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CASE NO. 21

TRIAL OF GENERAL TOMOYUKI YAMASHITA

UNITED STATES MILITARY COMMISSION, MANILA,

(8TH OCTOBER-7TH DECEMBER, 1945), AND THE SUPREME COURT OF THE UNITED STATES

(JUDGMENTS DELIVERED ON 4TH FEBRUARY, 1946).

Responsibility of a Military Commander for offences committed by his troops. The sources and nature of the authority to create military commissions to conduct War Crime Trials, Non-applicability in War Crime Trials of the United States Articles of War and of the provisions of the Geneva Convention relating to Judicial Proceedings. Extent of review permissible to the Supreme Court over War Crime Trials.

Tomoyuki Yamashita, formerly Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was arraigned before a United States Military Commission and charged with unlawfully disregarding and failing to discharge his duty as commander to control the acts of members of his command by permitting them to commit war crimes. The essence of the case for the Prosecution was that the accused knew or must have known of, and permitted, the widespread crimes committed in the Philippines by troops under his command (which included murder, plunder, devastation, rape, lack of provision for prisoners of war and shooting of guerrillas without trial), and/or that he did not take the steps required of him by international law to find out the state of discipline maintained by his men and the conditions prevailing in the prisoner-of-war and civilian internee camps under his command. The Defence argued, *inter alia*, that what was alleged against , Yamashita did not constitute a war crime, that the Commission was without jurisdiction to try the case, that there was no proof that the accused even knew of the offences which were being perpetrated and that no war crime could therefore be said to have been committed by him, that no kind of plan was discernible in the atrocities. committed, and that the conditions under which Yamashita had had to work, caused in large part by the United States military offensive and by guerrilla activities, had prevented him from maintaining any adequate overall supervision even over the acts of such troops in the islands as were actually under his command.

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The evidence before the Commission regarding the accused's knowledge of, acquiescence in, or approval of the crimes committed by his troops was conflicting, but of the crimes themselves, many and widespread both in space and time, there was abundant evidence, which in general the Defence did not attempt to deny.

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The Commission sentenced Yamashita to death and its findings and sentence were confirmed by higher military authority. When the matter came before the Supreme Court of the United States on a petition for certiorari and an application for leave to file a petition for writs of habeas corpus and prohibition, the majority of that Court, in a judgment delivered by Chief Justice Stone, ruled that the order convening the Commission which tried Yamashita was a lawful order under both United States and International Law, that the Commission was lawfully constituted, that the offence of which Yamashita was charged constituted a violation of the laws of war, and that the procedural safeguards of the United States Articles of War and of the provisions of the Geneva Prisoners of War Convention relating to Judicial Proceedings had no application to war crime trials.

Mr. Justice Murphy and Mr. Justice Rutledge dissented. Questions other than those already mentioned which were touched upon either in the majority judgment or in the two minority judgments were the following : the applicability or non-applicability to such proceedings as those taken against Yamashita of the safeguards provided by the United States Constitution and particularly of the Fifth Amendment thereto ; the extent of review permissible to the Supreme Court over war crimes trials ; and the alleged denial of adequate opportunity for the preparation of Yamashita's defence.

Yamashita was executed on 23rd February 1946.

A. OUTLINE OF THE PROCEEDINGS

1. THE APPOINTMENT OF THE COMMISSION

The Court which tried Yamashita was a United States Military Commission established under, and subject to, the provisions of the Pacific Regulations of 24th September, 1945, Governing the Trial of War Criminals. (Footnote 1: See Volume III of these Reports, p. 105.) Acting under authority from General MacArthur, Commander-in-Chief,

United States Army Forces, Pacific Theatre, General Styer, Commanding General, United States Army Forces, Western Pacific, appointed the Commission, and instructed it to meet in the City of Manila, Philippine Islands, " at the call of the President thereof." The Commission was convened on 8th October, 1945, at the High Commissioner's Residence in Manila.

2. AN INTENDED DEFENCE WITNESS PERMITTED TO ACT AS DEFENCE COUNSEL

In addition to the six officers appointed by Lt.-General Styer to defend the accused, the latter requested that his former Chief-of-Staff, Lieutenant-General Muto, and his former Assistant Chief or Deputy Chief-of-Staff, Major-General Utsunomiya, should act as

additional counsel. There were, he explained, a number of records and facts with which they alone were conversant. He needed their advice and assistance.

In view of the fact that the accused was proposing to call one of the men named as a Defence witness, however, the Prosecution submitted that, in a criminal proceeding, it would be entirely irregular for a witness for the Defence also to represent the accused as counsel. Even if his intention was not to serve as counsel, it would be equally irregular to allow the witnesses for a person accused as a criminal to sit in Court through the proceedings. He should be allowed to enter the court-room only if and when counsel proposed to call him as witness. On a Defending Officer stating that the proposed new Counsel would be in the court room only during the hearing of the Prosecution's evidence and that he would leave the court-room before the opening of the Defence, Counsel for the Prosecution pointed out that the damage would be done when the witnesses were in the courtroom during the Prosecution's case and not during the hearing of the evidence for the defence.

The President ruled that, since it was the desire of the Commission to conduct a fair trial, the request of the Defence would be granted.

Lt.-General Muto subsequently appeared as a defence witness.

3. THE ACCUSED AND THE CHARGE

Prior to 3rd September, 1945, the accused, Tomoyuki Yamashita, was 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, 1 Philippine Islands. On 25th September, by order of Lieutenant-General Wilhehn D. Styer, Commanding General of the United States Army Forces, Western Pacific, which command embraced the Philippine Islands, Yamashita was served with a charge prepared by the Judge Advocate General's Department of the Army which alleged that he, " Tomoyuki Yamashita, General Imperial Japanese Army, between 9th October, 1944 and 2nd September, 1945, at Manila and at other places in the Philippine Islands, while a 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, General Tomoyuki Yamashita, thereby violated the laws pf war."

On 8th October, 1945, the accused was arraigned before the Military Commission already described.

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4. THE BILL OF PARTICULARS AND SUPPLEMENTAL BILL OF PARTICULARS

On 8th October, 1945, as a result of a motion put forward by the Defence, (Footnote 1: see p. 8) the Prosecution filed a Bill of Particulars making 64 separate allegations, under a general introductory sentence which claimed that : " Between 9th October, 1944, and 2nd September, 1945, at Manila and other places in the Philippine Islands, members of Armed Forces of Japan under the command of the accused committed the following : " On 29th October, after a recess during which the Defence was to prepare its case, the Prosecution filed a Supplemental Bill of Particulars claiming that : " members of the armed forces of Japan, under the command of the accused, were permitted to commit . . . during the period from 9th October, 1944, to 2nd September, 1945, at Manila and other places in the Philippine Islands " a further 59 offences or groups of offences. The Defence claimed that the' Supplemental Bill made a completely new type of allegation, but this view was not shared by the Commission. (Footnote 2: See pp. 8-9.)

The classification of alleged offences made by the President of the Com-mission in delivering judgment may be reproduced at this point. He pointed out that : " The crimes alleged to have been permitted by the accused in violation of the laws of war may be grouped into three categories :

(1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war ;

(2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing, hanging, burning alive, and destruction by explosives ;

(3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offences extended throughout the period the accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended throughout the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon."

Nearly all of the 123 paragraphs contained in the two Bills of Particulars alleged the commission of a number of separate illegal acts ; nearly all of them also charged the perpetration of more than one crime, of which " mistreating " and " killing " appeared most frequently. An attempt was clearly made to arrange under each paragraph offences alleged to have been committed in one locality during one period of time or at the same approximate date.

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Thus, in the first paragraph of the Bill of Particulars, appear a number of different categories of crimes, committed against thousands of persons and against property :

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" 1. During the period from 9th October, 1944, to 1st May, 1945, undertaking and putting into execution 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 non-combatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity."

The fifth paragraph provides an example of one offence allegedly committed against a plurality of persons :

" 5. During November 1944, in northern Cebu Province, massacre, without cause or trial, of more than 1,000 unarmed non-combatant civilians." .

Paragraph 122, which appeared in the Supplemental Bill, alleged the commission of one offence against one person, the killing, on about 20th January, 1945, at Los Banos Internment Camp, Laguna Province, without cause or trial, of a named non-combatant civilian citizen of the United States of America, then and there interned by armed forces of Japan.

While many paragraphs simply alleged, for instance, the " killing of patients and civilian refugees by shellfire " (12), the " rape of civilian women " (14), or " brutally mistreating and killing two unarmed non-combatant male civilians " (16), others set out the names of the victims. Paragraph 22 alleged the brutal killing without cause or trial of three named persons, an Austrian citizen, a German citizen and a Russian citizen, all unarmed and non-combatant civilians.

The offences against persons alleged in the two Bills were largely described in the following terms, often with the addition of the words, " without cause or trial " : mistreating, beating, wounding, torturing, mutilating, maiming, raping, attempting to rape, killing, attempting to kill, executing, burning alive, massacring and exterminating.

Other such alleged offences were the unjustified failure or refusal to provide prisoners of war or civilian internees with adequate shelter, food, water, clothing, sanitation, medical care, and other essentials it being sometimes stated specifically that such omission caused malnutrition and death ; abandoning, without care or attention helplessly sick, wounded or starved prisoners of war and internees ; and deliberately profaning the bodies of dead prisoners of war and internees ; compelling non-combatant civilians to construct fortifications and entrenchments and otherwise take part in the operations of armed forces of Japan against the country of those civilians ; deliberately and unnecessarily exposing prisoners of war and civilian internees to gunfire and other hazards; and deliberately contaminating and poisoning a well of water, the sole source of potable drinking water for a large number of civilians. A breach of the Geneva Prisoners

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of War Convention was implied by paragraph 89, which alleged that, during the month of December 1944, at Manila, the crimes were committed against various prisoners of war, named and unnamed, of " 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 pronounced ; and executing a death sentence without communicating to the representative of the protecting power the nature and circumstances of the offence charged."

The Bills of Particulars also alleged many offences against property, again often of a mass and indiscriminate nature, on the part of the accused's troops. There were many allegations of the devastation, destruction and pillage, unjustified by military necessity, of public, private or religious property. For instance, paragraph 15 enumerates : " During the period from 1st January, 1945, to 1st March, 1945, both dates inclusive, deliberately, wantonly and without justification or military necessity, devastating, destroying and pillaging and looting of large areas of the city of Manila, including public, private and religious buildings and other property, and committing widespread theft of money, valuables, food and other private property in that city." Paragraphs 70 and 72 allege, *inter alia*, the destruction of property devoted exclusively to religious, hospital, or educational purposes. Paragraph 6 includes an allegation relating to, ". . . looting and stealing the contents of, and wilfully falling to deliver or make available, Red Cross packages and supplies intended for such prisoners of war."

Those stated to have been the victims of these atrocities were unarmed non-combatant civilians, civilian internees and prisoners of war ; and unspecified hospital patients. The civilians included Austrian, French, Russian, Chinese and German nationals as well as United States citizens.

The allegation that atrocities were committed according to a plan was made not only in paragraph 1, already quoted, (Footnote 1: See p.5) but also in paragraph 25, which sets out the following offences : " During the period from 1st January, 1945, to 1st March, 1945, deliberately planning and undertaking, without cause or trial, the extermination, massacre and wanton, indiscriminate killing of large numbers of unarmed non-combatant civilian men, women and children, inhabitants of the city of Manila and its environs, brutally mistreating, wounding, mutilating, killing and attempting to kill, without cause or trial, large numbers of such inhabitants, and raping or attempting to rape large numbers of civilian women and female children in that city."

In his opening address, the Prosecutor said that, in calling his witnesses, the number of the paragraph to which each piece of evidence related would be indicated. The legal significance of the Bills of Particulars was never defined by the Commission, and the brief analysis of their contents, which has been set out above, is intended simply to show the range of the offences for which the Prosecution held the accused responsible.

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5. DEFENCE PLEAS AND MOTIONS RELATING TO THE CHARGE AND THE BILLS OF PARTICULARS

Apart from the plea of not guilty, a number of motions were entered by the accused and his Counsel concerning various aspects of the Charge and the Bills of Particulars. These are described in the following ten paragraphs. It will be noticed that, while the first nine paragraphs set out arguments which took place before the beginning of the hearing of the evidence, and the rulings of the Commission on the matters in dispute, the last paragraph deals with certain events which took place during the hearing of the evidence but which are most conveniently dealt with in this part of the Report.

(i) *Claim of the Accused that a Copy of the Specifications was not Properly Served on Him*

On 8th October, 1945, the accused pleaded that no copy of the specifications had been sent to him in accordance with paragraph 14 (a) of the letter dated 24th September, 1945, General Headquarters, United States Forces, Pacific, entitled " Regulations Governing the Trial of War Criminals " :

" 14. RIGHTS OF THE ACCUSED. The accused shall be entitled :

" (a) To have in advance of trial a copy of the charges and specifications, so worded as clearly to apprise the accused of each offence charged."

The Prosecution claimed that the Charge which was served upon the accused included both what was ordinarily known as a Charge and also the specifications. In court-martial procedure, he went on, the Charge Sheet contained the Charge proper, as for instance the violation of the 86th Article of War. Underneath that, in a separate paragraph, would appear what was known as a specification, alleging that the accused, on a certain time, at a certain place, did certain things. If the Commission would examine the Charge which had been served upon the accused it would note that it did include both of those elements. He submitted that since court-martial procedure was much more strict in its provisions than the procedure followed before Military Commissions, it followed that the Charge against the accused was adequately drafted.

On finding that Defence Counsel were in agreement with the Prosecution on this point, the Commission ruled that the Charge and specifications had been properly served upon the accused.

(ii) *The First Motion to Dismiss the Case*

Later during the same sitting of the Commission, however, Defence Counsel moved that the Charge in hearing be stricken on the ground that it failed to state a violation, in so far as General Yamashita was concerned, of the laws of war. The Prosecution pointed out that the Commission had been ordered to try General Yamashita. If the Defence were

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seeking to raise a point of law, the appropriate time to do so was at the conclusion of the Prosecution's case, when they could move for a judgment of acquittal.

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He submitted, however, that there was no provision in the Commission's procedure for a motion such as Defence Counsel was now interposing. The objection of Counsel for the Defence was not sustained by the Court.

(iii) *Motion for the Filing of a Bill of Particulars*

Thereupon, Counsel for the Defence claimed that the language in which the Charge and specifications .had been drafted was uncertain and indefinite and did not fairly apprise the accused of that with which he stood charged. The Defence therefore moved that the Charge and cause in hearing be made more definite and certain, by specifying the time, place and dates of the accused's disregarding and failing to discharge his duty as Commander to control the operations of the members of his command. Details as to time, place and date should also be furnished as to the alleged offences and as to the persons who were allegedly permitted to commit them. The Prosecution, however, stressed that, although a motion such as this might be permissible in a court of law, the regulations the Defence was putting forward governing the Commission made no provision for such a motion. If the accused desired a Bill of Particulars, the Prosecution had no objection to supplying one ; what they objected to was an attempt to apply to the proceedings of the Commission " the technical objections and rules of evidence, pleadings and procedure which might apply in a court of law." Defence Counsel admitted that the Commission was not bound by the rules of a court of law, and based its application on principles of justice and fairness to the accused. Until they had received a Bill of Particulars, the Defence did not know what was charged and could not in fairness plead to the general issue of guilty or not guilty. The Prosecution then agreed to file a Bill of Particulars which they had already drafted, provided that they should have at a later date the privilege of serving and filing a Supplemental Bill of Particulars ; certain new information was expected from the United States, and other material had arrived too late for incorporation in the first Bill.

The Court granted the Defence motion for a Bill of Particulars and ruled that a Supplemental Bill of Particulars might be filed later, subject to such conditions as the Commission might then specify. The Court would judge these additional charges on their merits when the Prosecution presented them. Whereupon, the Bill of Particulars was received into evidence. (Footnote 1: See p.4)

(iv) *Plea of Not Guilty*

The accused was then asked for his plea to the Charge, and pleaded not guilty. The Commission then went into recess for three weeks to enable the Defence to prepare their case and the Prosecution to complete theirs.

