THE CASE OF GENERAL YAMASHITA

A Memorandum

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INDEX

	Page
Memorandum for the Record	1
Appendix A	
Decision of U.S. Supreme Court . .	23
Appendix B	
Notes on the case of General Yamashita, from Law Reports of Trial of War Criminals, United Nations War Crimes Commission	38
Appendix C	
Review of Trial Record	60

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
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MEMORANDUM FOR THE RECORD

SUBJECT: "The Case of General Yamashita," by A. Frank Reel

This memorandum is to delineate and record the pertinent facts bearing upon the public controversy which has arisen with respect to the desire of the University of Chicago Press to publish in the Japanese language for sale and distribution in Japan, the book entitled, "The Case of General Yamashita," by A. Frank Reel.

An unusual number of free copies of this book were distributed to editors, publishers and other prominent persons in Japan, but only one person here, the Manager of the Hosei University Press, exhibited any interest in its publication in the Japanese language for local sale. He determined after informal consultation with Major D.C. Imboden of this Headquarters that it would be inadvisable to do so and filed no formal request. Should any such request be received, however, it would be disapproved both because of the textual nature of the book and the inflammatory advertising material publicly circulated by the publishers to stimulate sales.

The book is essentially an attack upon our American system of jurisprudence -- indeed, it might better be said upon our American system -- in the refusal of the author, a practicing attorney, to accept the judgment of the United States Supreme Court, acting through a majority thereof, on issues both argued before that tribunal and discussed in the book. Instead, in an almost hysterical endeavor to propagate the minority viewpoint, subscribed to by only two of the eight participating justices, by re-pleading anew his identical views pled and lost before the trial commission and the highest forums of civil appeal and military review, the author but shows himself unable to accept the ethical base establishing in our country the primacy of majority decision. For the judgment of the Supreme Court upon the issues was final and controlling and so remains, despite the intervening years which have dimmed the memory of those without access to, or detailed knowledge of, the judicial record.

That being so, suffice it to point out here that the viewpoint of the author to the contrary notwithstanding, the Supreme Court upon hearing of these issues adjudged: (a) that the military commission appointed by General Styer as Commander U.S. Army Force, Western Pacific, which tried and convicted Yamashita, was lawfully created and lawfully convened, despite the cessation of hostilities; (b) that the allegations of the charge against

Yamashita, tested by any reasonable standard, adequately alleged a violation of the Laws of War and the Commission had authority to try and decide the issue which it raised; (c) that the regulations governing the procedure to be followed by the Commission and directing that it should 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," and that in particular it might admit affidavits, depositions or other statements taken by officers detailed for that purpose by military authority, was not in conflict with the Articles of War as alleged, nor did it deprive Yamashita of the due process provided by the Fifth Amendment to the Constitution; and (d) that Article 60 of the Geneva Convention did not require advance notice of Yamashita's trial to a neutral power representing the interests of Japan as a belligerent, as it is not properly for application in connection with war crimes charges. A copy of the Judgment is hereto appended as Appendix A.

The opinion of the Supreme Court was the subject of a lengthy commentary prepared by the United Nations War Crimes Commission and published in its Law Reports of Trials of War Criminals, Volume IV, B, Notes on the Case, pages 75-96 (attached as Appendix B). This commentary is of interest in its discussion of the issues raised and decided in the Yamashita case in relation to the practices and precedents elsewhere in the broad field of war crimes jurisprudence. Of particular interest is its discussion of the validity of that part of the regulations governing the procedure to be followed by the military commission in the admissibility of evidence. The author takes emphatic exception to this provision as violative of the due process safeguard of the Fifth Amendment to the Constitution. Commenting upon the Supreme Court's ruling that no such constitutional violation was involved, the United Nations War Crimes Commission points out that such a regulation follows procedure normal to the European countries, including those under Anglo-Saxon law. Indeed, the identical procedure has governed all war crimes trials in the Pacific area.

In support of his position on this issue, the author leans heavily upon the language of the two dissenting justices and complains bitterly that such language and the viewpoint it expressed was not considered by General MacArthur in his capacity as the final reviewing authority prior to ordering the execution of sentence. General MacArthur was concerned with the judgment of the Supreme Court as pronounced by the majority through the Chief Justice, rather than the dissenting views of a minority, but the latter, extensively carried by the press, were known to him and fully considered prior to enunciating his decision. He furthermore took cognizance of an identical minority viewpoint expressed in the case of General Homma heard by the Supreme Court shortly thereafter, and in his official action thereon he commented as follows:

> "In reviewing this case I have carefully considered the minority views presented by distinguished Justices of the United States Supreme Court in negation not only as to jurisdiction but as to method and merit. My action

as well as the record in this case would be incomplete were I to fail the obligation as the final reviewing authority of frank expression on issues of so basic a nature. I do so from the standpoint of a member of the executive branch of the government in process of its responsibility in the administration of military justice.

"No trial could have been fairer than this one, no accused was ever given a more complete opportunity of defense, no judicial process was ever freer from prejudice. Insofar as was humanly possible the actual facts were fully presented to the commission. There were no artifices of technicality which might have precluded the introduction of full truth in favor of half truth, or caused the slanting of half truth to produce the effect of non truth, thereby warping and confusing the tribunal into an insecure verdict. On the contrary, the trial was conducted in the unshaded light of truth, the whole truth and nothing but the truth. Those who would oppose such honest method, can only be a minority, who either advocate arbitrariness of process above factual realism, or who inherently shrink from the stern rigidity of capital punishment. Strange jurisprudence it would be, which for whatever reason defeated the fundamental purpose of justice -- to rectify wrong, to protect right and to produce order, safety and well being. No sophistry can confine justice to a form. It is a quality. Its purity lies in its purpose, not in its detail. The rules of war and the military law resulting as an essential corollary therefrom have always proven sufficiently flexible to accomplish justice within the strict limitations of morality."

While laying all emphasis upon the dissenting minority viewpoint to support his post-judicial contention that Yamashita was irregularly tried and unjustly executed, the author conveniently omits General MacArthur's statement of record giving in detail his reasons for approving the judgment of the commission which tried Yamashita and ordering execution of the sentence. This statement is hereunder reproduced for the purpose of the Memorandum:

"It is not easy for me to pass penal judgment upon a defeated adversary in a major military campaign. I have reviewed the proceedings in vain search for some mitigating circumstance on his behalf. I can find none. Rarely has so cruel and wanton a record been spread to public gaze. Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence

and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits--sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting therefrom as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten. Peculiarly callous and purposeless was the sack of the ancient city of Manila, with its Christian population and its countless historic shrines and monuments of culture and civilization, which with campaign conditions reversed had previously been spared.

"It is appropriate here to recall that the accused man was fully forewarned as to the personal consequences of such atrocities. On October 24--four days following the landing of our forces on Leyte--it was publicly proclaimed that I would 'hold the Japanese military authorities in the Philippines immediately liable for any harm which may result from failure to accord prisoners of war, civilian internees or civilian non-combatants the proper treatment and the protection to which they of right are entitled.'

"No new or retroactive principles of law, either national or international, are involved. The case is founded upon basic fundamentals and practice as immutable and as standardized as the most matured and irrefragable of social codes. The proceedings were guided by that primary rationaleof all judicial purposes--to ascertain the full truth unshackled by any artificialities of narrow method or technical arbitrariness. The results are beyond challenge.

"I approve the findings and sentence of the Commission and direct the Commanding General, Army Forces in the Western Pacific, to execute the judgment upon the defendant, stripped of uniform, decorations and other appurtenances signifying membership in the military profession."

In his labored effort to absolve Yamashita of command responsibility for the general conduct of his troops, the author resorts to the hollow pretense that his communications became disrupted and the naval and other units under his command would not obey his orders. This is complete nonsense. He passes without mention the due, public and repeated warning General MacArthur gave following his landing in Leyte, in an effort to secure for prisoners of war, civilian internees and non-combatants the protection guaranteed under the rules of modern war. This warning, placed in evidence before the military commission trying Yamashita, served timely to remind the latter of his solemn responsibility and to serve notice that he would be held to account for just such an orgy of brutality and outrage which in due course ensued. The following language of this warning was clear and unmistakable:

> "The surrender of American and Filipino forces in previous campaigns in the Philippines was made in full reliance that prisoners of war would be accorded the dignity, honor and protection provided by the rules and customs of war.
>
> "Since then unimpeachable evidence has been furnished me of degradation and even of brutality to which these gallant soldiers have been subjected, in violation of the most sacred code of martial honor. For such violations the Imperial Japanese Government will, of course, be fully responsible to my Government.
>
> "As Commander in Chief of the Allied forces in the field, I shall in addition, during the course of the present campaign, hold the Japanese military authorities in the Philippines immediately liable for any harm which may result from failure to accord prisoners of war, civilian internees or civilian non-combatants the proper treatment and due protection to which they, of right, are entitled."

That Yamashita failed to receive or understand this warning has not been suggested, nor could it have successfully been disputed. The brilliant campaign he conducted in opposing our forces furthermore belies the pretense that proper control was lacking or communications were fatally disrupted. The truth, supported on the trial by voluminous evidence, points to one of the most sordid orgies of rape and arson and murder over a widespread area and long period of time ever recorded of soldiers in military history, with no effective step taken by the responsible commander to stop or even curb the same--lest any so soon forget let the specifications to the charge on which Yamashita was tried, convicted, and executed, in briefed form from the record, here speak for themselves:

> "Mistreating and killing without cause or trial more than 25,000 men, women and children, unarmed non-combatant civ-

ilians, and devastating and destroying without military necessity entire settlements, pursuant to a deliberate plan to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, from 9 October 1944 to 1 May 1945.

"Wilfully failing to provide food and other necessities to civilian internees, resulting in starvation and death; mistreating and torturing more than one other unnamed civilian internee; mistreating, torturing and killing four civilian internees without cause or trial; and torturing and summarily executing without cause or trial more than six internees for minor infractions of rules at Santo Tomas Internment Camp, Manila, from 9 October 1944 to 2 February 1945.

"Mistreating and torturing numerous unarmed, non-combatant civilians at Japanese Military Police Headquarters, Manila, from October to December 1944.

"Torturing and killing without cause or trial three unarmed, non-combatant civilians at Japanese Military Police Headquarters, Manila, from 18 December to 31 December 1944.

"Torturing, mutilating, and executing Private Wade E. Gensemer, a member of the armed forces of the United States, then a Japanese prisoner of war at Carigara, Leyte, on or about 30 October 1944.

"Mistreating, striking, maiming, and killing, without cause or trial, prisoners of war of the armed forces of the United States; failing and refusing to provide adequate food, quarters and other necessities for prisoners of war; looting and stealing the contents of Red Cross packages intended for prisoners of war at Cabanatuan, Nueva Vizcaya Province during November and December 1944.

"Mistreating, torturing, and executing without cause or trial three American aviators while held as prisoners of war, at Batan Island, Batanes Province, on 20 October 1944.

"Mistreating and killing, by burning, bayoneting or shooting, without cause or trial, 141 prisoners of war of the United States armed forces, and mistreating, wounding, and attempting to kill 9 others, at Puerta Princesa, Palawan Island, on or about 14 December 1944.

"Mistreating and killing without cause or trial more than 300 unarmed non-combatant civilians, and wounding and attempting to kill 50 others, the entire population of the

barrio of Dapdap, Ponson Island, Camotes Islands, on 29 December 1945.

"Fortifying and installing military objectives on the premises of a civilian hospital with consequent killing of patients and refugees by shell fire at Philippine General Hospital, Manila, from 1 January to 17 February 1945.

"Mistreating and executing an American civilian internee without cause or trial at Los Banos Internment Camp, Laguna, on 28 January 1945.

"Deliberately, and without justification or military necessity, devastating, destroying, pillaging and looting large areas of Manila, including public, private, and religious buildings, and committing widespread theft of money, food, and other private property from 1 January to 1 March 1945.

"Mistreating, mutilating, and killing without cause or trial, large numbers of the inhabitants of Manila, pursuant to a deliberate plan to exterminate large numbers of unarmed, non-combatant civilians, men,women, and children, and raping or attempting to rape large numbers of civilian women and female children in that city from 1 January to 1 March 1945.

"Mistreating and killing two unarmed non-combatant male civilians at Dy-Pac Lumber Yard in Manila on 4 February 1945.

"Mistreating and killing, without cause or trial, 115 men, women, and children, all unarmed, non-combatant civilians; mistreating, torturing, and attempting to kill, without cause or trial, four unarmed non-combatant civilians in the vicinity of the Dy-Pac Lumber Yard, Manila, on or about 3 February 1945.

"Brutally killing, without cause or trial, forty men, women, and children, all non-combatant civilians, wounding and attempting to kill seventeen non-combatant civilians, raping two female civilians, attempting to rape another, and attempting to have carnal intercourse with the body of a dead female civilian at De La Salle College, Manila, from 7 to 14 February 1945.

"Mistreating and killing without cause or trial twenty-one unarmed, non-combatant civilians, and raping and murdering

a civilian female doctor at the National Psychopathic Hospital, Mandaluyong, Rizal Province, from 6 February to 8 February 1945.

"Killing Angel Gajo without cause or trial and wounding and attempting to kill three other persons, all unarmed non-combatant civilians, at Malate, Manila, on 10 February 1945.

"Killing, without cause or trial, two American citizens, two Filipinos, and two Spanish citizens, all unarmed non-combatant civilians, and wrongfully burning and destroying civilian homes at Pasay, Rizal Province, on 11 February 1945.

"Mistreating and killing, without cause or trial, two lieutenant colonels, both disarmed and demobilized members of the Philippine Army, and seventeen other persons, all unarmed, non-combatant civilians at Singalong, Manila, on 7 February 1945.

"Mistreating and killing without cause or trial eight unarmed, non-combatant civilians at Paco, Manila, on 7 February 1945.

"Mistreating and killing without cause or trial six Catholic priests and twenty-one other persons, all unarmed non-combatant civilians, and wounding and attempting to kill an unarmed, non-combatant Chinese civilian, at the San Marcelino Church and St. Vincent de Paul House, Manila, on 9 and 10 February 1945.

"Killing without cause or trial Supreme Court Justice Diaz and 37 other unarmed civilians, and wounding and attempting to kill 22 others at the corner of Taft Avenue and Padre Faura Street, Manila, on 10 February 1945.

"Massacring and killing 12 unarmed non-combatant civilians, maiming and attempting to kill 3 others, all without cause or trial, and unlawfully burning and destroying civilian homes at Paco, Manila, on 10 February 1945.

"Massacring and killing more than 53 civilians sheltered in the Philippine Red Cross Building, wounding and attempting to kill 4 others, and wantonly burning the building and contents at Manila, 10 February 1945.

"Massacring and killing without cause or trial 100 Filipino and French unarmed non-combatant civilians, wounding and attempting to kill 17 others, raping and subsequently killing civilian women, wantonly burning and destroying a civilian home and stealing civilians' private property, on Taft

Avenue, Manila, 7 February 1945.

"Brutally mistreating 600 and killing without cause or trial 373 men, women, and children, all unarmed non-combatant civilians, wounding and attempting to kill 27 others, wrongfully burning and destroying, with its contents, St. Paul's College, a building dedicated to religion, and stealing property of civilians, at St. Paul's College, Manila, on 9 February 1945.

"Mistreating about 400 women and children, repeatedly raping and attempting to rape about 76 women and girls from 9 February to 17 February 1945 at the Bay View Hotel, Alhambra Apartment Hotel, Miramar Apartment Hotel, and Manila Hotel, Manila.

"Killing without cause or trial nine members of the Canillas family and one other person, all unarmed non-combatant civilians, and wrongfully burning the Canillas home at Malate, Manila, on 8 and 9 February 1945.

"Mistreating and killing without cause or trial of Albert P. Delfino, Venezuelan consul, his wife, foster son, and a Chinese, all unarmed non-combatant civilians, wounding and attempting to kill two other persons, and wrongfully destroying a dwelling house, Taft Avenue, Manila, on 13 February 1945.

"Mistreating and killing without cause or trial Candido Jabson, a non-combatant civilian, wounding and attempting to kill his wife and sister-in-law, attempting to rape a civilian woman, and robbing and stealing personal property in Iloquin District, Rizal, on 20 February 1945.

"Burning alive or otherwise killing more than 30 unarmed, non-combatant civilians, wounding, attempting to burn alive and otherwise kill several others, and wrongfully burning and destroying a private dwelling at Singalong, Manila, on 12 February 1945.

"Mistreating and killing, without cause or trial, more than 400 unarmed, non-combatant civilians, including women and children; attempting to kill more than 100 others, pillaging and wantonly destroying property at Bauan, Batangas, on 28 February 1945.

"Mistreating and killing without cause or trial more than 2000 unarmed non-combatant civilians, including women and children, and destroying two barrios without military neces-

sity at Taal, Batangas Province, from 16 to 18 February 1945.

"Mistreating and killing without cause or trial 984 unarmed non-combatant civilians, and pillaging and unnecessarily destroying large areas of Cuena, Batangas Province, on 19 February 1945.

"Mistreating and killing without cause or trial more than 500 unarmed, non-combatant civilians, and pillaging and destroying property at San Jose, Batangas Province, on 20 February 1945.

"Mistreating and killing more than 1500 unarmed, non-combatant civilians, including women and children, and pillaging and destroying property at Santo Tomas, Batangas Province, from 16 February to 19 March 1945.

"Mistreating and killing without cause or trial more than 300 unarmed non-combatant civilians, wounding and attempting to kill more than 100 others, and wrongfully destroying a private dwelling on Singalong Street, Paco District, Manila, on 10 February 1945.

"Mistreating and killing without cause or trial more than 12,000 unarmed, non-combatant civilians and pillaging and destroying public and private property without military necessity in Lipa, Batangas Province, from 16 February to 19 March 1945.

"Abducting, mistreating, and killing without cause or trial about 7 unarmed, non-combatant civilians, including one woman, at Santa Rosa College, Intramuros, Manila, on 8 February 1945.

"Mistreating and killing without cause or trial more than 4000 unarmed, non-combatant civilians at Fort Santiago, Intramuros, between 10 and 23 February 1945.

"Mistreating and killing without cause or trial more than 5 unarmed, non-combatant civilians at Santo Domingo Church, Intramuros, Manila, on 17 February 1945.

"Mistreating and killing without cause or trial 500 unarmed, non-combatant civilians, and destroying property without military necessity at Tanauan, Batangas, on 10 February 1945.

"Massacring, without cause or trial, 7000 unarmed, non-combatant civilians, and raping 37 women at Calamba, Laguna, on 12 February 1945.

"Massacring, without cause or trial, 41 unarmed non-com-

batant civilians, at Pingus, Laguna Province, on 9 April 1945.

"Killing without cause or trial 50 unarmed, non-combatant civilians, including women and children, and pillaging and destroying property at Rosario, Batangas, on 13 March 1945.

"Killing without cause or trial 27 Chinese, unarmed, non-combatant civilians, and mistreating and attempting to kill all Chinese in the town of Los Banos, Laguna Province, on 6 March 1945.

"Mistreating and killing without cause or trial Antonio Villa-Real, a retired Philippine Supreme Court Justice and 14 other persons, wounding and attempting to kill 3 others and wrongfully burning a residence with its contents, at Balagtas Street, Manila, on 12 February 1945.

"Mistreating and killing, without cause or trial, more than 100 priests and other unarmed, non-combatant civilians, and mistreating and attempting to kill more than 6 others, in and near three air raid shelters in the vicinity of Plaza McKinley, Manila, on 19 and 20 February 1945.

"Mistreating and imprisoning in St. Augustine Church, Intramuros, Manila, more than 6000 unarmed, non-combatant civilians, including women and children, without food or medical supplies, and deliberately exposing them to shell fire, causing death of a large number of them, during the period 6 to 22 February 1945.

"Mistreating and killing without cause or trial, a nun and more than 50 other unarmed, non-combatant civilians at St. Augustine Church, Intramuros, Manila, from 6 to 22 February 1945.

"Killing without cause or trial a number of persons and attempting to kill other unarmed, non-combatant civilians, including women and children, in the vicinity of St. Augustine Church, Intramuros, Manila, on 23 February 1945.

"Raping and abusing numerous women and female children, killing and wounding, without cause or trial, non-combatant civilians, looting and stealing food and personal property, installing military weapons in religious institutions, wilfully destroying religious institutions without military necessity at St. Augustine Church and Convent, Intramuros, Manila, from 6 to 23 February 1945.

"Torturing, killing and attempting to kill, without cause or trial, unarmed non-combatant civilians at Cavite City, Imus, and elsewhere in Cavite from 9 October 1944 to about 1 February 1945.

"Mistreating and killing without cause or trial two named unarmed non-combatant civilians and others at Dasmarinas, Cavite Province, on 16 December 1944.

"Mistreating, imprisoning, and killing, all without cause or trial five named civilians and all other male inhabitants of the village of Imus, Cavite Province on 16 December 1944.

"Mistreating and killing without cause or trial numerous unarmed non-combatant civilians, at or near Fort Santiago, Intramuros from 9 October 1944 to 10 February 1945.

"Failing to provide proper facilities for American civilian internees at Los Banos Internment Camp, Laguna, from 9 October 1944 to 23 February 1945.

"Undertaking to terrorize, massacre and exterminate non-combatant civilian men, women and children, and pillaging and destroying towns, cities and public and private property in the Philippine Islands generally from 9 October 1944 to about 1 September 1945.

"Mistreating, neglecting and failing and refusing without justification to provide proper and adequate quarters, food and other necessities to more than 2200 prisoners of war at Old Bilibid Prison, Manila from 21 October to 13 December 1944, and deliberately subjecting said prisoners to public humiliation at Manila on 13 December 1944.

"Mistreating, neglecting and failing and refusing without justification to provide proper quarters, transportation, food and other necessities to more than 1600 prisoners of war, members of the Armed Forces of the United States, deliberately and unnecessarily exposing them to gun fire in the vicinity of Olongapo, Zambales Province, from 15 to 24 December 1944, and en route therefrom to Manila from 24 to 27 December 1944, and deliberately subjecting them to public humiliation at Manila on 27 December 1944.

"Improperly imprisoning four hundred members of the armed forces of the United States, and failing and refusing without justification, to provide them with adequate water, shelter and other essential facilities at Sakura Prisoner of War Camp, Fort McKinley, from 31 October 1944 to 15 January 1945

"Executing without cause or trial one woman, a United States citizen, and four other unarmed non-combatant women civilians at North Cemetery, Manila, during October or November 1944.

