‘He Offered a Prayer for the Flier He Had Just Killed’

Superior Orders at the US Army Trials in Manila, 1945–1947

Jamie Fellows * and Mark David Chong**

Abstract

The US Army war crimes trials held in Manila from 1945 to 1947 prosecuted around 200 Japanese military personnel for war crimes committed against US prisoners of war and Filipino non-combatants. Japanese defendants attempted to argue, with little success, that the defence of superior orders justified their actions. General Douglas MacArthur (Supreme Commander for the Allies in the Pacific or SCAP) was adamant that superior orders would not serve to excuse alleged Japanese war criminals from war crimes. What is clear from the trial documents and other archival material from Manila is that not all sections of the prosecution agreed with MacArthur’s interpretation of the law. However, it seems as though MacArthur’s pronouncement in relation to the application of superior orders may have had a profound impact on not only the Manila trials, but also with subsequent trials in World War II and beyond. This article explores the various arguments in relation to superior orders emanating from the US Army trials in Manila. The trials in Manila show that the rejection of superior orders as a defence in war crimes offered a reasonable foundation and precedent for how subsequent courts and tribunals evaluated the defence of superior orders within the context of war crimes jurisprudence.

1. Introduction

First Class Petty officer Tanaka Yukitsuna and 2nd Class Petty officer Hayashi Yoshinori were both junior officers in the Imperial Japanese Navy (IJN) stationed at the jail at Tolitoli in Indonesia in 1944 when they received orders to

* Associate Professor, Head of Law, College of Business, Law and Governance, James Cook University, Australia. [jamie.fellows@jcu.edu.au]

** Associate Professor, Criminology, College of Arts, Society and Education, James Cook University, Australia. [markdavid.chong@jcu.edu.au]

Journal of International Criminal Justice (2023), 122 https://doi.org/10.1093/jicj/mqad017

be part of a team to carry out the execution of eight US airmen.[1] The airmen were prisoners of war (POWs) being held by the Japanese at Tolitoli after their plane ditched into the sea at Boeol in September or October of that year.[2] The executions took place in a small coconut grove about two and a half kilometres from the Japanese seaplane base at Tolitoli. Each of the prisoners had their hands bound and were blindfolded. The first prisoner was instructed to kneel in front of a hole that had been dug earlier that day and Hayashi was ordered to carry out the first execution. Tanaka claimed that he carried out the seventh execution.[3]

As to who gave the initial order to execute the airmen was never fully established. There were conflicting reports. Some IJN personnel testified that the order initially came from a senior officer from the 22nd Japanese Special Naval Base at Balikpapan.[4] The person who radioed the directive was Lieutenant Junior Grade Igami, who was in charge of the Dispatch Seaplane Base. But there was no evidence that the order originated with him. Tanaka gave evidence that he believed the order came from Lieutenant Nishida who was present at the execution. Hayashi stated that he did not know who gave the order and because commanders of the jail changed often, he did not know who was in charge of the Unit. Warrant Officer Suitsu was responsible for arrangements at the scene of the execution and issued instructions as to the order of executions, but it was clear that Suitsu was not responsible for the initial decision to execute the fliers.

At their joint trial in Manila, Tanaka and Hayashi were convicted for the killings. That Tanaka and Hayashi had no role in the origination of the order and acted out of obedience to superior orders was clear to the Commission. They received sentences of 30 years' imprisonment but were spared the capital sentence. Witnesses reported that Hayashi 'offered a prayer for the flier he had killed, and … left after the fourth execution' due to the shock of killing a man.[5] Similarly, Tanaka returned to his quarters after the execution and did not work for the rest of the day on account of being unfit to do so.[6]

1 Material in relation to the trial and subsequent review of Tanaka and Hayashi can be located at Judge Advocate Section War Crimes Decisions, RG331, UD1865 290/23/06/02, Box 9781, Folder 34 at the National Archive and Records Administration (NARA) at College Park, Maryland, USA.

2 The exact date as to when the US airmen were taken prisoner and executed was in dispute during the trial. Some affiants held the date of the capture and execution to be in July or August, while other affiants believed the airmen were captured and executed in September or October 1944. Despite the debate as to these exact dates, the material facts of the case were, for the most part, agreed between the prosecution and defence teams.

3 Affidavit of Tanaka Yukitsuna, (prosecution exhibit 7) Judge Advocate Section War Crimes Decisions, RG331, UD1865 290/23/06/02, Box 9781, Folder 34.

4 Affidavits of Awazu Yoshio (prosecution exhibit 4), Fujita Gonroku (prosecution exhibit 5), Hayashi Yoshinori (prosecution exhibit 8) Judge Advocate Section War Crimes Decisions, RG331, UD1865 290/23/06/02, Box 9781, Folder 34.

5 *Ibid.*

6 Judge Advocate Section War Crimes Decisions, RG331, UD1865 290/23/06/02, Box 9781, Folder 34. The fact that Tanaka and Hayashi were in some way affected by the incident was borne out in their own testimony and was accepted by the panel.

The joint trial of Tanaka and Hayashi was one of dozens of trials conducted in Manila by the US Army between 1945 and 1947. The US Army trials in Manila — while not unique in terms of the number of prosecutions — highlight the struggles that military commissions experienced in grappling with the law of superior orders. On another level, these trials reveal that law making is far from a purely scientific or objective exercise, but is influenced by a range of external factors, such as political considerations and possibly the lingering animosity against the Japanese at the time. The US Army trials in Manila characterize law making at a critical juncture when modern war crimes jurisprudence was in its formative stages. Complex legal issues associated with individual and collective criminal responsibility for war crimes were being considered and crafted.

As it will be shown, one of the enduring problems with allowing the plea of superior orders to serve as a legitimate defence to war crimes is that it would validate manifestly unlawful conduct. Nonetheless, to disregard completely any legitimacy for the plea of superior orders could lead to a perhaps unacceptable level of injustice against the subordinate who obeyed unlawful orders.

This *wicked* dilemma was succinctly put by Dicey in 1885: 'Hence the position of a soldier is in theory and may be in practice a difficult one. He may ... be liable to be shot by a Court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it.[7] In one of the seminal texts on the question of superior orders, *The Defence of 'Obedience to Superior Order' in International Law*, Dinstein describes how thinking within the international legal community evolved towards considering superior orders as a legitimate defence in international law.[8] Dinstein reminds, in agreement with other scholars,[9] that the legitimacy of superior orders as a defence throughout international legal history, has swung between 'absolute liability' on the one hand and '*respondeat superior*' on the other.[10] In time, an 'intermediate position' emerged, taking into consideration the invidious position of the subordinate, yet ensuring that certain acts remain within the realms of criminality, as will be explained below.[11]

Proponents of absolute liability consider that 'obedience to orders does not create a defence *per se*, nor can it be taken into account within the compass of

7 A.V. Dicey, *Introduction to the Law of the Constitution* (8th edn, Liberty Fund, 1915), at 194.

8 Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Oxford University Press, 2012). Dinstein's argument was first developed as part of a doctoral thesis submitted in 1964 — see I. Prolegomena, xv.

9 See e.g. R. Cryer, 'Superior Scholarship on Superior Orders', 9 *Journal of International Criminal Justice* (2011) 959–972; J.B. Insco, 'Defense of Superior Orders Before Military Commissions', 13 *Duke Journal of Comparative and International Law* (2003) 389, at 390.

10 Dinstein, *supra* note 8, Chapter 2 'The Doctrine of *Respondeat Superior*' and Chapter 3 'The Doctrine of Absolute Liability'.