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(v) *Objection to the Filing of a Second Bill of Particulars*

On 29th October, the Commission was reconvened, and the Prosecution requested that there should be incorporated into the record of the proceedings the Prosecution's Supplemental Bill of Particulars. To this procedure the Defence objected.

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Defence Counsel began his argument on this point by claiming that on 8th October, 1945, the Defence had successfully objected to the granting to the Prosecution of the right to file a Supplemental Bill of Particulars, on the grounds that it was unprecedented and against ordinary principles of law and justice to allow the Prosecution, after a case had begun, to continue to file additional specifications. Counsel for the Defence submitted that any normal, intelligent person would assume that when the Prosecution, after filing sixty-four separate specifications, stated that they wished to file a Supplemental Bill of Particulars, that Supplemental Bill would probably contain one, two, three, four or perhaps even half a dozen additional particulars. Yet the Supplemental Bill of Particulars contained fifty-nine new, separate and distinct alleged offences. These fifty-nine offences were new in so far as the persons involved were concerned, in so far as the times were concerned, and for the most part in so far as the places were concerned. The Defence urged that it was " unconscionable in a case of this type practically to double at the last minute the list of offences charged."

In the second place, the Defence pointed out that whereas the first Bill had commenced with the words : " Between 9th October, 1944, and 2nd September, 1945, at Manila and other places in the Philippine Islands, members of Armed Forces of Japan under the command of the Accused committed the following : . . ." the opening words of the Supplemental Bill stated that ". . . members of the Armed Forces of Japan, under the command of the Accused, were permitted to commit " certain acts which were then set out. The new Bill alleged the granting of " permission " for 59 acts, and in no single case did it provide any details as to that " permission." It was not said who permitted any one of these acts, or how or in what circumstances.

The Prosecution first reminded the Commission that it had indeed given the former permission to file a Supplemental Bill of Particulars, then went on to say that there was no significance in the different opening wording contained in the two Bills. The purpose of the so-called Bill of Particulars was simply to specify the instances which were referred to generally in the Charge, and whether the Bill of Particulars said that the acts alleged were " permitted " or whether it claimed that they were " committed " by members of the command of the accused was immaterial. There was no provision in the regulations governing the procedure of such Commissions as the present for the production of a Bill of Particulars or for a motion to make the Charge more definite and certain. It was purely a matter of discretion for the Commission as to whether or not it would require a Bill of Particulars. The document had been termed a " Bill of Particulars " for lack of any more appropriate term, but it was not in fact a bill of the kind signified when that term was used in courts of law in the United States. Its sole purpose

was to specify the instances when the members of the command of the accused were permitted to commit acts contrary to the Laws of War. In other words, it referred back to and-must be construed in the light of the Charge itself.

The Defence thereupon pointed out that the Commission, in allowing the Bill of Particulars to be filed, had stated that a Supplemental Bill might be

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filed later, " subject to such conditions as the Commission may then specify." Counsel submitted that the normal, natural condition that would be specified in the filing of any Supplemental Bill of Particulars was that it should stay within the bounds of reason. The filing of nearly as many particulars as were contained in the first Bill he described as unconscionable. Defence Counsel could not agree that the two sets of opening words were materially the same, and claimed that the very essence of the case was the question of what must be established to prove an offence against the Laws of War, the four possible requirements being to show simply that an act was committed by someone under the command of a certain General, or that somebody permitted those acts, or that someone authorised them, or that someone ordered them.

The Commission rejected the Defence motion.

(vi) *Motion that the Prosecution Amplify the Particulars in Certain Ways*

The Defence next moved that particulars be furnished by the Prosecution, regarding each of the 59 new paragraphs, as to who granted permission to commit the alleged offences, to whom such permission was granted, the form of expression of the permission, and the times, places and dates of the giving of permission.

The Prosecutor replied that the Charge stated specifically that it was the accused who permitted these acts to be committed. Even in a United States Civil Court, the Prosecution would not be required to disclose their evidence through the medium of a Bill of Particulars, as was shown by the following passage from the judgment in the case of *Commonwealth v. Jordan*, 207 Massachusetts Reports 259 :

" The office of a Bill of Particulars is not to compel the Commonwealth to disclose its evidence but to give the defendant such information in addition to that contained in the complaint or indictment in regard to the crime with which he is charged, as law and justice require that he should have in order to safeguard his constitutional rights and to enable him to fully understand the crime with which he is charged and to prepare his defence."

The Prosecutor pointed out that the mention of " constitutional rights " made in this dictum constituted a reference to the Constitution of the United States, which in any case conferred no rights on the accused, an enemy alien. He thought that the details already provided in the Bills of Particulars met all of the requirements of justice and fair trial.

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Defence Counsel's answer was that the Fifth Amendment of the Constitution of the United States applied to " any person," not " any citizen. " Nevertheless, the Commission rejected the Defence motion.

(vii) *The First Motion for a Continuance*

The Defence then entered a motion requesting a recess of two weeks in order to enable the preparation of a case in answer to the 59 new allegations, to allow the Defence, for instance, so to acquaint themselves with the new

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accusations as to place them in a position properly to cross-examine the Prosecution's witnesses. Counsel reminded the Commission that the Prosecution had expressed surprise when the Defence had stated, on 8th October, 1945, that they could properly prepare a defence in two weeks. Surely, if the Prosecution was surprised that the Defence could prepare a defence on 64 specifications in two weeks, Counsel did not think that they could now object to a recess of two weeks to prepare a defence for a similar number of specifications based on new facts, new places, new names and a new theory of the case.

Defence Counsel quoted the passage from paragraph 14 of the Commission's rules of procedure to which reference had already been made : " The accused shall be entitled . . . to have in advance of trial a copy of the Charges and specifications, so worded as clearly to apprise the accused of each offence charged." Counsel interpreted the action of the Commission on 8th October, in requiring the Prosecution to furnish a Bill of Particulars, as signifying that a Supplemental Bill should also be furnished " in advance of trial," and claimed that this phrase signified : " Sufficient time to allow the Defence a chance to prepare its defence."

The Prosecutor at this point began to urge again that the specifications were incorporated in the original charge, as he had claimed when the accused himself insisted that he had not been served with specifications ; but the President interrupted the Prosecutor and said that this point had been adequately discussed.

The Defence motion was rejected by the Commission, but the latter added that if, at the end of the presentation by the Prosecution of evidence concerning the Bill of Particulars as presented during the arraignment, Defence Counsel should believe that they required additional time to prepare their case, the Commission would consider such a motion at that time.

Defence Counsel then indicated, but without further result, that time was desired at once " as much, if not more " to prepare for cross-examination " as the Prosecutor's case goes in " as to prepare an affirmative defence.

(viii) *The Second Motion to Dismiss the Case*

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The Defence then entered a motion to dismiss the case. Counsel first reminded the Commission that the previous motion to dismiss, made on the ground that the charge failed to state a violation of the Laws of War by the accused, was denied. The present motion was addressed to the Charge as supplemented by the original Bill of Particulars and by the Supplemental Bill of Particulars, and the claim was again made that it failed to set forth a violation of the Laws of War by the accused and that the Commission did not have jurisdiction to try the cause. It was the contention of Defence that the Bill of Particulars did not cure the defects of the Charge. On the contrary, it provided further reasons for allowing the motion.

The Bill of Particulars detailed sixty-four instances in which members of the accused's command ,were alleged to have committed. war crimes. In no instance was it alleged that the accused committed or aided in the commission of a crime or crimes, In no instance was it alleged that the accused

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issued an order, expressly or impliedly, for the perpetration of the crime or crimes charged. Nor was it alleged that the accused authorised the crimes prior to their commission or condoned them thereafter.

The Charge alleged that the accused failed in his duty to control his troops, permitting them to commit certain alleged crimes. The Bill of Particulars, however, set forth no instance of neglect of duty by the accused. Nor did it set forth any acts of commission or omission by the accused as amounting to a " permitting " of the crimes in question. What then was the substance of the Charge against the accused ? It was submitted by the Defence that, on the three documents now before the Commission, the Charge and the two Bills of Particulars, the accused was not accused of having done something or having failed to do something, but solely of having been something, namely commander of the Japanese forces. It was being claimed that, by virtue of that fact alone, he was guilty of every crime committed by every soldier assigned to his command.

American jurisprudence recognised no such principle so far as its own military personnel was concerned. The Articles of War denounced and punished improper conduct by military personnel, but they did not hold a commanding officer responsible for the crimes committed by his subordinates. No one would even suggest that the Commanding General of an American occupation force became a criminal every time an American soldier violated the law. It was submitted that neither the Laws of War nor the conscience of the world upon which they were founded would countenance any such charge. It was the basic premise of all civilised criminal justice that it punished not according to status but according to fault, and that one man was not held to answer for the crime of another.

It was an incontrovertible fact that the branding of military personnel as war criminals did not rest upon the mere fact of the command of troops, but rather upon the improper exercise of that command. This point was recognised officially by the War Department in its publication, *Rules of Land Warfare* (FM 27-10, Section 345, l), which provided as

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follows : " Liability of Offending Individuals. Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished."

There was nothing said in that provision concerning the Commanding General of a force being responsible, under the Laws of War, for any offences committed by members of his command without his sanction. Liability for war crimes was imposed on the persons who committed the crimes and on the officers who ordered the commission thereof. The war crime of a subordinate, committed without the order, authority or knowledge of his superior, was not a war crime on the part of the superior. The pleadings now before the Commission did not allege that the accused ordered, authorised or had knowledge of the commission of any of the alleged atrocities or war crimes. Without such an allegation, it was submitted, the cause must be dismissed as not stating an offence under the Laws of War.

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The Defence claimed that if a violation of the Laws of War was not alleged, the Military Commission had no jurisdiction to hear the cause. In the " case of the saboteurs," *Ex Parte Quirin* [Outline details of the case], decided in 1942, the judgment of the Supreme Court stated that : " Congress . . . has exercised its authority to define and punish offences against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offences which, according to the rules and precepts of the law of nations, and more particularly the Law of War, are cognisable by such tribunals. . . . We are concerned only with the question of whether it is within the constitutional power of the national government to place petitioners on trial before a military commission for the offences with which they are charged. We must therefore first inquire whether any of the acts charged is an offence against the Law of War cognisable before a military tribunal, and if so, whether the Constitution prohibits the trial."(Footnote 1: *Ex Parte Quirin et al*, 317 U.S.l, 1942.) *Ex Parte Quirin et al*, 317 U.S.l, 1942.

The Supreme Court found that the allegations contained in the charges against Quirin and his associates were offences within the Laws of War. Defence Counsel submitted that, had they found these allegations not related to offences against the Laws of War, the Supreme Court would have ruled that the military commission had no jurisdiction.

Defence Counsel maintained that there were two other grounds for the proposition that the Commission had no jurisdiction to try the case. The Commission was appointed by the Commanding General of Army Forces, Western Pacific, pursuant to authority delegated to him by the Commander-in-Chief, Army Forces, Pacific. The record did not, however, said Counsel, show any grant of authority from the President of the United States to the Commander-in-Chief, Army Forces, Pacific. Neither the Commander-in-Chief, Army Forces, Pacific, nor the Commanding General, Army Forces, Western

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Pacific, in the submission of the Defence, had authority to take the above-mentioned action. It was well settled that, in the absence of express statutory authority, a military commander had power to appoint a military commission only (a) as an exercise of martial law, (b) as an exercise of military government in occupied territory, or (c) as an incident of military operations during a period of hostilities. This principle was stated in Winthrop, *Military Law and Precedents*, on page 936.

There existed, said Counsel, neither martial law nor military government in the Philippines, and hostilities had ceased on or about 2nd September, 1945. There was no justification in law for the exercise by the Commander-in-Chief of the Army Forces, Pacific, of the extraordinary power by virtue of which the Commission was set up. The fundamental principle involved was apparently within the contemplation of the Commander-in-Chief, Army Forces, Pacific, when he issued the letter of 24th September, 1945, upon which the Commission based its authority, because paragraph 3 of his letter read as follows : " The Military Commissions established hereunder shall have jurisdiction over all Japan and all other areas occupied by the armed forces commanded by the Commander-in-Chief, Army Forces, Pacific." The Philippine Islands, Counsel pointed out, were not areas occupied by the armed forces. The above-mentioned letter, consequently, did not

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grant authority to set up military commissions in the Philippine Islands ; and Special Orders No. 112, Headquarters, United States Army Forces, Western Pacific, dated 1st October, 1945, was therefore without authority.

Paragraph 271 of the War Department Basic Field Manual, *Rules of Land Warfare*, in its reprint of Article 42 of the Annex of the Hague Convention No. IV of 1907, said that : " A territory is considered occupied when it is actually placed under the authority of the hostile army." The United States was not and never had been a hostile army with respect to the Philippine Islands. The re-entry into the Philippine Islands in 1944 and 1945 had constituted a recovery of territory, not an occupation. From the date of re-entry on Philippine soil, General MacArthur had consistently affirmed and recognised the full governmental responsibility of the Philippine Commonwealth. This was evidenced by publications in the *Official Gazette*, April 1945, page 86 ; May 1945, pages 145 to 148 ; and September 1945, page 494. On 22nd August, 1945, General MacArthur issued the following proclamation : " Effective on 1st September, 1945, United States Army Forces in the Pacific shall cease from further participation in the self-administration of the Philippines, as such is no longer necessary.

" Counsel claimed that if the projected trial should result in the conviction and sentence of the accused, such action would be subject to reversal, and made the following statement : " As officers of the United States Army, and as lawyers appointed to defend the accused, Defence Counsel are charged with a duty to the accused, to the Army, and to the people of the United States to pursue all proper legal remedies open to the Defence,

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including, if warranted, recourse to the Federal courts, and more particularly, the Supreme Court of the United States-citing again the Quirin case.

" In his reply, the Prosecutor submitted that there was no reason for the Commission to reverse its previous decision of 8th October, 1945, to deny the motion to dismiss. The mere fact that a Bill of Particulars and a Supplemental Bill of Particulars had subsequently been presented to the Commission had no bearing upon the issue. In any case, it was beyond question that the Commission had no authority to dismiss this proceeding, It was under direct orders of the Commanding General, Army Forces, Western Pacific, to proceed with the trial of Tomoyuki Yamashita. The Letter Order of General MacArthur, as Commander-in-Chief of the United States Army Forces, Pacific, dated 24th September, 1945, and addressed to the Commanding General, United States Army Forces, Western Pacific, stated : " It is desired that you proceed immediately with the trial of General Tomoyuki Yamashita, now in your custody, for the crimes indicated in the attached charge." Special Orders No. 112, dated 1st October, 1945, being the Order of the Commanding General, Army Forces, Western Pacific, establishing the Military Commission and directing its proceedings, required that it should follow the provisions of the above-mentioned letter. The Prosecutor concluded, therefore, that the Commission had no authority to dismiss the case at this stage. It must try Tomoyuki Yamashita and, in order to accomplish that task, it must hear the Prosecution's case.

Called upon to offer his arguments in rebuttal, Defence Counsel claimed that, if the officer who gave the direction to try Tomoyuki Yamashita had

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no jurisdiction to appoint a commission, he had no jurisdiction to order the trial of General Yamashita. The courts of the Commonwealth were open for any crimes which were committed by any member of the Japanese forces while they were in occupation of the Philippine Islands. He added that the present motion was not based on the Charge alone as had been the original motion to dismiss ; it was based on the Bill of Particulars and the Supplemental Bill, which did not state an offence against the Laws of War. The Defence had understood that the Bill of Particulars would cure the defects in the Charge but this had not been so.

The Commission rejected the second Defence motion to dismiss the case.

(ix) *A Question relating to the Status of the Accused*

The final motion put forward by the Defence before the Prosecutor's opening speech was one to cause the Prosecution to state for the record whether or not any notice had been given to the protecting power of the Japanese government concerning the trial of the case now before the Commission, in accordance with Article 60 of the Geneva Convention and paragraph 133 of Field Manual 27-10. The Prosecutor pointed out that Defence Counsel was basing his inquiry on the assumption that the accused was a prisoner-of-war. He claimed, however, that Yamashita was not before the Commission as a prisoner-of-

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war but as an alleged war criminal. The Prosecutor had therefore no objection to stating, for the benefit of the record, that so far as he knew, the United States of America had not given any notification, official notification, to the Government of Spain, the protecting power of Japan, that Tomoyuki Yamashita was being tried as a prisoner-of-war, for the reason that he was not being so tried. The Geneva Convention had no application to the case.