"Mistreating and killing, without cause or trial, thirteen named and more than 2000 unnamed civilians, all unarmed and non-combatants, during December 1944 at the same place.

"Subjecting to trial and executing three or more prisoners of war without any prior or subsequent notice to a representative of the protecting power, and without counsel, opportunity to defend to appeal, at Manila during December 1944.

"Mistreating and killing without cause or trial, twenty-six unarmed non-combatant civilians at North Cemetery, Manila, during November 1944.

"Massacring without cause or trial four hundred unarmed, non-combatant civilians at the Village of Polo in the town of Obando, Batan Province, on 10-11 December 1944.

"Mistreating and failing and refusing, without justification, to provide food and water for six named American non-combatant civilians and others then interned and detained, enroute from Camp Holmes Internment Camp near Baguio to Old Bilibid Prison, Manila, on 28 and 29 December 1944.

"Detaining and interning a large number of American, non-combatant civilian men, women and children without adequate food, clothing, sanitary facilities or medical supplies at Old Bilibid Prison, Manila, from 29 December 1944 to 4 February 1945.

"Installing and maintaining military weapons at Old Bilibid Prison, Manila, thereby exposing unarmed non-combatant civilian internees to gunfire and other hazards on 3 February 1945.

"Bombarding and attacking without military justification Old Bilibid Prison, Manila, then an undefended, non-military installation housing unarmed, non-combatant internees, from 3 to 12 February 1945.

"Killing without cause or trial many unarmed, non-combatant civilians and raping of civilian women at the towns of San Fernando and San Juan, La Union Province on or about 19 January 1945.

"Mistreating and abusing civilian women, and wrongfully

destroying Manila Cathedral, Intramuros, Manila, without military justification, from 4 to 7 February 1945.

"Torturing and killing without cause or trial more than 500 men, women, and children, all non-combatant civilians, wounding and attempting to kill many others, poisoning a drinking water well, raping numerous women and female children, and wrongfully destroying a building at the German Club, Ermita, Manila, on 10 February 1945.

"Massacring and killing without cause or trial of over one hundred men, women, and children, all unarmed non-combatant civilians, wounding and attempting to kill thirteen others, and wrongfully destroying and burning homes and other property of the Dr. Price House, Ermita, Manila, on 10 February 1945.

"Killing without cause or trial forty-three unarmed non-combatant civilians, and attempting to kill twelve others, at the Tabacalera Cigar and Cigarette Factory and The Shell Service Station, Ermita, Manila, on 11 February 1945.

"Mistreating, torturing and burning alive an unarmed, non-combatant civilian, mistreating and killing without cause or trial two others, attempting to kill, without cause or trial, numerous others, and burning and destroying houses and other property without justification in the Pasay District, Rizal, on or about 11 February 1945.

"Mistreating and killing without cause or trial more than thirty-four men, women,and children, all unarmed non-combatant civilians, wounding and attempting to kill thirty-one others, and wrongfully burning and destroying the private residence of Dr. Moreta, at Manila, on 17 February 1945.

"Mistreating and killing without cause or trial 730 unarmed non-combatant civilians, men, women and children, and mistreating others at San Pablo, Laguna Province, on 24 February 1945.

"Torturing and killing without cause or trial three prisoners of war of the armed forces of the United States, and five unarmed non-combatant civilians, at Cebu City, Cebu Province, on or about 26 March 1945.

"Mistreating and killing without cause or trial twenty-nine unarmed non-combatant civilians at the town of Bayombong, Nueva Vizcaya Province during March, 1945.

"Massacring more than twelve unarmed, non-combatant civilians, raping of women, and pillaging and destroying large areas of

the city without military necessity, at Cebu City, Cebu Province, in March 1945.

"Mistreating and massacring, without cause or trial, more than fifty-eight civilian men, women and children, and attempting to kill more than four others, at the Barrios of Pingus, Ulinig, Liko, and Santa Ana, and the municipality of Paete, Laguna Province, on about 7 April 1945.

"Burning and destroying, without justification, the village of Nanipil, Mountain Province and killing without cause or trial, non-combatant civilians therein, on 16 April 1945.

"Beheading and attempting to behead, without cause or trial, more than seven unarmed, non-combatant civilians at Titig Mountain, Mountain Province on 16 April 1945.

"Mistreating and killing, without cause or trial, eighty-three men, women and children, all unarmed, non-combatant civilians about 22 kilometers south of Baguio, Luzon, on 18 April 1945.

"Torturing and killing, without cause or trial, unarmed, non-combatant civilians at Basco, Batan Island, Batanes Group, on 10 May 1945.

"Torturing, killing, and attempting to kill, without cause or trial, unarmed, non-combatant civilians, destroying property without justification and confiscating food on Batan Island, Batanes Group from 1 March to 1 September 1945.

"Torturing, and killing more than eighty-four unarmed, non-combatant men, women and children civilians at Basco, Batan Island, Batanes Group on 10 July 1945.

"Mistreating and killing, without cause or trial, more than thirteen non-combatant civilians at Matina Pangi, Davao City, Mindanao Island on 15 May 1945.

"Killing, without cause or trial, a United States civilian internee at Los Banos Internment Camp, Laguna Province, on about 20 January 1945.

"Mistreating and killing, without cause or trial, at and in the vicinity of Iloilo, Panay Island, four or more unarmed non-combatant civilians during January 1945, and one or more unarmed non-combatant civilians on 22 March 1945."

The foregoing establishes the pattern of the conduct or rather misconduct of the troops under Yamashita's command. Not isolated instances these but a paroxysm of debauchery and brutal depravity infecting many units in many places over a long period of time. To pretend that they were unknown to the commander is to trifle with common sense. To contend that the commander lacked the power of control in the discipline unto death which characterized the Japanese fighting unit is to speak the mind either of a fool or a knave.

The author likewise passes with scarce comment the voluminous evidence before the military commission pointing to full knowledge by the high command of this reign of terror instituted against non-combatants and prisoners over a wide area. In discussing this phase of the trial record the Judge Advocate's Board (attached Appendix C) has this to say:

"During the period 9 October 1944 to 3 September 1945, General Tomoyuki Yamashita was the Japanese Supreme Commander in the Philippines, under Count Terauchi, the Supreme Southern Commander (R 930, 1013, 2695, 3520). He was the Commanding General of the Japanese 14th Army Group (also referred to as the 14th Area Army) and, in addition, had command of all the Kempei Tai (military police) in the Philippines (R 105, 2255, 2272, 3593). The prisoner of war and civilian internment camps were under his control through the commanding general of war prisoners (R 3588; Ex 7).

"At first there were a number of Japanese forces in the Philippines which were not under his command, such as the 4th Air Army, the 3rd Maritime Transport Command, 30,000 troops directly under Imperial Headquarters and the Southern Command, and the naval forces (R 3521, 3525, 3589) but these later were consolidated under him. About the first of December 1944, the 30,000 Imperial Headquarters and Southern Army troops were assigned to Him (R 3525). The 4th Air Army came under his control on 1 January 1945 (R 2676, 3525, 3589). By the middle of February, the 3rd Maritime Transport Command came under Yamashita (R 3525).

"The army forces in Manila and southern Luzon were formed into the Shimbu (mixed) group about 26 December 1944 and command of this group given to Lt. Gen. Shizuo Yokoyama (R 2664, 3621). The group consisted of 45,000 troops (R 2664), including the Fuji Heidan of 6,000 troops in Batangas and part of Laguna, under the immediate command of Col. Masatoshi Fujishige (R 2810, 2811).

"On 6 January 1945, about 20,000 naval land forces in the Manila area were assigned to the army for tactical command only during land fighting (R 2535, 2536, 2538, 3526, 3588). These naval forces included marines and Noguchi units from the Kobayashi group, and were under the immediate command of Rear Admiral Iwabuchi (R 2538, 2543, 2673). Disciplinary power over these forces

remained in the naval commander, Admiral Okoochi, and was exercised through Iwabuchi (R 2545). The army actually began to exercise command over these naval forces about 1 February (R 2668, 2671, 2672). Yamashita commanded these naval troops through Yokoyama's Shimbu group (R 2675).

"The prosecution introduced the following evidence on the issue of the direct responsibility of accused as distinguished from that incident to mere command. Accused testified that he had ordered the suppression or 'mopping up' of guerrillas (R 2811, 3545, 3547, 3578; Ex 353). About the middle of December 1944, Colonel Nishiharu, the Judge Advocate and police officer of the 14th Army Group, told Yamashita that there was a large number of guerrillas in custody and there was not sufficient time to try them and said that the Kempei Tai would 'punish those who were to be punished.' To this Yamashita merely nodded in apparent approval (R 3762, 3763, 3814, 3815). Under this summary procedure over 600 persons were executed as 'guerrillas' in Manila alone between 15 and 25 December 1944 (R 3763). In that same month, by a written order, Yamashita commended the Cortbitarte (Manila) Kempei Tai garrison for their fine work in 'suppressing guerrilla activities' (R905, 906). The captured dairy of a Japanese warrant officer assigned to a unit operating in the Manila area contained an entry dated 1 December 1944, 'Received orders, on the mopping up of guarrillas last night * * * it seems that all the men are to be killed. * * * Our object is to wound and kill the men, to get information and to kill the women who run away.' (R 2882; Ex 385).

"Throughout the record, evidence was presented in the form of captured documents and statements of Japanese made in connection with the commission of atrocities, referring to instructions to kill civilians. During the Paco massacre in Manila 10 February 1945, a Japanese officer said to his intended victims, 'You very good man but you die,' and, 'Order from high officer kill you, all of you,' (R 833). On 10 April 1945, during the murder of civilians near Samuyao, a Japanese soldier said, 'It was Yamashita's order to kill all civilians,' (R 2317). At Dy Pac Lumber Yard, Manila, on 2 February 1945, the Japanese captain in charge said that this killing was 'an order from above' (R 2174). At Calamba, Laguna, in February 1945, the killings were 'by order of the Army' because the people were 'anti-Japanese' (R 2893, 2894). On 19 February 1945, prior to the massacre at Los Banos, the Japanese garrison commander told the mayor of Los Banos that the Filipinos were double-crossers and deserved to be killed. The Japanese officer then told the mayor to prepare a list of 50 pro-Japanese civilians and all the other Filipinos would be killed (R 2396). A captured order to a machine gun company states, 'There will be many natives along our route from now on. All natives, both men and women, will be killed.' (R 2895)

"Captured notes of instructions by Colonel Masatoshi Fujishige, commander of the Fuji Heidan, to officers and non-commissioned officers of a reconnaissance unit contained the following, 'Kill American troops cruelly. Do not kill them with one stroke. Shoot guerrillas. Kill all who oppose the Emperor, even women and children,' (R 2812). Colonel Fujishige was under the command of Yamashita through General Yokoyama (R 2811).

"Evidence in the form of captured documents was introduced to show that before and during the battle of Manila the following orders were issued by the Japanese forces: An operations order of the Manila Navy Defense Force and Southwestern Area Fleet directed that when Filipinos are to be killed consideration must be given to saving ammunition and manpower and because disposal of dead bodies is troublesome they should be gathered into houses which are scheduled to be burned or destroyed (R 2909). An order of the Kobayashi Heidan group, 13 February 1945, directed that all people on the battlefield in or around Manila, except Japanese and Special Construction Units (Filipino collaborators) would be put to death (R 2905, 2906; Ex 404) (Note: The Kobayashi group, which included the Manila Navy Defense Force, was commanded for land operations by Yamashita through General Yokoyama (R 2538, 2673, 3622). A 'top secret' order by Yamashita as Commanding General, Shobu Army Group, dated 15 February 1945, stated, 'The Army expects to induce and annihilate the enemy on the plains of Central Luzon and in Manila. The operation is proceeding satisfactorily.' (R 122; Ex 6). 'Shobu' was the code name of the 14th Army Group (Ex 3, 4, 5).

"The prosecution introduced two witnesses, Narciso Lapus and Joaquin S. Galang, who were currently detained by the United States Government as suspected collaborators (R 912, 1058; Def Ex A-H). Both these men previously had offered to exchange information as to Japanese and Filipino collaborators in return for their freedom, but both swore that they had received no promise of reward for their testimony in this case (R 913, 1059).

"Lapus testified that from June 1942 to December 1944 he was private secretary to General Artemio Ricarte, an important Filipino puppet of the Japanese (R 917, 923). He further testified that one day in October 1944, Ricarte returned to his residence and told the witness that he, Ricarte, had just had a meeting with Yamashita who had said, 'We take the Filipinos 100 per cent as our enemies because all of them, directly or indirectly, are guerrillas or helping the guerrillas,' and, 'In a war with the enemies, we don't need to give quarters. The enemies should go,' (R 938). Yamashita revealed his plan to

allow the Americans to enter Manila, then counter-attack and destroy the Americans and also the Filipinos in Manila (R 939, 1023). He further said that he had instructions to destroy Manila, particularly the most populated and commercial district of the city (R 939). Ricarte stated that Yamashita had said he had ordered that when the population gave signs of pro-American movement or actions, the whole population of that place should be wiped out (R 940). Ricarte later told the witness that when Ricarte, in November 1944, asked him to revoke this order, Yamashita said, 'The order was given and could not be changed,' (R 947).

"The witness Galang testified that he was present and overheard a conversation between Yamashita and Ricarte, in December 1944 (R 1063, 1068, 1069). The conversation was interpreted by Ricarte's 12 year old grandson, Yamashita speaking Japanese which the witness did not understand (R 1065, 1068). When asked by Ricarte to revoke his order to kill all the Filipinos, Yamashita became angry and spoke in Japanese which was interpreted into Tagalog as, 'The order is my order. And because of that it should not be broken or disobeyed. It ought to be consumed, happen what may happen,' (R 1069). (Note: The defense introduced Bislummo Romero, the 13 year old grandson of Ricarte, who said he had never interpreted between his grandfather and Yamashita, and specifically denied interpreting the conversation testified to by Galang (R 2014, 2021).)"

From a legal point of view the judgment of the Supreme Court, delivered by Chief Justice Stone, after due hearing of the author and his defense colleagues, disposed of the legal issues and arguments now reiterated in the referenced book. Some psychological effort has, however, in addition been made to mold in the public mind a point of view which by our highest judicial process has been rejected.

The author thus now for the first time challenges the competence of the commission to hear and adjudge the Yamashita case on the ground that its members were all professional soldiers, who could therefore not be expected to offer serious resistance to the desires of superior officers "on whose favor their future well-being might depend;" none of whom was "a combat man who might be expected more readily and sympathetically" to understand Yamashita's military difficulties; and none of whom were lawyers. It is quite true, as alleged, that all members of the commission were professional soldiers--indeed, all had many years of distinguished military service--and that none were lawyers in the sense of being paid practitioners, but all had broad legal experience in that throughout their service they had participated on innumerable occasions in the trial of military offenders as prosecutor, counsel and member of the court. It is not true, as alleged that none of them had combat service. All saw service in operations against the Japanese in various of the Pacific campaigns. Nor is there the slightest support for the implication that the members of the commission were not free agents to hear and determine in accordance with conscience and the law the issues placed before them. To imply the contrary is but to prevaricate the truth.

General MacArthur's viewpoint and instructions were recently recalled by Captain J. J. Robinson, USNR, from the office of the Judge Advocate General of the Navy Department, in a letter dated 1 November 1949, wherein he stated:

> "These attacks on the trial and on General MacArthur are a source of special resentment to me because, as you know, I was the senior member of the Washington war crimes group of four officers to whom General MacArthur gave instructions in regard to the Yamashita case and other war crimes cases on 12 September 1945 at his headquarters at Yokohama, concluding with the request that we go to Manila and help his officers there initiate proceedings there. I remember distinctly, and I recorded in my notes, the General's insistence on fairness and legality. I read the transcript and record of the trial and the General's review. I therefore know how unjust and inaccurate these widely advertised charges are."

The author must well know that these allegations of incompetency even at their face value would not operate to render the officers concerned ineligible to sit upon such a commission. Indeed, this is best reflected from his failure to interpose similar objections upon trial of the case. What then can be the purpose in now making this post-judicial challenge of competence, other than to create the illusion in the reader's mind that the injustice accorded Yamashita was so basic and so flagrant that even his judges lacked the professional competence, the integrity, and the experience in war essential to a fair and just adjudication of the issues.

Furthermore, it should be here recorded that apart from the five general officers who composed the military commission, the legal adequacy of the record to sustain Yamashita's conviction and sentence was passed upon first by the Judge Advocate of General Styer's headquarters and thereafter by General Styer himself as the reviewing authority in the first instance. After his approval of the finding and sentence of the commission the record was sent to higher headquarters only because the death sentence was involved as a result of General Styer's review action. Thereafter the trial record was again subjected to meticulous review by a board of five senior officers of the Judge Advocate General's Department in General MacArthur's headquarters and subsequently referred to General MacArthur himself with the Board's recommendation that the sentence be approved. Corollary to these review proceedings the legal issues now raised by the author were argued before the nine Justices composing the Philippine Supreme Court and thereafter heard by the eight members of the United States Supreme Bench. Of all of these men who intervened to hear and pass upon one phase or another of the issue of Yamashita's guilt or innocence, the majority of them lawyers themselves, only two supported Yamashita's defense. It is solely upon the views expressed by this small minority of two of more than thirty, neither of whom is now here to correct any misinterpretation of his opinion, that the author at this late date seeks to resurrect the cause of Yamashita's innocence.

In his book he endeavors to palliate, if not actually to justify, the revolting atrocities committed by the Japanese upon non-combatants and our prisoners of war by claiming that Japanese perfidy found its inspiration in American example. In probably his most regrettable passage the author damns his own country by the allegation that, "The charges of brutality by Americans toward Americans that were leveled by both the North and the South after the Civil War do not make pleasant reading. Our callous extermination of American Indian women and children by flame and shot, often preceded by unconscionable betrayal, is part of an ugly picture. But probably the most telling analogy is to be found in American activity in these same Philippine Islands in the early part of the twentieth century. During the bloody 'Philippine Insurrection,' methods of torture were devised and used by Americans in the 'pacification' of the Filipinos that demonstrate that the cruel Japanese Kempeitai were essentially clever imitators ....." And he challenges our air bombardment policy in subduing Japan as "a violation of the letter of the laws of war," asking, "why must we judge our enemies by a different standard." A strange and shocking effort, indeed, to support the record of Japanese brutality, lust and outrage established on Yamashita's trial, and against which even the author takes no exception, at the expense of the American tradition of honor and decency and justice. Isolated instances may have occurred in American history wherein soldiers departed from the high standard of martial honor which has come down as one of our finest traditions, but certainly history points to no such a rampant and reckless abandonment of principle on the part of Americans to warrant the author's contention that the Japanese merely imitated the example Americans previously had set.

Highly questionable as much that the author has said may be, his right to say it is not here in issue. What is in issue is the translation of his book into the Japanese language and its dissemination among the Japanese people. The interest of the United States in the security of the American forces occupying the country render it so. To protect that interest and preserve that security it is essential to guard against inflammatory material designed to arouse irresponsible Japanese elements into active opposition. The book contains just such inflammatory material in its biased and shameless distortion and suppression of the facts in the effort to secure Yamashita's vindication in the minds of its readers. The common sense of the great majority of the Japanese people would reject the false concept it is intended to propagate as they have witnessed at first hand the spiritual qualities of the American soldier and the moral strength and righteousness of American justice. But it is of the irresponsible elements and opposition minorities with which we must concern ourselves. The trial of Yamashita and entire detail of the legal proceedings leading to his execution were widely carried at the time in the Japanese press without the slightest restriction -- hence there is no mere question of censorship involved. Far more than that is involved: the question of American prestige, American dignity, and American security.

We need not consider here the motive which has led to the publisher's

contemptuous public references to the President of the United States and distinguished members of the Senate. Possibly they are intended as a propaganda weapon to arouse the public interest--possibly this view is far too charitable. Suffice it to point out that neither the President nor Senators have had the slightest responsibility to intervene eitheriin the Yamashita trial or in the present efforts to propagate the author's views among the Japanese people.

This Memorandum would be incomplete did it close without mention of the public characterization of the Yamashita trial, conviction, and execution by the publisher as a "judicial lynching". He draws again upon the minority opinion of the late Mr. Justice Murphy for such a startling appraisal. But Mr. Justice Murphy did not so characterize it. He merely warned that "tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow." Chief Justice Stone and a majority of the Court had already adjudged that the concept of due process had not been violated, and had Mr. Justice Murphy intended to stigmatize that same proceeding on which the Supreme Court had just pronounced its judgment as a "judicial lynching" the effect would have been to throw the blame of guilt upon that high tribunal, of which he was a member, as an accessory thereto. It is unbelievable that the learned Justice would have intended this connotation to flow from his remarks--unfortunate that he cannot defend his own dictum against so licentious a misrepresentation.

Together with the advertising material of the publisher, the book is calculated to arouse in the minds of the Japanese doubt as to the moral standards of the American people and to impugn the integrity of the judicial process leading to judgments rendered in the trials for war crimes. The best that can be said for this effort to propagate among the Japanese people the false concept that Yamashita was denied the protection of elementary justice is that it is based upon a profit motive--the worst, that it is intended seriously to impair the American position in the Orient. Regardless, the end result would be the same. Passions of irresponsible elements would be aroused, minorities already in opposition would be strengthened, and American lives might well be the forfeit.

The better to insure that the book and the propaganda efforts of its publisher do not succeed in a perversion of the historical truth, inasmuch as no agency of the United States is official repository of the trial record, there is appended hereto as App. C the formal review thereof by a board of officers consisting of Col. C. M. Ollivetti, J.A.G.D., Col. H. F. Matoon, J.A.G.D., Col. S. F. Cohn, Inf., Lt. Col. Charles P. Muldoon, J.A.G.D., and Major John H. Finger, J.A.G.D., prepared just following the rendition of the commission's judgment.

COURTNEY WHITNEY
Brigadier General, U. S. Army
Chief, Government Section

APPENDIX A

SUPREME COURT OF THE UNITED STATES

Nos. 61 Miscellaneous and 672.--October Term, 1945.

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61 Miscellaneous In the Matter of the Application of General Tomoyuki Yamashita	Motion for leave to file petition for writ of habeas corpus and writ of prohibition and petition for writ of habeas corpus and writ of prohibition.
General Tomoyuki Yamashita, Petitioner, vs. 672 Lieutenant General Wilhelm D. Styer, Commanding General, United States Army Forces, Western Pacific.	On petition for a writ of certiorari to the Supreme Court of the Commonwealth of the Philippines.