11 Essentially this is now the position adopted by Art. 33 ICCSt. See P. Gaeta, 'The Defence of Superior Orders: the Statute of International Criminal Court versus Customary International Law', 10 *European Journal of International Law* (1999) 172, at 174. See, also, K. Kudo, 'Command Responsibility and the Defence of Superior Orders' (Doctor of Philosophy Thesis, University of Leicester, 2007) 11–14.

any other defence'.[12] General Douglas MacArthur's and other Allied war crimes trials, conducted at the conclusion of World War II, clearly adopted absolute liability as the preferred approach. The doctrine presumes liability on the part of the subordinate for unlawful acts irrespective of whether the genesis of those acts emanated from orders of that subordinate's superior(s). Absolute liability cares not that the subordinate is under a legal obligation to follow orders, but rather that the subordinate has an obligation to differentiate between lawful and unlawful orders. If the subordinate fails to make an appropriate determination between lawful and unlawful orders and proceeds to commit acts that violate the laws of war in obedience to such orders, then criminal responsibility will flow.

The Manila trials shine a spotlight on the issue of superior orders at a time when war crimes jurisprudence was being deliberated and formed. These trials highlight the dilemmas associated with allowing superior orders to be used as a legitimate defence to war crimes on the one hand, while on the other showing that the refusal to accept the legitimacy of superior orders can lead to injustices on the part of those who are compelled to carryout unlawful orders. As will be shown, this article adopts an intermediate position that accepts the reality that superior orders can and do play a significant role in the commission of war crimes, but also accepts that those who commit war crimes are not without agency and are at times able to refuse unlawful orders.

2. The US Army's Manila Trials

At the conclusion of the Pacific War, the US Army assumed responsibility for investigating and prosecuting war crimes committed by the Japanese during their brief, but tumultuous occupation of the Philippines. The role fell to the Judge Advocate Section at US General Headquarters, Southwest Pacific area and later went to the War Crimes Trials Division (WCTD) of the Philippines-Ryukyus Command once the new body was established in October 1945.[13] Prior to the Philippine authorities gaining the power to prosecute the remaining Japanese defendants in 1947, the WCTD prosecuted 87 war crimes cases comprising 191 defendants.[14] The Manila trials are a milestone for international criminal law because this was the first large-scale attempt by US military authorities to bring Japanese commanders to justice for war crimes. The high-profile *Yamashita* trial conducted in the Philippines in the early months after

12 Dinstein, *supra* note 8, at 68.

13 G. Bradsher, 'Japanese War Crimes and Related Topics: A Guide to Records at the National Archives', U.S. National Archives and Records Administration at College Park (NARA) (date unspecified) 188.

14 P. R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East* (University of Texas Press, 1979), at 67. Piccigallo's figures differ to those of Bradsher. Piccigallo claims that the US held 97 cases comprising 215 individuals of which 195 were convicted. As a source, he cites a newspaper report in the *China Press* dated 10 June 1947, and J.A. Appleman, *Military Tribunals and International Crimes* (The Bobbs-Merrill Co., 1954), at 267. Piccigallo claims 87 cases were tried.

Japan's surrender is still controversial and attracts debate to this day. In this trial, Yamashita Tomoyuki, the commander of the Imperial Japanese 14th Area Army in the Philippines, was indicted, convicted, and later executed on allegations of war crimes committed by his forces.

The US Army's war crimes commission in Manila prosecuted cases of the most severe kind. The death penalty was frequently applied.[15] Although the number of trials that took place in Yokohama far exceeded the number of trials conducted at Manila, many of the offences tried in Manila involved torture and murder of US POWs and Filipino non-combatants.[16] According to Piccigallo's assessment, the rate of defendants executed, among all those prosecuted, at Manila greatly exceeded that of any other US military commission conducted in the Asia-Pacific region. Piccigallo cites evidence showing that the number of defendants sentenced to death at Manila was around 43% of those who were tried.[17] In contrast, the number of death sentences handed out at other US trials in the Asia-Pacific was lower by comparison (5% at Yokohama, 13% in China, and 8% in the Pacific Islands).[18]

Why was the death penalty rate comparatively high in Manila? Was it due to the sheer brutality that Japanese forces inflicted upon the people of the Philippines and POWs during their fateful occupation of the Philippine Islands?[19] Or were there other factors at play? Was there a special vindictiveness handed down by the US military commissions in the Philippines due to the loss of face the USA experienced at the hands of an advancing Japanese expeditionary force several years prior? The extraordinarily high numbers of prosecutions and death sentences (in comparison to other US military commissions elsewhere) and the apparent refusal to accept several legal defences that should have, arguably, been accepted as positive law at the time, indicate that there may have been a multitude of factors at play. As it will be discussed, directions from senior US military figures on how to deal with individual cases may have played a part.

3. The Plea of Superior Orders

The defence of 'superior orders' is predicated on the assumption that an accused avoids criminal responsibility for acts done in furtherance to orders from someone who is in a position of authority, be it military or

15 Piccigallo, *ibid.*, at 66.

16 *Ibid.*, at 66–67.

17 *Ibid.*, at 95. Piccigallo states as authority for these figures research obtained by Appleman, *Military Tribunals, supra* note 14, at 267 and in turn attributes Appleman's figures to have been taken from official estimates from the office of the Supreme Commander in the Pacific, *Trial of Class "B" and "C" War Criminals*, at 202–204, and numbers from the US Department of the Navy, *Final Report, volume 1*, 103–110.

18 *Ibid.*

19 For a first-hand account of Japan's invasion and occupation of the Philippine Islands, see T.A. Agoncillo, *The Fateful Years: Japan's Adventure in the Philippines, 1941–45*, Vol. 2 (R.P. Garcia Publishing Company, 1965).

civilian.[20] Superior orders works on the basis that soldiers owe a 'duty of obedience … to their superior officers' and it would therefore be unlawful for a subordinate to disobey an order from a superior.[21] The obligation to observe orders is coercive, given that failure to do so could result in death for anyone who disobeys orders.[22] Superior orders has been one of the most commonly raised defences in the history of war crimes trials.[23] There are documented cases from as early as 1474 with the trial of Peter von Hagenbach,[24] to World War I[25] and the Nuremberg[26] and Tokyo trials,[27] where subordinates have attempted to raise superior orders as a defence to allegations of criminal wrongdoing. Superior orders as a defence to war crimes presents several dilemmas: the primary one being that admitting the defence may violate one's sense of justice, since it would enable those who commit atrocities to escape criminal responsibility for war crimes. However, to not allow the defence is to ignore the brutality that could result to subordinates for disobeying orders.[28]

As to how US tribunals in Manila were to deal with the issue of superior orders when raised as a defence, was addressed by General Douglas MacArthur, the Supreme Commander for the Allies in the Pacific (SCAP), by way of regulations introduced on 5 December 1945. In essence, superior orders were not to be available as a defence to war crimes.[29] The SCAP's directions seemed to be at odds with other extant legal interpretations. Robert L. Ward, a US civilian defence attorney appointed to defend Japanese

20 G. Dufour, 'The defence of superior orders: does it still exist?' 840 *International Review of the Red Cross* (2000), available online at https://www.icrc.org/eng/resources/documents/misc/57jqtf.htm (visited 1 May 2023).

21 A.M. Wilner, 'Superior Orders as a Defense to Violations of International Criminal Law', 26 *Maryland Law Review* (1996)127, at 127.

