



'JUS GLADII' - THE RIGHT OF THE SWORD:

THE TRIAL OF GENERAL YAMASHITA TOMOYUKI.

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A TIGER LEAVES HIS SKIN WHEN HE DIES,
A MAN LEAVES HIS NAME.

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STATEMENT

This thesis contains no material which has been accepted for the award of any degree or diploma in any University and, to the best of my knowledge and belief contains no material previously published or written by any person except when due reference is made in the text of the thesis.

words, was Yamashita's guilt or innocence being decided upon the substantive issue, or were external, political considerations paramount?

Starting from the assumption that the general purpose of trials is to achieve justice and equity between parties, then a correlation between these goals and the behaviour of the United States authorities in Yamashita's trial is needed. The disrespect and disregard of the law, and the extreme haste that characterised the American approach to the Yamashita trial are suggestive of the supremacy of political motivations.

An analysis of American foreign policy goals in Asia - the maintenance of stability in the region and its concomitant, the need for free trade and equal access to natural resources - particularly as they involve Japan and the Philippines, lead to the conclusion that American foreign policy attitudes determined the approach of the military commission at Yamashita's trial. A conviction was required by the dictates of politics, therefore the verdict was predictable.

In a second section of the thesis, a study is made of a selection of later command responsibility trials which amplify issues of the Yamashita trial, which develop the principle further, or show how it was applied by other prosecuting agencies, and the difficulties they encountered in its use. Trials selected for discussion include the I.M.T.F.E. and trials held at Nuremberg, the trial of Admiral Toyoda and the trials of senior officers held by Australia. This has enabled a comparative aspect and an Australian dimension to be included.

Major sources for the study have been the trial transcripts of the Yamashita, Toyoda and I.M.T.F.E. trials, as well as transcripts and other official documents on the Australian trials. The minutes of the Far Eastern Commission were consulted, as were the Nippon Times and other newspapers. Underpinning these primary sources are a wide range of secondary sources, focussing largely on the legal and foreign policy aspects of the thesis.

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I am grateful also to those who facilitated my access to source materials: the inter-Library Loans section of the Barr Smith Library of the University of Adelaide deserve particular thanks; the staff of the Australian Archives, Melbourne and especially Ms. Sandra Bardwell; Mrs. Joy Wheatley and Ms. Jenny Stokes of the Australian Archives, Canberra; Mr. McEwin and the library staff of the Australian War Memorial; the staff of the newspaper and microfilm section of the National Library, and Mr. Powell of the acquisitions section of the National Library.

But, I alone am responsible for all crimes of omission or those of commission which may occur herein.

PART 1

- PROLOGUE -

3.27 a.m. 23rd February, 1946.

Los Banos, Luzon, Commonwealth of the Philippines.

Raised rifles of American captors surrounded Japanese

prisoners herded into camp compounds throughout Luzon.

General Yamashita Tomoyuki was led from his cell in the war criminals enclosure.

He mounted the steps of the scaffold, and turned in the direction of the Imperial Palace, Tokyo.

In a strong voice he said

'I pray for the Emperor's long life and prosperity forever.'

A few short seconds later his body hung limply in the noose.

The sentence of the military commission was at last fulfilled.

The 'Tiger of Malaya' was dead.

But he was not forgotten.

INTRODUCTION

The world I know is now a shameful place.
There will never come a better time
For me to die.

Before an unknown grave claimed his mortal remains in what was to be an ignominious end to a successful military career, destined because of the judgment of the American military commission convicting him of war crimes, General Yamashita Tomoyuki, ¹ Commanding General of the 14th Area Army of the Imperial Japanese forces, committed these last sentiments to paper.

Spiritually prepared for his fate, General Yamashita's concern was for the care of the men who had fought so valiantly under his command despite the daunting privations they suffered. From the prisoner-of-war camp in Luzon where Yamashita was 'secretly' being held, he entrusted their care to his Chief-of-Staff, Lieutenant-General Muto Akira. ² 'Muto', Yamashita wrote in his last communication,

I told you just before I surrendered that I didn't see how I could go back to Japan. I had lost too many men. Once there were 250,000, now more than a half were gone. But you remember I said it was my responsibility to see that those remaining men got home all right. Now it must be your responsibility. Take care of them, Muto - see that they get home. That is my last wish. That is my last command. ³

These were the words of the 'Tiger of Malaya', the person accredited with the capture of the island fortress of Singapore, and recognised as one of Japan's most able field generals. Who was this man? By what peculiar twist of fate, then, had such a renowned samurai arrived at the gallows? What was the significance of his trial and his conviction as a war criminal? These are the central

questions to which this thesis will be addressed.