The President of the Commission then ruled that the request of the Defence Counsel had been adequately discussed by the Prosecution, within the limits of the information which would ordinarily be available, and requested the Prosecution to open its case.

(x) *Some Later Events Relating to the Preparation of the Defence*

This appears to be the most appropriate place to set out certain further requests for a continuance made by the Defence, and related events, which were referred to by Mr. Justice Rutledge in the course of his dissenting judgment on the motion and petition which Yamashita brought before the Supreme Court of the United States. (Footnote 1: See p.62)

On 29th October, 1945, near the end of the day's sittings, the President of the Commission interrupted the Prosecutor, who was about to call certain evidence relating to an item contained in the Supplemental Bill of Particulars, and stated that the Commission would not at that time listen to testimony or discussion on the item in question. In response to an inquiry by the Prosecution, the Defence indicated that it would require two weeks before it could proceed on the Supplemental Bill.

On 2nd November, 1945, after the Commission had received an affirmative answer to its inquiry whether the Defence was ready to proceed with an item in the Supplemental Bill which the Prosecution proposed to prove, the President said to the Defence Counsel : " Hereafter, then, unless there is no (*sic*) objection by the Defence, the Commission will assume that you are prepared to proceed with any items in the Supplemental Bill." On 6th November, 1945, the Prosecution enquired when the Defence would be ready to proceed on certain further items in the Supplemental Bill, and the Prosecutor added : " Frankly, sir, it took the War Crimes Commission some three months to investigate these matters and I cannot conceive of the Defence undertaking a similar investigation with any less period of time." At this point, the President stated : " Let the Commission answer that. We realise the tremendous task which we placed upon the Defence and with which they are faced and it is our determination to give them the time they require. We ask that no time be wasted and we feel confident that you will not waste any, and we will see to it that you get time to prepare your defence."

On 12th November, 1945, the Commission announced that it would grant a continuance " only for the most urgent and unavoidable reasons." The Commission went on to question the need for all of the six officers representing the defence to be present during

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presentation of all the case, suggested that one or two would be adequate and others should be out of the court-room engaged in performing specific missions for Senior Counsel, and suggested bringing in additional Counsel, that “ need to request continuance may not arise.”

Finally, on 20th November, at the end of the presentation of the evidence for the Prosecution, the Defence moved for “ a reasonable continuance.” Counsel stated that during the time the court had been in’ session, the Defence had had no time “ to prepare any affirmative defence,” since they had had to work “ day and night to keep up with the new Bill of Particulars.”

The Commission denied the motion ; in announcing its decision the President stated that in open session and in chambers the Commission had cautioned both Prosecution and Defence to so plan their preparation as to avoid the necessity of asking for a continuance, recalled the words used by the Commission on 12th November, and repeated that the Commission had, from an early point in the trial, from time to time invited the Defence to apply for the appointment of additional Counsel.

Counsel for the Defence then asked for “ a short recess of a day.” The Commission suggested a recess until 1.30 in the afternoon. Counsel responded this would not suffice. The Commission stated it felt “ that the Defence should be prepared at least on its opening statement,” to which Senior Counsel answered : “ We haven’t had time to do that, sir.” The Commission then recessed until 8.30 the following morning.

6. THE OPENING ADDRESS FOR THE PROSECUTION

After repeating the Charge facing the accused and emphasising that the former alleged a disregard of his duty to control the members of his

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command, the Prosecution made the following claim regarding General Yamashita’s command :

“ We will open our case with proof that the accused, Yamashita, was Commander of the Army Forces in the Philippines during the period stated in the charge-that is to say, from 9th October, 1944, to the time of surrender, September 1945 ; that in addition he commanded, as a part of those forces, or attached thereto, the so-called ‘ Kempei Tai ‘, or military police. We will show also that he had overall command of the prisoner-of-war camps and civilian internment camps, labour camps, and other installations containing prisoners of war and other internees in all the Philippine Islands.

“ We will show that his area or territory of command included all of the Philippine Islands, the entire area so known. We will show that at times he also commanded Navy forces and air forces, particularly when engaged as ground troops.”

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The Prosecutor then set out the essence of the case against the accused, in the following words :

" We will then show that various elements, individuals, units, organisations, officers, being a part of those forces under the command of the accused, did commit a wide pattern of widespread, notorious, repeated, constant atrocities of the most violent character ; that those atrocities were spread from the northern portion of the Philippine Islands to the southern portion ; that they continued, as I say, repeatedly throughout the period of Yamashita's command ; that they were so notorious and so flagrant and so enormous, both as to the scope of their operation and as to the inhumanity, the bestiality involved, that they must have been known to the accused if he were making any effort whatever to meet the responsibilities of his command or his position ; and that if he did not know of those acts, notorious, wide-spread, repeated, constant as they were, it was simply because he took affirmative action not to know. That is our case."

The Prosecutor made the following statement on the legal nature of the Commission and on the question of the applicability of the United States Articles of War (Footnote 1: See pp. 44-6 and 63-9.) to its proceedings :

" Furthermore, sir, the Articles of War do not apply to this Commission in any particular. It is so ruled by the Judge Advocate-General, and if the Commission or Defence so desires I will be glad to supply a copy of that recent ruling. The Articles of War are not binding upon, do not apply to this Commission.

" This Commission, sir, is not a judicial body ; it is an executive tribunal set up by, the Commander-in-Chief-more specifically, the Commanding General, AFWESPAC-for the purpose of hearing the evidence on this charge, and of advising him, along with the Commander-in-Chief of the Army Forces of the Pacific, as to the punishment, in the event that the Commission finds the charge to be sustained. It is an executive body, and not a judicial body."

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7. THE OPENING ADDRESS FOR THE DEFENCE

Before introducing evidence, the Defence made a short opening statement summarising the facts which they hoped to prove, and making the following claims in particular :

" Defence will show that the accused never ordered the commission of any crime or atrocity ; that the accused never gave permission to anyone to commit any crimes or atrocities ; that the accused had no knowledge of the commission of the alleged crimes or atrocities ; that the accused had no actual control of the perpetrators of the atrocities at any time that they occurred, and that the accused did not then and does not now condone, excuse or justify any atrocities or violation of the laws of war.

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" On the matter of control we shall elaborate upon a number of facts that have already been suggested to the Commission in our cross-examination of the Prosecution's witnesses :

1. That widespread, devastating guerilla activities created an atmosphere in which control of troops by high ranking officers became difficult or impossible

2. That guerilla activities and American air and combat activities disrupted communications and in many areas destroyed them altogether, making control by the accused a meaningless concept. And

3. That in many of the atrocities alleged in the Bill of Particulars there was not even paper control ; the chain of command did not channel through the accused at all. . . . "

You will see the picture of a General working under terrific pressure and difficulty, subject to last-minute changes in tactical plans ordered from higher headquarters, and a man who when he arrived in Luzon actually had command over less than half of the ground troops in the Island."

8. THE EVIDENCE BEFORE THE COMMISSION

As the President of the Commission pointed out, (Footnote 1: See pp.33-4.) the latter heard 286 witnesses and also accepted as evidence 423 exhibits of various kinds.

(i) *The Evidence for the Prosecution*

The evidence brought before the Commission established hundreds of incidents which included the withholding of medical attention from, and starvation of, prisoners of war and civilian internees, pillage, the burning and destruction of homes and public buildings without military necessity, torture by burning and otherwise, individual and mass execution without trial, rape and murder, all committed by members of the Japanese forces under the command of accused. These offences were widespread as regards both space and time.

By and large, the Defence did not deny that troops under the command of the accused had committed these various atrocities, and it is not therefore

proposed to summarise in these pages the testimony and documents which were placed before the Commission regarding these offences.

By stipulation, it was agreed that the accused was from 9th October, 1944, to 3rd September, 1945, Commanding General of Japanese 14th Army Group, including the Kempei Tei, or Military Police in the Philippine Islands ; this stipulation was received in evidence.

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Apart from claiming that the widespread nature of the offences described above must lead inevitably to the conclusion that they were planned by Yamashita, in view of his position of command, the Prosecution also produced evidence purporting more directly to show that the accused was implicated in the offences charged. This evidence is summarised in the following paragraphs.

Colonel Masatoski Fujishige, of the Japanese Army, testified that troops under. his command had operated in the Batangas Islands and part of the Laguna Province after 1st January, 1945. His commander was Lt.-General Yokoyama ; the latter, stated the witness, probably " might have " come under Yamashita's command. Masatoski admitted having instructed certain officers and non-commissioned officers under his orders to kill all who oppose the Emperor with arms, even women and children ; he had had orders to expedite the clearing of his area of guerrillas.

Narciso Lapus stated that he had been private secretary to the Philippine General Artemio Ricarte, who had supported and worked for the Japanese during their occupation of the Philippine Islands. During the period from October 1944 and 31st December, 1944, Ricarte maintained contact with Yamashita as Commander-in Chief of the Japanese forces in the Philippines. Ricarte told the witness that Yamashita, as the highest commander of the Japanese forces in the Philippines, had control over the army the navy and the air force. Four or five days after Yamashita arrived in the Philippines, Ricarte had a conversation with him, and on returning to his house, the latter told Lapus that Yamashita had issued a general order to all the commanders of the military posts in the Philippine Islands " to wipe out the whole Philippines, if possible," and to destroy Manila, since everyone in the Islands were either guerrillas or active supporters of the guerrillas ; wherever the population gave signs of favouring the Americans the whole population of that area should be exterminated. Yamashita subsequently rejected Ricarte's plea that he should withdraw these orders.

Joaquin Galang, who claimed to have been a friend of Ricarte, stated that in December 1944, Yamashita visited Ricarte, and the former rejected Ricarte's request that the order to kill all Philippine inhabitants and destroy Manila be revoked ; speaking through Ricarte's grandson as interpreter, Yamashita said : " An order is an order, it is my order, and because of that it should not be broken or disobeyed."

Hideo Nishiharu, who had been head of the Judge Advocate Section in the Headquarters of Yamashita in the Philippines, stated that on 14th December, 1944, he advised the accused that a large number of persons suspected of being guerrillas were in custody and that there was no time for trial. He suggested that the question of their punishment be left to military tribunal officers co-operating with the Military Police. Yamashita, said

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the witness, " offered no suggestions. He just nodded " and Nishiharu took this to signify assent. About 600 persons were thereupon executed without trial other than investigation by two officers.

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Richard Sakakida stated that he had been an interpreter in the office of Yamashita's Judge Advocate. He testified that in the case of offences by Filipino civilians and Americans, an investigation was made by the Japanese Military Police (Kempei Tai) and the record thereof was sent to the Court Martial Department ; the Judge Advocate assigned to the case and the Chief Judge Advocate would then decide on the verdict and sentence in advance of the trial. During December 1944, trial consisted merely in the accused signing his name and giving his thumb-print, in reading the charge to him and in sentencing him. In the event of death sentence being passed, the victim was not informed of this until arrival at the cemetery. In one week in December 1944, cases involving about 2,000 Filipinos accused of being guerrillas were so handled in Yamashita's headquarters. If Japanese soldiers were tried, however, witnesses for the accused were allowed to testify, and the accused was told of any death sentence at the time of trial. Japanese soldiers were tried and convicted of rape, but the witness could remember no convictions after October 1944.

Fermin Miyasaki, a Filipino citizen who had been employed by the Japanese Military Police as an interpreter, described the various methods of torture used by the " Cortabitarte Garrison " (the Southern Manila Branch of the Militarjr Police) during the period October to December 1944, on civilians suspected of being guerrillas or guerrilla sympathisers ; the witness then went on to state that in December 1944, Yamashita commended the Garrison in writing for their work " in suppressing guerrilla activities."

The Prosecution put in as evidence a certificate signed by Mr. James F. Bymes, Secretary of State of the United States of America, under date of 26th October, 1945, which included the following words:

" I further certify that, in response to proposals made by the Government of the United States through the Swiss Minister in Tokyo, the Swiss Minister telegraphed on 30th January, 1942, that the ' Japanese Government has informed me : ". . . Although not bound by the Convention relative treatment prisoners of war Japan will apply *mutatis mutandis* provisions of that Convention to American prisoners of war in its power." ' "

Filemon Castillejos, a Filipino, after describing the killing of three American prisoners of war by Japanese troops belonging to General Tajima's garrison, said that a Japanese Captain, a lieutenant and two soldiers had told him that the victims were killed because there was a telegram from Yamashita to General Tajima ordering that all the American prisoners in the Philippines be killed.

Paul Herinesen, a United States national who had been a prisoner of war in the Philippines, described how an American civilian internee, at the prison camp commandant's order, had been shot without trial while lying wounded on the guard-house floor. When protest was made by the internees, the commandant stated that he had had orders from Imperial Headquarters in Manila to shoot persons attempting to escape.

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(ii) *The Evidence for the Defence*

The following paragraphs set out the essential facts placed before the Commission by the Defence.

Denhichi Okoochi, who had been Supreme Commander of the naval forces in the Philippines, stated that he transferred to Yamashita tactical command of the navy and troops in Manila on 5th January, 1945, and that the accused retained this command until 24th August, 1945. The witness retained " administrative control " over these forces, that is to say control over " such things as personnel, supplies and so forth " but not the operational control, which was in Yamashita's hands.

Bislumino Romero, grandson of General Ricarte, stated that Galang was not stating the truth when he testified that Romero interpreted a conversation between Ricarte and Yamashita in the former's house ; he never interpreted any statement of the accused that " all Filipinos are guerrillas and even the people who are supposed to be under Ricarte," and the witness's grandfather had never made to Yamashita in the witness's presence any request that Yamashita should revoke an order to kill all Filipinos and destroy Manila.

Shizus Yokoyma, previously a Lieutenant-General in the Japanese Army under Yamashita, stated that the latter had issued no orders to him for the .killing of Filipino citizens or the destruction of property in Manila. The accused had warned him to be fair in all his dealings with the Filipino people. Yamashita had no power to discipline, promote, demote or remove members of the naval land forces.

Photostatic copies of parts of the issues of Manila Tribune for 4th, 17th and 26th November, 1944, and 31st January, 1945, which were put in as evidence by the Defence, showed that General Ricarte was active in assisting the Japanese and urging the Filipinos to resist the Americans. Official documents were put in as tending to prove that the Prosecution witnesses Lapus and Galang had been collaborators during the Japanese occupation of the Philippines.

Lieutenant-General Muto, Chief of Staff for Yamashita, appeared for the Defence. He stated that Yamashita had commanded the 11th Area Army with the duty to defend the entire Philippine Islands. Morale in the army was low and preparations for the defence were inadequate when the accused took over this task. Lack of knowledge of the Islands and the separation of commands prohibited the correction of deficiencies, and efforts to bring the independent commands under Yamashita's control required several months of negotiation. The accused had wanted to withdraw from Manila altogether and to fight in the mountains, but lack of transportation and reluctance on the part of certain of his officers had prevented him from taking this step, despite the orders which he gave that evacuation should take place. Only 1,500 to 1,600 of Yamashita's troops were in Manila at the time of the battle ; they had orders to maintain order and to protect supplies. Yamashita had no authority over the others. The witness had never heard of any order by Yamashita that non-combatant civilians be killed and Manila destroyed. Yamashita never

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visited any of the prisoner-of- war camps in the Philippines, but his policy was that prisoners should

be treated in accordance with the Geneva Convention. Prisoners were to be fed according to the same standards as Japanese soldiers, but reduced rations were inevitable due to food shortages. After complaints had been made to Yamashita concerning Japanese military police methods, he succeeded in having the Military Police Commander removed by the authorities in Tokyo. The witness denied that Colonel Nishiharu, Yamashita's Judge Advocate, had reported that there were one thousand guerrillas in custody and that there was no time to try them. In December, 1944, the Shimbu Army had power to try all suspected guerrillas and impose death sentences.