22 Cryer, *supra* note 9, at 959–972; Dinstein, *suptra* note 8, at vii–ix.

23 United Nations War Crimes Commission (UNWCC), 'Complete History of the United Nations War Crimes Commission and the Development of the Laws of War' (HMSO, London, 1948) Chapter X: Developments in the Doctrine of Individual Responsibility of Members of Governments and Administrators of Acts of State, of Immunity of Heads of State, and by Superior Orders, at 274; See, also, Kudo, *supra* note 11.

24 M.C. Bassiouni, *Crimes Against Humanity in International Law* (2nd edn., Kluwer Law International, 1999), at 517–518; see also, T.L.H. McCormack, 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime', in T.L.H. McCormack and G.J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (Kluwer Law International, 1997) 37.

25 Judgment, Case of Lieutenants Dithmar and Boldt, 16 The American Journal of International Law (AJIL)(American Society of International Law) (1922) 708–702 ('Llandovery Castle'); Judgment, Case of Commander Karl Neumann, Hospital Ship, 16 AJIL (1921) 704 ('Dover Castle case').

26 Charter of the International Military Tribunal (Nuremberg), 8 August 1945, Art. 8.

27 International Military Tribunal for the Far East Charter (IMTFE Charter), 19 January 1946, Art. 6.

28 Dicey, *supra* note 7, at 194.

29 'Letter Order of 5 December 1945, as amended 27 December 1946, Paragraph 5d(6) (redesignated paragraph 5d(4)' located in RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414.

soldiers on trial at Manila, stated in 1946 there were strong arguments to suggest that superior orders at the time amounted in fact to a complete defence to criminal responsibility under certain conditions.[30]

Not long after the USA commenced the large number of trials, it was clear that military commissions were unlikely to accept the plea of superior orders despite there being some basis for it in both international law and domestic military law.[31] The SCAP's directive on the plea of superior orders was troubling for some senior US prosecutors in the lead up to the trials. To further clarify the issue, in December 1945, General Douglas MacArthur introduced an amendment into the US Field Manual, altering the availability and effect of the defence of superior orders by inserting Paragraph 5d(6): '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.'[32]

Various interpretations regarding the applicability of the defence of superior orders ensued between the defence and the prosecution, and in a series of exchanges in November 1946 and January 1947 between the Chief of the SCAP Legal Section, Colonel Alva Carpenter, and US Defence Counsel, Robert L. Ward, the matter was finally referred to General Douglas MacArthur's office once again for clarification.[33] Defence Counsel Ward, by way of a Motion during the trial of Nanjo Masao, whom he was defending,[34] submitted that the plea of superior orders was good law and therefore should be a complete defence at international law. This was contrary to the US Legal Section's argument that superior orders would, at best, mitigate the sentence and have no effect on absolving criminal responsibility.[35] Ward cited a range of sources as authority for his argument, such as the US Rules of Land Warfare (RLW) Basic Field Manual (FM27-10, paragraph 345.1); the writings of reputable publicists

30 For example, see the Report of Robert Jackson, *Trial of War Criminals*, Department of State Publication 2420, Subsection III, paragraph 2, as cited in letter by Robert L. Ward, 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414, at 32.

31 For example, see, RG331 UD1321 290/12/12/1 — Shin Fusataro, Box 1566 Vol I–III; Nanjo Masao, Box 1573; Onishi Seichi, Box 1570 Vol I–VII; Toyota Chiyomi, Box 1567 Vol I–X; Nakamura Takeo et al.; also see, RG331 UD1322 290/12/19/01, Box 1674; Obara Yoshio, RG125 A1-3 290/C/68/5 Box 1.

32 'Motion – Superior Orders' from Counsel for the Defence (Robert L Ward) RG331, Folder 13 'Superior Orders', at 1.

33 For documents relating to Defense and Prosecution's substantive legal arguments regarding superior orders, see the trial of Nanjo Masao, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414. For correspondence to General Douglas McArthur, see, memorandum dated 19 January 1946 titled 'The Defense of Superior Orders in War Crimes Trials' and subsequent letter dated 2 December 1946 from Robert L. Ward, Defense Counsel seeking an 'order for retrial for *US v Masao Nanjo*', each located in Folder 7.

34 See, the trial of *Nanjo Masao*, RG331 UD1321 290/12/12/1 Box 1573.

35 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414, at 32–33.

Oppenheim and Wheaton; a report by Robert Jackson to the US President; a statement by President Roosevelt; and several leading cases that upheld the view that obedience to superior orders constituted a defence under both USA and international law.[36] According to Ward, the RLW made it 'mandatory that superior orders be considered a complete defense'.[37] Paragraph 345.1 of the RLW stated:

> Individuals and organizations who violate the accepted laws and customs of war may be punished therefore. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.[38]

Ward asserted that the SCAP's rule 'governing the trial of war criminals' dated 5 December 1945 contradicted the rule contained in FM27-10 paragraph 345.1. He challenged SCAP's assertion in the 5 December regulations that orders of an accused's superior, or of his government 'shall not constitute a defence, but may be considered in mitigation in punishment'.[39] Instead, Ward contended that the SCAP's position was illegal and contrary to the laws and customs of war and asserted that the correct position at law to the obedience of superior orders was 'a defense unless the accused knew the order to be illegal, or, if the order was in fact unlawful, he had reasonable grounds to believe that it violated the laws and customs of war, or the principles of criminal law generally prevailing in civilized nations.'[40]

In support of Ward's position regarding the validity of international law, he offered several case authorities and the published works of international scholars.[41] Although few details were given of the cases and other published works that allegedly supported superior orders as a complete defence 'or' mitigation of sentence, the fact that the Legal Section continued to deny the existence of the defence is perhaps telling about the way legal questions such as these were

36 *Ibid.*, 32.

37 *Ibid.*

38 FM27-10 Rules of Land Warfare, paragraph 345.1, US War Department, 1 November 1944, available online at https://archive.org/stream/Fm27-10-nsia/Fm27-10_djvu.txt (last visited 1 May 2023).

39 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414, at 32–33. Paragraph 5d(6) of the SCAP rule (5 December 1945) stated:

> '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.'

40 'Questions of Law – Superior Orders', unsigned, RG331, SCAP Legal Section, Law Division, Decimal File 1945 – 1951, 000.5 to 004 E, Box 1414, at 32–33.

41 For example, *Regina v Smith* — Ward asserted that this authority is the 'leading English case'; and 'Summation by the Russian Prosecutor in the Kharkov Trials, December, 1943'. As further authority, Ward cites several leading publicists, 'Winthrop, Military Law and Precedents, pages 296-297', 'Oppenheim, International Law, page 453' located in RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414.

being addressed throughout the trials. The Legal Section acted to dismiss Ward's legal interpretation and reiterated that their position in relation to the status of superior orders was in accordance with the regulation of 5 December 1946 promulgated by General MacArthur. Internally, however, the Legal Section was far from satisfied with the legality of their position on superior orders in light of the clear and unambiguous language expressed in FM27-10, paragraph 345.1. This confusion was borne out in an internal memo dated 19 December 1946 by Captain J. Bassin of the Law Division to Colonel Carpenter of SCAP Legal. Bassin shared an extraordinary admission regards the possible error of the SCAP's rule with respect to the plea of superior orders,[42] declaring in the memo that

> my problem at the time was to justify the denial of a new trial to Ward's client, as well as justify to you the recommendation of the present rules to conform with paragraph 345.1. This I have not been able to do to my satisfaction. [It] is true that paragraph 345.1 can be interpreted to mean that the War Department instructed MacArthur to provide both the defense of superior orders and to provide that it be considered a mitigation of punishment.[43]

He went on to state that, '[i]n brief, this is my problem; How can we recommend that Ward's client not be given a new trial ... and still recommend that paragraph 345.1 be adopted in to the rules'.[44] This was an admission that the SCAP's rule of 5 December 1946 contradicted FM27-10 and was prejudicial against any accused who raised superior orders as a defence to war crimes. Bassin was clearly troubled by this unfortunate legal dilemma — not so much it seems for reasons of injustice against an accused, but more so due to the possible embarrassment for the Legal Section and the SCAP if word got out that incorrect law had been applied throughout the US trials. By this time the US and other Allied trials were well underway and an admission by the USA that it had incorrectly applied the law could lead to an inordinate number of retrials, and potentially completely alter the direction of the entire US and Allied war crimes trials — not to mention the damage to the US's reputation and their legacy. The ramifications of such an outcome would be unthinkable particularly as many Japanese war criminals had already been executed.