(February 4, 1946.)

Mr. Chief Justice STONE delivered the opinion of the Court.

No. 61 Miscellaneous is an application for leave to file a petition for writs of habeas corpus and prohibition in this Court. No. 672 is a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines (28 U. S. C. Sec. 349), denying petitioner's application to that court for writs of habeas corpus and prohibition. As both applications raise substantially like questions, and because of the importance and novelty of some of those presented, we set the two applications down for oral argument as one case.

From the petitions and supporting papers it appears that prior to September 3, 1945, petitioner was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. On that date he surrendered to and became a prisoner of war of the United States Army Forces in Baguio, Philippine Islands. On September 25th, by order of respondent, Lieutenant General Wilhelm D. Styer, Commanding General of the United States Army Forces, Western Pacific, which command embraces the

Philippine Islands, petitioner was served with a charge prepared by the Judge Advocate General's Department of the Army, purporting to charge petitioner with a violation of the law of war. On October 8, 1945, petitioner, after pleading not guilty to the charge, was held for trial before a military commission of five Army officers appointed by order of General Styer. The order appointed six Army officers, all lawyers, as defense counsel. Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged.

On the same date a bill of particulars was filed by the prosecution, and the commission heard a motion made in petitioner's behalf to dismiss the charge on the ground that it failed to state a violation of the law of war. On October 29th the commission was reconvened, a supplemental bill of particulars was filed, and the motion to dismiss was denied. The trial then proceeded until its conclusion on December 7, 1945, the commission hearing two hundred and eighty-six witnesses, who gave order three thousand pages of testimony. On that date petitioner was found guilty of the offense as charged and sentenced to death by hanging.

The petition for habeas corpus set up that the detention of petitioner for the purpose of the trial was unlawful for reasons which are now urged as showing that the military commission was without lawful authority or jurisdiction to place petitioner on trial, as follows:

(a) That the military commission which tried and convicted petitioner was not lawfully created, and that no military commission to try petitioner for violations of the law of war could lawfully be convened after the cessation of hostilities between the armed forces of the United States and Japan;

(b) that the charge preferred against petitioner fails to charge him with a violation of the law of war;

(c) that the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 38th Articles of War (10 U. S. C. Secs. 1496, 1509) and the Geneva Convention (47 Stat. 2021), and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment;

(d) that the commission was without authority and jurisdiction in the premises because of the failure to give advance notice of petitioner's trial to the neutral power representing the interests of Japan as a belligerent as required by Article 60 of the Geneva Convention, 47 Stat. 2021, 2051.

On the same grounds the petitions for writs of prohibition set up that the commission is without authority to proceed with the trial.

The Supreme Court of the Philippine Islands, after hearing argument, denied the petition for habeas corpus presented to it, on the ground, among others, that its jurisdiction was limited to an inquiry as to the jurisdiction of the commission to place petitioner on trial for the offense charged, and that the commission, being validly constituted by the order of General Styer, had jurisdiction over the person of petitioner and over the trial for the offense charged.

In Ex parte Quirin, 317 U. S. 1, we had occasion to consider at length the sources and nature of the authority to create military commissions for the trial of enemy combatants for offenses against the law of war. We there pointed out that Congress, in the exercise of the power conferred upon it by Article I, Sec. 8, Cl. 10 of the Constitution to "define and punish . . . Offenses against the Law of Nations . . .", of which the law of war is a part, had by the Articles of War (10 U. S. C. Sec. 1471-1593) recognized the "military commission" appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war. Article 15 declares that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions . . . or other military tribunals." See a similar provision of the Espionage Act of 1917, 50 U. S. C. Sec. 38. Article 2 includes among those persons subject to the Articles of War the personnel of our own military establishment. But this, as Article 12 indicates, does not exclude from the class of persons subject to trial by military commissions "any other person who by the law of war is subject to trial by military tribunals", and who, under Article 12, may be tried by court martial, or under Article 15 by military commission.

We further pointed out that Congress, by sanctioning trial of enemy combatants for violations of the law of war by military commission, had not attempted to codify the law of war or to mark its precise boundaries. Instead, by Article 15 it had incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis powers were parties.

We also emphasized in Ex parte Quirin, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioner We consider here only the lawful power of the commission to try the petitioner

for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. See Ex parte Vallandingham, 1 Wall. 243; In re Vidal, 179 U. S. 126; cf. Ex parte Quirin, supra 39. They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of the restraint of liberty". 28 U. S. C. Secs. 451, 452. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. See Dynes v. Hoover, 20 How. 65, 81; Runkle v United States, 122 U. S. 543, 555-556; Carter v. McClaughry, 183 U. S. 365; Collins v. McDonald, 258 U. S. 416. Cf. Matter of Moran, 203 U. S. 96, 105.

Finally, we held in Ex parte Quirin, supra, 24, 25, as we hold now, that Congress by sanctioning trials of enemy aliens by military commission for offenses against the law of war had recognized the right of the accused to make a defense. Cf. Ex parte Kawato, 317 U. S. 69. It has not foreclosed their right to contend that the Constitution or laws of the United States withhold authority to proceed with the trial. It has not withdrawn, and the Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.

With these governing principles in mind we turn to the consideration of the several contentions urged to establish want of authority in the commission. We are not here concerned with the power of military commissions to try civilians. See Ex parte Milligan, 4 Wall. 2, 132; Sterling v. Constantin, 287 U. S. 378; Ex parte Quirin, supra, 45. The Government's contention is that General Styer's order creating the commission conferred authority on it only to try the purported charge of violation of the law of war committed by petitioner, an enemy belligerent, while in command of a hostile army occupying United States territory during time of war. Our first inquiry must therefore be whether the present commission was created by lawful military command and, if so, whether authority could thus be conferred on the commission to place petitioner on trial after the cessation of hostilities between the armed forces of the United States and Japan.

The authority to create the Commission. General Styer's order for the appointment of the commission was made by him as Commander of the United States Armed Forces, Western Pacific. His command includes, as part of a vastly greater area,

the Philippine Islands, where the alleged offenses were committed, where petitioner surrendered as a prisoner of war, and where, at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army. The Congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war to which we have referred, sanctioned their creation by military command in conformity to long established American precedents. Such a commission may be appointed by any field commander, or by any commander competent to appoint a general court martial, as was General Styer, who had been vested with that power by order of the President. 2 Winthrop, Military Law and Precedents, 2d ed., *1302; cf. Article of War 8.

Here the commission was not only created by a commander competent to appoint it, but his order conformed to the established policy of the Government and to higher military commands authorizing his action. In a proclamation of July 2, 1942 (56 Stat. 1964), the President proclaimed that enemy belligerents who, during the time of war, enter the United States, or any territory possession thereof, and who violate the law of war, should be subject to the law of war and to the jurisdiction of military tribunals. Paragraph 10 of the Declaration of Potsdam of July 6, 1945, declared that ". . . stern justice shall be meted out to all war criminals including those who have visited cruelties upon prisoners." U. S. Dept. of State Bull., Vol. XIII, No. 318, pp. 137-138. This Declaration was accepted by the Japanese government by its note of August 10, 1945. U. S. Dept. of State Bull., Vol. XIII, No. 320, p. 205.

By direction of the President, the Joint Chiefs of Staff of the American Military Forces, on September 12, 1945, instructed General MacArthur, Commander in Chief, United States Army Forces, Pacific, to proceed with the trial, before appropriate military tribunals, of such Japanese war criminals "as have been or may be apprehended". By order of General MacArthur of September 24, 1945, General Styer was specifically directed to proceed with the trial of petitioner upon the charge here involved. This order was accompanied by detailed rules and regulations which General MacArthur prescribed for the trial of war criminals. These regulations directed, among other things, that review of the sentence imposed by the commission should be by the officer convening it, with "authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed," and directed that no sentence of death should be carried into effect until confirmed by the Commander in Chief, United States Army Forces, Pacific.

It thus appears that the order creating the commission for the trial of petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals for the trial of offenses against the law of war committed by enemy combatants. And we turn to the question whether the authority to create the commission and direct the trial by military order continued after the cessation of hostilities.

An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. Ex parte Quirin, supra, 28. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists --from its declaration until peace is proclaimed. See United States v. Anderson, 9 Wall. 56, 70; The Protector, 12 Wall. 700, 702; McElrath v. United States, 102 U. S. 426, 438; Kahn v. Anderson, 255 U. S. 1, 9-10. The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. See Stewart v. Kahn, 11 Wall. 493, 507.

We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended.[1] In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.[2]

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[1]The Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties of the Versailles Peace Conference, which met after cessation of hostilities in the First World War, were of the view that violators of the law of war could be tried by military tribunals. See Report of the Commission, March 9, 1919, 14 Am. J. Int. L. 95, 121. See also memorandum of American commissioners concurring on this point, id., at p. 141. The treaties of peace concluded after World War I recognized the right of the Allies and of the United States to try such offenders before military tribunals. See Art. 228 of Treaty of Versailles, June 28, 1919; Art. 173 of Treaty of St. Germain, Sept. 10, 1919; Art. 157 of Treaty of Trianon, June 4, 1920.

The terms of the agreement which ended hostilities in the Boer War reserved the right to try, before military tribunals, enemy combatants who had violated

The extent to which the power to prosecute violations of the law of war shall be exercised before peace is declared rests, not with the courts, but with the political branch of the Government, and may itself be governed by the terms of an armistice or the treaty of peace. Here, peace has not been agreed upon or proclaimed. Japan, by her acceptance of the Potsdam Declaration and her surrender, has acquiesced in the trials of those guilty of violations of the law of war. The conduct of the trial by the military commission has been authorized by the political branch of the Government, by military command, by international law and usage, and by the terms of the surrender of the Japanese government.

The Charge. Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war. The charge, so far as now relevant, is that petitioner, between October 9, 1944, and September 2, 1945, in the Philippine Islands, "while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he . . . thereby violated the laws of war."

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command during the period mentioned. The first item specifies the execution of "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity." Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments.

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the law of war. 95 British and Foreign State Papers (1901-1902) 160. See also trials cited in Colby, War Crimes, 23 Michigan Law Rev. 482, 496-7.

[2]See cases mentioned in Ex parte Quirin, supra, p. 32, note 10 and in 2 Winthrop, supra, 1310-1311, n. 5; 14 Op. A. G. 249 (Modoc Indian Prisoners).

It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, Annex to Fourth Hague Convention, 1907, 26 Stat. 2277, 2296, 2303, 2306-7. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

This is recognized by the Annex to Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out". 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, (of the convention) as well as for unforeseen cases." And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals.[3] A like principle has been applied so as to impose liability on the United States in international arbitrations. Case of Jenaud, 3 Moore, International Arbitrations, 3000; Case of "The Zafiro", 5 Hackworth, Digest of International Law, 707.

We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution. There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances.[4] We do not here appraise the evidence on which petitioner was convicted. We do not consider what measures, if any, petitioner took to prevent the commission, by the troops under his command, of the plain violations of the law of war detailed in the bill of particulars, or whether such measures as he may have taken were appropriate and sufficient to discharge the duty imposed upon him. These are questions within the peculiar competence of the military officers composing the commission and were for it to decide. See Smith v. Whiting, supra, 178. It is plain that the charge on which petitioner was tried charged him with a breach of his duty to control the operations of the members of his command, by permitting them to commit the specified atrocities. This was enough to require the commission to hear evidence tending to establish the culpable failure of petitioner to perform the duty imposed on him by the law of war and to pass upon its sufficiency to establish guilt.

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[3]Failure of an officer to take measures to prevent murder of an inhabitant of an occupied country committed in his presence. Gen. Orders No. 221, Hq. Div. of the Philippines, August 17, 1901. And in Gen. Orders No. 264, Hq. Div. of the Philippines, September 9, 1901, it was held that an officer could not be found guilty for failure to prevent a murder unless it appeared that the accused had "the power to prevent" it.

[4]In its findings the commission took account of the difficulties "faced by the accused, with respect not only to the swift and overpowering advance of American forces, but also to errors of his predecessors, weakness in organization, equipment, supply . . . , training, communication, discipline and morale of his troops", and "the tactical situation, the character, training and capacity of staff officers and subordinate commanders, as well as the traits of character of his troops." It nonetheless found that petitioner had not taken such measures to control his troops as were "required by the circumstances". We do not weigh the evidence. We merely hold that the charge sufficiently states a violation against the law of war, and that the commission, upon the facts found, could properly find petitioner guilty of such a violation.

Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment. Cf. Collins v. McDonald, supra, 420. But we conclude that the allegations of the charge, tested by any reasonable standard, adequately alleges a violation of the law of war and that the commission had authority to try and decide the issue which it raised. Cf. Dealy v. United States, 152 U. S. 539; Williamson v. United States, 207 U. S. 425, 447; Glasser v. United States, 315 U. S. 60, 66, and cases cited.

The Proceedings before the Commission. The regulations prescribed by General MacArthur governing the procedure for the trial of petitioner by the commission directed that the commission should 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", and that in particular it might admit affidavits, depositions or other statements taken by officers detailed for that purpose by military authority. The petitions in this case charged that in the course of the trial the commission received, over objection by petitioner's counsel, the deposition of a witness taken pursuant to military authority by a United States Army captain. It also, over like objection admitted hearsay and opinion evidence tendered by the prosecution. Petitioner argues as ground for the writ of habeas corpus, that Article 25[5] of the Articles of War prohibited the reception in evidence by the commission of depositions on behalf of the prosecution in a capital case, and that Article 38[6] prohibited the reception of hearsay and of opinion evidence.

We think that neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for the violations of the law of war. Article 2 of the Articles of War enumerates "the persons . . . subject to these articles," who are denominated, for purposes of the Articles, as "persons subject to military law." In general, the persons so enumerated are

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[5]Article 25 provides: "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, . . . Provided, That testimony by deposition may be adduced for the defense in capital cases."

[6]Article 38 provides: "The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: . . . "

members of our own Army and of the personnel accompanying the Army. Enemy combatants are not included among them. Articles 12, 13 and 14, before the adoption of Article 15 in 1916, made all "persons subject to military law" amenable to trial by courts-martial for any offense made punishable by the Articles of War. Article 12 makes triable by general court martial "any other person who by the law of war is triable by military tribunals." Since Article 2, in its 1916 form, includes some persons who, by the law of war, were, prior to 1916, triable by military commission, it was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles 12, 13 and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered to be its traditional jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles.[7] It declared that "The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that . . . by the law of war may be triable by such military commissions."

By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not apply. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before

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[7]General Crowder, the Judge Advocate General, who appeared before Congress as sponsor for the adoption of Article 15 and the accompanying amendment of Article 25, in explaining the purpose of Article 15, said:

"Article 15 is new. We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, I was afraid that, having made a special provision for their trial by court-martial, (Arts. 12, 13, and 14) it might be held that the provision operated to exclude trials by military commission and other war courts; so this new article was introduced . . . ." (Sen. R. 130, 64th Cong., 1st Sess., p. 40.)

which he was tried, though sanctioned, and its jurisdiction saved by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

Petitioner further urges that by virtue of Article 63 of the Geneva Convention of 1929, 47 Stat. 2052, he is entitled to the benefits afforded by the 25th and 38th Articles of War to members of our own forces. Article 63 provides: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Since petitioner is a prisoner of war, and as the 25th and 38th Articles of War apply to the trial of any person in our own armed forces, it is said that Article 63 requires them to be applied in the trial of petitioner. But we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant.

Article 63 of the Convention appears in part 3, entitled "Judicial Suits", of Chapter 3, "Penalties Applicable to Prisoners of War", of Section V, "Prisoners' Relations with the Authorities", one of the sections of Title III, "Captivity". All taken together relate only to the conduct and control of prisoners of war while in captivity as such. Chapter I of Section V, Article 42, deals with complaints of prisoners of war because of the conditions of captivity. Chapter 2, Articles 43 and 44, relates to those of their number chosen by prisoners of war to represent them.

Chapter 3 of Section V, Articles 45 through 67, is entitled "Penalties Applicable to Prisoners of War". Part 1 of that chapter, Articles 45 through 53, indicates what acts of prisoners of war, committed while prisoners, shall be considered offenses, and defines to some extent the punishment which the detaining power may impose on account of such offenses.[8] Punishment is of

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[8]Part 1 of Chapter 3, "General Provisions", provides in Articles 45 and 46 that prisoners of war are subject to the regulations in force in the armies of the detaining power, that punishments other than those provided "for the same acts for soldiers of the national armies" may not be imposed on prisoners of war, and that "collective punishment for individual acts" is forbidden. Article 47 provides that "Acts constituting an offense against discipline, and particularly attempted escape, shall be verified immediately for all prisoners of war, commissioned or not, preventive arrest shall be reduced to the absolute minimum. . . . Judicial proceedings against prisoners of war shall be conducted as rapidly as the circumstances permit . . . . In all cases the duration of pre-

two kinds--"disciplinary" and "judicial", the latter being the more severe. Article 52 requires that leniency be exercised in deciding whether an offense requires disciplinary or judicial punishment. Part 2 of Chapter 3 is entitled "Disciplinary Punishments", and further defines the extent of such punishment, and the mode in which it may be imposed. Part 3, entitled "Judicial Suits", in which Article 63 is found, describes the procedure by which "judicial" punishment may be imposed. The three parts of Chapter 3, taken together, are thus a comprehensive description of the substantive offenses which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offenses, and of the procedure by which guilt may be adjudged and sentence pronounced.

We think it clear, from the context of these recited provisions, that part 3, and Article 63 which it contains, apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war. Section V gives no indication that this part was designed to deal with offenses other than those referred to in parts 1 and 2 of Chapter 3.

We cannot say that the commission, in admitting evidence to which objection is now made, violated any act of Congress, treaty or military command defining the commission's authority. For reasons already stated we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied. Nothing we have said is to be taken as indicating any opinion on the question of the wisdom of considering such evidence, or whether the action of a military tribunal in admitting

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ventive imprisonment shall be deducted from the disciplinary or the judicial punishment inflicted".

Article 48 provides that prisoners of war, after having suffered "the judicial or disciplinary punishment which has been imposed on them" are not to be treated differently from other prisoners, but provides that "prisoners punished as a result of attempted escape may be subjected to special surveillance". Article 49 recites that prisoners "given disciplinary punishment may not be deprived of the prerogatives attached to their rank." Articles 50 and 51 deal with escaped prisoners who have been retaken or prisoners who have attempted to escape. Article 52 provides: "Belligerents shall see that the competent authorities exercise the greatest leniency in deciding the question of whether an infraction committed by a prisoner of war should be punished by disciplinary or judicial measures. . . . This shall be the case especially when it is a question of deciding on acts in connection with escape. . . . A prisoner may not be punished more than once because of the same act or the same count."

evidence, which Congress or controlling military command has directed to be excluded may be drawn in question by petition for habeas corpus or prohibition.

Effect of failure to give notice of the trial to the protecting power. Article 60 of the Geneva Convention of July 27, 1929, 47 Stat. 2051, to which the United States and Japan were signatories, provides that "At the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the protecting power thereof as soon as possible and always before the date set for the opening of the trial." Petitioner relies on the failure to give the prescribed notice to the protecting power[9] to establish want of authority in the commission to proceed with the trial.

For reasons already stated we conclude that Article 60 of the Geneva Convention, which appears in part 3, Chapter 3, Section V, Title III of the Geneva Convention, applies only to persons who are subjected to judicial proceedings for offenses committed while prisoners of war.[10]

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[9]Switzerland, at the time of the trial, was the power designated by Japan for the protection of Japanese prisoners of war detained by the United States, except in Hawaii. 13 Dept. of State Bull. 122, July 22, 1945.

[10]One of the items of the bill of particulars, in support of the charge against petitioner, specifies that he permitted members of the armed forces under his command to try and execute three named and other prisoners of war, "subjecting to trial without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel; denying opportunity to appeal from the sentence rendered; failing to notify the protecting power of the sentence pronounced; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offense charged." It might be suggested that if Article 60 is inapplicable to petitioner it is inapplicable in the cases specified, and that hence he could not be lawfully held or convicted on a charge of failing to require the notice, provided for in Article 60, to be given.

As the Government insists, it does not appear from the charge and specifications that the prisoners in question were not charged with offenses committed by them as prisoners rather than with offenses against the law of war committed by them as enemy combatants. But apart from this consideration, independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense. 2 Winthrop, supra, *434-435, 1241; Article 84, Oxford Manual; U. S. War Dept., Basic Field Manual, Rules of Land Warfare (1940) par. 356; Lieber's Code, G. O. No. 100 (1863) Instructions for the Government of Armies of the United States in the Field, par. 12; Spaight, War Rights on Land, 462, n.

It thus appears that the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with violation of the law of war, and that the commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command. We have considered, but find it unnecessary to discuss other contentions which we find to be without merit. We therefore conclude that the detention of petitioner for trial and his detention upon his conviction, subject to the prescribed review by the military authorities were lawful, and that the petition for certiorari, and leave to file in this Court petitions for writs of habeas corpus and prohibition should be, and they are DENIED.

Mr. Justice JACKSON took no part in the consideration or decision of these cases.

Further, the commission, in making its findings, summarized as follows the charges, on which it acted, in three classes, any one of which, independently of the others if supported by evidence, would be sufficient to support the conviction: (1) execution or massacre without trial and maladministration generally of civilian internees and prisoners of war; (2) brutalities committed upon the civilian population; and (3) burning and demolition, without adequate military necessity, of a large number of homes, places of business, places of religious worship, hospitals, public buildings and educational institutions.

The commission concluded: "(1) that a series of atrocities and other high crimes have been committed by members of the Japanese armed forces" under command of petitioner "against people of the United States, their allies and dependencies; . . . that they were not sporadic in nature, but in many cases were methodically supervised by Japanese officers and non-commissioned officers (2) that during the period in question petitioner "failed to provide effective control of (his) troops, as was required by the circumstances." The commission said: "Where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them."

The commission made no finding of non-compliance with the Geneva Convention. Nothing has been brought to our attention from which we could conclude that the alleged non-compliance with Article 60 of the Geneva Convention had any relation to the commission's finding of a series of atrocities committed by members of the forces under his command, and that he failed to provide effective control of his troops, as was required by the circumstances; or which could support the petitions for habeas corpus on the ground that petitioner had been charged with or convicted for failure to require the notice prescribed by Article 60 to be given.

