

United States, Trial of Lieutenant General Harukei Isayama

[Source: Levie, H.S. (ed.), *International Law Studies: Documents on Prisoners of War*, Naval War College, R.I., Naval War College Press, vol. 60, 1979, pp. 345-348]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

TRIAL OF LIEUTENANT GENERAL HARUKEI ISAYAMA AND SEVEN OTHERS (U.S. Military Commission, Shanghai, July 25, 1946)

SOURCE 5 LRTWC 60

[...]

A. OUTLINE OF THE PROCEEDINGS

1. THE CHARGES

[...]

When taken together, the charge and accompanying Bill of Particulars, which specified the offences asserted that the accused Lieutenant-General Harukei Isayama did “permit, authorize and direct an illegal, unfair, unwarranted and false trial” before a Japanese Military Tribunal of certain American prisoners of war, did “unlawfully order and direct a Japanese Military Tribunal” to sentence to death these American prisoners of war, and did, “unlawfully order, direct and authorize the illegal execution” of the American prisoners of war. [...] With respect to the [other] accused [...], the Charges and Bills of Particulars asserted that they as members of the Japanese Military Tribunals did “knowingly, wrongfully, unlawfully and falsely try, prosecute and adjudge certain charges” against the several American prisoners of war “upon false and fraudulent evidence and without affording said prisoners of war a fair hearing,” did “knowingly, unlawfully and wilfully sentence” the several American Prisoners of war to be put to death resulting in their unlawful death. Several of the accused were further charged in their capacities as chief judge and prosecutors and those who acted

as judges were further charged with the wrongful and wilful failure to perform their duties as such judges and with the failure and neglect to provide a fair and proper trial.

The accused pleaded not guilty.

2. THE EVIDENCE BEFORE THE COMMISSION

The evidence showed that fourteen United States airmen were captured by the Japanese Formosan Army and interrogated for alleged violations of the Formosa Military Law relating to the punishment of enemy airmen for acts of bombing and strafing in violations of International Law. These fourteen airmen were for the most part radiomen, photographers and gunners, and were captured between 12th October, 1944, on which the Military Law was issued, and 27th February, 1945. The senior members of the plane crews – the pilots and co-pilots – were sent to Tokyo for intelligence purposes and were not tried by the Japanese with their fellow crew-members.

The Law in question provided that its terms would apply to all enemy airmen within the jurisdiction of the 10th Area Army and that punishment would be meted out to all enemy airmen who carried out any of the following: bombing and strafing with intent to destroy or burn private objectives of non-military nature; bombing and strafing non military objectives apart from unavoidable circumstances; disregarding human rights and carrying out inhuman acts; or entering into the jurisdiction with intentions of carrying out any of the foregoing. Death was provided as the punishment, but this, according to circumstances, could be changed to imprisonment for life or for not less than 10 years. The law stated that the punishment would be carried out by the appropriate Commander; and provided for the establishment of a Military Tribunal at Taihoku composed of officers of the 10th Area Army and other units under its command, and for the applicability of the regulations of the special court-martial to the Military Tribunal. It was further provided that anyone violating this law would be tried by Military Tribunal; that the commander would be in charge of the Tribunal and that the Tribunal would be composed of three judges – two ordinary army officers and one judicial officer – to be appointed by the commander.

All of the fourteen were interrogated by members of the 10th Area Army Judicial Department. There was some evidence that, during the investigation, the chief of the judicial Department, the accused Furukawa, inquired in Tokyo as to the disposition of the captured airmen, and that he was told that the fourteen should be tried if they came within the scope of the Military Law. On his return to Formosa he instructed his subordinates to complete the investigations. The evidence before the United States Military Commission disclosed that the records of the interrogations of several of the American airmen were falsified before the trial by the Japanese Court or before the Japanese Court records were completed.

The interpreter who was present when the falsified statements were taken testified that none of the airmen concerned made any admissions of indiscriminate bombing or strafing. This evidence was supported by the testimony of certain of those who had the task of recording the interrogations. The accused denied the

falsification and claimed that admissions of guilt had been made by the airmen.

It was the contention of the accused in the present trial that, in accordance with Japanese War Department directives, the 10th Areas Army asked instructions of the Central Government during the pre-trial investigations and forwarded statements of opinion prior to referring the cases for trial. A reply came back from Tokyo stating that if the opinions given were correct, severe judgement should be meted out. The accused Isayama, Chief of Staff, 10th Area Army, was advised of all proceedings. [...]