4. The Trials

A. Trial of 2nd Lieutenant Otsuka Noriyuki, Imperial Japanese Army, 6 July, 1946 — Evidence of Obedience to Superior Orders 'Not Relevant'

The trial and subsequent review of the conviction for Second Lieutenant Otsuka Noriyuki[45] was typical of the trials involving the plea of superior orders

42 'Memorandum For Colonel Carpenter, Comments on Memo – Superior Orders', 21 December 1946, located in RG331, SCAP Legal Section, Law Division, Decimal File 1945–1951, 000.5 to 004 E, Box 1414.

43 *Ibid.*, 1.

44 *Ibid.*, 2.

45 RG 331, 290/12/12/1, Box 1570 Vol I–VII.

in the US Army trials. Scant regard was given to the defence of superior orders despite there being what appears to be reasonable evidence that a subordinate was acting on direct orders from a superior. Otsuka was convicted and sentenced to death for his part in the unlawful killing, torture and mistreatment of several hundred Filipino civilians on various islands in the Philippines during 1943.[46]

The allegations were based on activities that occurred during the Sara-Ajuy expedition and Japan's infamous Bataan expedition.[47] Otsuka was accused of rounding up residents of the district for the purpose of ascertaining the whereabouts and activities of guerrillas. In written and oral testimony, the tribunal concluded that many of these people were later executed without trial or any evidence that they were involved in guerrilla activities. Eyewitness testimony indicated that the number of deaths were well in excess of two hundred. The prosecution alleged — with little dispute from the accused — that Otsuka personally took an active part in the killings, mostly by beheading his victims by the use of his 'samurai sword'.[48]

What was contested, however, were the circumstances that lead to the accused's conduct in relation to the killings. Otsuka's US defence counsel pointed out that, Otsuka was operating under direct command of Captain Watanabe who accompanied Otsuka's expeditionary force. The defence also contended that Captain Watanabe was following a proclamation from Colonel Tozuka to 'destroy everything — inhabitants, food, animals and buildings'.[49] The thrust of Otsuka's defence was predicated on the basis that he and his subordinates' conduct was carried out because they were following orders from their immediate and higher authorities.

There were three main points to Otsuka's defence. The first argument was that he and his troops did not kill anyone on their own initiative as they believed they were acting at all times under direct orders from Captain Watanabe who, as it was understood, was likewise acting under the orders of Colonel Tozuka. Otsuka's second argument focused on the fact that, under Japanese military law, company commanders in the field had lawful authority to carry out executions. Thirdly, failure to adhere to or refusal to obey superior orders (including those of Captain Watanabe) would result in a court-martial

46 *Ibid.*

47 *Ibid.*, [2]. See, GHQ Far East Command Office of the Judge Advocate, Otsuka Noriyuki Review of the Record of Trial by a Military Commission of Second Lieutenant Noriyuki Otasuka 51J-150382 IJA.

48 *Ibid.*, [2].

49 *Ibid.*, [3]. In an unrelated trial, Tozuka contradicted any assertion that his orders involved the killing and torture of non-combatants. Colonel Tozuka testified at the trial of one of his junior officers in separate proceedings that his orders were that 'armed bandits be systematically taken care of, but that civilians must not be injured, and that in examining suspects, threatening words were permitted but no torture was allowed'. See, Exhibit R 353, 358 GHQ Far East Command Office of the Judge Advocate, Otsuka Noriyuki Review of the Record of Trial by a Military Commission of Second Lieutenant Noriyuki Otasuka 51J-150382 IJA [3]. For the trial of Colonel Tozuka Ryoichi, see, *US v Japanese War Criminal Case Files* RG331, UD1321 290/12/12/1, Box 1565 Vol I–III.

and execution on the part of anyone who disobeyed.[50] On appeal, Colonel Shaw considered the evidence of Otsuka's part in the killings and rejected clemency. Shaw upheld the Military Commission's finding that Otsuka was a direct 'participant in the repeated brutal mistreatment and mass execution without trial of numerous, helpless prisoners'.[51] Regarding the defence of superior orders, he stated that the defence had failed to present sufficient evidence of superior orders. Colonel Shaw made a point of stating that the only reason why Otsuka raised superior orders was due to his 'fear of the consequences to him of disobedience of those orders'.[52] Shaw did make it perfectly clear that Otsuka's conduct was 'fully approved by his superiors', but he doubted whether Otsuka's actions on all occasions were limited to those specifically directed by his superiors — the implication being that Otsuka was a willing participant in the killings and went above what was actually ordered. Importantly for the outcome of the case, Colonel Shaw went on to state that the defence counsel had failed to establish the 'requisite circumstances constituting a defense, either under the rules governing such cases as this, or under international law as understood prior to the promulgation of such rules'.[53]

The rules to which Shaw referred were contained in MacArthur's letter of 5 December 1945. He implied the possibility that superior orders may well have constituted a defence had there been sufficient evidence that the defence was available in international law — a curious position given the SCAP's clear directive that superior orders was at best to be used to mitigate the sentence.

Colonel Shaw also examined an extract from the Military Laws of Japan. He reached the same conclusion as the Military Commission, denying the defence counsel's assertion that the Japanese military law established the death penalty for disobeying an order. According to Chapter 4, Article 57 of the Military Laws of Japan:

Anyone who objects to and disobeys orders of superiors is to be punished as follows:

1. In cases before an enemy — he shall be punished by death or imprisonment for life or over ten years.
2. In cases of military operations or in territories under martial rule — he shall be punished by an imprisonment between one and seven years.

50 Otsuka asserted that he often pleaded with Watanabe to spare women and children but the success of his pleadings would often depend on whether Watanabe was 'in good humor'. In a strange, but obscene way, Otsuka alleged as part of his defence, that he did not kill children because they 'cannot be cut by a sword because their neck is too short' — see, GHQ Far East Command Office of the Judge Advocate, Otsuka Noriyuki Review of the Record of Trial by a Military Commission of Second Lieutenant Noriyuki Otasuka 51J-150382 IJA, [3]. R 325-328.

51 GHQ Far East Command Office of the Judge Advocate, Otsuka Noriyuki Review of the Record of Trial by a Military Commission of Second Lieutenant Noriyuki Otasuka 51J-150382 IJA, [3].