APPENDIX B

NOTES ON THE CASE

Case No. 21, Trial of General Yamashita, from Law Reports of Trials of War Criminals, United Nations War Crimes Commission.

It is not proposed in these pages to touch upon all of the many points of legal interest which arose between the commencement of proceedings against Yamashita in Manila and the delivery of judgments by Chief Justice Stone, Mr. Justice Rutledge and Mr. Justice Murphy in the Supreme Court. Attention is to be turned more particularly to the questions of International Law which were involved and, where desirable to a comparative study of international practice on these matters. Among the topics which will not be discussed in this commentary, most of which received extensive treatment during the proceedings and particularly in the judgments delivered by Chief Justice Stone, Mr. Justice Murphy and Mr. Justice Rutledge, are the question of the legal basis in the United States Law and the jurisdiction of the Commission which tried Yamashita, the applicability of the United States Articles of War and of the Fifth Amendment to the United States Constitution and the extent to which the Supreme Court of the United States was legally empowered to review the proceedings and findings of United States Military Commissions. It is proposed to devote attention to the following topics: the legality of the trial of war criminals after the termination of hostilities, the finding that an alleged war criminal is not entitled to the protection of the Geneva Prisoner of War Convention relating to trial, the types of evidence admitted in war crime trial proceedings, the stress placed by the Commission on the need for expeditious procedure, and the responsibility of a commander for offences committed by his troops.

1. THE LEGALITY OF THE TRIAL OF WAR CRIMINALS AFTER THE TERMINATION OF HOSTILITIES.

Chief Justice Stone, in delivering the majority judgment of the Supreme Court, stated that:

> "No writer on International Law appears to have regarded the power of military tribunals, otherwise competent to try violations of the Law of War, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commissions after the cessation of hostilities and before the proclamation of peace, for offences against the Law of War committed before the cessation of hostilities."

The dissenting judges made little objection to this point, although Mr. Justice Rutledge thought that there was less necessity for a military commission to be appointed after active hostilities were over, since "there is no longer the danger which always exists before surrender and armistice.... The nation may be more secure now than at any time after peace is officially concluded."

It has been pointed out that, "In so far as the application of the usages of war to war crimes is concerned, the jurisdiction of the enemy courts only

exists as long as the war lasts. After the war, war crimes can only be prosecuted if they constitute ordinary crimes," and "The most serious shortcoming of customary International Law consists in its limitation for the duration of war of national jurisdiction in war crimes which are not simultaneously ordinary crimes."

The position under customary International Law seems, therefore, to be that whereas (as was recognized by the Supreme Court and by general international practice following the recent war) jurisdiction over war crimes exists without limitation beyond the cessation of fighting and up to the conclusion of peace, jurisdiction continues after this point only over such offences as are also infringements of the municipal law of the state whose courts are trying the alleged offender. Whether an offence fulfils this test of illegality under municipal law will depend upon the laws of each state, and the attitude which these laws reflect to the principle of the territoriality of criminal law.

This position under customary International Law can, of course, be altered by international agreement; "...the belligerents have to make up their mind at the peace conference whether they wish to bury the past by a general amnesty, leave the matter unsettled or institute proceedings in time of peace, a procedure which, as a derogation of customary International Law, requires the sanction of an international agreement between the States concerned." It has thus been possible for the Peace Treaty between the Allied and Associated Powers and Italy to provide, in Article 45, that:

> "1. Italy shall take all necessary steps to ensure the apprehension and surrender for trial of:
>
> (a) Persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity;
>
> (b) Nationals of any Allied or Associated Power accused of having violated their national law by treason or collaboration with the enemy during the war.
>
> "2. At the request of the United Nations Government concerned, Italy shall likewise make available as witnesses persons within its jurisdiction, whose evidence is required for the trial of the persons referred to in paragraph 1 of this Article.
>
> "3. Any disagreement concerning the application of the provisions of paragraphs 1 and 2 of this Article shall be referred by any of the Governments concerned to the Ambassadors in Rome of the Soviet Union, of the United Kingdom, of the United States of America, and of France, who will reach agreement with regard to the difficulty."

The Treaties of Peace with Roumania, Bulgaria, Hungary and Finland contain similar provisions. An interesting passage in the official Commentary by the United Kingdom Foreign Office on the Treaty with Italy runs as follows:

> "The United Nations have concluded certain agreements between themselves for the bringing to justice of war criminals. Italy, once the Peace Treaty comes into force, would be under no obligation to assist in this matter. Provision is thus made in Article 45 that she should assist in the apprehension and surrender both of war criminals and of quislings."

On the related question of permissibility under International Law of continuing, after the conclusion of peace, the operation of sentences passed on war criminals before that event, another learned authority has expressed the following view, which commands general assent:

> "All war crimes may be punished with death, but belligerents may, of course, inflict a more lenient punishment, or commute a sentence of death into a more lenient penalty. If this be done and imprisonment take the place of capital punishment, the question arises whether persons so imprisoned must be released at the end of the war, although their term of imprisonment has not yet expired. Some answer this question in the affirmative, maintaining that it could never be lawful to inflict a penalty extending beyond the duration of the war. But it is believed that the question has to be answered in the negative. If a belligerent has a right to pronounce a sentence of capital punishment, it is obvious that he may select a more lenient penalty and carry it out even beyond the duration of the war. It would in no wise be in the interest of humanity to deny this right, for otherwise belligerents would be tempted always to pronounce and carry out a sentence of capital punishment in the interest of self-preservation."

2. ALLEGED WAR CRIMINALS NOT ENTITLED TO RIGHTS RELATING TO JUDICIAL PROCEEDINGS SET OUT IN THE GENEVA CONVENTION.

There was a division of opinion in the Supreme Court as to the applicability of Part 3 (Judicial Proceedings) of Part III, Section V, Chapter 3 of the Geneva Prisoners of War Convention of 1929 to the trial of a person accused of a war crime as distinct from an offence committed while a prisoner. The view taken by the majority, that the Convention does not apply, has, however, been that followed in the practice of the various states which have held war crime trials in recent years.

This principle is so well established that it has rarely been questioned in war crime trials. It was, however, raised, and decided in the same way as in the Yamashita Trial, in the Dostler Trial and in the Trial of Martin Gottfried Weiss and 39 others by a General Military Government Court at Dachau, 15 November -- 13 December, 1945 (The Dachau Trial). For an interesting decision on the part of the French Cour de Cassation (Court of Appeal), that an alleged war criminal is not entitled to the rights provided for a

prisoner of war under French law reference should be made to the report on the Wagner Trial. The Court ruled that the appellants were not sent as prisoners of war before the Military Tribunal which tried them and regarded as irrelevant the fact that that Tribunal was not composed in the way laid down for the trial of French military personnel and so, in accordance with paragraph 13 of Article 10 of the Code de Justice Militaire, also for the trial of prisoners of war. Paragraph 13 provides that "military tribunals convened for the trial of French military personnel, that is to say according to the rank of the accused." It will be seen that this is an application in terms of French law of Article 63 of the Geneva Convention: "A sentence shall only be pronounced on a prisoner of war by the same tribunals and in accordance with the same procedure as in the case of persons belonging to the armed forces of the detaining Power." In deciding as it did, therefore, the Cour de Cassation tacitly affirmed the principle that the provisions of the Geneva Convention regarding judicial proceedings do not protect any prisoner of war during his trial for alleged war crimes.

In an editorial comment on the Yamashita proceedings, Professor Quincy Wright has made a brief but interesting comment on a separate though related aspect of the matter. He states that, irrespective of the interpretation of Article 63 of the Geneva Convention, "it is to be noted that denial of justice in International Law has frequently been interpreted to require, as a minimum, treatment of aliens equal to that of nationals. It may be questioned, however, whether International Law requires the application of this principle in military commissions. The enemy can, apart from specific convention claim only the international standard even if the national is given more."

3. THE TYPES OF EVIDENCE ADMITTED IN WAR CRIME TRIAL PROCEEDINGS.

In commenting upon the conflict of opinion in the Supreme Court as to the admissibility in war crime proceedings of depositions, affidavits, and hearsay and opinion evidence, Professor Quincy Wright points out that, while the majority opinion of the Supreme Court did not cite international practice on this matter, it is clear "that international tribunals have hesitated to exclude any sort of evidence and the courts in many civilized countries are similarly free in the admission of evidence leaving it to the judges to appreciate the weight that should be attached to the materials. Such evidence has been commonly admitted in military tribunals although in American courts martial certain limitations are imposed by statute. It is not believed that admission of such evidence constitutes a denial of justice in International Law."

A study of the rules and the practice followed in war crime trials by other than United States Military Tribunals does indeed indicate that the tendency to render admissible a wide range of evidence, and to allow the courts then to decide what weight to place on each item is at least in the Anglo-Saxon Countries a general one and is demonstrated not merely in the elastic rules of evidence which are binding on the courts but also by the liberal interpretations placed by the courts on these provisions when points of doubt arise.

The practice of the British Military Courts for instance, is amply demonstrated by the Belsen Trial proceedings, and indeed the decisions of the Court in this trial had a strong influence on the British practice in subsequent trials. The opening words of Regulation 8 (i) of the British Royal Warrant are moreover substantially the same as Article 9 (1) of the Australian War Crimes Act of October 11th, 1945, and the provisions of Regulation 8 (i) as a whole are essentially the same as those of Regulations 10 (1) and (2) reenacted under the Canadian War Crimes Act of 31st August, 1946, it being stated again that it is the duty of the Court to judge the weight to be attached to any evidence given in pursuance of this provision which would not otherwise be admissible.

A few words may be added on affidavit and hearsay evidence in particular. The Defence in the Yamashita Trial directed more objections against affidavits and items of hearsay evidence than against any other type of evidence. It is true that these types of evidence cannot be subjected to cross-examination in the same way as the first hand evidence of a witness in court, yet in these particular aspects also the attitude of the Commission trying the case, and of the draftsmen who produced the regulations which bound its proceedings, is paralleled by the practice of other Anglo-Saxon countries. In the Belsen Trial, for instance, a large number of affidavits were admitted and also much hearsay evidence, including some contained in the affidavits themselves.

During the trial of Erich Killinger and four others by a British Military Court, Wuppertal, 26th November-3rd December, 1945, before the tendering of the affidavit evidence for the Prosecution, the Defence applied for one deponent to be produced in person. The Defence had been given to understand that the British officer in question would be available for questioning. The Court decided, after hearing argument, that the deponent could not be produced "without undue delay" (in the wording of Regulation 8 (i) (a)), and the President of the Court added the significant statement that "we realize that this affidavit business does not carry the weight of the man himself here, as evidence, and when it is read we will hear what objections you have got to anything that the affidavit says, and we will give that, as a Court, due weight." The President's words may fairly be taken as a reference to the fact that if evidence is given by means of an affidavit the person providing the evidence is not present in Court to be examined, cross-examined and re-examined.

Nevertheless, in his summing up, the Judge Advocate in the trial of Karl Adam Golkel and thirteen others, by a British Military Court, Wuppertal, Germany, 15th-21st May, 1946, stressed that: "There is no rule that evidence given in the witness box must be given more weight than evidence, statements, taken on oath outside the court. As I said earlier, take into account all the circumstances...."

The Continental practice tends to prefer not to make special rules of evidence applicable to war crime trials, yet often the result is the same, the Courts not being bound by rules of evidence of a highly technical nature. For instance, the Ordinance of 28th August, 1944, under which trials by French Military Tribunals are held, makes no special provisions regarding

evidence and procedure, and the rules contained in the Code de Justice Militaire, which govern trials of French military personnel, are applied. Article 82 of the Code, on which the Presiding Judge in the Wagner Trial relied in ordering certain documents to be filed with the records of the case, provides however that:

> "The President shall possess a discretionary power over the conduct of the proceedings and the elucidation of the truth.
>
> "He may, during the course of the proceedings, cause to be produced any piece of evidence which seems to him of value in the finding of the facts and he may call, even by means of a summons, any person whom it may seem to him necessary to hear...."

It is also significant that such special rules of evidence as have been made for the conduct of war crime trials by courts set up by continental countries have tended to relax the rules of evidence binding on those courts. Thus, the Norwegian Law No. 2 of 21st February, 1947, which governs the procedure of Norwegian War Crimes Trials, has made, on the matter of evidence, only one departure from the ordinary civil court procedure of Norway, but this provides that, during the main hearing of war crimes cases, previous statements of witnesses, whether given before a court or not, may be read and used as evidence if the statement has been given by a person who has since died or disappeared or whose personal appearance is impossible to arrange or would cause considerable delay or expense. Again, paragraph 28 (1) of the Czechoslovak Law of 24th January, 1946, which concerns the punishment of war criminals and traitors by Extraordinary People's Courts, provides that: "....The examination of the accused and the taking of evidence shall be conducted in general in accordance with the ordinary rules of criminal procedure. Verbatim reports of the interrogation of accomplices and witnesses and the views of experts may be read whenever the president of the senate considers this suitable." Such verbatim reports as those mentioned in the second sentence of this provision would be admissible in other than war crimes proceedings only with the consent of both Prosecution and Defence, if at all.

The Anglo-Saxon drafting technique is reflected in the wording of the Charters of the International Military Tribunals. Article 13 (Evidence) of the Charter of the International Military Tribunal for the Far East provides, inter alia, as follows:

> "a. Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible."

With the exception of the omission of the final sentence, Article 19 of the Charter of the Nuremberg International Military Tribunal has the same wording.

In general it may be said that the rules of evidence applied in war crime trials are less technical than those governing the proceedings of courts conducting trials in accordance with the ordinary criminal law. This is not to say that any unfairness is done to the accused; the aim has been to ensure that no guilty person will escape punishment by exploiting technical rules. The circumstances in which war crime trials are often held make it necessary to dispense with certain such rules. For instance many eye witnesses whose evidence was needed in trials in Europe had in the meantime returned to their homes overseas and been demobilised. To transport them to the scene of trial would not have been practical, and it was for that reason that affidavit evidence was permitted and so widely used.

Furthermore, it should be pointed out that the historic function of many of the stricter rules of evidence such as the rule against heresay was to protect juries from evidence which had not been subjected to cross-examination and the value of which, owing to their inexperience, they might not be able properly to assess. It has been argued with justification, however, that the judges serving on war crime courts are less likely to need such protections than is the average juryman and that many of the stricter rules therefore lose their raison d'etre.

4. THE STRESS PLACED BY THE COMMISSION ON THE NEED FOR EXPEDITIOUS PROCEDURE.

The dissenting judgments of Mr. Justice Rutledge and Mr. Justice Murphy claimed that the trial of Yamashita had been conducted with undue haste and quoted as proof, inter alia, the attitude taken by the Commission to the Defence's repeated requests for a continuance. The Commission made no secret of its desire to conduct the trial as expeditiously as possible, and the following statement made by the President of the Commission on 12th November, 1945, is worth quoting as an indication of this wish:

> "The Commission will grant a continuance only for the most urgent and unavoidable reasons. The trial has now consumed two weeks of time. The Prosecution indicates that this week will be required to finish its presentation. Early in the trial the Commission invited Senior Defence Counsel to apply for additional assistants in such numbers as necessary to avoid the necessity for a continuance. The offer has been extended from time to time throughout the trial. The Commission is still willing to ask that additional counsel be provided for we do not wish to entertain a request for a continuance. The Commission questions either the necessity or desirability for all members of counsel being present during all of the presentation of the case for the Prosecution. We feel that one or two members of the Defence staff in the courtroom is adequate and that the remaining member or members should be out of the courtroom performing specific missions for Senior Counsel. It directs both Prosecution and Defence to so organize and direct the preparation and presentation of their cases, including the use of assistants, to the end that need to request a continuance may not arise.

"As a further means of saving time both Prosecution and Defence are directed to institute procedures by which the Commission is provided essential facts without a mass of non-essentials and immaterial details. We want to know (1) what was done, (2) where it was done, (3) when it was done, (4) who was involved. Go swiftly and directly to the target so the Commission can obtain a clear-cut and accurate understanding of essential facts. Cross-examination must be limited to essentials and avoid useless repetition of questions and answers already before the Commission. We are not interested in trivialities or minutiae of events or opinions. Except in unusual or extremely important matters the Commission will itself determine the credibility of witnesses. Extended cross-examinations which savour of fishing expeditions to determine possible attacks upon the credibility of witnesses serve no useful purpose and will be avoided."

The Pacific Regulations of 24th September, 1945, which governed the proceedings of the Commission, provide, in Regulation 13 (a) and (b) that:

"13. CONDUCT OF THE TRIAL. A Commission shall:

(a) Confine each trial strictly to a fair, expeditious hearing on the issues raised by the charges, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference.

(b) Deal summarily with any contumacy or contempt, imposing any appropriate punishment therefor."

Like the introduction of more elastic rules of evidence into the proceedings of the Commission, this desire for expedition is again not without parallel in other systems of war crime courts; indeed it may be regarded as a characteristic of trials by military tribunals. Article 18 of the Charter of the Nuremberg International Military Tribunal makes the following provisions, which are substantially the same as those of Article 12 (a)-(c) of the Charter of the International Military Tribunal for the Far East:

"Art. 18. The Tribunal shall

(a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,

(b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,

(c) deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without prejudice to the determination of the charges."

No analogous provisions are made in the Regulations governing war crime trials held before British Military Courts, but the following statement made by the Judge Advocate just before the opening of the case for the Prosecution in the Trial of Heinrich Klein and 15 others by a British Military Court at Wuppertal, 22nd-25th May 1946, shows the existence of the same underlying desire to continue justice with expedition:

> "Experience of these courts has shown that trials are taking too long. It is not suggested that there has been any obstruction; on the contrary, the court has much appreciated the assistance and co-operation which it has received from counsel for the defence. It happens, however, inevitably that a large number of accused usually means that there is a considerable amount of repetition. It is therefore necessary for the main defence to be conducted by one counsel on behalf of all. Other counsel will, of course, be permitted to add where they so wish, but it must be clearly understood that the main burden must fall on one counsel, whoever counsel for the defence like to select among themselves. Any further questions or speeches after the leading counsel must be limited to the sole question of the participation of their particular client or degree of responsibility.
>
> "No attempt will be made, of course, to prevent anything being said which is in the interests of justice, but we wish to proceed with the greatest possible speed, because there are large numbers of other persons awaiting trial, and it is unfair that they should be kept in custody without trial longer than can be helped.
>
> "The court feel, therefore, that they can rely upon the help of counsel for the defence in disposing of these cases as quickly as possible."

5. THE RESPONSIBILITY OF A COMMANDER FOR OFFENCES COMMITTED BY HIS TROOPS.

(i) The issue in the Yamashita Trial

Immediately after the hearing of the evidence for the Prosecution, the Defence put forward a plea of no case to answer and asked the Commission to find the accused not guilty. During the ensuing argument, the Prosecutor stated: "The record itself strongly supports the contention or conclusion that Yamashita not only permitted but ordered the commission of these atrocities. However, our case does not depend upon any direct orders from the accused. It is sufficient that we show that the accused "permitted" these atrocities.... With respect to the accused having permitted atrocities, there is no question that the atrocities were committed in the Philippines on a widespread scale; notorious, tremendous atrocities; thousands of people massacred; men, women and children; babes in arms; defenceless, unquestionably non-combatants. Who permitted them? Obviously the man whose duty it was to prevent such an orgy

of planned and obviously deliberate murder, rape and arson — the commander of those troops!"

The main allegation of the Prosecution therefore was that Yamashita was guilty of a breach of the Laws of War in that he permitted the perpetration of certain offences. As has been seen, the Defence denied that this charge constituted an accusation of a breach of the Laws of War, and the discussion in the Supreme Court, in so far as it turned on matters of substantive law, constituted on examination of that denial.

(ii) Liability of Officers for Offences Shown to have been Ordered by Them

There have been many trials in which an officer who has been shown to have ordered the commission of an offence has been held guilty of its perpetration.

One example among many is the trial of General Anton Dostler, by a United States Military Commission, Rome, 8th-12th October, 1945, in which the accused was found guilty of having ordered the illegal shooting of fifteen prisoners of war.

While the principle of the responsibility of such officers is not in doubt, it is nevertheless interesting to note that it has even been specifically laid down in certain texts which have been used as authorities in war crime trials. For instance, paragraph 345 of the United States Basic Field Manual, F.M. 27-10, in dealing with the admissibility of the defence of Superior Orders, ends with the words: "....The person giving such orders may also be punished."

(iii) Liability of a Commander for Offences Not Shown to have been Ordered by Him

The more interesting question, however, is the extent to which a commander of troops can be held liable for offences committed by troops under his command which he has not been shown to have ordered, on the grounds that he ought to have used his authority to prevent their being committed or their continued perpetration, or that he must, taking into account all the circumstances, be presumed to have either ordered or condoned the offences. The extent to which such liability can be admitted is not easy to lay down, either legally or morally.

(iv) A Classification of the Relevant Trials and Legal Provisions

The law on this matter is still developing and it would be wrong to expect to find hard and fast rules in universal application. In the circumstances it is inevitable that considerable discretion is left in the hands of the Courts to decide how far it is reasonable to hold a commander responsible for such offence of his troops as he has not been explicitly proved to have ordered. The relevant trials and municipal law enactments may be classified under the following two categories:

(i) material illustrating how, on proof of certain circumstances, the burden of proof is shifted, so as to place on an accused the task of showing to the satisfaction of the Court that he was not responsible for the offences committed by his troops.

(ii) material actually defining the extent to which a commander may be held responsible for his troops' offences.

The first type of material relates to a matter of evidence, the second type to a matter of substantive law.

(v) Trials and Provisions Relevant to the Question of the Burden of Proof

Of interest in connection with the shifting of the burden of proof are Regulations 10 (3) (4) and (5) of the War Crimes Regulations (Canada), and Regulation 8 (ii) of the British Royal Warrant which makes a provision similar to Article 10 (3) of the Canadian provisions:

> "Where there is evidence that a war crime has been the result of concerted action upon the part of a unit or group of men, then evidence given upon any charge relating to that crime against any member of such unit or group may be received as prima facie evidence of the responsibility of each member of that unit or group for that crime."