Past approaches to the emotional issue of war guilt and war crimes trials have led to the generation of two distinct strands of scholarship. The first of these has concentrated on the issues of the legality of such trials, the problem of the double standard perpetuated in the trials of the vanquished by the victors (moral righteousness and 'victor's justice'), the procedural aspect of the trials and the abandonment of legal safeguards in their prosecution, plus the question of the review of sentences awarded by courts convened under war crimes jurisdiction. Voluminous before Vietnam and the Calley case, this body of scholarship received considerable stimulation from the latter controversy, as is evidenced by the studies of Falk, Kolko and Lifton, amongst others. ⁴

Focusing on Nuremberg and the International Military Tribunal for the Far East, the second strand of scholarship has devoted its attention to the actual trials, considering them as events in history, and discussing the specifics—who was tried, by whom, and the verdict—rather than viewing them in a broader perspective. In this context, the trial of General Yamashita Tomoyuki escaped the attention of students until recently, when some interest in it was revived by the debate surrounding the conviction of Calley, but even now Yamashita's case has been the subject of only one full-length study. ⁵

The impact of the Calley case upon scholarship has, as noted above, been considerable, but the most striking feature

of the argument surrounding his case has been the confusion and the failure to resolve the fundamental question of what constitutes war criminality.

Therefore, what this thesis attempts, and the factor that distinguishes it from earlier studies is its effort to unite the two threads of scholarship. A study of the Yamashita trial leads to a recognition that this trial, as the first trial of a significant war criminal after World War II, and with its utilisation of the command responsibility doctrine (negative criminality) set a precedent for the later trials, such as those held at Nuremberg, the International Military Tribunal for the Far East, the Yokohama trials and trials held by the Australian and Dutch authorities. In this respect alone, the Yamashita decision had a great effect on the shape these later trials took. To understand the problems associated with the exercise of the war crimes jurisdiction, and in particular the case of General Yamashita as the pace-setter, reference will be made to the other aspect of scholarship, legal theory. Thus it is hoped that legal theory will help to amplify the problems and difficulties with the Yamashita trial; at the same time, the Yamashita trial will reveal the discrepancies and flaws in the theory of law applied by the courts.⁶ This connection has been insufficiently related in the earlier studies.

In addition, the trial of General Yamashita will be compared and contrasted to the later trials held at Nuremberg, the IMTFE, by the Australian authorities and most importantly, with that of Admiral Toyoda Soemu, tried on a command res-

possibility basis for crimes (in part) identical to those for which General Yamashita paid with his life.

Using this as a basis, the question to which this thesis is addressed is whether, given the fact that there were substantial flaws in the legal basis underpinning the charge against General Yamashita, and given also the way in which the procedure was conducted, did 'justice' have any real chance of being practised at his trial? In other words, was Yamashita's guilt or innocence being assessed by the military commission that tried him on the basis of the evidence presented to it, or were political considerations paramount? Was it a case of 'victor's justice'? ⁷

One assumption is made, that the general purpose behind trials is to achieve justice and equity between parties. The goal here is to attempt a correlation between this consideration and the behaviour exhibited by the United States in its prosecution of General Yamashita.

General Yamashita surrendered to the American forces at Baguio, Luzon, at the command of the Japanese Emperor on September 2nd, 1945. One month later, on October 2nd, 1945, General Yamashita found himself being arraigned before an American military tribunal in Manila, on charges arising from the Japanese defence of the Philippines. It was alleged that,

at Manila and other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its Allies, (he) 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 the people of the United States and of its allies and dependencies, particularly the Philippines, and he, General Tomoyuki Yamashita, thereby violated the laws of war.

The Prosecutor did not assert any direct involvement on the part of Yamashita in the 'brutal atrocities' that occurred, the charge was one of negative criminality based on the 'principle' of command responsibility. It was argued that the charge had ample legal precedent, that its roots lay in the lesser military crime of dereliction of duty. What the charge amounted to, therefore, was reckless disregard or dereliction of duty in the failure to prevent the commission of breaches of the laws and customs of warfare.