52 *Ibid.*

53 *Ibid.*

3. In cases of other circumstances — he shall be punished by an imprisonment of less than two years.[54]

Colonel Shaw stated that 'the assertions of the accused as to his liability to the death penalty for willful disobedience are ... without merit'.[55] From what he and the original military commission could ascertain under Japanese military law, the maximum penalty applicable to Otsuka for disobeying orders pursuant to the killing of non-combatants under Japanese military law were contained in paragraph (2) or possibly (3), which would be a penalty between one to seven years imprisonment, but not death. The fact that Shaw did not consider that paragraph (1) was applicable is presumably because the orders were not related to 'an enemy' but were made in relation to non-combatants.

Shaw did not believe that any defence to superior orders would be available to mitigate the original death sentence even if Otsuka was acting under orders. The reason for rejecting superior orders to mitigate Otsuka's death sentence was seemingly because Colonel Shaw believed that Otsuka could and should have disobeyed a manifestly unlawful order given to him. The reality, however, of disobeying orders from a superior would have been unimaginable to many in the IJA at the time.

B. Trial of Warrant Officer Shin Fusataro Imperial Japanese Army (Kenpeitai), Manila, 16–18 July 1946 (the 'Civilian Massacre' Case)

Shin Fusataro was a warrant officer in the Kenpeitai (Japanese military police).[56] As tragic as the case is for the innocent victims of Japanese military expansionism, Shin's case, and others like it, sheds some light on the way the US tribunals dealt with the plea of superior orders when the plea was raised in the context of civilian massacres committed by members of the Kenpeitai. The Commission did not look favourably on the plea of superior orders in Shin's case. The question arising from this case was whether the decision to disregard the plea of superior orders was due to the nature of the perpetrator (i.e., Kenpeitai). The nature of the victim(s), too, is relevant here given that the tribunal was dealing with mass killings of civilian non-combatants.

These killings were part of a broader military objective by Japanese forces in the area to suppress an aggressive, and at times extremely effective, guerrilla insurgency against the occupying Japanese forces. The defence argued that stopping the guerrilla insurgency was necessary for Japan to achieve its strategic position throughout the Philippines against USA and Allied forces.[57] The orders to stop guerrillas and other pockets of resistance could, therefore, be

54 *Ibid.*, [4].

55 *Ibid.*

56 Unless indicated otherwise, archival material in relation to the trial and review of Shin Fusataro is located in RG331 UD1321 290/12/12/1 Box 1566 Vol I–III, Folder 82.

57 Military necessity is premised on the notion that in order to advance one's military objective, certain acts that would otherwise be deemed unlawful could be considered necessary so as to bring about a more hasty conclusion to the conflict, which would in turn have other positive

viewed as a broader policy objective coming from much higher up the military chain of command in Tokyo. If the Commission saw Shin's actions as falling within the ambit of superior orders emanating from higher command, then he would have a greater chance of arguing the defence of superior orders. No such consideration of superior orders was entertained, and it is clear the Commission went to significant lengths to deny the operation of superior orders at his trial, even as a means to mitigate the harshness of the sentence.[58]

According to the indictment, Shin Fusataro was charged with numerous offences each involving the unlawful killing of unarmed Filipino non-combatants in various locations throughout the Iloilo province on the Philippine Island of Panay.[59] The first specification (i.e. count of indictment) stated that Shin, in September 1943, killed five members of the Yap family at Jimomoa, Iloila in the Philippines without lawful justification. Specifications 2, 3 and 4 each alleged that he participated in the killing of approximately 50, 100 and 30 unarmed non-combatants in various locations throughout the same province from August to September 1943.[60] Shin pleaded not guilty to each of the charges. After a trial lasting several days, on 18 July 1946, the tribunal found the accused guilty on all specifications, albeit revising down the number of victims due to lack of evidence.[61] The sentence, handed down on the same day, was 'death by hanging'.[62]

Throughout the trial, Shin professed his innocence on all charges and maintained that he did not at any time take part in the killings, even stating that on some occasions he was not in the vicinity of where they took place. The facts of the case were strongly contested by the accused and after the trial, while his pending execution loomed ever closer, Shin petitioned the commander of the Army Forces, Western Pacific (AFWESPAC) — unsuccessfully — for a retrial so that he could 'ascertai[n] the true facts of the case'.[63] After the initial trial, evidentiary aspects of the case were re-examined by the reviewing

results such as reducing the number of casualties and the destruction of civilian and military infrastructure.

58 In contrast, see the *Trial of Suguwara Isaburo* (RG331 UD1321 290/12/12/1) where superior orders was accepted upon a recommendation of the Judge Advocate for clemency which reduced the death sentence to 15 years' imprisonment, on the basis the accused Suguwara was regarded more as a hapless executioner than a willing participant in the unlawful killing of three US fliers.

59 See *United States of America Vs Fusataro Shin*, Summary of charges, 'Military Commission, Orders No. 1', APO 500, 10 January 1947.

60 Shin was also charged with unlawfully permitting soldiers under his command to kill eight unarmed non-combatants in various locations throughout Iloilo province. The charges relate to command responsibility and are the subject of discussion in the section that deals with US trials involving command responsibility. On the charge relating to his role in allowing subordinates to carry out the killings based on command responsibility, he was found not guilty.

61 Specification 1: guilty of killing four people; Specification 2: guilty of killing 5; Specification 3: guilty of killing 6; Specification 4: guilty of killing 3. See Folder 82, pages 1–2.

62 Folder 82, 'Pleas, Findings, and Sentence', at 2.

63 Petition to the Commanding Officer AFWESPAC, from Shin Fusataro WO 517-40895, 3 January 1947.

authority, headed up by Dayton M. Harrington, a civilian attorney assigned to assist the Staff Judge Advocate, Colonel Ashton M. Haynes JA.[64] The evidence relied upon by the prosecution consisted of testimony from two Filipino eyewitnesses, who claimed to have seen Shin at the various scenes of the alleged killings.

In addition to the testimony of eyewitnesses, the prosecution also relied on sections of written testimony taken from a convicted Japanese war criminal, Lieutenant-General Kono Takeshi at Shin's trial.[65] According to details outlined in the review documents, evidence from the *Kono* trial revealed that Kenpeitai were not in the habit of conducting trials of guerrilla suspects on Panay Island because they had no authority to try them. Instead, the policy of the Japanese Army, according to Kono's testimony, was to transport guerrilla suspects to Manila for interrogation and trial.[66] The evidence from Kono's trial in relation to the policy of dealing with guerrilla suspects in Manila, rather than in the field, made it clear that Shin's activities were contrary to higher orders that required captives to be afforded a proper trial and not be summarily dealt with in the field. Such a practice seemed to accord with the testimony of eyewitnesses who testified against Shin.[67] This information was taken as proof of Shin's guilt at trial.[68] Kono's testimony was used to show that Shin was in breach of existing orders rather than in obeyance to them.

Citing excerpts from the trials of *United States v Otsuka Noriyuki and Kuwano Tadataka*, Shin's defence team claimed that the objective of the Panay expedition was to seek out and apprehend Filipino guerrillas. The Panay expedition was commanded by Lieutenant General Kono and the Brigade was commanded by General Kuroda, under whom three battalions were commanded by Lieutenant Colonel Tozuka. Given that Filipino insurgents were a significant impediment for the Japanese military occupation, Shin's defence team argued that it was common policy throughout the Japanese military to suppress Filipino resistance. They claimed it was commonly understood that any order to kill civilians would, on the face of it, be consistent with policy and have come from the senior ranks of the Japanese military. On that basis, no junior ranking Japanese soldier would have questioned the lawfulness of an order or would have had any reason to question its legality.