Lieutenant-Colonel Ishikawa of Yamashita's headquarters staff, who had been in charge of supply after 27th September, 1944, and inspected prisoner and internee camps, also stated that the prisoners' food was similar to that of the Japanese soldiers. An order from Tokyo, that prisoners be treated in a friendly manner and that as much food as possible be left behind for them should the Americans approach, was passed on by Yamashita. The witness, on his trips to the camps at Santo Tomas, Bilibid and Fort McKinley, had heard no reports of cruelty or ill-treatment. The accused required that any complaints filed by American prisoners of war and civilian internees should be brought to his attention.

Lieutenant-General Koh, who had been Commanding General of Prison and Internment Camps in the Philippines under Yamashita, also claimed that prison camps were operated under orders from Tokyo in accordance with the provisions of the Geneva Convention. The food given to prisoners of war and internees was inadequate, but the Japanese were likewise on reduced rations. Yamashita did not inspect the camps.

This witness gave evidence regarding conditions in the camps tending to show that they were as high as they could be in the circumstances. Lieutenant-General Shiyoku Kou, who had been in charge of two prisoner-of- war camps and three civilian internment camps, and John Shizuo Ohaski, an employee in one of the camps, were also called and gave similar evidence for the Defence.

The accused himself gave sworn evidence. He stated that, on his assuming command of the 14th Area Army on 9th October, 1944, he had but few experienced officers and he was short of all supplies, including food and transport. At first there were over 30,000 troops in the Islands who were not under his orders. These included the naval land forces in Manila, and when he did achieve control over these it was for operational and not for disciplinary purposes. He had unsuccessfully ordered the evacuation of Manila. He denied issuing orders for ill-treatment or torture of captives or having had reports of such offences, and his policy was to treat prisoners of war in the same way as his own troops in matters such as food. He had ordered that armed guerrillas be suppressed and had left the methods to be used to the discretion of his commanders. He denied that his Judge Advocate had ever told him that a large number of guerrillas would have to be disposed

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of without trial, for lack of time. The Commanding Generals of the 35th and Shimbu Armies had authority to pass death sentences on American prisoners of war tried in their areas without referring

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the matter to the accused. The accused admitted, nevertheless, that he was responsible to the Southern Army for seeing that the proper procedure was followed ; communications were cut, however, and he did not always know about details.

The accused admitted that prisoner-of-war and civilian internment camps were under his command and claimed that all death sentences passed in the 14th Army required his approval ; the death sentences passed on guerrillas which he had approved in the Philippines were not more than 44 in number.

9. THE TYPES OF EVIDENCE ADMITTED

As was indicated by the President of the Commission (Footnote 1:see pp. 33-4), a wide variety of types of evidence was admitted during the course of the trial. A large number of objections were made by the Defence, not always unsuccessfully, to the admission of items of evidence, in particular to pieces of documentary evidence and to hearsay evidence.

When the case eventually came before the Supreme Court of the United States, Mr. Justice Rutledge, in his dissenting opinion (Footnote 2:See pp. 60-l and 62-3.), referred to a series of events which it would be appropriate to describe at this point. On 1st November, 1945, the President of the Commission ruled that the latter was unwilling to receive affidavits without corroboration by witnesses on any item in the Bills of Particulars. On 5th November, however, the Commission reversed this ruling and affirmed its prerogative of receiving and considering affidavits or depositions, if it chose to do so, " for whatever probative value the Commission believes they may have, without regard to the presentation of some partially corroborative oral testimony."

10. THE CLOSING ADDRESS FOR THE DEFENCE

Defence Counsel attacked the evidence of the Prosecution concerning some few of the alleged offences, but in general the Defence did not deny that the atrocities alleged by the Prosecution had actually taken place, and the principal aim of Counsel was to show that the accused was not legally responsible for these offences.

Great stress was placed on the' difficulties which had faced the accused on his taking command of the 14th Army Group on 9th October, 1944. It was claimed that :

" The 14th Army Group was subordinate to the Supreme Southern Command under Count Terauchi, whose headquarters was in Manila. The navy was under a separate and distinct command, subordinate only to the naval command in Tokyo. Subordinate to

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Count Terauchi's command, but parallel with the 14th Army Group, were the 4th Air Army, the 3rd Transport Command, and the Southern Army Communications Unit. Therefore, out of approximately 300,000 troops in

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Luzon, only 120,000 were under General Yamashita's command. An acute shortage of food existed, and the Japanese army was exceedingly short in both motor transport and gasolene. The accused found that the general state of affairs in the 14th Army Group was very unsatisfactory. The Chief of Staff was ill, there were only three members of Kuroda's staff left in the headquarters, and the new members were not familiar with the conditions that existed in Luzon. The 14th Army Group was of insufficient strength to carry out the accused's mission, inasmuch as it was, in his opinion, about five divisions short of what would be required. His troops were of poor calibre and not physically up to standard requirements. The morale of his men was poor. In addition, a strong anti-Japanese feeling existed among the Filipino population. Preparations for defence were practically non-existent. . . .

" To unify the 14th Command, General Yamashita requested that 30,000 troops under the Southern Command be transferred to him. This was accomplished in the early part of December. The 4th Air Army came under his command on 1st January, 1945, the 3rd Maritime Transport Command came under his command during the period 15th January to 15th February of this year. The navy never came under his command, but the naval troops in the City of Manila came under the command of the 14th Army Group on 6th January for tactical purposes during landing operations only.

" This limited command . . . involved the right to order naval troops to advance or to retreat, but did not include the command of such things as personnel, discipline, billeting or supply. . . .

" After the American victory on Leyte, the Japanese situation on Luzon became extremely precarious. The American blockade became more and more effective ; the shortage of food became critical. The American air force continually strafed and bombed the Japanese transportation facilities and military positions. General Yamashita, charged specifically with the duty of defending the Philippines, a task that called for the best in men and equipment, of which he had neither, continued to resist our army from 9th October to 2nd September of this year, at which time he surrendered on orders from Tokyo.

" The history of General Yamashita's command in the Philippines is one of preoccupation and harassment from the beginning to the end."

The Defence maintained that the Manila atrocities were committed by the naval troops, and that these troops were not under General Yamashita's command. How, it was asked, could he be held accountable for the actions of troops which had passed into his command only one month before, at a time when he was 150 miles away-troops whom he

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had never seen, trained or inspected, whose commanding officers he could not change or designate, and over whose actions he had only the most nominal control ?

In the submission of the Defence no kind of plan was discernible in the Manila atrocities : " We see only wild, unaccountable looting, murder and rape. If there be an explanation of the Manila story, we believe it lies in this : Trapped in the doomed city, knowing that they had only a few days at best to live, the Japanese went berserk, unloosed their pent-up fears and passions in one last orgy of abandon."

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It was pointed out that General Yamashita arrived in Manila on 9th October and left on 26th December. Until 17th November, General Yamashita was not even the highest commander in the City of Manila since his immediate superior, Count Terauchi, was there and in charge. It was Count Terauchi and not General Yamashita who was handling affairs concerning the civilian population, relations with the civil government and the discouragement and suppression of anti-Japanese activities. The crucial period, therefore, was from 17th November to 26th December, a matter of a mere five weeks, during which General Yamashita was in Manila and in charge of civilian affairs. Could it be seriously contended that a commander who was beset and harassed by the enemy and was staggering under a successful enemy invasion to the south and expecting at any moment another invasion in the north could in such a short period gather in all the strings of administration ? Even so, the accused took some steps in an attempt to curb the activities of the Japanese military police who were terrorising the civilian population.

Regarding the charges alleging the killings of prisoners of war, the submission of the Defence, in essence, was that Yamashita had not been shown to have known of, condoned, excused, permitted or ordered them ; sometimes there was no proof even of them having been committed by troops under his command.

The rest of the allegations as to prisoner-of-war camps had to do with treatment and, for the most part, the question of insufficient food. The Defence rested their argument in this connection on the seriousness of the general food situation in the Philippine Islands, which was aggravated by the United States offensive. The Defence claimed that the evidence had shown that, despite this situation, the prisoners of war got rations equal to those of the Japanese soldiers. The accused had done all he could to alleviate the food situation in the civilian internee and prisoner-of-war camps, and far from ordering all American prisoners of war executed, or ordering any prisoners of war executed, General Yamashita's orders were to turn them over to the American forces at the earliest available time.

The main submissions of the Defence relating to the military police and guerrilla situation in Manila were : first, that guerrillas were, in the eyes of International Law, subject to trial and execution if caught ; second, that International Law did not prescribe the manner or form of trial which must be given ; third, that the suspected guerrillas held in Manila in December, 1944, were tried in accordance with the provisions of Japanese

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military law and regulations ; fourth, that General Yamashita never ordered or authorised any deviation from the provisions of Japanese military law and regulations ; fifth, that the fact that the method of trial prescribed by Japanese military law and regulations is a summary one and not in accord with Anglo-Saxon conceptions of justice was immaterial, since International Law did not prescribe any special method of trial, and in no event were Japanese methods of trial provided by Japanese law the fault or responsibility of the accused.

The explanation for many of the atrocities alleged by the Prosecution was to be found in the activities of the Philippine guerrilla movement which did great damage to the Japanese position. However admirable its members i might be as fearless fighters, they were, in Japanese eyes, criminals, and the

Japanese had every right under International Law to try and execute them as such. Any civilian who took up arms against the Japanese was, in the eyes of International Law, guilty of war treason, just as any Japanese in Tokyo who might now take up arms against the United States would be a war traitor and subject to the death sentence. The evidence regarding the treatment of the Philippine guerrillas on capture was confused but it seemed that there was first an investigation by a military police investigating officer ; then a consultation or conference by the judge advocate's department ; and finally a form of trial, which had much less importance and formality than the hearing in the judge advocate's department. The evidence indicated that Japanese methods of trial and procedure were foreign to the American standards of justice. It had been shown in the witness box, however, that these methods were used not only in the case of civilians accused of guerrilla activities, but also in the case of Japanese soldiers accused of purely military offences. In neither case was there a right to counsel ; in neither case were witnesses called. In both cases the decision of the court was based on the facts developed in the military police investigation held before trial. Furthermore, the methods of trial used were substantially those required by Japanese military law and regulations. As war criminals, guerrillas were liable to execution and there was an equal right on the part of the occupant to take stern methods to exterminate them. If captured, they were not entitled to any of the rights of a prisoner of war. There would certainly have to be proof that the person captured was a guerrilla, or was aiding the guerrillas, and this implied the holding of a trial. The Prosecution had alleged many executions without trial, but the Defence submitted that in practically all of these cases there was at least a semblance of an investigation. The Defence had claimed that because General Yamashita was a prisoner of war, his trial should follow at least the rules laid down by the *Manual for Courts Martial*, but the Prosecution had taken the position that General Yamashita, as an" accused war criminal, was not entitled to the rights of a prisoner of war and that those rules need not apply. The same should apply, *a fortiori*, to guerrillas, argued the Defence, because a guerrilla was never a prisoner of war.

The allegations concerning punitive expeditions that included the execution of small children or other persons who were not guerrillas were a different matter, but there had

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been no testimony that General Yamashita ever ordered or permitted or condoned or justified or excused in any way these atrocities. All of the testimony had been to the contrary. In relation to the guerrillas, however, the Defence submitted that General Yamashita did precisely what he should have done under the circumstances. He issued an order in which he directed action against armed guerrillas, but was careful to say " armed", and at the same time he informed his chiefs-of-staff " to handle the Filipinos carefully, to co-operate with them and to get as much co-operation as possible from the Filipino people."

The Defence anticipated that the Prosecution would claim that there were so many of these atrocities, that they covered so large a territory, that General Yamashita must have known about them. The reply of the Defence was that, in the first place, a man was not convicted on the basis of what someone thought he must have known but on what he has been proved beyond reasonable doubt to have known ; and in the second place, General

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Yamashita did not know and could not have known about any of these atrocities.

Practically all of the atrocities took place at times when and in areas where the communication of news of such matters was practically impossible. Further, the accused's orders were clear : to attack armed guerrillas and to befriend and win the co-operation of other civilians. When atrocities occurred, they were committed in violation of General Yamashita's orders, and it was quite natural that those who violated these orders would not inform him of their acts.

The accused had himself explained why he knew nothing of the various alleged atrocities. He had pointed out that he was constantly under attack by large American forces, and had said :

" Under these circumstances I had to plan, study and carry out plans of how to combat superior American forces, and it took all of my time and effort.

" At the time of my arrival I was unfamiliar with the Philippine situation, and nine days after my arrival I was confronted with a superior American force. Another thing was that I was not able to make a personal inspection and to co-ordinate the units under my command. . . . It was impossible to unify my command, and my duties were extremely complicated.

" Another matter was that the troops were scattered about a great deal and the communications would of necessity have to be good, but the Japanese communications were very poor. . . .

" Reorganisation of the military force takes quite a while, and these various troops, which were not under my command, such as the Air Force and the Third Maritime Command . . . were gradually entering the command one at a time, and it created a very complicated situation. . . . Under the circumstances I was forced to confront the superior U.S. forces with subordinates whom I did not know and with whose character and ability I was unfamiliar.

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" Besides this I put all my effort to get the maximum efficiency and the best methods in the training of troops and the maintaining of discipline, and even during combat I demanded training and main: tenance of discipline. However, they were inferior troops, and there simply wasn't enough time to bring them up to my expectations. . . .
" We managed to maintain some liaison, but it was gradually cut off, and I found myself completely out of touch with the situation. I believe that under the foregoing conditions I did the best possible job I could have done. However, due to the above circumstances, my plans and my strength were not sufficient to the situation, and if these things happened they were absolutely unavoidable."

The Defence submitted that General Yamashita's problem was not easy. He was harassed by American troops, by the guerrillas, and even by conflicting and unreasonable demands of his superiors. He had no time to inspect prisoners ; all he could do about the guerrilla situation was to give orders to suppress armed combatant guerrillas and befriend and co-operate with other civilians, and to trust his subordinates to carry out his orders.

Defence Counsel pointed out that the evidence of the Prosecution related almost exclusively to the proof of the atrocities alleged in the Bills

of Particulars. A minute fraction thereof attempted to impute to General Yamashita the knowledge of the commission of the atrocities and, in a few instances, the ordering of the commission of the atrocities.

The evidence of Lapus (Footnote 1: See p.19), a collaborator during the Japanese occupation, had tended to show General Yamashita as having ordered the massacre of civilians and the destruction of the City of Manila, but his evidence had been full of inconsistencies. Galang, (Footnote 2: See p.19) another collaborator, testified that in a conversation General Ricarte said to General Yamashita, through Ricarte's grandson as interpreter : " I would like to take this occasion to ask you again to revoke the order to kill all of the Filipinos and to destroy all of the city," and that General Yamashita answered : " An order is an order ; it is my order. It should not be broken or disobeyed." Yet the grandson (Footnote 3: See p.21.) had testified that he had not interpreted the conversation alleged to have taken place between his grandfather and General Yamashita in the presence of Galang. The evidence of Castillegos (Footnote 4: See p.20) was valueless hearsay. Counsel for the Defence submitted that there was no credible testimony in the entire record of trial which in any manner supported any contention that General Yamashita had ordered or had actual knowledge of the commission of any of the atrocities set forth in the Bills of Particulars. Without knowledge of the commission or the contemplated commission of the offences, General Yamashita could not have permitted the commission of the atrocities. The Defence did not deny the commission of atrocities by Japanese troops, but the fact that atrocities were committed did not prove that General Yamashita had knowledge of the commission thereof ; nor could knowledge be inferred therefrom under the conditions which existed during the period in which the atrocities were committed.

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Under adverse combat conditions, with the myriad of problems which had to be solved in fighting a losing battle, neither General Yamashita or the members of his staff could or would have time for any duties other than those of an operational nature and could not, and did not, know of the commission of the acts set forth in the Bills of Particulars by troops whose imminent and inevitable death turned them into battle-crazed savages. Nor was General Yamashita or the members of his staff chargeable with any dereliction of duty in not learning of these occurrences.