The three reports which follow the present report in this Volume are also of interest. During the Trial of Kurt Meyer the Court heard not only a discussion of the effect of Regulation 10 (3) (4) and (5), but also some remarks on the part of the Judge Advocate on the proving by circumstantial evidence of the giving of a direct order. The arguments quoted on pp. 123-4, from the Trial of Kurt Student are of the same kind. Of particular interest is the stress placed on the repeated occurrence of offences by troops under one command as prima facie evidence of the responsibility of the commander for those offences. The Trial of Karl Aauer and Six Others seems to suggest that responsibility may be inferred from surrounding circumstances, including the prevailing state of discipline in an army. It is also worthy of note that the participation in offences of officers standing in the chain of command between an accused commander and the main body of his troops may be regarded as some evidence of the responsibility of the commander for the offences of those troops. (Compare the words of the Commission which tried Yamashita, set out on pages 34 and 35, Case No. 21, Law Reports of Trials of War Criminals, selected and prepared by The United Nations War Crimes Commission, Volume IV). Regulation 10 (5) of the Canadian Regulations makes it possible for a Court to regard even the presence of an officer at the scene of the war crime, either at or immediately before its commission, as prima facie evidence of the responsibility not merely of the officer but also of the commander of the formation, unit, body or group whose members committed the crime.

Regulation 8 (ii) of the British Royal Warrant, like Regulation 10 (3) of the Canadian Regulations, may be applied so as to enable suitable evidence to be introduced as prima facie evidence of a commander's responsibility in the same way as it may be as evidence of the responsibility of any other member of a unit or group. For a discussion during the Belsen Trial of the application of Regulation 8 (ii) and of the possible operation against Kramer,

Kommandant of Belsen Concentration Camp, reference should be made to pages 140-141 of Volume II of this series (Law Reports of Trials of War Criminals selected and prepared by the United Nations War Crimes Commission).

(vi) Trials and Provisions Relevant to the Question of Substantive Law

It is clearly established that a responsibility may arise in the absence of any direct proof of the giving of an order for the commission of crimes. Three trials by United States Military Commissions in the Far East illustrate the principle that a duty rests on a commander to prevent his troops from committing crimes, the omission to fulfil which would give rise to liability. Shiyoku Kou was sentenced to death by a Military Commission in Manila, on 18th April, 1946, after being found guilty of "unlawfully and wilfully" disregarding, neglecting and failing to discharge his duties as Major-General and Lieutenant-General by "permitting and sanctioning" the commission of murder and other offences against prisoners of war and civilian internees.

The second relevant United States Trial is that of Yuicki Sakamoto, held at Yokohama, Japan, on 13th February, 1946. The accused was sentenced to life imprisonment after being found guilty on a charge alleging that he "between 1st January, 1943, and 1st September, 1945, at a prisoner-of-war camp Fukuoka 1, Fukuoka, Kyushu, Japan, did commit cruel and brutal atrocities and failed to discharge his duty as Commanding Officer in that he permitted members of his command to commit cruel and brutal atrocities."

A charge entitled Neglect of Duty in Violation of the Laws and Customs of War was brought against Lt.-General Yoshio Tachibana and Major Sueo Matoba of the Imperial Japanese Army and against Vice-Admiral Kunizo Mori, Captain Shizuo Yoshii and Lt. Jisuro Sujeyoshi of the Imperial Japanese Navy, in their trial by a United States Military Commission at Guam, Marianas Islands, in August, 1946. The Specifications appearing under this charge alleged that various of the above accused unlawfully disregarded, neglected and failed to discharge their duty, as Commanding General and other respective ranks, to control members of their commands and others under their control, or properly to protect prisoners of war, in that they permitted the unlawful killing of prisoners of war, or permitted persons under their control unlawfully to prevent the honourable burial of prisoners of war by mutilating their bodies or causing them to be mutilated or by eating flesh from their bodies. The Prosecution claimed that there had been an intentional omission to discharge a legal duty. All of the accused mentioned above were found guilty of the charge alleging neglect of duty, and although a sentence of life imprisonment was the highest penalty imposed by the Commission on an accused sentenced on this charge alone, the trial does serve as further proof that neglect on the part of a higher officer of a duty to restrain troops and other persons under his control can render the officer himself guilty of a war crime when his omission has led to the commission of such a crime.

Appearing before Australian Military Courts sitting at Rabaul, General Hitoshi Imamura and Lt.-General Masao Baba were found guilty of committing war crimes in that each "unlawfully disregarded and failed to discharge his

duty as a Commander to control the members of his command, whereby they committed brutal atrocities and other high crimes against the people of the Commonwealth of Australia and its Allies." The former accused was sentenced to imprisonment for ten years by a Military Court sitting from 1st to 16th May, 1947; the latter to death by a similar Court sitting from 28th May to 2nd June, 1947. Terms of imprisonment have also been awarded in various other trials before Australian Military Courts in which alleged war criminals were found guilty of offences of the same category.

The principles governing this type of liability, however, are not yet settled. The question seems to have three aspects:

(i) How far can a commander be held liable for not taking steps before the committing of offences, to prevent their possible perpetration?

(ii) How far must he be shown to have known of the committing of offences in order to be made liable for not intervening to stop offences already being perpetrated?

(iii) How far has he a duty to discover whether offences are being committed?

Certain relevant provisions of municipal law exist. Thus, Article 4 of the French Ordinance of 28th August, 1944, Concerning the Suppression of War Crimes, provides that:

> "Where a subordinate is prosecuted as the actual perpetrator of a war crime, and his superiors cannot be indicted as being equally responsible, they shall be considered as accomplices in so far as they have organised or tolerated the criminal acts of their subordinates."

In a similar manner, Article 3 of Law of 2nd August, 1947, of the Grand Duchy of Luxemberg, on the Suppression of War Crimes, reads as follows:

> "Without prejudice to the provisions of Articles 66 and 67 of the Code Penal, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and delicts set out in Article 1 of the present Law: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided these crimes or delicts."

Article IX of the Chinese Law of 24th October, 1946, Governing the Trial of War Criminals, states that:

> "Persons who occupy a supervisory or commanding position in relation to war criminals and in their capacity as such have not fulfilled their duty to prevent crimes from being committed by their subordinates shall be treated as accomplices of such war criminals."

A special provision was also made in the Netherlands relating to the responsibility of a superior for war crimes committed by his subordinates. The Law of July 1947, adds, inter alia, the following provision to the Extraordinary Penal Law Decree of 22nd December, 1943:

> "Article 27 (a) (3): Any superior who deliberately permits a subordinate to be guilty of such a crime shall be punished with a similar punishment as laid down in paragraphs 1 and 2."

It will be seen that the French enactment mentions only crimes "organised or tolerated," the Luxembourg provision only those "tolerated" and the Netherlands enactment only those "deliberately permitted." A reference to an element of knowledge enters into the drafting of each of these three texts.

The Chinese enactment does not define the extent of the duty of commanders "to prevent crimes from being committed by their subordinates," but the extent to which the Chinese Courts have been willing to go in pinning responsibility of this kind on to commanders was shown by the Trial of Takashi Sakai by the Chinese War Crimes Military Tribunal of the Ministry of National Defence, Nanking, 27th August, 1946. The accused was sentenced to death after having been found guilty, inter alia, of "inciting or permitting his subordinates to murder prisoners of war, wounded soldiers and non-combatants; to rape, plunder, deport civilians; to indulge in cruel punishment and torture; and to cause destruction of property." The Tribunal expressed the opinion that it was an accepted principle that a field Commander must hold himself responsible for the discipline of his subordinates. It was inconceivable that he should not have been aware of the acts of atrocity committed by his subordinates during the two years when he directed military operations in Kwantung and Hong Kong. This fact had been borne out by the English statement made by a Japanese officer to the effect that the order that all prisoners of war should be killed, was strictly enforced. Even the defendant, during the trial had admitted a knowledge of murder of prisoners of war in the Stevensons Hospital, Hong Kong. All the evidence, said the Tribunal, went to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war.

It will be noted that the Tribunal pointed out that the accused must have known of the acts of atrocities committed by his subordinates; the question is therefore left open whether he would have been held guilty of breach of duty in relation to acts of which he had no knowledge.

A British Military Court at Wuppertal, 10th and 11th July, 1946, sentenced General Victor Seeger to imprisonment for three years on a charge of being concerned in the killing of a number of Allied prisoners of war; the Judge Advocate said of this accused: "The point you will have to carefully consider - he is not part of any organisation at all - is: was he concerned in the killing, in the sense that he had a duty and had the power to prevent these people being dealt with in a way which he must inevitably have known would result in their death...it is for you with your members, using your military knowledge going into the whole of this evidence to say whether it is right to hold that General Seeger, in this period between, let us say the middle of

August or towards the end of August, was holding a military position which required him to do things which he failed to do and which amounted to a war crime in the sense that they were in breach of the Laws and Usages of War." The Judge Advocate thus made it clear that a commander could be held to have occupied a military position which required him to take certain measures, the failure to take which would amount to a war crime. Yet it seems implicit in the Judge Advocate's words that some kind of knowledge on the accused's part was necessary to make him guilty.

The three trials reported later in this Volume (Volume IV, Law Reports of Trials of War Criminals, selected and prepared by the United Nations War Crimes Commission) also provide, inter alia, some evidence that an accused must have had knowledge of the offences of his troops.

Thus, in the Trial of Student, Counsel and the Judge Advocate spoke in terms of "General Student's general policy," of no bomb being dropped "without Student knowing why" and of the troops believing either that the offences had been ordered by the commander or that their offences would be "condoned and appreciated." It is to be noted that the possibility of Student being made liable in the absence of knowledge, on the grounds that he ought to have found out whether offences were being committed or were likely to be committed, or that he ought to have effectively prevented their occurrence, is not mentioned.

In the Trial of Kurt Meyer, the Judge Advocate stated that anything relating to the question whether the accused either ordered, encouraged or verbally or tacitly acquiesced in the killing of prisoners, or wilfully failed in his duty as a military commander to prevent, or to take such action as the circumstances required to endeavor to prevent, the killing of prisoners, were matters affecting the question of the accused's responsibility.

Here it will be noted that the possibility of a commander being held responsible for offences on the grounds that he ought to have provided against them before their commission is not ruled out.

The Judge Advocate in the Trial of Rauer and Others, however, stated that the words, contained in the charge against Rauer, "concerned in the killing" were a direct allegation that he either instigated murder or condoned it. The charge did not envisage negligence.

The Trial of Field Marshal Erhard Milch by a United States Military Tribunal at Nuremberg, from 2nd January, 1947, to 17th April, 1947, is also of interest in this connection.

The Judgment of the Court on count two, which alleged that the defendant was a principal in, accessory to, ordered, abetted, took a consenting part in and was connected with, plans and enterprises involving medical experiments, without the subjects' consent, in the course of which experiments, the defendant, with others, perpetrated murders, brutalities, curelties, tortures and other inhuman acts, includes the following passage:

> "In approaching a judicial solution of the questions involved in this phase of the case, it may be well to set down seriatim the controlling legal questions to be answered by an analysis of the proof:

(1) Were low-pressure and freezing experiments carried on at Dachau?

(2) Were they of a character to inflict torture and death on the subjects?

(The answer to these two questions may be said to involve the establishment of the corpus delicti.)

(3) Did the defendant personally participate in them?

(4) Were they conducted under his direction or command?

(5) Were they conducted with prior knowledge on his part that they might be excessive or inhuman?

(6) Did he have the power or opportunity to prevent or stop them?

(7) If so, did he fail to act, thereby becoming particeps criminis and accessory to them?"

The Court later expressed the following conclusions, having declared the corpus delicti to be proved:

"(3) The Prosecution does not claim (and there is no evidence) that the defendant personally participated in the conduct of these experiments.

"(4) There is no evidence that the defendant instituted the experiments or that they were conducted or continued under his specific direction or command....

"(5) Assuming that the defendant was aware that experiments of some character were to be launched, it cannot be said that the evidence shows any knowledge on his part that unwilling subjects would be forced to submit them or that the experiments would be painful and dangerous to human life. It is quite apparent from an over-all survey of the proof that the defendant concerned himself very little with the details of these experiments. It was quite natural that this should be so. His most pressing problem involved the procurement of labour and materials for the manufacture of airplanes....

"(6) Did the defendant have the power or opportunity to prevent or stop the experiments? It cannot be gainsaid that he had the authority to either prevent or stop them in so far as they were being conducted under the auspices of the Luftwaffe. It seems extremely probable, however, that

in spite of him, they would have continued under Himmler and the S.S. But certainly he had no opportunity to prevent or stop them, unless it can be found that he had guilty knowledge of them, a fact which has already been determined in the negative....

"(7) In view of the above findings, it is obvious that the defendant never became particeps criminis and accessory in the low-pressure experiments set forth in the second count of the indictment.

"As to the other experiments, involving subjecting human beings to extreme low temperatures both in the open air and in water, the responsibility of the defendant is even less apparent than in the case of the low-pressure experiments...."

It will be seen that the accused was held not guilty of being implicated in the conducting of the illegal experiments referred to because the Tribunal was not satisfied that he knew of their illegal nature; no duty to find whether they had such a nature is mentioned.

Some support is given, however, to the view that a commander has a duty, not only to prevent crimes of which he has knowledge or which seem to him likely to occur, but also to take reasonable steps to discover the standard of conduct of his troops, and it may be that this view will gain ground.

The Supreme Court of the United States held that General Yamashita had a duty to "take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population," that is to say to prevent offences against them from being committed. The use of the terms "appropriate in the circumstances" serves to underline the remark made previously, namely, that a great discretion is left to the Court to decide exactly where the responsibility of the commander shall cease, since no international agreement or usage lays down what these measures are. The Commission which tried Yamashita seemed to assume that he had had a duty to "discover and control" the acts of his subordinates, and the majority judgment of the Supreme Court would appear to have left open the possibility that, in certain circumstances, such a duty could exist. In dissenting, Mr. Justice Murphy expressed the opinion that: "Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different."

Some passages from the judgment of the United States Military Tribunal which tried Karl Brandt and Others at Nuremberg, from 9th December, 1946, to 20th August, 1947, are relevant here. The evidence before the Tribunal had shown that, by a decree dated 28th July, 1942, and signed by Hitler, Keitel and Lammers, Brandt was appointed Hitler's Plenipotentiary for Health and Medical Services, with high authority over the medical services, military and civilian, in Germany. The judgment states:

"Certain Sulfanilamide experiments were conducted at Ravensbruck for a period of about a year prior to August 1943.

These experiments were carried on by the defendants Gebhardt, Fischer, and Oberhauser -- Gebhardt being in charge of the project. At the third meeting of the consulting physicians of the Wehrmacht held at the Military Medical Academy in Berlin from 24th to 26th May, 1943, Gebhardt and Fischer made a complete report concerning these experiments. Karl Brandt was present and heard the reports. Gebhardt testified that he made a full statement concerning what he had done, stating that experiments had been carried out on human beings. The evidence is convincing that statements were also made that the persons experimented upon were concentration camp inmates. It was stated that 75 persons had been experimented upon, that the subjects had been deliberately infected, and that different drugs had been used in treating the infections to determine their respective efficacy. It was also stated that three of the subjects died. It nowhere appears that Karl Brandt made any objection to such experiments or that he made any investigation whatever concerning the experiments reported upon, or to gain any information as to whether other human subjects would be subjected to experiments in the future. Had he made the slightest investigation, he could have ascertained that such experiments were being conducted on non-German nationals, without their consent, and in flagrant disregard of their personal rights; and that such experiments were planned for the future.

"In the medical field Karl Brandt held a position of the highest rank directly under Hitler. He was in a position to intervene with authority on all medical matters; indeed, it appears that such was his positive duty. It does not appear that at any time he took any steps to check medical experiments upon human subjects. During the war he visited several concentration camps. Occupying the position he did and being a physician of ability and experience, the duty rested upon him to make some adequate investigation concerning the medical experiments which he knew had been, were being, and doubtless would continue to be, conducted in the concentration camps."

Similarly, of the accused Handloser, who had been Chief of the Wehrmacht Medical Services and Army Medical Inspector, it is said:

"The entries in the Ding Diary clearly indicate an effective liaison between the Army Medical Inspectorate and the experiments which Ding was conducting at Buchenwald. There is also credible evidence that the Inspectorate was informed of medical research carried on by the Luftwaffe. These experiments at Buchenwald continued after Handloser had gained actual knowledge of the fact that concentration camp inmates had been killed at Dachau as the result of freezing; and that inmates at Ravensbruck had died as victims

of the sulfanilamide experiments conducted by Gebhardt and Fischer. Yet with this knowledge Handloser in his superior medical position made no effort to investigate the situation of the human subjects or to exercise any proper degree of control over those conducting experiments within his field of authority and competence.

"Had the slightest inquiry been made the facts would have revealed that in vaccine experiments already conducted at Buchenwald, deaths had occurred -- both as a result of artificial infections by the lice which had been imported from the Typhus and Virus Institutes of the OKH at Cracow or Lemberg, or from infections by a virulent virus given to subjects after they had first been vaccinated with either the Weigl, Cox-Haagen-Gildemeister, or other vaccines, whose efficacy was being tested. Had this step been taken, and had Handloser exercised his authority, later deaths would have been prevented in these particular experiments which were originally set in motion through the offices of the Medical Inspectorate and which were being conducted for the benefit of the German armed forces.

"These deaths not only occurred with German nationals, but also among non-German nationals who had not consented to becoming experimental subjects."

In like manner it is said that the accused Genzken, who was Gruppenfuehrer and Generalleutnant in the Waffen S.S., "knew the nature and scope of the activities of his subordinates, Mrugowsky and Ding, in the field of typhus research; yet he did nothing to ensure that such research would be conducted within permissible legal limits. He knew that concentration camp inmates were being subjected to cruel medical experiments in the course of which deaths were occurring; yet he took no steps to ascertain the status of the subjects or the circumstances under which they were being sent to the experimental block. Had he made the slightest inquiry he would have discovered that many of the human subjects used were non-German nationals who had not given their consent to the experiments.

"As the Tribunal has already pointed out in this Judgment, 'the duty and responsibility for ascertaining the quality of the consent rests upon each individual who initiates, directs, or engages in the experiment. It is a personal duty and responsibility which may not be delegated to another with impunity.'"

For those and other reasons, each of the three accused named above was found guilty of war crimes and crimes against humanity. Brandt was sentenced to death and the other two to imprisonment for life.

More generally, in connection with the guilt of Handloser and the accused Schroeder (who was also found guilty of war crimes and crimes against humanity and sentenced to life imprisonment) it was recalled that, for the reasons given

by the Supreme Court in the Yamashita proceedings, "the Law of War imposes on a military officer in a position of command an affirmative duty to take such steps as are within his power and appropriate to the circumstances to control those under his command for the prevention of acts which are violations of the Laws of War."

Basing their argument on the words of the Tribunal in the Trial of Karl Brandt and Others, which are quoted above in relation to the guilt of Brandt, Handloser and Genzken, the Prosecution in its opening statement in the Trial of Carl Krauch and Others before a United States Military Tribunal in Nuremberg (The I. G. Farben Trial) made the following claim:

> "Moreover, even where a defendant may claim lack of actual knowledge of certain details, there can be no doubt that he could have found out had he, in the words of Military Tribunal No. 1, made 'the slightest investigation.' Each of the defendants, with the possible exception of the four who were not Vorstand members, was in such a position that he either knew what Farben was doing in Leuna, Bitterfeld, Berlin, Auschwitz, and elsewhere, or, if he had no actual knowledge of some particular activity, again the words of Military Tribunal No. 1, 'occupying the position that he did, the duty rested upon him to make some adequate investigation.' One cannot accept the prerogatives of authority without shouldering responsibility."

It has also been said that an accused may not always rely on the fact that battle conditions prevented him from maintaining control over his troops; their previous training should be such as to ensure discipline. In his editorial comment on the Yamashita proceedings, Professor Quincy Wright has said:

> "The issue is a close one, but it would appear that International Law holds commanders to a high degree of responsibility for the action of their forces. They are obliged to so discipline their forces that members of those forces will behave in accordance with the rules of war even when military circumstances in considerable measure eliminate the practical capacity of the commander to control them."

Yamashita's long years of experience may have constituted a damning factor Had he been an inexperienced officer or immature in years, his liability may have been considered as being proportionately less.

However that may be, there can be no doubt that the widespread nature of the crimes committed by the troops under Yamashita's command was a factor which weighed heavily against the accused. An occasional or solitary act of brutality, rape or murder might, through the exigencies of combat conditions, be easily overlooked by even the most zealous of disciplinarians, and his failure to note or punish that act would not necessarily be considered as showing a lack of diligence on his part. It proved impossible, however, to

escape the conclusion that accused either knew or had the means of knowing of the widespread commission of atrocities by members and units of his command; his failure to inform himself through the official means available to him of what was common knowledge throughout his command and throughout the civilian population, could only be considered as a criminal dereliction of duty on his part. The crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing either prima facie evidence that the accused knew of their perpetration, or evidence that he must have failed to fulfil a duty to discover the standard of conduct of his troops.

Short of maintaining that a Commander has a duty to discover the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded means of knowledge as being the same as knowledge itself. This presumption has been defined as follows:

> "Means of knowledge and knowledge itself are, in legal effect, the same thing where there is enough to put a party on inquiry. Knowledge which one has or ought to have under the circumstances is imputed to him....In other words, whatever fairly puts a person on inquiry is sufficient notice where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. A person has no right to shut his eyes or his ears to avoid information, and then say that he had no notice; he does wrong not to heed to 'signs and signals' seen by him." (39 Am. Jur., pp. 236-237, Sec. 12.)

It is clear that the knowledge that he might be made liable for offences committed by his subordinates even if he did not order their perpetration would in most cases act as a spur to a commander who might otherwise permit the continuance of such crimes of which he was aware, or be insufficiently careful to prevent such crimes from being committed. It is evident, however, that the law on this point awaits further elucidation and consolidation.

(vii) The Problem of the Degree of Punishment to be Applied

Under International Law, any war crime is punishable with death, but a lesser penalty may also be imposed. Thus even where a superior has been held responsible for the crimes of his subordinates he has not always been condemned to death. The punishment meted out, like the question of guilt itself, will depend upon the circumstances of each case. The Convening Authority who reviewed the Trial of Kurt Meyer commuted the death sentence passed on him to one of life imprisonment, on the grounds that Meyer's responsibility did not warrant the extreme penalty. The sentence of death passed on Karl Rauer was also commuted to one of life imprisonment, and the sentence passed on Kurt Student (which was not confirmed) was one of five years' imprisonment. Again, the highest penalty imposed for breach of duty alone in the Trial of Lt.-General Yoshio Tachibana was the sentence of life imprisonment passed on Vice-Admiral Mori.