The crimes for which he had to answer, many of them committed by troops not even under his command umbrella, were new to Yamashita. He had not been aware of their perpetration at the time of their occurrence, and neither had he subsequently been orally informed or received written reports suggestive of this. However, the Prosecution argued that it was Yamashita's duty as commander to keep himself informed of the actions and behaviour of the troops he led. If he did not know of their misdemeanors it was because he took positive action to remain uninformed, he 'must have known'. No evidence was introduced to offer proof of this knowledge to link Yamashita as commander with the crimes of his troops. Knowledge was an abstract notion.

Further, the Prosecution and the Tribunal refused to acknowledge the difficulties under which Yamashita operated, (and by implication, the efficacy of the American attack on

the Philippines), particularly the crisis caused by the unexpected launching of the battle for Leyte Gulf, begun within nine days of his assumption of command. In addition, they clung to an American perception of how the command structure of the Japanese armed forces should have operated, adamant in their refusal to attempt an understanding of the realities of the situation. This was tantamount to arguing that the evidence was immaterial.

The charge upon which General Yamashita was arraigned was unknown in the past practice of civilized nations. Command responsibility had hitherto only applied to commanders who had actively participated in such incidents, or who had ordered their commission, or who otherwise knew of their existence and tried to conceal evidence of the commission of an infraction against the law of war or who did not take appropriate action. These were positive acts rather than a crime of omission. Only the former aspect of command responsibility was at that time encompassed within the jurisdiction of the law of war. Neither did municipal law cover command responsibility.

No member of the commission had legal experience or expertise. Effectively this meant that the raison d'etre for the existence of legal technicalities, and their necessity was not recognised. This in turn led to much flouting of the normally fundamental rights of the Accused, especially the right to be regarded as innocent until proven guilty, and to confront the witnesses testifying against him.

All members of the commission were inferior in rank to

General Yamashita. In addition, they were desk generals, and as such lacked an understanding of combat conditions, essential for a trial by one's peers, which trials by military commissions and tribunals purported to be.

Throughout the trial, evidence not normally accepted in American jurisprudence was freely admitted, and safeguards for the rights of the Accused were dismissed. Opinion, hearsay (even involving the statements of a dead man about what another person allegedly told him, as recounted by the testifying party) and the recourse to affidavit, so that no cross-examination could be undertaken were commonplace. Qualitatively, most of the evidence assembled by the Prosecution against General Yamashita was of grossly inferior standard and in more normal circumstances, it would not have been admitted, let alone be given probative value by a court. This was coupled with the difficulty of getting the original Japanese documents presented concurrently with the acceptance of the English translations into evidence, since the regulations covering the operation of the commission did not stipulate this as a mandatory requirement. The Prosecution saw Defence efforts in this direction as obstructionist tactics; they preferred to present the English translations and have them re-translated back into Japanese, with all the attendant possibilities for abuse when this course was inescapable.

Nevertheless, this was the supposedly impartial forum through which the truth was to be elucidated, and justice administered.

Thus, the contempt for the law manifested by the commission, the impediments to the preparation and presentation of the defence case repeatedly placed before counsel, and the undue haste with which the trial was conducted, amongst other factors, attest to the supremacy of political motivations. Accordingly, what will be contended, is that the foreign policy attitudes of the United States at this point in time shaped or determined the approach of the military commission to the trial of General Yamashita. A conviction was demanded by the dictates of politics, the verdict to be reached by the Tribunal was quite predictable. Victor's justice.

To view the trial of General Yamashita from this perspective is to deny the validity of examining it in isolation, merely as the trial of a single individual, one of many hundreds held under war crimes jurisdiction at the conclusion of World War II. By acquiescing to that latter viewpoint, the argument actually being postulated is to intimate that judicial decisions are formulated in a social and political vacuum. This is clearly at odds with reality. The question that remains, is how does the trial of General Yamashita relate to these broader issues?

I have chosen to adopt the definition provided by the Oxford Dictionary, so that when talking of 'attitudes', reference will be being made to the 'posture of a body proper to, or implying some action or mental state assumed by human beings.' This stance is based on the supposition that foreign policy decisions, and the definition of the situation that precedes them, rarely have an immaculate conception in historical necessity.⁸ Hence, it is reasonable to suggest

that motives underlie attitudes in that there is a desire to effect a certain result from a pattern of behaviour. By observing behaviour, or the approaches taken toward given problems or incidents, the attitudes operative in that situation reveal themselves as observable phenomena (through the process of inference).⁹ In this context then, the foreign policy approach adopted by a nation is regarded as being the specific behavioural manifestation of the attitudes on which it is grounded.