The evidence adduced by the Prosecution, therefore, did not establish that either General Yamashita or his headquarters issued orders directing the commission of the atrocities set forth in the Bills of Particulars ; nor did it establish that General Yamashita or his headquarters had any knowledge thereof, permitted the commission thereof, or that under the circumstances then existing General Yamashita unlawfully disregarded and failed to discharge his duty as the Commanding General of the 14th Area Army in controlling the operations of the members of his command, thereby permitting them to commit the atrocities alleged.

The only possible basis for imputing to General Yamashita any criminal responsibility for the commission of these atrocities was provided by his status as the Commanding General of some of the troops involved in the commission thereof.

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The United States did not recognise a criminal responsibility based upon the status of an individual as a Commanding General of troops, but did recognise the criminal liability attached to a Commanding General for the improper exercise of that command. The United States had defined the criminal liability of individuals offending against the Laws of War in the War Department Publication, *Rules of Land Warfare*, FM 27-10, Section 345. 1, wherein criminal liability was defined and limited to individuals and organisations who violated the accepted laws and customs of war.

Under this section, the liability for war crimes was imposed on the persons who committed them and on the officers who ordered the commission thereof. The war crime of a subordinate, committed without the order authority or knowledge of the superior officer, was not the war crime of the superior officer.

Not only was there no proof of the criminal responsibility of General Yamashita for the alleged offences ; witnesses for the Defence had testified that no orders directing or authorising the commission of the alleged acts were issued by General Yamashita or by his headquarters, that no reports of any of the acts were received by General Yamashita or his headquarters, that under the circumstances General Yamashita and the members of his staff were absorbed in the duties incident to combat to the exclusion of other duties normally performed by an army headquarters, and that the proper functioning of General Yamashita and his staff officers was complicated by enemy action, disabling and destruction of supply lines, lines of communication and motor equipment, the lack of gas

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and oil for the operation of the vehicles which were not damaged, and the consequent impossibility to keep advised of the administrative functioning of his command.

General Yamashita, testifying as a witness in his own behalf, had denied that he issued any orders directing the commission of any act of atrocity, that he received any report of the commission of such acts, that he had any knowledge whatsoever of the commission of such acts, that he permitted such acts to be perpetrated, or that he condoned the commission of such acts.

11. *THE CLOSING ADDRESS FOR THE PROSECUTION*

The Prosecution claimed that the principal contentions as between the Defence and the Prosecution were as to whether or not the accused failed to perform a duty which he owed as commander of armed forces in the Philippines, and as to whether or not such a failure would constitute a violation of the Laws of War.

The accused had acknowledged that he was under a duty under International Law to control his troops so that they would not commit wrongful acts, that if commanding officer ordered, permitted or condoned the crime which was committed by his troops or his subordinate, then that commanding officer would be subject to criminal punishment under the military law of Japan, and that if he took all possible means to prevent the crime committed by his troops or his subordinate, and yet that crime was committed, then the commanding officer, despite all of the efforts which he made, would bear administrative responsibility to his superiors.

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The Prosecution underlined the fact that so far as the Laws of War were concerned there was no such distinction between criminal responsibility and administrative responsibility. If an act constituted a violation of the laws of war the death penalty might be assessed irrespective of whether or not under the military laws of the nation involved or in civil law there would or would not be a criminal responsibility.

The evidence had shown that the accused became to all intents and purposes after the 17th November, 1944, the military governor of the Philippine Islands. He was the highest military commander in this area. It was his duty, in addition to his duty as a military commander, to protect the civilian population. Whereas Defence Counsel had referred to the atrocities as having been committed by “ battle-crazed men under the stress and strain of battle,” there was in fact evidence that in many instances those acts were committed under the leadership of commissioned officers. That is quite a far cry from the sudden breaking of bounds of restraint by individuals on their own initiative. The submission of the Prosecution was that the evidence showed that these atrocities were carefully planned, carefully supervised ; they were in fact commanded.

The Prosecution recalled that the accused had asserted that he had no knowledge of these acts, and that if he had had knowledge or any reason to forsee these acts he would have

taken affirmative steps to prevent them. In explanation of his claim that he had no knowledge he had asserted that his communications were faulty. The Prosecution submitted however that there was nothing in the record to the effect that the accused did have adequate communications. For instance, the accused had acknowledged that reports from Batangas concerning guerrilla activity were received from time to time. Even if it were accepted that the accused did not know of what was going on in Batangas, the fact remained that he did not make an adequate effort to find out. It was his duty to know what was being done by his troops under his orders. The accused had pleaded that he was too hard pressed by the enemy to find out what was the state of discipline among his troops. The Prosecution claimed however that the performance of the responsibility of the commanding officer toward the civilian populations is as heavy a responsibility as the combating of the enemy. And if he chose to ignore one and devote all of his attention to the other he did so at his own risk.

The accused had made no special attempt to find what the prevailing conditions were in the prison camps under his control, and many of the atrocities against the civilian population were committed very close to his headquarters. The accused had testified that he did not inquire as to the methods being pursued by the military police. He issued orders for the release of certain unfortunate captives upon the approach of United States troops, but only because he knew he was defeated and wanted to improve his record.

He had also acknowledged that he knew that prisoners of war were being made to work on airfields or on airfield installation. In response to questions he had stated that, in his opinion, airfield work was entirely in accordance with International Law, so long as the airfield was not under

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attack. The Prosecution claimed, however, that it was a violation of the Geneva Convention for those men to work on that airfield at all.

Turning to the food situation, the Prosecutor claimed that the evidence showed that according to the observation and the personal knowledge of internees the Japanese garrison at each of those camps actually were getting better food and more food than were the internees.

There was no evidence that the accused ordered the executions of certain prisoners of war which had been proved. The executions were, however, carried out by men under his command. The very method by which those executions were accomplished, the complete disregard of the prescribed procedure, showed that those men were acting under approval. Otherwise they would never have dared tp be so arbitrary.

Many thousands of unarmed women and children had been butchered in Manila and in Batangas, and they could not be considered guerrillas. They were given no trial, and their killing was carried out by military men acting as military units, and led by officers, non-commissioned and commissioned. These massacres were not done in the heat of battle.

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More than 25,000 people, over a period of more than a month, were massacred in a methodical obviously planned way and, as the evidence indicated very strongly, under the orders of General Fujisige, the Commanding Officer in the Batangas area. The Prosecution claimed that the accused must be held responsible for these atrocities in view of the wide and general nature of the order which he issued for the prompt subjugation of armed guerrillas. The Prosecutor claimed that : " He knew the guerrilla activity. He knew that his troops were being harassed. He gave them an order which naturally under the circumstances would result in excesses, in massacres, in devastation, unless the order were properly supervised. He unleashed the fury of his men upon the helpless population, and apparently, according to the record, made no subsequent effort to see what was happening or to take steps to see to it that the obvious results would not occur-not a direct order, but contributing necessarily, naturally and directly to the ultimate result."

Whatever the procedures of the courts martial under Yamashita may have been, he had acknowledged that he made no effort to determine what those courts martial were doing. He had stated that no American prisoner of war was tried by court martial. But he could not possibly know one way or the other because, as he had said, he received no reports from them. The same applied with respect to trials by military tribunals of civilian internees.

A suspected guerrilla was not afforded any particular type of trial under International Law. There must, however, be a trial, and the minimum requirements of a trial would be knowledge of the charges, an opportunity to defend, and a judicial determination of guilty or innocence on the basis of the evidence. In fact, if the Military Police saw fit to decide that a person was to be killed, that person did not go to a court martial ; he was executed by the Military Police. General Yamashita had denied that he had ever given the Military Police authority to carry out death sentences, or authority to try and assess death sentences ; and yet, according to the testimony of the interpreter at the Cortabitarte garrison headquarters that was the

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practice of the Military Police. If Yamashita did not know of it, that was his fault. There was no question that the Military Police were directly under the command of Yamashita ; he had acknowledged that to be so.

Yamashita had claimed that the naval troops in Manila were only under his tactical command, but General Muto had acknowledged that any officer having command of troops of another branch under him did have the authority and duty of restraining those men from committing wrongful acts. The atrocities committed by these naval troops were not the acts of irresponsible individuals, acting according to a whim or while in a drunken orgy ; nor were they usually committed in the heat of battle. They were acting under officers, sometimes in concert with officers. Obviously, their acts constituted a deliberate, planned enterprise.

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The Prosecutor admitted that the application of the Laws of War to a commanding officer who fails to control his troops had not frequently been attempted. Nevertheless, he submitted that it was well recognised in International Law, even under the international conventions, that a commanding officer did have a duty to control his troops in such a way that they did not commit widespread, flagrant, notorious violations of the laws of war. He repeated that since there had existed in the Philippines a wide-spread pattern of atrocities over a period of time, necessarily notorious and committed by organised military units led by officers, there must have been a failure on the part of the ultimate commander of those troops to perform his duty so to control those troops that they would not commit such acts.

The Prosecutor argued that, since Yamashita had acknowledged that he did command an army composed of lawful belligerents, then Article 1 of the Hague Convention made him responsible for the acts of his subordinates. (Footnote 1: " The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions : " 1. To be commanded by a person responsible for his subordinates." ") This was true also under the common usages of war. Further, claimed the Prosecutor : " The criminal laws, the customs, the laws generally of civilised nations, are construed to apply in the international field as a part of the Laws of War as well, wherever they bear any relation at all," and " under laws generally, any man who, having the control of the operation of a dangerous instrumentality, fails to exercise that degree of care which under the circumstances should be exercised to protect third persons, is responsible for the consequences of his dereliction of duty. We say, apply that in this case ! Apply that in the field of military law. It is applied by international tribunals or claims commissions with respect to claims for pecuniary damages by individuals or governments against individuals of another government, or against other governments, arising out of illegal acts. There are many cases where, under International Law, a government of one nation - or let us say a nation has been held financially responsible because of the wrongful acts of its agents or representatives, military or otherwise, with consequent injuries to the nationals of other countries. There is nothing to prevent the application of that same principle in the law of war on a criminal basis."

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The Prosecution regarded the present case to be a clear case, in the international field, of criminal negligence. Wharton's *Criminal Evidence*, Volume I, Section 88, stated that a person " is not supposed to have known the facts of which it appears he was ignorant ; but if his ignorance is negligent or culpable . . . then his ignorance is no defence." A similar principle had been applied in the field of International Law. For instance, Borchard, *Diplomatic Protection*, page 217, stated that : ". . . the failure of a government to use due diligence to prevent a private injury is a well recognised ground of international responsibility." The Prosecutor continued : " Now, if it is proper and permissible under International Law and the Laws of War to apply to an entire government, an entire nation, civil responsibility in the form of damages for wrongful actions, violations of Laws of War by the agents or the representatives of that nation, is there any reason under the sun why a responsibility, criminal or civil, under the Laws of

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War, might not properly be applied under the proper circumstances in the proper case to an individual. The Defence cries that Yamashita was too far away from the scene of battle, too far removed from the actual perpetrators, justly to be charged and punished for the crimes of those under him. Yet, his very government, his entire nation may legally be held responsible - even farther removed from the perpetrators and from the scene of the crime." The analogy of liability under municipal law for the specific crime of manslaughter was also used by the Prosecution.

Moore's *International Law Digest*, Volume VI, page 919, stated that " . . . It is true that soldiers sometimes commit excesses which their officers cannot prevent ; but in general, a commanding officer is responsible for the acts of those under his orders. Unless he can control his soldiers, he is unfit to command them." The Prosecution concluded that if Yamashita could not control his troops, it was his duty to mankind, to say nothing of his duty to his country to inform his superiors of that fact so that they might have taken steps to relieve him. There was no evidence that he did that.

12. THE VERDICT AND SENTENCE

The findings of the Commission were delivered on 7th December, 1945.

The President of the Commission, after repeating the charge and summarising the offences contained in the Bills of Particulars, (Footnote 1: See p.4.) pointed out that it was "noteworthy that the accused made no attempt to deny that the crimes were committed, although some deaths were attributed by Defence Counsel to legal execution of armed guerrillas, hazards of battle and action of guerrilla troops favourable to Japan."

The President made the following remarks concerning the evidence which had been received :

" The Commission has heard 286 persons during the course of this trial, most of whom have given eye-witness accounts of what they endured or what they saw. They included doctors and nurses ; lawyers, teachers, businessmen ;men and women of religious orders ; prisoners of war and civilian internees ; officers of the United States Army ;

officers of the Japanese Army and Navy ; Japanese civilians ; a large number of men, women and children of the Philippines ; and the accused. Testimony has been given in eleven languages or dialects. Many of the witnesses displayed incredible scars of wounds which they testified were inflicted by Japanese from whom they made miraculous escapes followed by remarkable physical recovery. For the most part, we have been impressed by the candour, honesty and sjncerity of the witnesses whose testimony is contained in 4055 pages in the record of trial.
" We have received for analysis and evaluation 423 exhibits consisting of official documents of the United States Army, the United States State Department, and the Commonwealth of the Philippines ; affidavits ; captured enemy documents or translations

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thereof ; diaries taken from Japanese personnel, photographs, motion picture films, and Manila newspapers."

The President then went on to set out what may be regarded as the essential facts of the case as follows :

" The Prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by the accused. Captured orders issued by subordinate officers of the accused were presented as proof that they, at least, ordered certain acts leading directly to exterminations of civilians under the guise of eliminating the activities of guerrillas hostile to Japan. With respect to civilian internees and prisoners of war, the proof offered to the Commission alleged criminal neglect, especially with respect to food and medical supplies, as well as complete failure by the higher echelons of command to detect and prevent cruel and inhuman treatment accorded by local commanders and guards. The Commission considered evidence that the provisions of the Geneva Convention received scant compliance or attention, and that the International Red Cross was unable to render any sustained help. The cruelties and arrogance of the Japanese Military Police, prison camp guards and officials, with like action by local subordinate commanders were presented at length by the Prosecution.

" The Defence established the difficulties faced by the accused with respect not only to the swift and overpowering advance of American forces, but also to the errors of his predecessors, weaknesses in organisation, equipment, supply with especial reference to food and gasolene, train communication, discipline and morale of his troops. It was alleged that the sudden assignment of Naval and Air Forces to his tactical command presented almost insurmountable difficulties. This situation was followed, the Defence contended, by failure to obey his orders to withdraw troops from Manila, and the subsequent massacre of unarmed civilians, particularly by Naval forces. Prior to the Luzon Campaign, Naval forces had reported to a separate ministry in the Japanese Government and Naval Commanders may not have been receptive or experienced in this instance with respect to a joint land operation under a single commander who was designated from the Army Service. As to the crimes themselves, complete ignorance that

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they had occurred was stoutly maintained by the accused, his principal staff officers and subordinate commanders, further, that all such acts, if committed, were directly contrary to the announced policies, wishes and orders of the accused. The Japanese Commanders testified that they did not make personal inspections or independent checks during the Philippine campaign to determine for themselves the established procedures by which their subordinates accomplish their missions. Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted. "

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The Judgment of the Commission was delivered by the President in the following words :

" This accused is an officer of long years of experience, broad in its scope, who has had extensive command and staff duty in the Imperial Japanese Army in peace as well as war in Asia, Malaya, Europe, and the Japanese Home Islands. Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility. This has been true in all armies throughout recorded history. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, 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. Should a commander issue orders which lead directly to lawless acts, the criminal responsibility is definite and has always been so understood. The *Rules of Land Warfare*, Field Manual 27-10, United States Army, are clear on these points. It is for the purpose of maintaining discipline and control, among other reasons, that military commanders are given broad powers of administering military justice. The tactical situation, the character, training and capacity of staff officers and subordinate commanders as well as the traits of character, and training of his troops are other important factors in such cases. These matters have been the principal considerations of the Commission during its deliberations.

" General Yamashita : The Commission concludes : (1) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against people of the United States, their allies and dependencies throughout the Philippine Islands ; 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 you failed to provide effective control of your troops as was required by the circumstances.

" Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging."

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13. AN APPEAL FOR CLEMENCY

Five of the Counsel who had defended Yamashita addressed to the Appointing Authority, and to General MacArthur as Confirming Authority, a request that the verdict of guilty be disapproved, and as an alternative a recommendation for clemency.