In the Trial of Oberregierungsrat Ernst Weimann and Others, the Supreme Court of Norway decided that a police chief, who knew that the torture inflicted by his subordinates on Norwegian prisoners was causing deaths, should suffer not death but penal servitude for life on the grounds that he himself took no part in the ill-treatment of prisoners and that the district under his jurisdiction was too wide to allow him to follow each individual case personally. The defendant Weimann came to Norway in July 1944 as chief of the German Sipo in Bergen. He was also in charge of the Aussendienststellen of Hoyanger in Odda, Aardalstangen and Floro. He was charged before the Gulating Lagmannsrett in September 1946, with having given permission for the employment of the method of "verscharfte Vernehmung," an illegal form of torture, in the interrogation of 23 named Norwegian prisoners, one of whom was a woman. In two cases the torture was so severe that the prisoners died from the after-effects of the ill-treatment. The Court found that though he himself had not taken part in the ill-treatment of prisoners, he was a judge by profession and ought to have realised more than anyone how wrong it was to tolerate torture when interrogating prisoners. The Court considered it a particularly aggravating circumstance that despite the fact that two prisoners had died as a result of "verscharfte Vernehmung," the defendant neither changed his methods nor denied his subordinates the use of torture. The Lagmannsrett sentenced this accused to death.

The Supreme Court on appeal (August 1947) altered the sentence to one of penal servitude for life. Judge Berger, delivering the opinion of the majority of the judges, said that though it had been found by the Lagmannsrett that the appellant had been aware of what his subordinates were doing, he himself had never ill-treated any of the prisoners. The appellant was chief of a large district where he was unable to follow each individual case personally. He had been apparently intent on following his own country's interest to the best of his understanding.

APPENDIX C

GENERAL HEADQUARTERS
UNITED STATES ARMY FORCES, PACIFIC
OFFICE OF THE THEATER JUDGE ADVOCATE

JA 201-Yamashita, Tomoyuki,
General, Imperial Japanese Army.

A.P.O. 500,
26 December 1945.

SUBJECT: Review of the Record of Trial by a Military Commission of Tomoyuki Yamashita, General, Imperial Japanese Army.

TO: The Commander-in-Chief, United States Army Forces, Pacific, APO 500.

1. OFFENSES:

a. Charge: Violation of the Laws of War

While commander of Armed Forces of Japan at war with the United States of America and its Allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its dependencies, particularly the Philippines, between 9 October 1944 and 2 September 1945, at Manila and other places in the Philippines (R 31)

Such atrocities are enumerated as Items 1-123 in the Bill of Particulars as discussed in paragraph 2 hereafter, and proof on each of the 90 items on which testimony was adduced is analyzed in detail in the annex to this review

b. Pleas: Not Guilty (R 58)

c. Findings: Guilty (R 4063)

d. Sentence: Death by hanging (R 4063)

e. Maximum Sentence: As a military commission may direct

f. Convening Authority: Lieutenant General W. D. Styer, U.S. Army, commanding United States Army Forces, Western Pacific, who approved the sentence

g. Place of Trial: The High Commissioner's Residence, Manila, P. I. (R 1)

h. Date of Trial: Arraignment 8 October 1945; Trial 29 October 1945 to 7 December 1945 (R 1,62, 4063)

2. PRELIMINARY REMARKS:

This is a trial by military commission. By Letter Order (R 20), file AG 0005 (24 Sept 45) DCS, General Headquarters, United States Army Forces, Pacific, dated 24 September 1945, subject: "Trial of War Criminals", the Commanding General, United States Army Forces, Western Pacific, was authorized to appoint military commissions for the trial of war criminals, and, accordingly, accused, General Tomoyuki Yamashita, was brought to trial before such a commission under charges alleging violation of the Laws of War as above set forth. Accused was arraigned 8 October 1945 and, pursuant to motion of the defense, a Bill of Particulars and later a supplemental Bill were furnished accused, setting forth the details of the 123 atrocities included within the charge, for which accused was alleged to be responsible. The actual trial began 29 October 1945 and ended 7 December 1945. The record consists of 4,063 pages and 437 exhibits. The prosecution introduced competent evidence on 90 of the items of the original and supplemental Bills, establishing the killing by Japanese military and naval personnel operating on land, of more than 30,000 men, women and children throughout the Philippines, without trial or apparent cause, in addition to other thousands of acts of rape, torture, looting, pillaging and destruction of homes, entire villages and other civilian property, as well as the killing and mistreatment of prisoners of war and civilian internees. Because of the exceedingly voluminous character of the testimony, the evidence of these atrocities will be summarized and consolidated in this review, while each of the several items alleged in the Bills of Particulars on which evidence was introduced, together with an analysis of the evidence to support it, is set forth in an annex hereto appended. In summarizing the evidence for the prosecution, consideration will be first given to alleged atrocities against civilians, showing their geographical distribution throughout the Philippines, followed by similar actions against prisoners of war and civilian internees, and finally the evidence of the alleged individual responsibility of the accused for actions committed by his subordinates.

3. EVIDENCE: The competent evidence, therefore, is briefly summarized as follows:

a. Evidence for the Prosecution:

(1) Offenses against Civilians:

MANILA (Items 3, 10, 12, 15, 16, 17, 20, 23, 24, 25, 27, 28, 29, 30, 32, 34, 35, 36, 41, 48, 50, 51, 52, 53, 60, 61, 62, 63, 64, 68, 77, 80, 88, 89, 93, 97, 98, 99, 101, 102, 104, 105)

Upon the approach of the American forces in February 1945, the Imperial Japanese Army and Navy forces killed and wounded great numbers of the people of Manila, destroyed large areas of the city and blew up and burned homes and other private property (R 370, 383, 400, 467, 589, 676, 769, 778, 1094, 1103, 1107; Ex 82, 91, 92, 93, 119, 124, 131, 153, 157, 162, 192), fortified and defended hospitals and churches, forcing the Americans to attack and destroy these buildings in order to drive out the Japanese armed forces (R 572, 1259, 1292). Other religious and charitable institutions were deliberately destroyed by explosives and fire (R 179, 185, 1258, 1282, 2048, 2054; Ex 15), as were public buildings of no military value (R 1188, 1200). Over 8,000 men, women and children, all unarmed, non-combatant civilians, were killed and over 7,000 mistreated, maimed and wounded without cause or trial (R 212, 271, 348, 370, 412, 429, 445, 587, 606, 669, 717, 743, 778, 806, 871, 1147, 1159, 1197, 1200, 1222, 1262, 1270, 1299, 1370, 2211, 2223).

The Japanese considered all Filipinos, including women and children, as guerrillas, and ordered them put to death upon advance of the Americans on Manila (R 2905, 2906; Ex 392). The orders prescribed the procedure to be followed: the victims were to be gathered in a house or other place, killed with the least expenditure of ammunition and manpower, and the bodies disposed of by burning with the building or being thrown into a river (R 2909, 2910; Ex 393). These orders were carried out and supervised by officers of the Imperial Japanese Army and Navy (R 136, 204, 223, 264, 267, 346, 588, 716, 740, 767, 777, 831, 833, 1139, 1143, 1260, 2152, 2168, 2345). In two instances, the Japanese officers stated to their victims that they were acting pursuant to orders of higher authority (R 833, 2174).

In the mass of the 44 atrocities revealed by the evidence, there appeared a similarity of pattern and an orderliness and dispatch in execution. In the first place, the reign of terror broke out suddenly, lasted a short period, principally from 6 to 20 February 1945, and followed the standard procedure prescribed in orders. The victims were rounded up at a central place, usually a house or larger building (R 190, 410, 429, 450, 463, 587, 606, 715, 738, 767, 775, 797, 823, 2167; Ex 131), where they were bayoneted, beheaded, burned or otherwise killed with the minimum expenditure of ammunition (R 148, 192, 271, 283, 348, 405, 410, 453, 587, 621, 717, 745, 779, 798, 833, 1134, 1197, 2151, 2168; Ex 126). The bodies were then disposed of by throwing into a river (R 806, 865) or burning with a house or building (R 467, 607, 639, 768, 778, 1188, 1200, 1237; Ex 91, 92, 93, 114, 124) or burying in mass graves (R 2152). Further evidence of prior planning was the advance preparation of the sites of the atrocities, as for example, having strings installed to set off explosives (R 445, 477), holes cut in the floor for bodies to fall through (R 823), mass graves dug (R 2151, 2268) and gasoline ready for burning bodies and buildings (R 467, 589, 669, 768, 778).

Throughout this period, individual Japanese and groups of Japanese indulged in acts of bestiality and sadism. Hundreds of women and girls were raped (R 293, 302, 318, 366, 508, 513, 536, 551, 669, 676, 1252, 1276, 1291, 2045, 2052), breasts and genitals of females were hacked off or abused (R 385, 519, 670, 763; Ex 77, 82) and dead bodies of women were violated (R 318). Babies were thrown into the air and spitted on bayonets (R 483, 1169). Men and women, without cause, were beaten with clubs and gun butts, burned, hung by the limbs, blinded and given the "water cure" (large quantities of water being forced through the mouth and nostrils) (R 871, 873, 883, 901, 2216). Looting and pillaging often accompanied these atrocities (R 1254, 1257, 1291).

BATANGAS PROVINCE, LUZON ISLAND (Items 1, 43, 44, 45, 47, 49, 54,57)

More than 16,000 unarmed, non-cambatant civilians, including large numbers of women and children, were killed in Batangas Province from November 1944 to April 1945 (R 1510, 1534, 1547, 1568, 1580, 1594, 1601, 1740, 1770, 1805, 1829, 1846, 1855). In addition to bayoneting, shooting and burying the victims alive, the Japanese forced 300 men to jump by small groups into a well 30 meters deep, after which many were shot and heavy weights were dropped on them (R 1493-1498). In another instance, 300 to 400 unarmed civilians were forced into a room, bayoneted and shot, after which kerosene was poured on the bodies and they were set on fire (R 1768, 1769). In addition, women were raped (R 2179), two pregnant women were assaulted and an unborn child was ripped from its mother's body (R 2186, 2197), and the tongue of one male civilian was cut out (R 2179). While the killing of only 4,000 persons was directly proved as being caused by the Japanese (R 1510, 1534, 1547, 1568, 1580, 1740, 1805, 1829, 1846, 1855), the places, time and circumstances of the remaining 12,000 deaths from other than natural causes, indicate that they were caused by the same agency, i. e., the Japanese (R 1594, 1601, 1602, 1841).

Accompanying these massacres were numerous cases of pillaging (R 1766, 1776, 1815) and wanton destruction of private, public, and religious property without military necessity (R 1559, 1588, 1592, 1624, 1648, 1661, 1671, 1738, 1740, 1833, 1849, 2190). Several entire barrios were burned to the ground. Lipa (population 45,000), Santo Tomas (100 houses) and Tanauan (1,602 houses) were almost entirely destroyed by the Japanese (R 1588, 1592, 1833, 1849, 2200).

The following evidence indicates a deliberate plan of extermination: most of the atrocities were committed during a short period in February 1945 (R 1491, 1506, 1515, 1524, 1533, 1546, 1556, 1621, 1628, 1647, 1652, 1655, 1661, 1671, 1707, 1710, 1714, 1736, 1737, 1739, 1764, 1775, 1783, 1799, 1813, 1839, 2182) and were carried on under the supervision of Japanese officers (R 1510, 1518, 1521, 1767, 1770, 1811, 1820, 1822) following the same procedure of concentrating the population of a town or barrio at a convenient place and killing them in an orderly manner (R 1491, 1506, 1515, 1524, 1534, 1707, 1710, 1714, 1764, 1775, 1801, 1813). The large scale upon which attempts were made to exterminate the male population of some places (R 1534, 1547, 1770) and the wanton killing of women and children (R 1510, 1568, 1581, 1740, 1805, 1829, 1846, 1855) indicate

an intention to wipe out the people of the province. The deliberate destruction of whole towns and barrios was also a part of this plan (R 1588, 1592, 1628, 1648, 1652, 1661, 1671, 1739, 1833, 1849).

Although in a few specific instances the witnesses failed to give the branch of service of the Japanese perpetrators (R 1737, 1754, 2187), it was clearly proved that the mass of atrocities was committed by officers and soldiers of the Imperial Japanese Army (R 1770, 1781, 1802, 1815, 1829, 1833, 2182). Batangas Province, during this period, was under the control of the Fuji Heidan Headquarters, the 17th Infantry Regiment and the military police, all components of the army (R 1487, 1488; Ex 284).

BULUCAN PROVINCE, LUZON ISLAND (Item 82)

Five hundred men of the village of Polo were gathered up by Japanese soldiers on 10 December 1944, some of them were beaten, a few released and the rest executed at the cemetery (R 2352-2356). On the same day, 200 men of the town of Obando were also mistreated and executed at the hands of the Japanese army, navy and military police (R 2363-2365). On 7 February 1945, 29 men, women and children of Obando were killed by bayoneting, among them a 19 day old baby and a young woman who was first raped and disemboweled (R 2369-2374), and on 25 February, at the same place, several women and children were killed (R 2365) and a boatload of civilians on a river passing through Obando were fired on by the Japanese. Some drowned and those who did not were bayoneted, only one escaping (R 2374, 2375).

CAGAYAN PROVINCE, LUZON ISLAND (Part of Item 72)

Thirty miles east of Aparri at the barrio of Tapel on 30 June 1945, Japanese soldiers fired on five unarmed Filipinos in a boat, killing one and wounding two, bayoneted and killed three men and women after first tying them to a tree, blinded two men by grenade fragments and injured three others by saber and bayonet cuts, and disposed of ten or twelve other bodies in wells. Women were taken to the Japanese command post and did not return (R 2057-2062).

CAVITE PROVINCE, LUZON ISLAND (Items 66, 84, 85, part of 72)

On 16 and 17 December 1944, Japanese military police gathered 12 citizens of Imus, including four doctors (R 2430-2433, 2436-2438, 2442-2443) and 23 men of Dasmarinas, guerrilla suspects, tortured them and later executed them in the cemetery without trial (R 2439, 2440, 2444, 2449, 2456, 2459-2465, 2472). Some were cruelly beaten, given the "water cure" and burned on the feet while suspended from the ceiling (R 2434, 2438-2439, 2448-2449, 2456, 2457). Other citizens, including a woman, were also tortured but not executed (R 2448, 2454, 2455). At Tagatay on 29 January 1945, 50 to 60 unarmed men, women and children were bound and held all day in a private house by Japanese soldiers who later took them out one by one, asked them if they were guerrillas and receiving a negative response, undressed them laid them face down, pounded them on the back with pieces of wood, cut them with a sharp bolo knife and swung them over a steep cliff, 43 to 45 deaths resulting (R 2140-2149).

LAGUNA PROVINCE, LUZON ISLAND (Items 55, 56, 58, 105, part of 72)

On six different occasions from 21 February to 6 March 1945, Japanese officers, soliders and military police gathered together and killed by bayoneting, a total of about 264 men, women and children from different barrios of Los Banos (R 1874-1890, 2378-2393), and even earlier, on 3 February, about 300 burned bodies and skeletons were found in and about the chapel at the College of Agriculture (R 2386, 2387). More than 2,500 men, women and children of Calamba were killed by bayoneting or burning on a single day, 12 February 1945 (R 1977, 1979, 1981, 1985, 1992, 1999, 2004, 2008, 2012), at which time numerous houses were burned (R 1981, 1985, 2005, 2010, 2013). All male residents of San Pablo between the ages of 15 and 50, 6,000 to 8,000 in all, were assembled in a local church on 24 February 1945 (R 2064, 2065, 2069). The 700 Chinese among those assembled were taken out, forced to dig large trenches and under the supervision of officers were bayoneted to death and thrown into the trenches (R 2070, 2072, 2083), some being beheaded by the officers (R 2084, 2088). The following day, five patients were taken from the local hospital by the Japanese soldiers and beheaded while on their stretchers (R 2090, 2091). All inhabitants of another town, presumably Anilao, were killed during the month of February by one Japanese unit, which looted quantities of food, money and civilian goods (R 2893). Under the directions of a captain, 60 Japanese soldiers bound and bayoneted to death over 32 men, women and children at Pingus on 9 April 1945 (R 1894, 1901). Three soldiers at that time looted a private house and attempted to rape one female civilian (R 1892).

LA UNION PROVINCE, LUZON ISLAND (Item 90)

About 150 residents of the barrio of Negros, San Fernando, La Union, on 18 January 1945, 50 of the barrio of Casilogon, San Juan, on the same day, and 600 of the barrio of Dalayap, San Fernando, La Union, on 26 January 1945, were gathered up by the Japanese and killed by bayoneting, beheading and striking on the head (R 2338-2343), the barrios of Casilogon and Dalayap both being burned (R 2341, 2343).

MOUNTAIN PROVINCE, LUZON ISLAND (Items 114, 115, 116, part of 72)

A group of 16 men and 67 women and children on their way from Birak Mines to the lowlands in search of food on 18 April 1945 were seized by 30 Japanese soldiers under the command of two officers (R 2656, 2657, 2661). The men were tied in groups of four each, led 50 yards away, blindfolded, bayoneted and thrown into a ditch (R 2657, 2658). Despite screams of protest, the same treatment was given the women and children who were not blindfolded (R 2659). Only one of the entire group survived (R 2660).

A larger group of 315 men, women, and children, also on a journey to the lowlands in search of food, from Samayao on 10 April 1945, were relieved of all their possessions by Japanese soldiers (R 2314-2315, 2327-2332) who again separated the men from the women and children and took them to the side of a mountain where they were killed by being struck in the neck (R 2329). The women and children were taken family by family

to the mountain and despite urgent protests were told it was "Yamashita's order to kill" (R 2317, 2324), and without reason were blindfolded, struck on the neck and rolled down the hill (R 2319, 2333, 2337). Only two to four of the entire group survived (R 2320, 2321, 2330).

Seven civilians were apprehended by 1,000 soldiers of the Japanese Tiger Unit (R 2507) at the village of Nanipil, Mountain Province, on 15 April 1945, and on pleading ignorance to questions concerning guerrillas' activities were "boxed", slapped and tied to a tree (R 2502, 2503) and the next day witnessed the soldiers machine gun and set fire to 30 houses of the village (R 2505). They were then taken to Titig Mountain where they were beheaded and fell or were pushed over the side (R 2506). One escaped fatal injury.

NUEVA VISCAYA PROVINCE, LUZON ISLAND (Items 11, part of 72)

During December 1944, 30 civilian prisoners at Bayombong garrison in Viscaya were taken to previously prepared graves and executed by bayoneting (R 2404-2408), many having previously been tortured by the "water cure" or whipped (R 2405, 2406). One woman prisoner was repeatedly raped (R 2411, 2412).

At Bagabag Ferry on 17 December, the Japanese commander, after calling a meeting of all men of 15 years of age or over, selected about 25 with the help of a Filipino collaborationist, tied them up and killed 21 by bayoneting and shooting (R 2413, 2414).

ALBAY PROVINCE, BATAN ISLAND (Items 117, 119, 121)

About 80 unarmed, non-combatant, allegedly pro-American sympathizers were arrested and confined by the Japanese at Basco, Batan Island, from early May to about 1 September 1945 (R 2631, 2632, 2634, 2635). Some were tortured by being hung from the rafters and having small quantities of flaming liquid applied to their skin, others suffered broken hands and lost their eyes, and at least 74 were killed (R 2629, 2631, 2634, 2635).

CEBU PROVINCE, CENTRAL PHILIPPINES (Item 112)

Four Japanese soldiers at Cebu City on 26 March 1945, raped several civilian girls 13 to 19 years of age (R 2038, 2039), then killed 12 members of their family, including women and children, by bayoneting and burning, and finally destroyed the house by fire (R 2032-2035).

CITY OF DAVAO PROVINCE, MINDANAO ISLAND (Item 118)

Two days after a warning by a Japanese captain to the inhabitants of Davao City on 13 May 1945 that the Americans were coming and all civilians would be killed (R 2931-2933), Japanese army and navy personnel killed by bayoneting and beating 166 inhabitants of one barrio, including women and small children (R 2933-2940).

CITY OF ILOILO PROVINCE, PANAY ISLAND, CENTRAL PHILIPPINES (Item 123)

Four Filipino civilians were bayoneted and killed by Japanese soldiers at Iloilo from 8 to 13 January 1945, one after being thrown in the air and kicked and another following his request for sugar from a Japanese captain (R 2157-2164). Another was shot and killed by Japanese soldiers on 21 March when he mistook the soldiers for guerrillas and shouted, "Victory Parade." (R 2160-2161).

LEYTE PROVINCE, CENTRAL PHILIPPINES (Item 11)

At the barrio of Dapdap, Ponson Island, on 29 December 1944, 300 civilians were assembled in a church by Japanese soldiers, where 100 were singled out, bayoneted and machine gunned, 60 dying from wounds received (R 2474-2481, 2495, 2496; Pros Ex 331). Elsewhere in the village, 300 other civilians, including many children, were murdered and several wounded in their houses or in the vicinity of the church (R 2481, 2483-2488, 2496-2498; Pros Ex 334, 335).