The fourteen Americans were tried in units according to the planes of which they were crew members. There were six cases, all brought to trial on 21st May, 1945. The American airmen were not afforded the opportunity to obtain evidence or witnesses on their own behalf. The defence attempted to justify this, first on the ground that lack of personnel and facilities made it impossible to permit the airmen to go to the scenes of their alleged indiscriminate bombings and strafings, and secondly on the ground that the airmen were given full opportunity in court to make whatever statements they wished. Some testimony was adduced by the prosecution in the United States trial to show that, except for the charges, no other document or evidence was interpreted to the airmen, and that they were not defended by counsel.

There was some evidence indicating that, under the Japanese system of military justice, an accused was not allowed defence counsel in time of war; the evidence before a tribunal was largely documentary, based on admissions and statements of the accused in pre-trial interrogations and reports of damage and investigations by the gendarmerie; and the accused might testify before the tribunal and might introduce evidence on his behalf. It was the contention of the defence that this was the procedure followed in each of the trials of the fourteen American airmen, and this procedure, it was testified, was the normal one.

It was the contention of the defence that since an intention on the part of the Japanese Prosecution to demand the death penalty had been approved by Tokyo, and since the death penalty had been demanded at the trials, the military tribunal had to adjudge death and the commander had to order its execution [...]. The commander [...] issued an order for the execution of all fourteen after final instructions were received from Tokyo. On the morning of 19th June, 1945, the American fliers were lined up in front of an open ditch, shot to death and then buried in that ditch.

The Japanese records of trial relating to these American airmen, and which were turned over to American authorities in September 1945, were not completed until after the Japanese surrender. [...] The accused did not sign the records of the trials until after the war.

3. THE FINDINGS AND SENTENCES

All of the accused were found guilty.

Discussion

1. Were the American prisoners of war denied a fair trial, as the US Court concluded? If so, because the trial violated the rules of IHL then applicable? Even though Japan was not a State Party to the 1929 Geneva Convention relative to the Treatment of Prisoners of War? Were the accused before the US Military Commission denied a fair trial according to the rules of IHL applicable today? (GC III, Arts 82-89 and 99-108)
2.
 - a. Under contemporary IHL, may or must POWs be punished by the Detaining Power for acts such as those qualified as crimes by the Formosa Military Law, even though they were committed prior to capture? (GC III, Art. 85; P I, Arts 51 and 85)
 - b. According to contemporary IHL, did the Formosa Military Law apply to the accused? Was that law compatible with IHL? If not, was it because the law was enacted without proper notification to the Protecting Powers? Could the law at least have been applicable to the fourteen airmen who were captured on the same day that it was enacted? Was it because the law was enacted without the consent of the Power on which the prisoners of war depended? Or because the law called for the death penalty as a punishment? Or because the law applied only to enemy airmen? (GC III, Arts 82, 87, 88 and 100)
3.
 - a. Was the Japanese trial conducted in accordance with the judicial guarantees stipulated by contemporary IHL? If not, were the accused validly sentenced? (GC III, Arts 84, 102 and 105; CIHL, Rule 100)
 - b. Was the evidence against the airmen properly obtained? (GC III, Art. 99(2))
 - c. Should the accused have been granted the opportunity to obtain evidence or witnesses? (GC III, Art. 105)
 - d. Although the Japanese system of military justice did not allow an accused to have a defence counsel, should the accused here have been provided with a defence counsel? (GC III, Arts 99(3) and 105)
 - e. Should the Court have granted the accused the right of appeal? Did they have such a right ? (GC III, Art. 106)
4. Could the Japanese and the US trial have taken place, even though the Protecting Power had not been notified of the proceedings? (GC III, Art. 104)
5. Would it have been consistent with contemporary IHL to carry out the executions so quickly following the sentence? Must not the Protecting Power first be notified? Which information must such a communication contain? (GC III, Arts 100(3), 101 and 107)
6. Under contemporary IHL, would the US have had the right or the obligation to punish the Japanese judges for their participation in the sentencing of the airmen? Were the Japanese judges under US jurisdiction when they committed their crimes? May a judge be sentenced for a judgment he has rendered? (GC III, Art. 130)