In relation to the specific allegations levelled against Shin, his defence team attempted to show that the orders pertaining to, and the subsequent treatment

64 Review, *United States of America v Fusataro Shin*, Headquarters, United States Army Forces Western Pacific, Office of the Staff Judge Advocate, Manila, 15 November 1946. (Folder 82).

65 *Ibid.*, at 3–4.

66 *Ibid.*, at 4.

67 Kono's evidence regarding policies in relation to the requirement that suspected guerrillas be sent to Manila could be seen as an attempt to avoid criminal responsibility on his part through command responsibility on the basis that, if it were proven that troops in the field broke with established orders by killing guerrilla suspects without trial, such actions would form the basis of a defence against an allegation of command responsibility.

68 Review, *United States of America v Fusataro Shin*, Headquarters, United States Army Forces Western Pacific, Office of the Staff Judge Advocate, Manila, 15 November 1946. (Folder 82, at 5). Tubungbanwa and Padora's testimony are cited as exhibits R-21–R-79.

of, Filipino civilians was at the command of Lieutenant Nakatsukasa.[69] The defence further claimed that the direct order given to Shin to carry out the expedition was given by Lieutenant Okura in September 1943. Defence counsel claimed that, during the expedition, operational orders were given by Lieutenant Colonel Tozuka and Captain Watanabe. Shin's defence attempted to show a clear delineation of roles and responsibilities with respect to orders involving civilians tried, to establish distance between Shin and his superiors in relation to the orders.

Shin's defence counsel attempted to dilute his role in the killings by insisting that any actions he took in relation to the atrocities that occurred during the expedition were minor and, importantly, out of a legal obligation to obey orders. The Commission took this aspect of his defence as an admission that he committed at least some of the atrocities for which he was charged. Therein lies a fundamental flaw in the superior orders defence. In raising the defence of superior orders, an accused has to admit some or all of the facts surrounding the charges. The defendant must choose whether to deny the charges completely, or whether to risk making admissions while justifying the acts on the basis of superior orders. If successfully argued, the plea of superior orders might have reduced Shin's death sentence to a lengthy jail term. With all appeals exhausted, Shin Fusataro was executed on 24 February 1947 along with three other convicted Japanese war criminals at the Luzon POW camp in Manila.[70]

C. Trial of First Lieutenant Toyota Chiyomi, Imperial Japanese Army, Manila, 20–31 July 1946

In contrast to the trials of Shin and Otsuka, the Commission in Toyota's case adopted a slightly different approach. The Commission agreed to the defence's plea to mitigate the death sentence to imprisonment based on superior orders. First Lieutenant Toyota Chiyomi of the Imperial Japanese Army was charged with killing scores of specified and unspecified Filipino civilians during September 1943.[71] The killings occurred in various locations throughout the Western Visayas as part of the IJA's campaign to suppress Filipino guerrilla

69 *Ibid.*, at 6. Defence exhibits relied upon during the trial and referred to as part of the review are cited in the review documents as exhibits R-108–R-147.

70 Correspondence from Headquarters Philippines-Ryukyus Command, Subject: *Execution of War Criminals Tomizo Hirakawa, Tokizo Makita, Hisaki Itai and Fusutaro Shin*, to Commander in Chief, Far East. See also Memorandum to Commanding General, PHILRYCOM, Subject: *Report of Execution of Japanese*, from Headquarters 795th Military Police Battalion Luzon Prisoner of War Camp No.1. All documents contained in Folder 82.

71 Arraignment, *United States of America vs Chiyomi Toyota*, Military Commission convened by the Commanding General, United States Army Forces Western Pacific, Vol I, at 1–17; see also 'Trial of Chiyomi Toyota', Headquarters Philippines-Ryukyus Command, Major General J. G. Christiansen, US Army Deputy Commander and Chief of Staff, 6 January 1947. Both documents located in *United States of America vs Chiyomi Toyota* RG331 UD1321 290/12/12/1 Box 1567 Vol I–X, Folder 86.

resistance. The charge consisted of four specifications detailing allegations against Toyota for his part in the killings.[72]

Toyota received a sentence of imprisonment of 25 years and not the death sentence. One reason why Toyota avoided the death penalty could be the fact that the Commission focused on aspects of command and control thereby enlivening the possibility that Toyota acted out of a legal obligation that he honestly and reasonably held. The Commission and the reviewing authority went to unusual lengths in discussing the order of battle that existed when Toyota was alleged to have committed the crimes. The purpose in doing so was to ascertain whether Toyota's actions were explicitly in accordance with IJA orders. One cannot rule out the possibility that both the Commission and, subsequently, the reviewer were influenced by the likelihood that the harsh treatment meted out to civilians, by the IJA, during this phase of the Philippine campaign occurred as a result of orders coming from the highest echelons of the IJA to suppress Filipino guerrilla resistance. The Commission could not ignore the possibility that killing Filipino civilians as a countermeasure to the insurgency was so commonplace that it would hardly have been viewed by Toyota and his subordinates as unlawful.

At the time of the alleged killings, the Commission accepted that Toyota was under the direct supervision of Lieutenant Colonel Tozuka. It was also accepted that Tozuka and Toyota were both under the control of General Kono Takeshi of the 14th Japanese Army. Major General J. G. Christiansen, the Deputy Commander and Chief of Staff, especially noted that Toyota was the only person charged for these killings despite their scale and the apparent chain of command and evidence suggesting that their orders emanated from above.[73] Specifications 1 and 2 of the charge of unlawful killing stipulated that Toyota was responsible for directly killing, or permitting others under his command to unlawfully kill, at least 54 'unarmed, non-combatant civilians'. None of the victims in specification 2 were named. Specifications 3 and 4, however, were even less specific regarding the number of civilians killed and simply alleged that Toyota killed an 'unascertained number of unarmed, non-combatant civilians'.[74] Not only were the number of civilians killed unspecified, but the

72 *Ibid.* Specification 1 involved the killing of '2 unarmed, non-combatant civilians' and the attempted killing of Agustin Dasas near Dumarao, Capiz. The names of the two civilians for the deaths of whom Toyota was charged, were not specified; Specification 2 alleged that Toyota killed and unlawfully permitted others under his command to kill 'approximately 52 unarmed, non-combatant civilians'; Specifications 3 and 4 alleged that Toyota killed and permitted others to kill, 'an unascertained number of unarmed, non-combatant civilians' in various locations.

73 *United States of America v Chiyomi Toyota*, Headquarters United States Army Forces Western Pacific, Office of the Staff Judge Advocate, 27 December 1946, document located in *United States of America v Chiyomi Toyota* RG331 UD1321 290/12/12/1 Box 1567 Vol I–X, Folder 86, at 4.

74 Arraignment, *United States of America vs Chiyomi Toyota*, Military Commission convened by the Commanding General, United States Army Forces Western Pacific, Vol I, at 1–17; *United States of America vs Chiyomi Toyota*, Headquarters United States Army Forces Western Pacific, Office of the Staff Judge Advocate, 27 December 1946, documents located in *United States of America vs Chiyomi Toyota* RG331 UD1321 290/12/12/1 Box 1567 Vol I–X, Folder 86.

prosecution was also unable to identify and name a single victim. Toyota pleaded not guilty to the charge. The Military Commission found him guilty but only in relation to specification 1 and not to specifications 2, 3 and 4. It sentenced him to imprisonment for 25 years to be served at Sugamo Prison, Tokyo.