(2) Offenses against Prisoners of War and Civilian Internees (Items 2, 4, 6, 7, 9, 13, 69, 73, 76, 83, 86, 87, 89, 94, 95, 109, 122);

During the period October 1944 to February 1945, thousands of American and British prisoners of war and civilian internees, including women and children, were confined in Old Bilibid Prison, Santo Tomas University and Fort McKinley, Manila, and other prisoner of war and civilian internee camps in Cabanatuan and Los Banos, Luzon, and Puerto Princesa, Palawan, P. I. Large numbers were crowded together in poorly constructed and highly inflammable nipa and sawale huts and their only facilities for drinking water or latrines were self-provided (R 1913-1933). Many slept on floors without mattresses or blankets and lacked sanitary facilities and medical supplies (R 2640). In some instances, medical supplies originally were provided once a month; in 1943 they were provided only upon request and finally not at all (R 2647). In other instances, quinine was furnished on rare occasions but short of that no other medical supplies or equipment were issued and outside purchases were not permitted (R 1351-1382, 2789-2790). Frequently, Japanese soldiers removed nearly all medical supplies from the few Red Cross packages permitted to reach the camps (R 2789-2802). A room in General Yamashita's headquarters was seen piled to the ceiling with Red Cross packages, many of which had been opened and rifled (R 1458). From October 1944 to February 1945 at Santo Tomas University, no doctors or nurses were provided but three American army doctors, prisoners of war, were permitted to operate a hospital in the University compound (R 1366). Diabetes and dysentery were prevalent and there were many deaths from disease and malnutrition (R 1468, 1861, 1914). The American army doctors were not permitted to give malnutrition as a cause of death (R 1468, 1861). Up to October 1944, a daily food ration having 1,000 to 1,100 calories per person per day was provided (R 1439). It could be supplemented by outside purchases with Red Cross funds and vegetables raised in small gardens, but there is at least one instance on record when the vegetables were confiscated (R 1354-1386, 1931). After October 1944, the daily food ration deteriorated rapidly (R 1356). First

it was reduced to two meals per day and thereafter progressively reduced until it consisted of only between 400 and 600 calories per person per day (R 1356, 1439). By November 1944, rice reserves became exhausted, for the most part it became palay, or unhulled rice, and no purchases from the outside were permitted (R 1362-1391, 1470-1483, 1931). Meals consisted of no more than a watery, starchy substance and in some instances a spoonful of dried fish (R 2837). As a result, the prisoners of war and civilian internees became very weak, most of them weighing less than 100 pounds, and ate pigeons, cats and rats when they could catch them (R 2643). During December 1944 and again in January 1945, garbage was made available to eat, and Japanese soldiers stood around and laughed as the prisoners of war and internees fought for it (R 2642-2643). Rotten meat filled with maggots was provided on occasion, and at Fort McKinley 400 prisoners of war were forced to go one to two days without water and were reduced to eating grass and sticks dug up in their inclosure (R 2756-2758). At Santo Tomas University, Japanese guards and civilians received a much better ration than the prisoners of war and civilian internees there and appeared better fed (R 1386, 1419-1470). On 23 December 1944, four internees, Grinnell, Duggleby, Larson and Johnson, were arrested, one was tortured and subsequently all were beheaded (R 1369, 1370, 1414-1417).

On 28 December 1944, about 37 United States civilian internees, including women and children, and all their baggage, were moved in one truck from Camp Holmes to Old Bilibid Prison, a distance of about 175 miles (R 2782-2786). No more than three stops were made enroute for food or relief. There were two cases of dysentery in the group and in neither case was the internee given an opportunity to get off the truck (R 2783). Many of the prisoners of war and civilian internees were slapped and required to stand at attention or were forced to kneel on concrete floors for long periods of time by the Japanese guards (R 2838). Some were beaten with pick-handles, and others were compelled to work on military installations, in the construction of air fields or the loading and unloading of ships with ammunition and bombs (R 2806, 2807).

On about 15 December 1944, in Old Bilibid Prison, two scarcely recognizable, thin and frail American navy fliers were executed without trial (R 2267-2294). On 28 January 1945, at Los Banos, a civilian internee was walking toward camp between the two barbed wire fences surrounding it and without warning or challenge was shot by a Japanese guard. Although wounded, he was dragged to the guardhouse and with no semblance of trial was again shot through the head at the camp commandant's order (R 1939-1941, 1950).

On 14 December 1944 at Puerto Princesa, Palawan, a Japanese lieutenant ordered 150 United States prisoners of war into three air raid shelters (R 2709). Shortly afterwards, Japanese soldiers began firing into them, poured in buckets of gasoline which they set on fire and when the prisoners of war tried to escape, they were shot down and most of them killed with rifle and machine gun fire or bayoneted and clubbed (R 2710-2714). At another time, a Japanese soldier progressively poured gasoline on the feet, hands and body of a wounded prisoner of war and lit it while the Japanese soldier's companions stood by and laughed and while the prisoner of war pleaded to be shot (R 2718-2723).

On 13 December 1944, 1,619 officers and enlisted men, prisoners of war, were crowded into the hold of the Japanese steamship "Oryoku Maru" (R 2838-2868). They were so crowded they had to remain in a sitting position without freedom of movement (R 2840-2869). They were not fed (R 2853). Five-gallon cans were provided for urinals and latrines which were not permitted to be emptied and, as a result, spilled all over the holds (R 2839-2869). Canteens and mess gear also had to be used for urinals and latrines, and in many instances afterward used for drinking and eating (R 2844). Many went mad, slit each others' throats and sucked warm blood from their victims (R 2844). The ship was not marked as a prisoner of war transport and was heavily armed with antiaircraft guns. As a result, it was damaged and ultimately sunk by American aircraft, and many prisoners of war were lost (R 2860). As they scrambled out of the holds, they were machine gunned and bayoneted (R 2860-2861). The survivors were gathered at Olangapo, near Subic Bay, Luzon, and during their six-day stay there were given thirteen spoonsful of raw rice containing rocks, sticks and dirt (R 2849-2862). Several were shot as they attempted to salvage food from the ship (R 2849, 2862).

On 21 March 1945, two American fliers who had been captured at Talisay, Cebu, were taken with their hands tied behind their backs to a foxhole. Both were forced to a kneeling position, were struck on the neck by a Japanese sergeant with a large sword in the presence of a Japanese captain, lieutenant, four sergeants and a corporal, and the lieutenant fired three shots into the body of one. Later, the other one succeeded in getting out of the foxhole and asked for water. He was forced back into it; whereupon a Japanese soldier placed wood on top of it, poured in gasoline and set it on fire, burning the aviator to death (R 2120, 2133).

On or about 20 November 1944, three American fliers, on a mission to bomb the Japanese fleet, were shot down north of Luzon and made their way to Batan Island in a rubber boat. There they were captured and turned over the the Japanese by the natives. After being held for a time, they were taken out, tied to a tree, bayoneted and buried alive (R 2588, 2610).

(3) Accused's Responsibility:

During the period 9 October 1944 to 3 September 1945, General Tomoyuki Yamashita was the Japanese Supreme Commander in the Philippines, under Count Terauchi, the Supreme Southern Commander (R 930, 1013, 2695, 3520). He was the Commanding General of the Japanese 14th Army Group (also referred to as the 14th Area Army) and, in addition, had command of all the Kempei Tai (military police) in the Philippines (R 105, 2255, 2272, 3593). The prisoner of war and civilian internment camps were under his control through the commanding general of war prisoners (R 3588; Ex 7).

At first there were a number of Japanese forces in the Philippines which were not under his command, such as the 4th Air Army, the 3rd Maritime Transport Command, 30,000 troops directly under Imperial Headquarters and the Southern Command, and the naval forces (R 3521, 3525, 3589) but these later were consolidated under him. About the first of December 1944, the 30,000 Imperial Headquarters and Southern Army troops were assigned

to him (R 3525). The 4th Air Army came under his control on 1 January 1945 (R 2676, 3525, 3589). By the middle of February, the 3rd Maritime Transport Command came under Yamashita (R 3525).

The army forces in Manila and southern Luzon were formed into the Shimbu (mixed) group about 26 December 1944 and command of this group given to Lt. Gen. Shizuo Yokoyama (R 2664, 3621). The group consisted of 45,000 troops (R 2664), including the Fuji Heidan of 6,000 troops in Batangas and part of Laguna, under the immediate command of Col. Masatoshi Fujishige (R 2810, 2811).

On 6 January 1945, about 20,000 naval land forces in the Manila area were assigned to the army for tactical command only during land fighting (R 2535, 2536, 2538, 3526, 3588). These naval forces included marines and Noguchi units from the Kobayashi group, and were under the immediate command of Rear Admiral Iwabuchi (R 2538, 2543, 2673). Disciplinary power over these forces remained in the naval commander, Admiral Okoochi, and was exercised through Iwabuchi (R 2545). The army actually began to exercise command over these naval forces about 1 February (R 2668, 2671, 2672). Yamashita commanded these naval troops through Yokoyama's Shimbu group (R 2675).

The prosecution introduced the following evidence on the issue of the direct responsibility of accused as distinguished from that incident to mere command. Accused testified that he had ordered the suppression or "mopping up" of guerrillas (R 2811, 3545, 3547, 3578; Ex 353). About the middle of December 1944, Colonel Nishiharu, the Judge Advocate and police officer of the 14th Army Group, told Yamashita that there was a large number of guerrillas in custody and there was not sufficient time to try them and said that the Kempei Tai would "punish those who were to be punished." To this Yamashita merely nodded in apparent approval (R 3762, 3763, 3814, 3815). Under this summary procedure over 600 persons were executed as "guerrillas" in Manila alone between 15 and 25 December 1944 (R 3763). In that same month, by a written order, Yamashita commended the Cortbitarte (Manila) Kempei Tai garrison for their fine work in "suppressing guerrilla activities" (R 905, 906). The captured diary of a Japanese warrant officer assigned to a unit operating in the Manila area contained an entry dated 1 December 1944, "Received orders, on the mopping up of guerrillas last night***it seems that all the men are to be killed. ***Our object is to wound and kill the men, to get information and to kill the women who run away." (R 2882; Ex 385).

Throughout the record, evidence was presented in the form of captured documents and statements of Japanese made in connection with the commission of atrocities, referring to instructions to kill civilians. During the Paco massacre in Manila 10 February 1945, a Japanese officer said to his intended victims, "You very good man but you die," and, "Order from high officer kill you, all of you," (R 833). On 10 April 1945, during the murder of civilians near Samuyao, a Japanese soldier said, "It was Yamashita's order to kill all civilians," (R 2317). At Dy Pac Lumber Yard, Manila, on 2 February 1945, the Japanese captain in charge said that this killing was "an order from above" (R 2174). At Calamba, Laguna, in February 1945, the killings were "by order of the Army" because the people were "anti-Japanese" (R 2893, 2894). On 19 February 1945, prior to the massacre at

Los Banos, the Japanese garrison commander told the mayor of Los Banos that the Filipinos were double-crossers and deserved to be killed. The Japanese officer then told the mayor to prepare a list of 50 pro-Japanese civilians and all the other Filipinos would be killed (R 2396). A captured order to a machine gun company states, "There will be many natives along our route from now on. All natives, both men and women, will be killed," (R 2895).

Captured notes of instructions by Colonel Masatoshi Fujishige, commander of the Fuji Heidan, to officers and non-commissioned officers of a reconnaissance unit contained the following, "Kill American troops cruelly. Do not kill them with one stroke. Shoot guerrillas. Kill all who oppose the Emperor, even women and children," (R 2812). Colonel Fujishige was under the command of Yamashita through General Yokoyama (R 2811).

Evidence in the form of captured documents was introduced to show that before and during the battle of Manila the following orders were issued by the Japanese forces: An operations order of the Manila Navy Defense Force and Southwestern Area Fleet directed that when Filipinos are to be killed consideration must be given to saving ammunition and manpower and because disposal of dead bodies is troublesome they should be gathered into houses which are scheduled to be burned or destroyed (R 2909). An order of the Kobayashi Heidan group, 13 February 1945, directed that all people on the battlefield in or around Manila, except Japanese and Special Construction Units (Filipino collaborators) would be put to death (R 2905, 2906; Ex 404). (Note: The Kobayashi group, which included the Manila Navy Defense Force, was commanded for land operations by Yamashita through General Yokoyama (R 2538, 2673, 3622)). A "top secret" order by Yamashita as Commanding General, Shobu Army Group, dated 15 February 1945, stated, "The Army expects to induce and annihilate the enemy on the plains of Central Luzon and in Manila. The operation is proceeding satisfactorily." (R 122; Ex 6). "Shobu" was the code name of the 14th Army Group (Ex 3, 4, 5).

The prosecution introduced two witnesses, Narciso Lapus and Joaquin S. Galang, who were currently detained by the United States Government as suspected collaborators (R 912, 1058; Def Ex A-H). Both these men previously had offered to exchange information as to Japanese and Filipino collaborators in return for their freedom, but both swore that they had received no promise of reward for their testimony in this case (R 913, 1059).

Lapus testified that from June 1942 to December 1944 he was private secretary to General Artemio Ricarte, an important Filipino puppet of the Japanese (R 917, 923). He further testified that one day in October 1944, Ricarte returned to his residence and told the witness that he, Ricarte, had just had a meeting with Yamashita who had said, "We take the Filipinos 100 per cent as our enemies because all of them, directly or indirectly, are guerrillas or helping the guerrillas," and, "In a war with the enemies, we don't need to give quarters. The enemies should go," (R 938). Yamashita revealed his plan to allow the Americans to enter Manila, then counter-attack and destroy the Americans and also the Filipinos in Manila (R 939, 1023). He further said that he had instructions to destroy Manila, particularly the most populated and commercial district of the city (R 939). Ricarte stated that Yamashita had said he had ordered that when the population gave signs of pro-American movement or

actions, the whole population of that place should be wiped out (R 940). Ricarte later told the witness that when Ricarte, in November 1944, asked him to revoke this order, Yamashita said, "The order was given and could not be changed," (R 947).

The witness Galang testified that he was present and overheard a conversation between Yamashita and Ricarte, in December 1944 (R 1063, 1068, 1069). The conversation was interpreted by Ricarte's 12 year old grandson, Yamashita speaking Japanese which the witness did not understand and the interpreter translating into Tagalog which the witness did understand (R 1065, 1068). When asked by Ricarte to revoke his order to kill all the Filipinos, Yamashita became angry and spoke in Japanese which was interpreted into Tagalog as, "The order is my order. And because of that it should not be broken or disobeyed. It ought to be consummated, happen what may happen," (R 1069). (Note: The defense introduced Bislummo Romero, the 13 year old grandson of Ricarte, who said he had never interpreted between his grandfather and Yamashita, and specifically denied interpreting the conversation testified to by Galang (R 2014, 2021).)

b. Evidence for the Defense:

Accused was advised of his rights as a witness and elected to testify in substance that on 9 October 1944, nine days before American forces landed on Leyte, he was assigned as commanding general of the Japanese 14th Area Army and charged with the defense of the Philippines (R 3518-3519). He was not supreme commander in the Philippines since Count Terauchi, Commander-in-Chief of the Japanese Southern Army, held that status until 30 August 1945, and maintained headquarters in Manila until 17 November 1945, when he moved to Saigon, French Indo-China (R 3520). When accused took over command of the Japanese 14th Area Army, there were 120,000 Japanese troops on Luzon and 100,000 on Mindanao. On 22 October 1945, by direction of the Japanese Southern Army, accused sent 50,000 Japanese troops to Leyte to assist the Japanese navy and air corps in the defense of that island (R 3523-3524). When, on about 7 December 1944, he realized the battle for Leyte was lost, his next problem was the defense of Luzon, and at his request, from the beginning of December 1944 to the middle of February 1945, the Japanese Southern Army added to his command the following troops in Luzon not previously under him: 30,000 troops from the Japanese Southern Army and Imperial General Headquarters at the beginning of December; the 4th Air Army on 1 January; Japanese navy troops for tactical purposes when engaged in land operations only as of 6 January (but actually on 3 February); and the 3rd Maritime Transport Command in the middle of February (R 3524-3526, 3588). At its peak, his command reached 240,000 troops in Luzon and included 160 coastal ships, prisoner of war and civilian internee camps and the Kempei Tai or military police (R 3524-3526, 3585-3593). Prisoner of war ships or shipments did not come under his command until the middle of January 1945 (R 3542).

The Japanese 14th Area Army contained only infantry and had very little artillery support (R 3127). The population of Manila was so large it was impossible to feed it; the buildings were highly inflammable and the land was flat and impossible to defend (R 3527). As a result, on or about 6 December 1944, accused drew up a plan, which received the approval of the Japanese Southern Army, to take Manila out of the battle area and, using a delaying action, withdraw his forces to the mountains north and east of the city (R 3524-3527, 3669).

Pursuant thereto, about the middle of December 1944, he issued the necessary orders to evacuate the city and ordered his chief of staff to inform the 4th Air Army and the navy of his decision (R 3630). During December 1944 or January 1945, no known defenses were constructed in the city, but he maintained Japanese troops there for defense against airborne attack (R 3631, 3670). Only about 1,500 Japanese army troops remained in the city during the Battle of Manila and they were used to guard military supplies, protect the supply route, control traffic and obtain oil (R 3528). When, on 13 February 1945, he heard the greater part of the navy troops remained in the city, he sent an order for their immediate evacuation, but he did not receive a direct reply to his order (R 3529-3534). His telephone and wireless communication systems had broken down and it took from two days to two weeks to get a message through to different headquarters (R 3123, 3387). He specifically related:

> "I never heard about any of the killings. *** I was constantly under attack by large American forces *** under pressure day and night *** and it took all of my time and effort. *** I was not able to make a personal inspection. *** The troops were scattered about a great deal. *** Communications were very poor. *** I was forced to confront the superior United States forces with subordinates whom I did not know and with whose character and ability I was unfamiliar. *** I found myself completely out of touch with the situation. *** If I could have foreseen these things, I would have concentrated all my efforts toward preventing it."*** (R 3654-3656)

Although the attitude of the Filipino civilians was one of increasing hostility (R 3574), he did not, though in violation of duty, investigate their conditions at any time (R 3583, 3584) nor did he ever inspect prisoner of war or civilian internment camps (R 3537), even though one was located at his headquarters (R 3573), nor receive reports of prisoner disposal submitted to his own headquarters (R 3612, 3613) or reports from the military police as to their methods or personnel held in their custody (R 3592). At no time did he order, receive any report or acquire any knowledge whatever of any mistreatment or killing of civilians, American prisoners of war or civilian internees by the military police or any of his subordinates (R 3534, 3536, 3540, 3541, 3543, 3551, 3646, 3647). Although he heard reports of guerrilla activities and directed their suppression or "mopping up" (R 3545, 3547, 3578), he did not authorize or receive reports of execution of suspected guerrillas by the military police (R 3552).

He was responsible for enforcing regulations concerning military trial (R 3877, 3878, 3882) though he could not change them as to their procedure (R 3873). Sentences of death by court-martial or other military tribunal in the 14th Area Army required his approval (R 3590, 3591, 3865, 3866), though execution of such sentences of the 35th Army and the Shimbu group could be ordered by their own commander (R 3869, 3870). There were no trials of prisoners of war or civilian internees in his command while in the Philippines (R 3590, 3591) but he approved about 40 death sentences concerning guerrillas (R 3868). He was never advised that a large number of persons suspected as guerrillas were held by the Kempei Tai or that there was insufficient time to give them a trial or that their cases were disposed of without trial (R 3592, 3871). While a commanding officer must so control his troops that they do not commit atrocities, unless he has ordered, permitted or condoned the offenses he has no criminal responsibilities and if he has taken necessary precautions, then he is subject to no more than administrative punishment (R 3650, 3652, 3653, 3674). His first notice of the commission of any atrocities charged was his receipt of charges at New Bilibid prison (R 3556), although if he had known he would have taken every possible preventative and punitive measure (R3558). He was completely absorbed by the operational command of preparing to confront superior United States forces (R 3583, 3584); communications were poor; he was unfamiliar with the character and ability of his subordinates; because of the day and night pressure consuming all of his time he was completely out of touch with the situation (R 3654-3657).

Lt. Gen. Muto, Chief of Staff, corroborated accused's testimony, emphasizing the difficulty of maintaining personal contact with troops and their conduct (R 2998, 3013, 3020, 3021, 3025) and the attendant necessity of relying on reports of subordinates which disclosed no abuses or violations of Laws of War (R 3019).

The defense of Manila, guerrilla activities and treatment of prisoners of war and civilian internees were the subjects of additional defense evidence.

The Noguchi detachment of 1,800 which remained during the Battle of Manila (R 3113) was dispersed at five central points in the city (R 3114). It constructed a few pillboxes but prepared no other means of defense except the placing of dynamite on two bridges pursuant to directions (R 3141) and was not ordered to destroy buildings (R 3130) or even to occupy Manila (R 3127). Its mission included the maintenance of order, protection of supplies, prevention of atrocities (R 3114) and mopping up of guerrillas (R 3137). Shortly after a premature contact with the Americans on 3 February (R 3119), which was not expected by Japanese intelligence until 20 February (R 3117), communications became poor (R 3120, 3123, 3124) and while attempting to evacuate the city the troops were engaged and cut off at the Paco Station by the United States forces (R 3125). No reports of atrocities committed in the city of Manila were ever received by Colonel Noguchi, commander of the detachment (R 3124). The United States ATIS never intercepted an order by the accused directing the destruction of Manila or the killing of prisoners of war or non-combatant civilians (R 3393) even though the method of issuance would ultimately result in the production of a large number of written copies, as the immediate sub-

commander, after oral receipt from General Yamashita, would reduce the order to writing and pass it down through the chain of command (R 3394).

Widespread guerrilla activities of well-organized units numbering at least 300,000 in the Central Luzon area and centered in Manila persisted from 1942 to the time of the surrender (R 3437, 3443, 3447). Their underground activities and repeated attacks on Japanese supply lines and personnel (R 3440, 3447) even included an attempt to blow up General Yamashita's headquarters (R 3044, 3045), culminating in the issuance of the suppression order (R 3036).

Four defense witnesses and a commission witness, Lt. Gen. Kou, commander of prisoner of war and civilian internee camps under General Yamashita, testified that food rations of American prisoners and civilian internees, although greatly curtailed by absolute necessity during at least some of the internment period, did not differ from those issued to Japanese soldiers (R 3222, 3223, 3271, 3348, 3349). Some of the Japanese were better off, however, because they had other outside sources of food (R 3374, 3375). Difficulties were caused by lack of fuel for transportation and enemy and guerrilla attacks on supply lines (R 3189, 3192, 3219), the food situation being bad everywhere, even in General Yamashita's headquarters (R 3195). Primary responsibility was in the camp commanders, not General Yamashita, who, however, had the overall responsibility (R 3251, 3252). Grinnell, Duggleby, Larson and Johnson, the American internees at Santo Tomas under General Kou's command, were turned over by him to the Kempei Tai late in December, though he thought for investigational purposes (R 3311, 3312, 3366-3368).

As to treatment of American prisoners aboard the "Oryoku Maru" (Item 83), though the room given them was uncomfortable and too small, there was no ventilation when the hatch was closed (R 3326, 3327) and the ship was unmarked (R 3331), they had the same accomodations as Japanese soldiers (R 3341). Loading, unloading and guarding of the prisoners were General Kou's responsibilities (R 3326, 3328, 3329), while furnishing of food and accomodations were duties of the captain of the ship, not at that time under the command of Kou (R 3341). Both accused and General Muto stated that the prisoners killed at Palawan were assigned to the 4th Air Army, which did not come under accused's command until 1 January 1945 (R 3029, 3541).

