexperience, they might not be able properly to weigh for probative value. Courts have never felt that the bench, itself, would be prejudiced by hearsay testimony or give undue weight to it. Indeed, the usual procedure is for a judge to listen to hearsay testimony or receive a synopsis of it in order to determine whether the jury should be allowed to hear it under one of the many exceptions to the rule.

3. It is well-established that administrative tribunals may consider hearsay evidence:

Consolidated Administration Co. v.

National Labor Relations Board, 305 U. S.
197, 229-230.

National Labor Relations Board v. Cities

Service Oil Co., (2 ccA), 129 F. 2d. 933

4. Even in the case of jury trials, the best modern authorities look upon the hearsay rule with disfavor. It has been whittled down by numerous qualifications until it is almost meaningless. Professor Wigmore lists 14 principal classes of exceptions to the rule. (Wigmore, A Treatise on Evidence, 3rd e. 1940, Vol. V, section 1426.)

"The needless obstruction to investigation of truth caused by the hearsay rule is due namely to the inflexibility of its exceptions, to the rigidly technical construction of those exceptions by the courts, and to the enforcement of the rule when its contravention would do no harm, but would assist in obtaining a complete understanding of the transaction.-----In all probability,

if we closed our eyes (a good deal of the time) to the Hearsay rule, and allowed the witness to tell his story, hearsay and all, without interruption, we should not only secure a more lucid picture of events and a smoother trial, but should in all probability arrive just as near the truth in the end." Wigmore, supra, section 1427.

Wigmore explains that the only merit to the hearsay rule is its emphasis on the right of cross-examination. (Wigmore, supra, sections 1362, 1420). In the present proceedings before the military commissions, however, there is no such right. (See discussion above.) This demonstrated, for example, by the provision in General MacArthur's Regulations permitting the introduction of affidavit testimony.

5. As stated above, a military commission is not a court, or court-martial, but rather an executive, or administrative agency. It is composed of officers deemed capable of giving the proper weight to hearsay. Therefore, one of the two reasons for the hearsay rule does not apply here. Thus, hearsay is common in tribunals administering international law, as well as administrative tribunals. (See 3 above; see authorities cited in VII-3, above).

6. As for the right of cross-examination, the other reason for the hearsay rule, as noted above, there is no such absolute right in these trials, for the Articles of War and the Constitution do not apply. The Regulations, par. 14 C, provide that the accused shall have the right:

"To---cross examine each adverse witness who personally appears before the commission."

This provision, together with the provision authorizing the admission of affidavits, denies any absolute right of cross examination.

7. Therefore, since the trial is not before a jury, and since there is no right to exclude evidence on the

ground it has not been subjected to the right of cross-examination, both the reasons behind the hearsay rule fade away, with the result that the rule has no application.

8. The Regulations issued by General MacArthur state:

"The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the minds of a reasonable man."

Similar regulations were approved by the U. S. Supreme Court in the Quirin case and by Fairman, pp. 276-277, and were adopted by the United Nations for the European War Crimes trials, and by the Australian Government for Australian War Crimes Trials. These Regulations obviously do away with all technical rules of evidence, including the hearsay rule.

IX

Reports

1. Par. 16A (2) of the Regulations authorizes the admission in evidence of:

"Any report which appears to the commission to have been signed or issued....by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report."

2. Even the hearsay rule and the Manual for Courts Martial permit official records and reports (Manual for Courts Martial, 1928, page 121).

3. This Regulation, however, goes beyond any technicalities in criminal or court-martial procedure.

X

Rulings

1. The practice in courts-martial that rulings by the Law member on questions of evidence are final, does not

apply here, for courts-martial procedure does not govern. Any rulings made by the Law member are "subject to objection by any member", and in case of objection, to vote of the entire commission.

2. Accordingly, the Regulations provide (par. 9):

"All decisions of the commission shall be by majority vote of the members present...."

XI

Punishment

"All war crimes are subject to the death penalty, although a lesser penalty may be imposed. The punishment should be deterrent..." (FM 27-10, par. 357)

2. "While, as to property rights and life and liberty, all aliens domiciled in the United States, or temporarily therein, are accorded the equal protection of the law, and due process of law, such is not the case as to alien enemies. Alien enemies have no rights and no privileges, unless by special favor, during time of war." (De Lacey v. U. S., 249 F 625).
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