D. Trial of Petty Officer Suguwara Isaburo, Imperial Japanese Navy, Manila, 8–10 February 1947

The military Commission in the trial of Petty Officer Suguwara Isaburo succinctly stated the proposition that superior orders can operate to mitigate a death sentence under certain circumstances. The plea of superior orders was successfully raised to commute the sentence of death handed down in the first instance by a military commission which sentenced Suguwara and two others to death by 'musketry'.[75] Interestingly, in Suguwara's case, the recommendation to commute his death sentence to a custodial sentence came from the reviewing authority, Judge Advocate Colonel Shaw, who in previous cases had been adamant that superior orders was not a valid defence at international law.[76] Suguwara was jointly tried with two others: Lieutenant Yamaguchi Sentaro and Ensign Tasuki Kiyoto, both of whom were IJN members. The three accused were charged with the violations of laws of war, specifically the unlawful executions of three captured US airmen whose plane crashed landed at Sanga Sanga, near Samarinda in Borneo in May 1945.[77] All three Japanese accused were found guilty and sentenced to death for their role in the executions.

According to the review of the Record of Trial, the three US airmen were the three surviving crew members of a US Army airplane. They were apprehended by the IJN and taken to a wharf at Samarinda. The airmen endured captivity for over a month during which time they were subjected to irregular bouts of moderate interrogation by Japanese Keibitai (security personnel). After one month's confinement, the three airmen, blindfolded with their hands tied behind their backs, were taken by a group of ten IJN personnel and made to kneel beside a shallow grave where they were each beheaded by Suguwara and another man, Tasuki.[78] The fact that Suguwara and Tasuki performed the executions was not disputed. What was contentious, however, as far as the convictions were concerned — at least according to Suguwara's defence team — was the level of culpability that should be attributed to Tasuki and Suguwara who performed the acts as opposed to Yamaguchi (superior to

75 RG331 UD1321 290/12/12/1, 'Evidence', page 2.

76 The Trial of 2nd Lieutenant Otsuka Noriyuki, Imperial Japanese Army, 6 July, 1946', RG 331, 290/12/12/1, Box 1570 Vol I-VII, as discussed above.

77 2nd Lieutenant Leslie W. Jacobs, Sergeant James W. Hagerty and Corporal Frank J. Molinari of the US Army.

78 RG331 UD1321 290/12/12/1, 'Evidence', at 2–3.

both men) who admitted to giving the order to carry out the executions on the day.

Upon review of the original case on 8 February 1947, the reviewing authority, headed by Colonel Shaw, recommended that the death penalty for Yamaguchi and Tasuki be confirmed and carried out. However, the authority took a rare step and recommended Suguwara's sentence to be confirmed but commuted to a period of incarceration of 15 years. The recommendation to overturn the original decision was based on several factors. The authority cited 'extenuating circumstances disclosed by the evidence in the case …, and which contrast it uniquely with cases submitted to the confirming authority in the past'.[79] The extenuating circumstances to which Colonel Shaw referred were, in his view, of the nature that would constitute sufficient grounds to form the basis of a plea of superior orders for clemency in Suguwara's case. He cited several reasons for this conclusion. First, he stated that the evidence presented to the reviewing authority strongly suggested that Suguwara:

a. was acting in obedience to the order of a superior officer, his immediate commander;
b. had no contact with the airmen prior to their execution;
c. had no command discretion;
d. was not chargeable with knowledge of the Rules of Land Warfare;
e. in performing the task to which he was ordered Suguwara manifested neither spirit of vengeance nor personal ill will; and
f. had no other offense alleged or proven against him.[80]

Colonel Shaw argued that the evidence to substantiate the plea of superior orders in Suguwara's case was stronger than other cases where superior orders was raised. In distinguishing other cases where superior orders had been raised and had failed, he stated that the other cases usually involved orders of 'indiscriminate slaughter or were otherwise palpably illegal; that the orders were indefinite or not directly received; the accused was in a position of some discretion, or that the accused was a volunteer or eagerly obedient. None of those elements and nothing comparable thereto are present in Suguwara's case.'[81]

Colonel Shaw contested that the facts and circumstances in relation to Suguwara's involvement regarding the execution of the three US airmen were very different from other cases and, on that basis, the plea of superior orders to mitigate the sentence was not precluded. With reference to the documentary evidence cited by the initial trial commission, Colonel Shaw agreed there existed no reason for 'disturbing the extreme penalty adjudged against

79 'Supplement to Review of the Record of Trial by Military Commission of Lieutenant (jg) Sentaro Yamaguchi, 51J-127752, Ensign Kiyoto Tasuki, 51J-127753 and Superior Petty Officer Isaburo Suguwara, 51J-127754, of the Imperial Japanese Navy', to The Supreme Commander for the Allied Powers, from Colonel Franklin P. Shaw, Judge Advocate, General Headquarters Far East Command Office of the Judge Advocate, 22 February 1947, RG331 UD1321 290/12/12/1.

80 *Ibid.*, [3 a–f].

81 *Ibid.*, [4].

Yamaguchi':[82] Yamaguchi directed the executions of the three US airmen and he had knowledge of — or at least reason to suspect — the illegal nature of the executions, as indicated by his contradictory statements throughout the trial. This gave the impression that he was attempting to hide behind the 'protective cloak of superior orders as a defense' by claiming that the execution order came from higher headquarters — despite later admitting that the order came from him and no one else.[83]

According to Colonel Shaw, the reason for taking this position in relation to Tasuki was because Tasuki was shown to have had greater responsibility than Suguwara in the days and weeks that preceded the executions. The evidence clearly showed that he was in charge of interrogating the airmen and took part in beating the three prisoners at various times.[84] Furthermore, Tasuki knew that the three airmen did not receive a trial — or at the very least, according to his rank and experience, he would or should have known that. Shaw concluded that:

> We thus do not have the case of an executioner who receives and blindly carries out a mandate of his superior, without knowledge of its illegality, or in fear of dire personal consequences awaiting refusal to obey. . . . There is no reason to doubt that Tasuki's concurrence or at least acquiescence in the plan of execution was given. He did not hesitate to fulfill the order nor does he claim coercion or fear of consequences for failure to act. Any Japanese naval officer is well aware of the fact that an execution cannot be carried out without a written order from a competent commander and a writ of the prosecutor concerned, and that under Japanese naval law, a further order of the Minister of the Navy is required (Japanese Naval Court-Martial Law Article 504). Tasuki, one of the senior officers under Yamaguchi and admittedly aware of the lack of legal procedure, was in a position to refuse his order if he so desired.[85]

Significantly, Colonel Shaw acknowledged that by accepting the prospect that superior orders did play a crucial role in the unlawful killing of the three US airmen, the SCAP would establish 'a criterion for the exercise of clemency which will not strip of meaning his [General MacArthur's] instructions respecting mitigation of punishment under paragraph 5d(6) of the regulations promulgated by him'.[86]

Shaw JA accepted that the 'possibility of creating an undesirable precedent is not present' because Suguwara's case was unique.[87] That assessment was based on his view that obedience to superior orders was the 'sole impelling inducement to the commission of an act, not to the accused, patently illegal'.[88] In other words, possibly due to Suguwara's limited knowledge of military law and his rank, it was not entirely clear that he would understood the order to execute the airmen to be unlawful under the laws of war. On that basis,

82 *Ibid.*, at 5, [4] Clemency.
83 *Ibid.*
84 *Ibid.*, at 6.
85 *Ibid.*
86 *Ibid.*, [2].
87 *Ibid.*, [5].
88 *Ibid.*

argued Shaw, Suguwara represented the precise 'case for which must have been intended the exercise of clemency authorized by the Supreme Commander . . .'.[89]

Contained in correspondence dated February 1947 from General MacArthur's office, Shaw's recommendations were upheld and Suguwara's death sentence was commuted to 15 years' imprisonment. Likewise, Shaw's recommendations that Yamaguchi and Tasuki not be granted clemency was also accepted and their execution orders were confirmed.[90]

5. The Broader Context: Lessons from Manila

The Manila trials are often overlooked for their contribution to establishing important principles in relation to superior orders. The Manila trials were important for establishing principles of individual criminal responsibility as a precursor to many of the subsequent Allied war crimes trials and, arguably, the existing legal framework associated with Article 33 of the Rome Statute, as is discussed below.