They submitted that even were it a fact that the atrocities were not sporadic in nature but were supervised by Japanese officers and non-commissioned officers, these supervised cases were scattered over the entire area of the Philippine Islands and there was no evidence that the officers or non-commissioned officers who were responsible therefore reported these acts to General Yamashita. The second and basic conclusion of the

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Commission(Footnote 1) indicated that its members agreed that the fact that in some instances there was a supervision bv Japanese officers and non-commissioned officers did not warrant a conclusion that General Yamashita had ordered or directed the commission of such acts or that he had any knowledge that such acts had been or were being committed. (l) That during the period in question the accused " failed to provide effective control of (his) troops as was required by the circumstances." The second conclusion made it apparent that the death sentence was adjudged for an offence that did not include any criminal intent, any specific intent, or any *mens rea*. At its worst, the offence stated by the Commission was simply unintentional ordinary negligence. The sentence of hanging was grossly disproportionate for such an offence.

The recommendation continued :

" The Commission said *inter alia* :

" ' Taken at full face value, the testimony indicates that Japanese senior commanders operate in a vacuum, almost in another world with respect to their troops, compared with standards American Generals take for granted.'

It is respectfully submitted that even though this be accepted as a fact, no General Officer commanding any army is to be held criminally liable and hanged for the customs and procedure inherent in that army simply because that standard of customs and procedure in the American Army. "

The plea went on to claim that :

" The first duty of an officer in any army is to accomplish the mission assigned to him. This General Yamashita attempted to do, concentrating most of his time and the time of the members of his staff on the countless operational matters involved in the accomplishment of his mission, and thereby, of necessity, relegating administrative functions within his command to a secondary role."

It was submitted that, under those circumstances, Yamashita " did not fail to exercise control of his troops to the extent that he was criminally negligent in the performance of his duty."

After pointing out that much of the evidence against the accused consisted of " hearsay. evidence, opinion evidence, and *ex parte* affidavits," and

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(1) That during the period in question the accused " failed to provide effective control of (his) troops as was required by the circumstances."

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claiming that the cumulative effect was prejudicial to the substantial rights of the accused, the plea went on to claim that the prosecution did not introduce any direct evidence whatsoever to show that the accused had issued orders for the commission of the alleged atrocities, nor that he had received any reports from any subordinate officers, or from any other sources, that such alleged atrocities had been or were being committed ; nor that he had had any knowledge that such alleged atrocities had been or were being committed. Having no knowledge of the commission of the alleged atrocities, the accused could not have permitted the commission thereof as alleged in the charge, and the Commission in its conclusion indicated that it found no such permission.

It was maintained that : "'This is the first time in the history of the modern world that a commanding officer has been held criminally liable for acts committed by his troops. It is the first time in modern history that any man has been held criminally liable for acts which according to the conclusion of the Commission do not involve criminal intent or even gross negligence. The Commission therefore by its findings created a new crime."

This plea was rejected by the Appointing and Confirming Authorities and the findings of the Military Commission confirmed.

14. PETITION TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS

Yamashita, on being sentenced, petitioned the Supreme Court of the Philippine Islands for a writ of habeas corpus, but this Court after hearing argument, denied the petition 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 offence 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 offence charged.

The decision of the Court is not here analysed at length, since there is available the decision of the Supreme Court of the United States, to which Yamashita had recourse on the failure of his petition to the Supreme Court of the Philippines.

15. PETITION TO THE SUPREME COURT OF THE UNITED STATES

The case was brought before the Supreme Court of the United States on a petition for writs of habeas corpus and prohibition in that Court, and on a petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines, denying the petitioner's application to the Court for writs of habeas corpus and prohibition. The opinion of the Court, rejecting Yamashita's petition and application, was delivered by Chief Justice Stone on 4th February, 1946. Dissenting judgments were read by Mr. Justice Murphy and Mr. Justice Rutledge. (Footnote 1: Mr. Justice Jackson took no part in the consideration of this case.) The issues raised and the opinions expressed were of the highest legal importance in relation to war crimes and the trial of those accused of committing them.

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1. CHIEF JUSTICE STONE (MAJORITY OPINION) (Footnote 1)

(i) *The Problems Before the Supreme Court*

After summarising the history of the trial before the Military Commission, Chief Justice Stone set out the problems facing the Supreme Court, in the following words :

" The petitions 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., ss. 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."

Note:pp.38-75 deal partly with the legal status of the Military Commission that tried General Yamashita. These sections have been omitted here. The headings that have been omitted are indicated.

(ii) *The Sources and Nature of the Authority to Create Military Commissions to Conduct War Crime Trials*

This section omitted here, pp. 38-40

(iii) *The Authority to Create the Military Commission Which Tried Yamashita*

This section omitted here, pp. 40-41

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(iv) T*he Question Whether the Authority to Create the Commission and Direct the Trial by Military Order Continued after the Cessation of Hostilities*

This section omitted here, pp. 41-42

p.42

(v) *The Question Whether the Charge Against Yamashita Failed to Allege a Violation of the Laws of War*

Chief Justice Stone observed that : " Neither Congressional action nor the military orders constituting the Commission authorised it to place petitioner on trial unless the charge preferred against him is of a violation of the Law of War."

p.43

The Chief Justice then quoted the charge, made reference to the Bills of Particulars, and went on to say :

" It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognised in International Law as violations of the Law of War. Articles 4, 28,46 and 47, Annex to Fourth Hague Convention, 1907, 36 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 ofthe 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 violations is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

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“ This is recognised 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 fulfil 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 recognised, and its breach penalised by our own military tribunals. (Footnote 1) 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. 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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" 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. UnitedStates*, 152 U.S. 539 ; *Williamson v. United States*, 207 U.S. 425, 447 ; *Classer v. United States*, 315 U.S. 60, 66, and cases cited."

(vi) *Articles 25 and 38 of the United States Articles of War and the Provisions of the Geneva Prisoners of War Convention Regarding Judicial Suits Not Applicable to Trials of Alleged War Criminals*

This section omitted here, pp. 44-48

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(1) " 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, 17th August, 1901. And in Gen. Orders No. 264, Hq. Div. of the Philippines, 9th September, 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."

(vii) *Effect of Failure to give Notice of the Trial to the Protecting Power*

This section omitted here, pp.48-49

p.49

11. DISSENTING JUDGMENT OF MR. JUSTICE MURPHY

(i) *Applicability of the Fifth Amendment to the United States Constitution to War Crime Trials and to the Yamashita Trial in Particular* (Footnote 1)

Mr. Justice Murphy had no doubt that a United States Military Commission appointed to try alleged war criminals was bound to observe the procedural rights of an accused person as guaranteed by the United States Constitution, especially by the due process clause of the Fifth Amendment.

His opinion is stated in the following passage :

" The Fifth Amendment guarantee of due process of law applies to ' any person ' who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy

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(1) The Fifth Amendment to the United States Constitution, which was adopted on 15th December, 1791, runs as follows (Italics inserted) : " No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger ; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb ; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of Law ; nor shall private property be taken for public use, without just compensation."

belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, colour or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. . . . They cannot be ignored by any branch of the Government, even the military, except under the most extreme and urgent circumstances. "

In Mr. Justice Murphy's opinion, " The failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment is apparent in this case. . . . No military necessity or other emergency demanded the suspension of the safeguards of due process. Yet petitioner was rushed to trial under an improper charge, given insufficient time to prepare an adequate defence, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced to be hanged."

Such a procedure was " unworthy of the traditions of " the United States people and possessed " boundless and dangerous implications " for the future, but " even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure."

(ii) *Extent of Review Permissible to the Supreme Court in Cases such as the Present*

This section omitted here, p.50

(iii) *The Question Whether the Charge against Yamashita had Stated a Recognised Violation of the Laws of War*

Mr. Justice Murphy agreed that the military commission was lawfully created in this instance and that petitioner could not object to its power to try him for a recognised war crime. He felt it impossible, however, to agree that the charge against the petitioner stated a recognised violation of the Laws of War.

After summarising the history of the United States offensive against Yamashita's troops, and pointing out that the Commission in its findings had itself noted the difficulties under which he had acted, (Footnote 1: See p.34) Mr. Justice Murphy pointed out that nowhere in the charge or in the Bills of Particulars, " was it alleged that the petitioner personally committed any of the atrocities, or that he ordered their commission; or that he had any knowledge of the commission thereof by members of his command." " The findings of the military commission," he went on, " bear out this absence of any direct personal charge against the petitioner." The commission merely found that atrocities and other high crimes " have been committed by members of the Japanese armed forces under your command . . . that they were not sporadic in nature but in many cases. were methodically supervised by Japanese officers and non-commissioned officers . . . that during the period in question you failed to provide effective control of your troops as was required by the circumstances."

Mr. Justice Murphy claimed that " read against the background of military events in the Philippines subsequent to 9th October, 1944, these charges amount to this : ' We, the victorious American forces . . . charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganisation which we ourselves created in large part.' " He expressed the view that " to use the very inefficiency and disorganisation created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality."

He continued : " International Law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault ; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations . . . .The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is that probability that International Law refuses to recognise such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance."

Mr. Justice Murphy then went on :

" The Court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention is misplaced. Thus the statement in Article 1 of the Annex to Hague

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Convention No. IV of 18th October, 1907, 36 Stat. 2277, 2295, to the effect that the laws, rights and duties of war apply to military and volunteer corps only if they are ' commanded by a person responsible for his subordinates,' has no bearing upon the problem in this case. Even if it has, the clause ' responsible for his subordinates ' fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. The phrase has received differing interpretations by authorities on International Law. In Oppenheim, *International Law* (6th Edition rev. by Lauterpacht, 1940, vol. 2, p. 204, footnote 3) it is stated that ' The meaning of the word " responsible " . . . is not clear. It probably means " responsible to some higher authority," whether the person is appointed from above or elected from below ; . . . ' Another authority has stated that the word ' responsible ' in this particular context means 'presumably to a higher authority,' or 'possibly it merely means one who controls his subordinates and who therefore can be called to account for their acts. ' Wheaton, *International Law* (14th Edition, by Keith, 1944, p. 172, footnote 30). Still another authority, Westlake, *International Law* (1907, Part II, p. 61), states that ' probably the responsibility intended is nothing more than a capacity of exercising effective control.' Finally, Edwards and Oppenheim, *Land Warfare* (1912. p. 19, para. 22) state that it is enough ' if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of position and authority. ' It seems apparent beyond dispute that the word ' responsible ' was not used in this particular Hague Convention to hold the commander of a defeated army to any high standard of efficiency when he is under destructive attack ; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances.

" The provisions of the other conventions referred to by the Court are on their face equally devoid of relevance or significance to the situation here in issue. Neither Article 19 of Hague Convention No. X, 36 Stat. 2371,2389, nor Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, refers to circumstances where the troops of a commander commit atrocities while under heavily adverse battle conditions. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV, 36 Stat. 2295,2306, that the commander of a force occupying enemy territory ' 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.' But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that.

" Even the Laws of War heretofore recognised by this nation fail to impute responsibility to a fallen commander for excesses committed by his disorganised troops while under attack. Paragraph 347 of the War Department publication, *Basic Field Manual*, Rules of Land Warfare, FM 27-10 (1940), states the principal offences under the Laws of War

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recognised by the United States. This includes all of the atrocities which the Japanese troops were alleged to have committed in this instance. Originally this paragraph concluded with. the statement that ' The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.' The meaning of the phrase ' under whose authority they are committed ' was not clear. On 15th November, 1944, however, this sentence was deleted and a new paragraph was added relating to the personal liability of those who violate the Laws of War. Change, 1, FM 27-10. The new paragraph 345.1 states that ' Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defence or in mitigation of punishment. The person giving such orders may also be punished.' From this conclusion seems inescapable that the United States recognises individual criminal responsibility for violations of the Laws of War only as to those who commit the offences or who order or direct their commission. Such was not the allegation here. Cf. Article 67 of the Articles of War, 10 U.S.C., s. 1539."

Mr. Justice Murphy drew attention to numerous instances, especially with reference to the Philippine Insurrection in 1900 and 1901, where commanding officers were found to have violated the Laws of War by specifically ordering members of their command to commit atrocities and other war crimes, and to other cases where officers had been held liable where they knew that a crime was to be committed, had the power to prevent it and failed to exercise that power. In no recorded instance, however, had the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the Laws of War.

The United States Government had claimed that the principle that commanders in the field are bound to control their troops had been applied so as to impose liability on the United States in international arbitrations. The precedents quoted, however, related to arbitrations on property rights, (Footnote 1) not to charges of war crimes ; even more significant was the fact that even these arbitration cases fail to establish any principle of liability where troops under constant assault and demoralising influences by attacking forces. The same observation applied to the common law statutory doctrine, referred to by the Government, that one who is under a legal duty to take protective or preventive action is guilty of criminal homicide if he wilfully or negligently omits to act, and death is proximately caused. (Footnote 2) Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different.

" Moreover," said Mr. Justice Murphy, " we are not dealing here with an ordinary tort or criminal action ; precedents in those fields are of little if

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(1) *Case of Jeunnuud* (1880), 3 Moor, International Arbitrations (1898) 3000 ; *Case of TheZufiro* (1910), 5 Hackworth, Digest of International Law (1943) 707.

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(2) " *State v. Harrison*, 107 N.J.L. 213 ; *State v. Irvine*, 126 La. 434 ; Holmes, The Common Law, p. 278."

any value. Rather we are concerned with a proceeding involving an international crime."

The only conclusion which Mr. Justice Murphy could draw was " that the charge made against the petitioner is clearly without precedent in International Law or in the annals of recorded military history."

That did not mean " that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of International Law and recognised concepts of justice." The charge in the present case, however, " was speedily drawn and filed but three weeks after the petitioner surrendered. The trial proceeded with great dispatch without allowing the defence time to prepare an adequate case. Petitioner's rights under the due process clause of the Fifth Amendment were grossly and openly violated without any justification. All of this was done without any thorough investigation and prosecution of those immediately responsible for the atrocities, out of which might have come some proof or indication of personal culpability on petitioner's part. Instead the loose charge was made that great numbers of atrocities had been committed and that petitioner was the commanding officer ; hence he must have been guilty of disregard of duty. Under that charge the Commission was free to establish whatever standard of duty on petitioner's part that it desired. By this flexible method a victorious nation may convict and execute any or all leaders of a vanquished foe, depending upon the prevailing degree of vengeance and the absence of any objective judicial review."

III. DISSENTING JUDGMENT OF MR. JUSTICE RUTLEDGE

(i) *Opening Remarks*

Mr. Justice Rutledge claimed that Yamashita's trial was a novelty in United States history, both legally and historically. There must be room in law for growth, but it was necessary for the judges to keep in view the traditions of the past, of which none was " older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether, citizens, aliens, alien enemies or enemy belligerents." Mr. Justice Rutledge expressed his view in these words : " With all deference to the opposing views of my brethren, whose attachment to that tradition needless to say is no less than my own, I cannot believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command."'

" It is not in our tradition," continued Mr. Justice Rutledge, " for anyone to be charged with crime which is defined after his conduct, alleged to be criminal, has taken place ; (Footnote 1) or in language not sufficient to inform him of the nature of the offence or to

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enable him to, make defence. (Footnote 2) Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown

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(l) " *Cummings v. Missouri*, 4 Wall. 217 ; *Kring v. Missouri*, 107 U.S. 221."
(2) " *Armour Packing Co. v. United States* 209 U.S. 56, 83-84 *United States v. Cohen Grocery Co.*, 255 U.S. 81 ; cf. *Screws v. United States*, 325 U.S. 91. See . . ." (as pp. 59-60).

actively to have participated in knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so.