Some eight character witnesses, military and civilian, called by the accused, testified to his soundness of character as a man (R 3454, 3483, 3495, 3510), his firmness and fairness as a disciplinarian (R 3454, 3469, 3483) and his ability and energetic leadership as a soldier (R 3490, 3496), that he was well thought of by his people (R 3490), was without political ambitions (R 3490, 3511, 3515, 3516) and was a moderate as distinguished from a radical (R 3500, 3501, 3516).

4. DISCUSSION:

a. Jurisdiction

There can be no reasonable question as to the jurisdiction of the military commission which tried the accused, both over the offense charged against him and his person. The authority of the theater commander to appoint military commissions exists as a necessary consequence of the power to wage war, the commission being an instrumentality for the more efficient execution of the war powers vested in Congress and the president as commander-in-chief (Winthrop "Military Law and Precedents", 1920 Reprint, page 831). The jurisdiction of such tribunals to try enemy officers and soldiers for violation of the Laws of War has long been recognized. The fundamental source of the authority is International Law and would exist even in the absence of constitutional provisions (United States v. Curtis Wright Corp, 299 US 304, 318 (1926); Dig Op JAG, 1912, pages 1066-1067; Rules of Land Warfare, FM 27-10, par 7). In addition, Congress has recognized the jurisdiction of military commissions by mention thereof in 11 of the Articles of War (AW 15, 23-27, 38, 80, 82, 115) without however defining their jurisdiction or power. The enactment of these Articles of War, while it recognizes the legality of military commissions leaves untouched the traditional power of such bodies in time of war to try and sentence enemy personnel accused of violations of the Laws of War. Under such authority, as it long has existed, the power to appoint such commissions has ordinarily been exercised in the Army of the United States by the same officers as are authorized by Article of War 8, to convene courts-martial (Winthrop, page 835). Since both the Commander-in-Chief, who authorized the court's appointment, and the Commanding General, United States Army Forces, Western Pacific, possess such power, the validity and jurisdiction of this particular commission over this case is thus established. In any event, the matter is now pending before the Supreme Court of the United States on an application for writ of habeas corpus and other relief, filed by the accused, whose decision on the matter will probably finally determine all jurisdictional questions herein.

b. Sufficiency of the Charge

There can be equally little doubt that the charge is sufficient, read in conjunction with the items of the Bill of Particulars, aptly to charge violation of the Laws of War. The gist of the offense is that accused wrongfully failed to discharge his duty as a military commander to control the members of his command, permitting them to commit the atrocities alleged. The doctrine that it is the duty of a commander to control his troops is as old as military organization itself and the failure to discharge such duty has long been regarded as a violation of the Laws of War. In the Annex to the Hague Convention No. IV of October 18, 1917, embodying the regulations respecting the laws and customs of war on land, adopted by that Convention, we find:

> "The laws, rights and duties of war apply not only to armies but to militia and volunteer corps fulfilling the following conditions:
>
> 1. To be commanded by a person responsible for his subordinates." (FM 27-10, Rules of Land Warfare, Sec 9)

Thus, a necessary prerequisite of the right of an army to conduct hostilities is the requirement that it be commanded by an officer responsible for its actions. It must, however, be conceded that only rarely, if at all, has punishment for failure to exercise control been meted out to an individual commander. Expiation for such failure has, in the past, customarily been required only of the belligerent power itself under the provisions of Article 3, Hague Convention No. IV, 1917, respecting the laws and customs of war on land, which provides:

> "A belligerent party which violates the provisions of said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."

But since the duty rests on a commander to protect by any means in his power both the civil population and prisoners of war from wrongful acts of his command and since the failure to discharge that duty is a violation of the Laws of War, there is no reason, either in law or morality, why he should not be held criminally responsible for permitting such violations by his subordinates, even though that action has heretofore seldom or never been taken. The responsibility of the commander to control his troops is well understood by all experienced military men, including accused, who admitted in writing in open court that failure to discharge such duty would be culpable (R 3674). The accused should thus not be heard to complain of being held criminally responsible for such violation, particularly in view of the solemn warnings given the Axis powers by the Government of the United States on the outbreak of hostilities that all those responsible for war crimes, either directly or indirectly, would be held accountable (Congressional Record, 9 March 1943, page 1773). It should be borne in mind that International Law is not a static body of definite statutes but a living, growing thing. By solemn pronouncement, the United Nations gave warning that a new era had arrived with respect to the conduct of all persons, even high commanders, in their methods of waging war. In the enlightened and newly awakened conscience of the world, there is nothing either legally or morally wrong in now holding to strict accountability not only those who by their own acts violate the laws of humanity, but also those who knowingly or negligently permit such acts to be done. It is only by so holding commanders that any forward progress toward decency may be expected.

c. Procedure

The procedure under which the commission conducted the trial was proscribed by directive of General Headquarters, United States Army Forces, Pacific, by Letter Order dated 24 September 1945, file AG 000.5, Subject: "Regulations Governing the Trial of War Criminals". While these regulations established a fair basis for the trial, they varied in some important respects from those governing trials by courts-martial, particularly with respect to the admissibility of evidence, concerning which it was provided:

"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."

Under this directive, the commission accepted hearsay testimony, ex parte affidavits, reports of investigation, official motion pictures and documents which could not ordinarily have been received by a court-martial but which, in the mind of the commission, had probative value. This method of procedure is assigned as error but the contention is without merit. It has long been recognized that military commissions are not bound by ordinary rules of evidence but in the absence of any statutory directive or instructions from higher authority may prescribe their own rules so long as they adhere to the elementary principles of fairness inherent in Anglo-Saxon procedure (Winthrop, page 841; FM 27-5, par 38; Fairman "Law of Martial Rule", 2nd Ed, pages 264, 265). The defense on the other hand insists that in enacting the 11 Articles of War above cited, Congress did so limit the procedure of the commission. However, the Judge Advocate General in a long and well considered opinion addressed to the director of the War Crimes Office, Washington, D. C., a copy of which is on file with the War Crimes Branch of this headquarters, has recently ruled that the Articles of War above mentioned have no relation to the trial of enemy war criminals and places no limitations upon the procedure of the commission in this case. In view of this opinion, extended discussion of the reason therefor is unnecessary except to comment that the procedure in the instant case is in the main the same as that followed in the celebrated Saboteur Case (Ex parte Quirin 317 US 1), the legality of the trial in which was upheld by the Supreme Court. It follows that under established precendents the procedure in the instant case was correct, and since a careful reading of the record of trial discloses that the instructions of General Headquarters were carefully followed, accused procedurally had a fair trial.

d. Sufficiency of the evidence to support the findings .

The elements of the offense charged against accused may be stated as follows: (1) that the atrocities were committed as alleged in the Bill of Particulars (2) by members of accused's command; and (3) that accused unlawfully disregarded and failed to discharge his duty as commander of armed forces of Japan to control the operations of the members of his command, permitting them to commit such atrocities.

The evidence of the atrocities alleged in the ninety different specifications on which proof was adduced is clear, complete, convincing and, for the most part, uncontradicted by the defense. Throughout the islands, which were laid waste by an unparalleled burning and destruction of entire villages, homes, churches, hospitals and schools, all without military

justification, its people, including thousands of women and children, were tortured, starved, beaten, bayoneted, clubbed, hanged, burned alive and subjected to mass executions rarely rivalled in history, more than 30,000 deaths being revealed by the record. Prisoners of war and civilian internees suffered systematic starvation, torture, withholding of medical and hospital facilities and execution in disregard of the rules of international law. The defense, while conceding the commission of atrocities, offered evidence tending to establish that many, though not a substantial portion, resulted from guerrilla activity. The frailty of this defense is revealed by executions of countless women and children, who, though in isolated instances engaged in guerrilla tactics, did not do so in large numbers or pursuant to plan, and by the systematic putting to death with indescribable bestiality of little girls and boys only months oreven days old. Furthermore, the alleged "guerrillas" were rarely accorded a trial as required by international law (FM 27-10, par. 351), and even that right when granted was wholly technical, as the suspects were not allowed to be represented by counsel, to testify or offer evidence on their own behalfs, at trials none of which lasted more than five minutes (R 2264, 2285). Though not denying the mistreatment, torture, murder or other violations of the laws of war with respect to American prisoners and civilian internees, and while not pretending that they were well fed, the accused claims that the Japanese themselves received the same rations. There is, however, substantial evidence of their systematic starvation while Japanese guards were well fed, and even when the rations were the same the Japanese frequently had outside sources of food unavailable to those held by them.

It is also abundantly proved that the atrocities were committed by members of the accused's command. By his own testimony he assumed command of the 14th Area Army, embracing all of the Philippines, on 9 October 1944, and while his jurisdiction did not at first include the 4th Air Army some 30,000 troops directly under Count Terauchi, the Supreme Southern Commander, and the 3rd Maritime Transport Command, these troops successively came under his jurisdiction so that by 6 January he had under him all land troops in the Philippines and the tactical control of all naval forces fighting on land. By the 15th of February he also took over the 3rd Maritime Transport Command. During the entire time he controlled, through intermediate commanders, prisoner of war and civilian internee camps and the military police. Most of the atrocities occurred after 6 January, and on analysis it appears that all earlier ones were committed in areas occupied exclusively by troops under the accused's command. No issue is tendered on this question except with respect to the Palawan incident involving 150 prisoners of war (Item 9) and the mistreatment of prisoners aboard the Oryoku Maru (Item 83), concerning which it is insisted that the troops committing these atrocities were not under accused's jurisdiction. It is unnecessary to decide the issue on these two cases in view of the over-whelming number of other atrocities concerning which there is no question but that they were committed by accused's troops.

The only real question in the case concerns accused's responsibility for the atrocities shown to have been committed by members of his command. Upon this issue a careful reading of all the evidence impels the conclusion that it demonstrates this responsibility. In the first place the atrocities were so numerous, involved so many people, and were so widespread that accused's professed ignorance is incredible. Then, too, their manner of commission reveals a striking similarity of pattern throughout. Shortly before the arrival of American forces in each area civilians were rounded up in a central place where they were bayoneted, beheaded or otherwise killed with a minimum expenditure of ammunition and the bodies buried or disposed of in rivers, by burning in houses or burying in mass graves. In many instances there was evidence of prearranged planning of the sites of the executions. Almost uniformly the atrocities were committed under the supervision of officers or noncommissioned officers and in several instances there was direct proof of statements by the Japanese participants that they were acting pursuant to orders of higher authorities, in a few cases Yamashita himself being mentioned as the source of the order. There was also a similarity of method in cases involving prisoners of war and civilian internees. All this leads to the inevitable conclusion that the atrocities were not the sporadic acts of soldiers out of control but were carried out pursuant to a deliberate plan of mass extermination which must have emanated from higher authority or at least had its approval. Evidence in the form of captured diaries and documents also indicates that the executions of civilians were ordered by higher command. For example, captured notes and instructions by Colonel Fujishige, one of accused's subordinates, contained the following: "Kill American troops cruelly. Do not kill them with one stroke. Shoot guerrillas. Kill all who oppose the Emperor, even women and children" (R 2812). Especially noteworthy was an order of the Kobayashi Group, commanded by accused through General Yokoyama. This order was found in the Manila area and directed that all people on the battlefield in and around Manila, except Japanese and special construction units, be put to death (R 2905, 2906, Ex. 404). This group was commanded by a major general and the source of the order therefore comes high in the chain of command, close to the accused himself. From the widespread character of the atrocities as above outlined, the orderliness of their execution and the proof that they were done pursuant to orders, the conclusion is inevitable that the accused knew about them and either gave his tacit approval to them or at least failed to do anything either to prevent them or to punish their perpetrators. Accused himself admitted that he ordered the suppression or "mopping up" of guerrillas (R 2811, 3545, 3578, Ex. 353) and that he took no steps to guard against any excesses in the execution of this order. One cannot be unmindful of the fact that accused, an experienced officer, in giving such an order must have been aware of the dangers involved when such instructions were communicated to troops the type of the Japanese.

There was some evidence in the record tending to connect accused even more directly with the commission of some of the atrocities. His own Staff

Judge Advocate, Colonel Nishiharu, told him that there was a large number of guerrillas in custody and not sufficient time to try them and said that the Kempei Tai "would punish those who were to be punished". To this proposition that guerrillas thus to be executed without trial accused merely nodded in apparent approval (R 3762, 3763, 3814, 3815). In addition some significance may be given to the testimony of the witness Joaquin S. Galang who in December heard accused tell Ricarte, the celebrated collaborationist, through an interpreter, a 14-year old boy and grandson of Ricarte, in speaking of the alleged order to kill Filipinos in Manila, "The order is my order and because of that it should not be broken or disobeyed" (R 1069, 2014). While this evidence is somewhat weakened by proof that the witness who so testified was a confirmed collaborationist himself, and by the denial of the grandson that he interpreted the conversation, it cannot be wholly disregarded since it is entirely consistent with what later transpired in Manila. Accused stoutly insists that he knew nothing of any of the atrocities and assigns as the reason for his lack of knowledge the complete breakdown of the communications incident to the swift and overpowering advance of the American forces and to his complete preoccupation with plans for the defense of the Philippines. He states that his troops were disorganized and out of control, leaving the inference that he could not have prevented the atrocities even had he known of them. With respect to Manila, he insists that he had only tactical command of naval troops operating in the city and although he had authority to restrain such troops committing disorders, he could not discipline them, the situation being thus complicated by dual control between himself and the Navy. Here in particular the defense witnesses testified to a breakdown of communications with the forces in Manila. While, however, it may be conceded that the accused was operating under some difficulty due to the rapidity of the advance of the Americans, there was substantial evidence in the record that the situation was not so bad as stated by the accused. General Yokoyama admitted that he had communication with troops in Manila until 20 February and with the accused until June and made frequent reports to him (R 2674). Surely a matter so important as the massacre of 8,000 people by Japanese troops must necessarily have been reported. Since accused had authority to control the operations of the naval troops he cannot absolve himself of responsibility by showing that others had the duty of punishing them for disorders. There is no suggestion as to any breakdown in communications with Batangas where late in February some of the most widespread atrocities occurred, nor is there any substantial proof that communications with the other points in the islands at which atrocities occurred were at all interrupted. It is also noteworthy that the mistreatment of prisoners of war at Ft. McKinley occurred while accused was present in his headquarters only a few hundred yards distant and some of the other atrocities transpired close to the proximity of Baguio where he had his headquarters after removal from Manila. Taken all together, the court was fully warranted in finding that the accused failed to discharge his responsibility to control his

troops thereby permitting the atrocities alleged and was thus guilty as charged.

5. CLEMENCY:

None of the five members of the commission recommended clemency, nor did Lieutenant General W. D. Styer, Commanding United States Army Forces, Western Pacific, who approved the sentence. Under international law all war crimes are subject to the death penalty, although a lesser sentence might have been imposed by the commission had it so desired (FM 27-10, par. 357). Under the facts and circumstances established in this case, the penalty imposed by the commission is appropriate to the offense and no commutation thereof is warranted. This office is therefore constrained to recommend that clemency be not extended.

6. OPINION: It is the opinion of this office that:

a. The Commission was legally constituted;

b. The Commission had jurisdiction of the person and the offense;

c. The evidence supports the finding of guilty;

d. The record discloses no errors injuriously affecting the substantial rights of the accused; and,

e. The sentence is legal.

7. RECOMMENDATIONS: It is accordingly recommended that the sentence be confirmed and ordered executed under the supervision of and at a time and place to be designated by the Commanding General, United States Army Forces Western Pacific.

8. ACTION: An action designed to carry the above recommendations into effect should they meet with your approval, is submitted herewith.

s/ John H. Finger
t/ JOHN H. FINGER
Major, J.A.G.D.,
Assistant Theater Judge Advocate.

s/ Charles P. Muldoon
t/ CHARLES P. MULDOON
Lieutenant Colonel, J.A.G.D.,
Assistant Theater Judge Advocate.

s/ H. F. Mattoon
t/ H. F. MATTOON
Colonel, J.A.G.D.,
Assistant Theater Judge Advocate.

s/ S. F. Cohn
t/ S. F. COHN
Colonel, Infantry,
Assistant Theater Judge Advocate.

s/ C. M. Ollivetti
t/ C. M. OLLIVETTI
Colonel, J.A.G.D.,
Theater Judge Advocate.

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GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
Government Section

Supplement to Memorandum,
The Case of General Yamashita,
22 November 1949.

Tokyo, Japan
27 January 1950

Since preparation of my memorandum of 22 November 1949 exhaustive reference to the voluminous Japanese press coverage of the Yamashita trial has brought to light a formal statement made by Yamashita's defense counsel on 7 November 1945 while the trial was in progress. This statement, as carried by the Nippon Times of that date, is reproduced hereunder for this record because of its complete negation of many of the statements and charges contained in the Reel book published nearly four years later.

"JUST TRIAL ASSURED FOR GEN. YAMASHITA

"Defense Counsel, Major Guy, Issues Statement

"The following statement on the American Military Commission procedure in the trial of General Tomoyuki Yamashita in Manila was prepared by Major George F. Guy, assistant defense counsel, during his visit to Tokyo to collect evidence for the defense and was released on Tuesday by the PRO.

"DESCRIPTION OF AMERICAN MILITARY COMMISSION TRYING TOMOYUKI YAMASHITA:

"The Military Commission now trying General Tomoyuki Yamashita at the United States High Commissioner's residence in Manila, consists of five American Generals, appointed for this purpose by Lieutenant General Styer, Commanding the United States Forces in the Western Pacific. General Styer appointed this commission pursuant to directions from General MacArthur's headquarters.

"The trial opened on October 29 and is still in progress. The Generals originally appointed on the commission are:

"Major General Russell B. Reynolds, President; Major General Clarence L. Sturdevant, Law Member; Major General James A. Lester; Brigadier General William G. Walker; Brigadier General Egbert F. Bullens.

"The order, appointing the commission, also appointed the following officers as prosecutors:

"Major Robert M. Kerr, Infantry, as Prosecutor; Captain M. D. Webster, JAGD; Captain William N. Calyer, JAGD; Captain D. C. Hill, JAGD; Captain Jack M. Pace, Infantry, as Ass't Prosecutors.

"Also on the same order the following officers for the Defense Counsel:

"Colonel Harry E. Clarke, JAGD; Lieutenant Colonel Walter C. Hendrix, JAGD; Lieutenant Colonel James G. Feldhaus, JAGD; Major George F. Guy, Cavalry; Captain Adolf F. Reel, JAGD; Captain Milton Sandberg, JAGD.

"Under American law and under the directive concerning the appointment of the commission, all of the sessions thereof are open to the public and anyone is free to attend and listen to the proceedings. The only exception to this rule will be when the testimony is of a delicate nature, such as when it is necessary for women to testify as to attacks upon them. As a result, practically all of the proceedings are open and available to anyone who wishes to go to observe.

"General Yamashita is being afforded every legitimate defense that can be advanced on his behalf. His counsel have all been working arduously on the case since the first week in October, when they were appointed, having even gone so far as to send Major George F. Guy, Cavalry, to Tokyo for the purpose of uncovering evidence which may be used in behalf of the defense of General Yamashita. The General cannot be forced to testify himself unless he so wishes and he has not been subjected to anything in the nature of a 'preliminary investigation' by the prosecution prior to the actual opening of the trial itself. He is being accorded all of the rights and defenses that would be accorded an American officer on trial. All of the witnesses who testify against him must do so in his presence and all of the documentary evidence introduced against him must be exhibited to him and his counsel before it is received in evidence by the commission. His counsel is also entitled to cross-examine all witnesses testifying against him. All of the proceedings are taken down in writing and the record thereof will, in the event of a conviction, have to be approved by General MacArthur before any sentence of the commission will be carried out. General MacArthur's review of the record will assure General Yamashita that any record of conviction is legally sufficient to sustain the conviction.

"The Military Commission is a form of American military court and is authorized by American law. A Military Commission

was used in Washington, D.C. in July of 1942 for the trial of eight German spies who landed from Germany by submarines on the American coasts for the purpose of blowing up American railroads, bridges and factories. In that case an appeal was taken to the Supreme Court of the United States, the highest court in America - and that tribunal affirmed the proceedings before the commission and, therefore, military commissions as a court are well-founded in American law and their legality has been confirmed by the United States Supreme Court."

Reconciliation of the foregoing statement with the book in reference is utterly impossible. At that time, i.e. while Yamashita's trial was in progress, his counsel, as reflected by this formal statement of Major Guy, a member senior to Reel, (and experienced lawyer by civil profession), was entirely satisfied with the legality and composition of the military commission and the legal procedures governing the trial. He publicly pointed out that "military commissions as a court are well-founded in American law and their legality has been confirmed by the United States Supreme Court." This confirmed fully and unequivocally the legality in the eyes of counsel of the arraignment and trial of Yamashita before that form of a tribunal -- a fact which his subordinate Reel challenges four years later in his referenced book. Indeed, counsel was so completely satisfied at that time that Yamashita was being accorded a fair and just trial of the issues raised by the charge, that he gave it this unqualified endorsement: "He (Yamashita) is being accorded all of the rights and defenses that would be accorded an American officer on trial." Could it have been anything but his own complete accord with this view that caused Yamashita, after hearing the sentence pronounced upon him, to say, "I want to thank the commission for a fair trial" (Nippon Times of December 9, 1945). Yamashita indeed, as his attorney stated, was accorded all of the rights and defenses that would be accorded an American officer on trial. What more than this could one ask in the trial of an enemy officer?

The Japanese reaction to the penalty meted out to Yamashita after all of the incidents of trial and appeal had been concluded is fairly summarized in the editorial of the Nippon Times of February 10, 1946, reading in part:

> "The story of the atrocities which the troops under General Yamashita committed has shocked the Japanese people no less than anyone else when the facts finally became known to them. The Japanese people are agreed that there must be proper punishment and atonement for such crimes, and it is in full accord with the Japanese conception of responsibility for the commander to assume the full burden of the acts of his subordinates. There can be none who will question the full justice of the penalty which has been imposed."

It is to be regretted that in the face of almost universal acceptance, including the Japanese, of the justice inherent in the Yamashita judgment certain writers of influence in American community life, as well as journals of distinction and responsibility, have lent themselves at this late date to the Yamashita propaganda without apparent effort to check the veracity of the statements and allegations contained therein. By failing this simple precaution they became partisans to a grave injustice against their country, its record,

tribunals and public officials while professing a sense of deep outrage at a pretended injustice against an enemy national.

COURTNEY WHITNEY
Brigadier General, U. S. Army
Chief, Government Section

<u>Please insert in cover of memorandum to which this is a supplement.</u>

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