Prior to the US Army War Crimes Trials in Manila, the defence of superior orders was raised at various times throughout history and, depending on the circumstances of each case, may or may not have been accepted as a successful defence.[91] The Manila trials — alongside the trials conducted at Nuremberg and Tokyo where these principles were also tested — marked a turning point in the development of the jurisprudence of superior orders. Tribunal findings in Manila were significant in several ways in developing legal precedents in international criminal law, including the unequivocal rejection of the defence of superior orders as a blanket defence but at the same time, accepting that superior orders could mitigate the harshness of the sentence.

These rulings had implications for the defence as it established the principle that individuals cannot escape responsibility for their actions simply by claiming that they were following orders, no matter how clear the evidence existed of such orders. The infamous *Yamashita* trial[92] conducted in Manila in late 1945 and early 1946 highlighted some broader implications for the defence of superior orders in terms of individual responsibility. In this case, the tribunal held that a soldier could be held responsible for war crimes even if they were

89 *Ibid.*

90 General Headquarters Supreme Commander for the Allied Powers, APO500, correspondence from Douglas MacArthur, General of the Army, United States Army, Supreme Commander, February 1947.

91 UNWCC, *supra* note 23. See also Kudo, *supra* note 11, at 7. One early case where the plea was unsuccessful, was Haganbach's case — for full commentary and analysis, see, G.S. Gordon, 'The Trial of Peter von Hagenbach: Recording History, Historiography and International Criminal Law', in K.J. Heller and G. Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford University Press, 2013). For cases where superior orders were accepted, see, *Clark v State* (1867) 135 ALR 52, cited in N. Keijzer, *Military Obedience* (Sijthoff and Noordhoff, 1978) 158.

92 *Yamashita v Styer* 317 US 1; 66 S. 340 (US Supreme Court) ('*Yamashita trial*').

following orders from their superiors. The tribunal in *Yamashita* recognized that an individual has a duty to refuse to obey illegal orders, and that this duty overrides any obligation to obey orders from a superior.

The subsequent trials that occurred in Manila directly after *Yamashita*, however, presented a more nuanced set of findings that made it obvious that superior orders could play a significant role in unlawful killings, and that the immense pressure on subordinates (moral as well as legal) to obey superior orders is too obvious to ignore as a contributing factor in the commission of war crimes. The cases presented in this paper make it clear that at least some regard was given to the validity of superior orders as a defence where there was evidence the accused was acting under direct orders of their superiors,[93] or where killings occurred due to the broader policy considerations at play regarding the killing of non-combatants suspected of engaging in guerrilla warfare.[94] Other trials that considered the validity of superior orders occurred where the accused was shown to hold an honest and reasonable belief in the existence and legality of the orders[95] or where the accused was acting in obedience to the order of an immediate commander and did not act in the 'spirit of vengeance nor personal ill will' and had not committed other offences of a similar nature.[96]

This and other legal precedents may have had a significant impact on the development of international criminal law on the point, and specifically on the drafting of Article 33 of the Rome Statute of the International Criminal Court (ICC).[97] As it is well-known, Article 33 is titled 'Superior orders and prescription of law' and provides guidance on the responsibility of individuals who carry out orders from a superior in the commission of crimes within the jurisdiction of the Court.

Overall, Article 33 of the Rome Statute is designed to ensure that individuals who commit international crimes cannot use superior orders as a defence to avoid accountability. At the same time, it recognizes that there may be circumstances where individuals are obligated to follow orders and may not be held responsible if the orders they received were not manifestly unlawful. These provisions are not unlike the findings at the Manila Trials, particularly in relation to cases such as *Toyota* and *Suguwara.*[98]

93 Trial of 2nd Lieutenant Otsuka Noriyuki, Imperial Japanese Army, 6 July, 1946 RG 331, 290/12/12/1, Box 1570 Vol I–VII.

94 Trial of Warrant Officer Shin Fusataro Imperial Japanese Army (Kenpeitai), Manila, 16–18 July 1946, RG331 UD1321 290/12/12/1 Box 1566 Vol I–III, Folder 82.

95 Trial of First Lieutenant Toyota Chiyomi, Imperial Japanese Army, Manila, 20–31 July 1946 RG331 UD1321 290/12/12/1 Box 1567 Vol I–X, Folder 86.

96 Trial of Petty Officer Suguwara Isaburo, Imperial Japanese Navy, Manila, 8–10 February 1947, RG331 UD1321 290/12/12/1.

97 Art. 33 ICCSt.

98 Trial of First Lieutenant Toyota Chiyomi, Imperial Japanese Army, Manila, 20–31 July 1946 RG331 UD1321 290/12/12/1 Box 1567 Vol I–X, Folder 86; and Trial of Petty Officer Suguwara Isaburo, Imperial Japanese Navy, Manila, 8–10 February 1947, RG331 UD1321 290/12/12/1.

6. Conclusion

It was clear at an early stage that the so-called superior orders defence would prove problematic for those involved in the prosecution and defence of alleged Japanese war criminals at the US Army war crimes trials in Manila. The SCAP had tried to deny legitimacy of the doctrine and thereby prevent Japanese defendants from escaping criminal responsibility for the deaths of US POWs and Filipino civilians. Perhaps it was due to some innate sense of justice that the SCAP's original edict precluded the Commissions from considering superior orders to relieve criminal responsibility for war crimes even if under strict orders. Perhaps, the initial restriction of superior orders was due to domestic political sensitivities, fearing that admitting the defence would open legal 'floodgates' to allow defendants *en masse* to escape liability.

There is clear evidence that defence attorneys (both civilian and military) raised the problem squarely and directly with the SCAP. There is also evidence that, after some internal deliberation, in later individual trials the defence of superior orders did occasionally play some role in mitigating the sentence, providing certain conditions were present. The documents of the US Army trials in Manila reveal much of the inner-workings of a USA occupying force, flush with the victory over a depleted Japanese military force and how they stayed the hand of 'victors' justice' in favour of accepting that, in war, sometimes the only reason why people do cruel things is because of the fear that — if they don't — then they too will suffer the same fate.

The importance of the Manila Trials for superior orders lies in the fact that they provided greater certainty surrounding the law applicable to this defence. The trials recognized that individuals have a responsibility to refuse to carry out orders that they know to be illegal and that they cannot use the defence of superior orders to escape accountability for their actions.

This precedent has been recognized in subsequent international criminal trials and tribunals and has played a key role in the development of international criminal law, displaying trends that continued up to Article 33 of the Rome Statute. By establishing the principle that individuals will be held accountable for their actions, even when they are obeying orders, the Manila Trials helped to establish the foundation for modern international criminal law and helped to ensure that war crimes and crimes against humanity could be prosecuted and punished.