" It is outside our basic scheme to condemn men without giving reasonable opportunity for preparing defence ;(Footnote 1) in capital or other serious crimes to convict on ' official documents . . . ; affidavits ; . . . documents or translations thereof; diaries . . . , photographs, motion picture films and . . . newspapers '(Footnote 2) or on hearsay, once, twice or thrice removed,(Footnote 3) more particularly when the documentary evidence or some of it is prepared *ex parte* by the prosecuting authority and includes not only opinion but conclusions of guilt. Nor in such cases do we deny the rights of confrontation of witnesses and cross-examination. (Footnote 4)

" Our tradition does not allow conviction by tribunals both authorised and bound (Footnote 5) by the instrument of their creation to receive and consider evidence which is expressly excluded by Act of Congress or by treaty obligation ; nor is it in accord with our basic concepts to make the tribunal, specially constituted for the particular trial, regardless of those prohibitions the sole and exclusive judge of the credibility, probative value and admissibility of whatever may be tendered as evidence.

" The matter is not one merely of the character and admissibility of evidence. It goes to the very competency of the tribunal to try and punish consistently with the Constitution, the laws of the United States made in pursuance thereof, and treaties made under the nation's authority.

" All these deviations from the fundamental law, and others, occurred in the course of constituting the Commission, the preparation for trial and defence, the trial itself, and therefore, in effect, in the sentence imposed. Whether taken singly in some instances as departures from specific constitutional mandates or in totality as in violation of the Fifth Amendment's command that no person shall be deprived of life, liberty or property without due process of law, a trial so vitiated cannot withstand constitutional scrutiny."

The only basic protection accorded to the petitioner had been representation by able Counsel : yet this had lost much of its value because of the denial of reasonable opportunity for them to perform their function.

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(1) “ Hawk v. Olson, No. 17, October Term, 1945, decided 13th November, 1945 ; Snyder v. Massachusetts, 291 U.S. 97, 105 : “ What may not be taken away is notice of the charge and an adequate opportunity to be heard in defence of it.” See . . .” (as pp. 62-3).
(2) “ The commission’s findings state : “-We have received for analysis and evaluation 423 exhibits consisting of official documents of the United States Army, the United States State Department, and the Commonwealth of the Philippines ; affidavits ; captured enemy documents or translations thereof ; diaries taken from Japanese personnel, photographs, motion picture films, and Manila newspapers.”
Concerning the specific nature of these elements in the proof, the issues to which they were directed, and their prejudicial effects, see text infiu and notes m . . .” (now pp. 57-62).
(3) “ Queen v. Hepburn, 7 Cranch. 289 ; Donnelly v. United States, 228 U.S. 243, 273. . . . (as p. 61, note 2.)
(4) “ Motes v. United States, 178 U.S. 471 ; Paoni v. United States, 281 Fed. 801. See . . .” (as pp. 57-63.)
(5) The judgment here made a cross-reference to the material now set out on page 58, note 1, and pages 60-l and 62-3.

Mr. Justice Rutledge summed up his view as follows : “ On this denial and the Commission’s invalid constitution specifically, but also more generally upon the totality of departures from constitutional norms inherent in the idea of a fair trial, I rest my judgment that the Commission was without jurisdiction from the beginning to try or punish the petitioner and that, if it had acquired jurisdiction then, its power to proceed was lost in the course of what was done before and during trial.”

The only hypothesis on which either of these conclusions be avoided was “ that an enemy belligerent in petitioner’s position is altogether beyond the pale of constitutional protection, regardless of the fact that hostilities had ended and he had surrendered with his country. The Government has so argued, urging that we are still at war with Japan and all the power of the military effective during active hostilities in theatres of combat continues in full force unaffected by the events of 14th August, 1945, and after.

“ In this view the action taken here is one of military necessity, exclusively within the authority of the President as Commander-in-Chief and his military subordinates to take in warding off military danger and subject to no judicial restraint on any account, although somewhat inconsistently it is said this Court may ‘ examine ’ the proceedings generally.

“ As I understand the Court, this is in substance the effect of what has been done, For I cannot conceive any instance of departure from our basic concepts of fair trial, if the failures here are not sufficient to produce that effect.”

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Mr. Justice Rutledge's attitude to this argument was expressed in these words :

" We are technically still at war, because peace has not been negotiated finally or declared. But there is no longer the danger which always exists before surrender and armistice. Military necessity does not demand the same measures. The nation may be more secure now than at any time after peace is officially concluded. In these facts is one great difference from *Ex parte Quirin*, 317 U.S. 1. Punitive action taken now can be effective only for the next war, for purposes of military security. And enemy aliens, including belligerents, need the attenuated protections our system extends to them more now than before hostilities ceased or than they may after a treaty of peace is signed. Ample power there is to punish them or others for crimes, whether under the Laws of War during its course or later during occupation. There can be no question of that. The only question is how it shall be done, consistently with universal constitutional commands or outside their restricting effects. In this sense I think the Constitution follows the flag.

" The other thing to be mentioned in order to be put aside is that we have no question here of what the military might have done in a field of combat. There the maxim about the law becoming silent in the noise of arms applies. The purpose of battle is to kill. But it does not follow that this would justify killing by trial after capture or surrender, without compliance with laws or treaties made to apply in such cases, whether trial is before or after hostilities end."

p.57

The Judgment continues : " My basic difference is with the Court's view that provisions of the Articles of War and of treaties are not made applicable to this proceeding and with its ruling that, absent such applicable provisions, none of the things done so vitiated the trial and sentence as to deprive the Commission of jurisdiction."

Mr. Justice Rutledge expressed his agreement with the views of Mr. Justice Murphy with respect to the substance of the crime, and went on to state : ' My own primary concern will be with the constitution of the Comrnssion and other matters taking place in the course of the proceedings, relating chiefly to the denial of reasonable opportunity to prepare petitioner's defence and the sufficiency of the evidence, together with serious questions of admissibility, to prove an offence, all going as I think to the Commission's jurisdiction," but, before proceeding to his first major topic, he claimed that " although it was ruled in *Ex Parte Quirin, supra*, that this Court had no function to review the evidence, it was not there or elsewhere determined that it could not ascertain whether conviction is founded upon evidence expressly excluded by Congress or treaty ; nor does the Court purport to do so now."

(ii) *The Range of Evidence Admitted*

Section 16 of the Regulations Governing the Trial of War Criminals, by which the directive of General MacArthur to General Styer (Footnote 1) was accompanied,

permitted, in the words of Mr. Justice Rutledge, reception of documents, reports, affidavits, depositions, diaries, letters, copies of documents, or other secondary evidence of their contents, hearsay, opinion evidence and conclusions, in fact of anything which in the Commission's opinion " would be of assistance in proving or disproving the charge," without any of the usual modes of authentication. (Footnote 2)

The learned Judgment continues :

" A more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made. So far as the admissibility and probative value of evidence was concerned, the directive made the Commission a law unto itself.

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(1) see pp. 2-3.
(2) " 16. Evidence.-(a) The Commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted :

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

" It acted accordingly. As against insistent and persistent objection to the reception of all kinds of ' evidence,' oral, documentary and photographic, for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value, the Com-mission not only consistently ruled against the defence, but repeatedly stated it was bound by the directive to receive the kinds of evidence it specified, (Footnote 1)

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reprimanded counsel for continuing to make objection, declined to hear further objections, and in more than one instance during the course of the proceedings reversed its rulings favourable to the defence, where initially it had declined to receive what the prosecution offered. Every conceivable kind of statement, rumour, report, at first, second, third or further hand, written, printed or oral, and one ' propaganda ' film were allowed to come in, most of this relating to atrocities committed by troops under petitioner's command throughout the several thousand islands of the Philippine Archipelago during the period of active hostilities covered by the American forces' return to and recapture of the Philippines.

" The findings reflect the character of the proof and the charge. The statement quoted above (Footnote 2) gives only a numerical idea of the instances in which ordinary safeguards in reception of written evidence were ignored. In addition to these 423 ' exhibits,' the findings state the Commission ' has heard 286 persons during the course of this trial, most of whom have given eye-witness accounts of what they endured or what they saw. . . .' "

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(1) " In one instance the president of the Commission said : ' The rules and regulations which guide this Commission are binding upon the Commission and agencies provided to assist the Commission. . . . We have been authorised to receive and weigh such evidence as we can consider to have probative value, and further comments by the Defence on the right which we have to accept this evidence is decidedly out of order.' But see note 19." (At present set out on pages 60-1 .)
(2) See p. 55, note 2.

(iii) *The Question of the Accused's Knowledge*

Mr. Justice Rutledge's judgment continues :

" But there is not a suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents, with the exception of the wholly inferential suggestion noted below. Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together. The only inferential findings that he had knowledge, or that the Commission so found, are in the statement that ' the crimes alleged to have been permitted by the accused in violation of the Laws of War may be grouped into three categories ' set out below, (Footnote 3) in the further statement that

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(3) " Namely, ' (1) Starvation, execution or massacre without trial and maladministration generally of civilian internees and prisoners of war ; (2) Torture, rape, murder and mass execution of very large numbers of residents of the Philippines, including women and children and members of religious orders, by starvation, beheading, bayoneting, clubbing,

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hanging, burning alive, and destruction by explosives ; (3) Burning and demolition without adequate military necessity of large numbers of homes, places of business, places of religious worship, hospitals, public buildings, and educational institutions. In point of time, the offences extended throughout the period the Accused was in command of Japanese troops in the Philippines. In point of area, the crimes extended through the Philippine Archipelago, although by far the most of the incredible acts occurred on Luzon."'

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' the Prosecution presented evidence to show that the crimes were so extensive and so widespread, both as to time and area, that *they must* either have been *wilfully permitted* by the accused, *or secretly ordered* by ' him ; and in the conclusion of guilt and the sentence. (Footnote 1) (Emphasis added.) Indeed the Commission's ultimate findings draw no express conclusion of knowledge, but state only two things : (1) the fact of widespread atrocities and crimes ; (2) that petitioner ' failed to provide effective control . . . as required by the circumstances.'

" This vagueness, if not vacuity, in the findings runs throughout the proceedings, from the charge itself through the proof and the findings, to the conclusion. It affects the very gist of the offence, whether that was wilful, informed and intentional omission to restrain and control troops known by petitioner to be committing crimes or was only a negligent failure on his part to discover this and take whatever measures he then could to stop the conduct.

" Although it is impossible to determine from what is 'before us whether petitioner in fact has been convicted of one or the other or of both these things, the case has been presented on the former basis and, unless as is noted below there is fatal duplicity, it must be taken that the crime charged and sought to be proved was only the failure, with knowledge, to perform the commander's function to control, although the Court's opinion nowhere expressly declares that knowledge was essential to guilt or necessary to be set forth in the charge."

In a footnote to these paragraphs, Mr. Justice Rutledge pursues the point further :

" The charge, set forth at the end of this note, is consistent with either theory - or both - and thus ambiguous, as were the findings. See note(**1**) below .The only word implying knowledge was ' permitting.' If ' wilfully ' is essential to constitute a crime or charge of one, otherwise subject to the objection of ' vagueness,' cf. *Screws v. United States*, 325 U.S. 91, it would seem that ' permitting ' alone would hardly be sufficient to charge ' wilful and intentional ' action or omission ; and, if taken to be sufficient to charge knowledge, it would follow necessarily that the charge itself was not drawn to state and was insufficient to support a finding of mere failure to detect or discover the criminal conduct of others.

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(1) “ In addition the findings set forth that captured orders of subordinate officers gave proof that ‘ they, at least,’ ordered acts ‘ leading directly to ’ atrocities ; that ‘ the *proof offered* to the Commission *alleged* criminal *neglect* . . . as well as complete failure *by the higher echelons* of command *to detect* and prevent cruel and inhuman treatment accorded by local commanders and guards ‘.; and that, although ‘ the defence had established the difficulties faced by the Accused ’ with special reference among other things to the discipline and morale of his troops under the ’ swift and overpowering advance of American forces,’ and notwithstanding he had stoutly maintained his complete ignorance of the crimes, still he was an officer of long experience ; his assignment was one of broad responsibility ; it was his duty ‘ *to discover* and control ’ crimes by his troops, if widespread, and therefore ‘ The Commission concludes : (I) That a series of atrocities and other high crimes have been committed by members of the Japanese armed forces under your command against the people of the United States, their allies and dependencies throughout the Philippine Islands ; 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 you failed to provide effective control of your troops as was required by the circumstances. “ ‘ Accordingly upon secret written ballot, two-thirds or more of the members concurring, the Commission finds you guilty as charged and sentences you to death by hanging. (Emphasis added.) ”

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“ At the most ‘ permitting ’ could charge knowledge only by inference or implication. And reasonably the word could be taken in the context of the charge to mean ‘ allowing ’ or ‘ not preventing,’ a meaning consistent with absence of knowledge and mere failure to discover. In capital cases such ambiguity is wholly out of place. The proof was equally ambiguous in the same respect, so far as we have been informed, and so, to repeat, were the findings. The use of ‘ wilfully,’ even qualified by a ‘ must have,’ one time only in the findings hardly can supply the absence of that or an equivalent word or language in the charge or in the proof to support that essential element in the crime. . . .”

The judgment itself then goes on :

“ It is in respect to this feature especially, quite apart from the reception of unverified rumour, report, etc., that perhaps the greatest prejudice arose from the admission of untrustworthy, unverified, unauthenticated evidence which could not be probed by cross-examination or other means of testing credibility, probative value or authenticity.

“ Counsel for the defence have informed us in the brief and at the argument that the sole proof of knowledge introduced at the trial was in the form of *ex parte* affidavits and depositions. Apart from what has been excepted from the record in the applications and the briefs, and such portions of the record as I have been able to examine, it has been impossible for me fully to verify counsel’s statement in this respect. But the Government has not disputed it ; and it has maintained that we have no right to examine the record upon any question ‘ of evidence. ’ Accordingly, without concession to that view, the statement of counsel is taken for the fact. And in that state of things, petitioner has been

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convicted of a crime in which knowledge is an essential element, with no proof of knowledge other than what would be inadmissible in any other capital case or proceeding under our system, civil or military, and which furthermore Congress has expressly commanded shall not be received in such cases tried by military commissions and other military tribunals. (Footnote 1: See p. 63-9 for the material to which the judgment here makes cross-references.)

" Moreover counsel assert in the brief, and this also is not denied, that the sole proof made of certain of the specifications in the Bills of Particulars was by *ex parte* affidavits. It was in relation to this also vital phase of the proof that there occurred one of the Commission's reversals of its earlier rulings in favour of the defence, a fact in itself conclusive demonstration of the necessity to the Prosecution's case of the prohibited type of evidence and of its prejudicial effects upon the Defence."

A footnote explains the reference to " one of the Commission's reversals of its earlier rulings " : " On 1st November, early in the trial, the President of the Commission stated : ' I think the Prosecution should consider the desirability of striking certain items. The Commission feels that there must be witnesses introduced on each of the specifications or items. *It has no objection to considering affidavits, but it is unwilling to form an opinion*

of a particular item based solely on an affidavit. Therefore, until evidence is introduced, these particular exhibits are rejected.' (Emphasis added.)

" Later evidence of the excluded type was offered, to introduction of which the Defence objected on various grounds including the prior ruling. At the Prosecution's urging the Commission withdrew to deliberate. Later it announced that ' after further consideration, the Commission reverses that ruling [of 1st November] and affirms its . prerogative of receiving and considering affidavits or depositions, if it chooses to do so, for whatever probative value the Commission believes they may have, without regard to the presentation of some partially corroborative oral testimony.' It then added : ' The Commission directs the Prosecution again to introduce the affidavits or depositions then in question, and other documents of similar nature which the Prosecution stated has been prepared for introduction.' (Emphasis added.)

" Thereafter this type of evidence was consistently received and again, by the undisputed statement of counsel, as the sole proof of many of the specifications of the bills, a procedure which they characterise correctly in my view as having ' in effect, stripped the proceeding of all semblance of a trial and converted it into an *ex parte* investigation.' "

(iv) *Concluding Remarks on the Type of Evidence Admitted*

The Judgment continues :

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“ These two basic elements in the proof, namely, proof of knowledge of the crimes and proof of the specifications in the bills, that is, of the atrocities themselves, constitute the most important instances perhaps, if not the most flagrant, (Footnote 1) of departure not only from the express command of Congress against receiving such proof but from the whole British-American tradition of the common law and the Constitution. Many others occurred, which there is neither time nor space to mention. (Footnote 2)

“ Petitioner asserts, and there can be no reason to doubt, that by the use of all this forbidden evidence he was deprived of the right of cross-examination and other means to establish the credibility of the deponents or affiants, not to speak of the authors of reports, letters, documents and newspaper articles ; of opportunity to determine whether the multitudinous crimes specified in the bills were committed in fact by troops under his command or by naval or air force troops not under his command at the time alleged ; to ascertain whether the crimes attested were isolated acts of individual soldiers or were military acts committed by troops units acting under supervision of officers ; and,

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(1) “ This perhaps consisted in the showing of the so-called ‘ propaganda ’ film, ‘ Orders from Tokyo,’ portraying scenes of battle destruction in Manila, which counsel say ‘ was not in itself seriously objectionable.’ Highly objectionable, inflammatory and prejudicial, however, was the accompanying sound track with comment that the film was ‘ evidence which will convict,’ mentioning petitioner specifically by name.”
(2) “ Innumerable instances of hearsay, once or several times removed, relating to all manner of incidents, rumours, reports, etc., were among these. Many instances, too, are shown of the use of opinion evidence and conclusions of guilt, including reports made after *ex parte* investigations by the War Crimes Branch of the Judge Advocate General’s Department, which it was and is urged had the effect of ‘ putting the prosecution on the witness stand ’ and of usurping the commission’s function as judge of the law and the facts. It is said also that some of the reports were received as the sole proof of some of the specifications.”

finally, whether ‘ in short, there was such a “ pattern ” of conduct as the Prosecution alleged and its whole theory of the crime and the evidence required to be made out.’

“ He points out in this connection that the Commission based its decision on a finding as to the extent and number of the atrocities and that this of itself establishes the prejudicial effect of the affidavits, etc., and of the denial resulting from their reception of any means of probing the evidence they contained, including all opportunity for cross-examination. Yet it is said there is no sufficient showing of prejudice. The effect could not have been other than highly prejudicial. The matter is not one merely of ‘ rules of evidence.’ It goes,

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as will appear more fully later, to the basic right of defence, including some fair opportunity to test probative value.

" Insufficient as this recital is to give a fair impression of what was done, it is enough to show that this was no trial in the traditions of the common law and the Constitution. If the tribunal itself was not strange to them otherwise, it was in its forms and modes of procedure, in the character and substance of the evidence it received, in the denial of all means to the accused and his counsel for testing the evidence, in the brevity and ambiguity of its findings made upon such a mass of material and, as will appear, in the denial of any reasonable opportunity for preparation of the defence. Because this last deprivation not only is important in itself, but is closely related to the departures from all limitations upon the character of and modes of making the proof, it will be considered before turning to the important legal questions relating to whether all these violations of our traditions can be brushed aside as not forbidden by the valid Acts of Congress, treaties and the Constitution, in that order. If all these traditions can be so put away, then indeed will we have entered upon a new but foreboding era of law."

(v) *The Alleged Denial of Opportunity to Prepare Defence*

Mr. Justice Rutledge claimed that Yamashita's six Defence Counsel would have found it impossible to prepare adequately, during the three weeks before the trial, a defence against the 64 items contained in the Bill of Particulars, (Footnote 1: See p.4) " had nothing more occurred." He went on :

" But there was more. On the first day of the trial, 29th October, the Prosecution filed a Supplemental Bill of Particulars, containing 59 more specifications of the same general character, involving perhaps as many incidents occurring over an equally wide area. A copy had been given the Defence three days earlier. One item, No. 89, charged that American soldiers, prisoners of war, had been tried and executed without notice having been given to the Protecting Power of the United States in accordance with the requirements of the Geneva Convention, which it is now argued, strangely, the United States was not required to observe as to petitioner's trial."

After recapitulating the various requests of the Defence for a continuance, (Footnote 2: And also the Commission's rulings of 1st and 5th November, 1945, regarding admissibility of uncorroborated affidavits. See pp. 10, 15-16, 23 and 60-l.) Mr. Justice Rutledge expressed the following view :

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" Further comment is hardly required. Obviously the burden placed upon the Defence, in the short time allowed for preparation on the original bill, was not only ' tremendous.' In view of all the facts, it was an impossible one, even though the time allowed was a week longer than asked. But the grosser vice was later when the burden was more than doubled by service of the supplemental bill on the eve of trial, a procedure which taken in connection with the consistent denials of continuance and the Commission's later

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reversal of its rulings favourable to the Defence was wholly arbitrary, cutting off the last, vestige of adequate chance to prepare defence and imposing a burden the most able counsel could not bear. This sort of thing has no place in our system of justice, civil or military. Without more, this wide departure from the most elementary principles of fairness vitiated the proceeding. When added to the other denials of fundamental right sketched above, it deprived the proceeding of any semblance of trial as we know that institution."

(vi) *The Question of the Applicability of the Articles of War*

This section omitted here, pp.63-69

(vii) *The Question of the Applicability of the Geneva Convention of 1929*

This section omitted here, pp.69-73

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(viii) *The Question of the Applicability of the Fifth Amendment to the United States Constitution* (Footnote 2: See p. 49)

Mr. Justice Rutledge's view on this final topic was expressed in his judgment as follows :

" Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

" The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause.

" For it is exactly here we enter wholly untroddden ground. The safe signposts to the rear are not in the sum of protections surrounding jury trials or any other proceeding known to our law. Nor is the essence of the Fifth Amendment's elementary protection comprehended in any single one of our time-honoured specific constitutional safeguards in trial, though there are some without which the words ' fair trial ' and all they connote become a mockery.

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" Apart from a tribunal concerned that the law as applied shall be an instrument of justice, albeit stern in measure to the guilt established, the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumour, report, or the results of the prosecution's *ex parte* investigations, but shall stand on proven fact ; the other, correlative, lies in a fair chance to defend. This embraces at the least the rights to know with reasonable clarity in advance of the trial the exact nature of the offence with which one is to be charged ; to have reasonable time for preparing to meet the charge and to have the aid of counsel in doing so, as also in the trial itself ; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence then to have further reasonable time for meeting the unexpected shift.

" So far as I know, it has not yet been held that any tribunal in our system, of whatever character, is free to receive ' such evidence as in its opinion ' would be ' of assistance in proving or disproving the charge ' or, again as in its opinion, ' would have probative value in the mind of a reasonable man ' ; and, having received what in its unlimited discretion it regards as sufficient, is also free to determine what weight may be given to the evidence received without restraint. (Footnote 1)

" When to this fatal defect in the directive, however innocently made, are added the broad departures from the fundamentals of fair play in the proof and in the right to defend which occurred throughout the proceeding, there can be no accommodation with the due process of law which the Fifth Amendment demands.

" All this the Court puts to one side with the short assertion that no question of due process under the Fifth Amendment or jurisdiction reviewable here is presented. I do not think this meets the issue, standing alone or in conjunction with the suggestion which follows that the Court gives no intimation one way or the other concerning what Fifth Amendment due process might require in other situations.

" It may be appropriate to add here that, although without doubt the directive was drawn in good faith in the belief that it would expedite the trial and that enemy belligerents in petitioner's position were not entitled to more, that state of mind and purpose cannot cure the nullification of basic constitutional standards which has taken place."

(ix) *Concluding Remarks*

Mr. Justice Rutledge's dissenting judgment ends with these words :

" It is not necessary to recapitulate. The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these

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(1) " There can be no limit either to the admissibility or the use of evidence if the only test to be applied concerns probative value and the only test of probative value, as the directive commanded and the commission followed out, lies ' in the Commission's opinion,' whether that be concerning the assistance the ' evidence ' tendered would give in proving or disproving the charge or as it might think would ' have value in the mind of a reasonable man.' Nor is it enough to establish the semblance of a constitutional right that the com mission declares, in receiving the evidence, that it comes in as having only such probative value, if any, as the commission decides to award it and this is accepted as conclusive."

proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply.

" I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

" It was a great patriot who said :
' He that would make his own liberty secure must guard even his enemy from oppression ; for if he violates this duty he establishes a precedent that will reach himself.' (Footnote 1:" Tom Paine, quoted in Brooks, The World of Washington Irving, 73, n. I am indebted to Counsel for petitioner for this quotation.")

" Mr. Justice Murphy joins in this opinion."

16. EXECUTION OF SENTENCE

Yamashita was executed on 23rd February, 1946.

B. NOTES ON THE CASE

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

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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 United States Law and the jurisdiction of the Commission which tried Yamashita, (Footnote 2: See pp. 38-41, and-see Volume I of this series pp. 23-4, 29-31 and 72-9) the applicability of the United States Articles of War (Footnote 3: See pp. 44 and 63) and of the Fifth Amendment to the United States Constitution (Footnote 4: See pp. 49 and 73) 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. (Footnote 5: See pp. 39 and 50) 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.

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1. THE LEGALITY OF THJ3 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." (Footnote 1: See p.42)

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. " (Footnote 2: See p.56)

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. " (Footnote 3: Dr. G. Schwarzenberger, *International Law and Totalitarian Lawlessness*, London, 1943, pp. 61 and 67.)

The position under customary International Law seems, therefore, to be that whereas (as was recognised by the Supreme Court and by general international practice following the

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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. (Footnote 4: See G. Schwarzenberger, *op.cit*, pp.61-2)

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." (Footnote 5: G. Schwarzenberger, *op.cit*, pp.67) 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." (Footnote 1: British Command Paper, Cmd. 7022, p. 18)

The Treaties of Peace with Roumania, Bulgaria, Hungary and Finland contain similar provisions. (Footnote 2: *Ibid,* pp.80, 100, 119 and 140) 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

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she should assist in the apprehension and surrender both of war criminals and of quislings." (Footnote 3: British Command Paper, Cmd. 7026)

On the related question of the 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." (Footnote 4: Oppenheim-Lauterpacht, *International Law*, Sixth Edition (Revised) Volume II, p. 456.)

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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. (Footnote 1: See pp.46 and 69) 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* (see Volume I of this series, pp. 29- 31) and in the Trial of Martin Gottfried Weiss and 39 others by a General Military Government Court at Dachau, 15th November-13th December, 1945 (*The Dachau Trial*) to be reported in a later volume of these reports. 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 (see Volume III of these Reports, pp. 42- 43). 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

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Article 10 of the *Code de Justice Militaire*, also for the trial of prisoners of war. Paragraph 13 provides that " military tribunals convened to try prisoners of war are composed in the same way as those 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." (Footnote 2: *American Journal of International Law*, Vol. 40, No. 2 , April, 1946, p . 405.)

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

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and opinion evidence, (Footnote 1: See pp.46, 48, 50, 57, and 61) 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 civilised 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." (Footnote 2: Loc cit, p.405)

A study of the rules and the practice followed in war crime trials by other than United States Military Tribunals, (Footnote 3:Regarding the rules of evidence followed by United States Military Commissions, Military Government Courts and Military Tribunals, see Volume III of this series, pp. 109-111, 117 and 118.) 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

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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, (Footnote 4: See Volume II of this series, pp.129 *et.seq.*) 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 (*Ibid*. pp.130-131) 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) re-enacted 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. (Footnote 6: See Volume II of this series, pp.. 131-138) During the trial of Erich Killinger and four others by a British Military Court, Wuppertal, 26th November-3rd December, 1945,(Footnote 7: See Volume III of this series, pp. 67-75) before the tendering of the affidavit evidence for the Prosecution, the Defence applied for one

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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 realise 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,(Footnote 1: To be reported in Volume V of this series) stressed that : " There is no rule that evidence given in the witness box must be given more weight than evidence,

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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. (Footnote 2: See volume III of this series, pp.97-9) 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, (Footnote 3: *Ibid,*p.39) 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, (Footnote 4: *ibid*, pp.87 and 88) 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

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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*." (Footnote 1: Italics Inserted) 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 :

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" 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 hearsay 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'être*.

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

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the Defence's repeated requests for a continuance. (Footnote 1: See pp.10, 15, 50, 54 and 62) 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

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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 organise 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 minutia: 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." (Footnote 2: Substantially the same provisions are made by the United States Pacific December Regulations and China Theatre Regulations and by Ordinance No. 7 of the Military Government of the United States Zone of Germany. (Regarding the United States war crimes law and practice in general, see Volume III of this series, pp. 103-20).) Substantially the same provisions are made by the United States Pacific December Regulations and China Theatre Regulations and by Ordinance No. 7 of the Military Government of the United States Zone of Germany. (Regarding the United States war crimes law and practice in general, see Volume III of this series, pp. 103-20).

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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

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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,
(6) 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

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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, (Footnote 1: See pp. 7 and 11) and the discussion in the Supreme Court, in so far as it turned on matters of substantive law, constituted on examination of that denial. (Footnote 2: See pp.42-4, 51-4, 57 and 548-61)

(ii) *Liability of Oficers 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. (Footnote 3: See Volume I of this series, pp. 22-34)

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.

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(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), (Footnote 1: See pp.128-9) 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),(Footnote 2: See pp. 107-8 and 110-11) but also some remarks on the part of the Judge Advocate on the proving by circumstantial evidence of the giving of a *direct order*.(Footnote 3: See p.108) 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. (Footnote 4: See p.123, and compare Regulation 10 (4) of the Canadian Regulations, cited on p.128. For an example of the same line of thought in the Yamashita Trial, see pp.17 and 34) The *Trial of Karl Rauer and Six Others* (Footnote 5: See pp.113-17) 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

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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). 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. (Footnote 1: See p.129)

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.

(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

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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

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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 lead 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 befbre 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 coinmitted ?

Certain relevant provisions of municipal law exist. Thus, Article 4 of the French Ordinance of 28th August, 1944, Concerning the Suppression of War Crimes, (Footnote 1) 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."

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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 Pénal*, 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."

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(1) Regarding the French Law concerning trials of war criminals by Military Tribunals and Military Governmeht Courts in the French Zone of Germany, see Volume III of this series, pp. 93-102.

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 the 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

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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

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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 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

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the commander or that their offences would be " condoned and appreciated." (Footnote 1: See pp. 123-4) 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 endeavour to prevent*, the killing of prisoners, were matters affecting the question of the accused's responsibility.(Footnote 2: See p.108)

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*. (Footnote 3: See p. 116)

The *Trial of Field Marshal Erhard Milch* by a United States Military Tribunal at Nuremberg, (Footnote 4: To be reported in greater detail in a subsequent volume of these reports.) 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

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medical experiments without the subjects' consent, in the course of which experiments, the defendant, with others, perpetrated murders, brutalities, cruelties, 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 ?

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(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.

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“ As to the other experiments, involving subjecting human being 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

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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, (see p. 35), 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. (Footnote 1: "The Doctors Trial," to be reported in a later volume of this report.) 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

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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

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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." (Footnote 1: Italics inserted.)

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 efort 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.

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“ These deaths not only occurred with German nationals, but also among non-German nationals who had not consented to becoming experimental subjects." (Footnote 1: Italics inserted.)

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

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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 these 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 Law 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) (Footnote 2) 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 in the words of Military Tribunal

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(2) This trial began on 27th August, 1947, and will be reported in a later volume of these reports.

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No. 1, ' occupying the position that he did, *the duty rested upon him to make some adequate investigation*. '(Footnote 1: Italics inserted.) 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,(Footnote 2: Loc.cit. p.404) Professor Quincy Wright has said :

" The isssue 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, (Footnote 3: Cf. p. 85 concerning the burden of proof in such cases as this.) or evidence that he must have failed to fulfil a duty to *discover* the standard of conduct of his troops. (Cf. p. 91)

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

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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. (Footnote 1: See p. 109) The sentence of death passed on Karl Rauer was also commuted to one of life imprisonment, (Footnote 2: See p. 114) and the sentence passed on Kurt Student (which was not confirmed) was one of five years' imprisonment. (Footnote 3: See p. 120) Again, the highest penalty imposed for breach of duty alone in the Trial of Lt.-General Yoshio Tachibana (Footnote 4: See pp. 86-7) 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 Fiord. He was charged before the Gulating Lagmannsrett in September 1946, with having given permission for the employment of the method of " verschärfte 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

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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 " verschärfte 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 interests to the best of his understanding.

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