Within the total foreign policy approach pursued by the United States many different attitudes were embraced. These included the attitudes of the general population, the informed laymen and the official post-war policy planners. The trial of Japanese war criminals of which General Yamashita was the first, was amenable to all of these viewpoints although for varying reasons, and thus, judicial and political decisions being complementary (and foreign policy being a political issue), the path the military commission took was determined by factors external to itself, and by implication external also to questions of guilt or innocence. This ultimately led to the gallows for its human pawn, General Yamashita.

As a result of the pioneering work of Bernard Cohen, it is possible for historians to trace the fluctuations of American public opinion throughout the wartime period until the conclusion of the Japanese peace-treaty (with which Cohen was primarily concerned), through the study of published public opinion polls.¹⁰ It is on this base that the next comments rest.

The attitude of the public towards the political settlement of the Pacific War with Japan, and particularly the question of the prosecution of alleged Japanese war criminals was largely a product of Pearl Harbour and conditioned by the ferocity and tenacity of Japanese soldiers in their defence of their nation. The limitations on the capacity of the general population to fully understand the issues involved and their significance, led to a situation where their reaction was based on mood and emotion, and they lacked the structured opinions indicative of deeper thought and a reasoned approach to the problem. Such a tendency was reinforced by Government pronouncements regarding the atrocities routinely practised by the Japanese upon American prisoners of war, and by the intensity of the battles with the enemy, which were killing thousands of young American men. For these reasons, the majority of the populace, in the fervent turmoil of the immediate aftermath of the war, were intolerant of the Japanese, and hard in their assessments for the future treatment of the country of their late enemy. Indeed, in September 1945 some 70% of Americans were of the opinion that the surrender policies administered by their government were not sufficiently harsh, and that greater punishment was warranted. With this groundswell of opinion, the United States government could feel quite sure of the outside limitations of policy that the population would feel disposed to accept, and within which decision makers routinely keep.

To the bulk of the population then, the Japanese, at the termination of hostilities were seen as being 'inherently

warlike'. They were responsible for the deaths of many young Americans, and the disruption of the lives of millions of others. Americans were suspicious of their intentions and hostile towards them, reacting on a personal and emotional level with a type of thinking that was both stereotyped and rigid and to which harsh or severe punishment for the Japanese was quite amenable.

Thus, 'stern justice' for all war criminals, as promised in the Potsdam Declaration, was demanded by the bulk of the population. The trial of General Yamashita, the 'Tiger of Malaya' and often also erroneously known as the 'Beast of Bataan', offered the prospect of a fulfilment of that desire. The fact that he was convicted for his responsibility for the Philippine atrocities meant that guilt was popularly attributed to General Yamashita, but the public having reached the same conclusion as the Tribunal did not necessarily guarantee the use of the same logical constructions, or an awareness of the influences at work and the implications of the decision. Generally, it is reasonable to say, the public would have remained unaware of any greater political motivations behind the trial, and the policy that encouraged Yamashita's prosecution.

Why then, did American foreign policy planners elect to pursue a course of action that encompassed the prosecution of General Yamashita and the other Japanese war criminals?

Within the circles of people responsible for the formulation and delineation of official policy, there existed, as is characteristic of human thought, a spread of opinions

regarding the treatment that should be accorded a defeated Japan. Essentially, such attitudes were statements of preference: preferences for and preferences against the likely or anticipated outcome of planned policy stances. The definition of preference, and its corollary, the definition of national obligations and duties, were conditioned by ideology.

The predominant attitude within this circle was that inspired by and attributable to Cordell Hull, Secretary of State in the Roosevelt administration. Hull had examined the American experience during the inter-war period and especially the Great Depression, and based his post-war policy objectives on his understanding of the factors at work in international relations at that time. This study led Hull to impute to economics the role of a primary cause of the war with Japan, and consequently he strove to remove the exacerbating stimuli associated with the Depression, namely, restrictions on free trade and access to raw materials, from a recurrence in the post-war world. Hence, American political objectives were contingent upon a sophisticated set of economic peace aims.

The major goal and operational premise of the Hullian attitude was the need for the maintenance of stability in post-war Asia, or in Hull's words, to see that 'orderly processes in international relations were maintained'.¹¹ Instability, equated with the refusal to work within the existing institutional framework, was seen also on an ideological plane as being conducive to the spread of Commun-

ism. Instability and Communism in turn, upset the economic relations between trading nations, both prejudicing American interests in Asia, and provoking hostility between nations. Clearly, policies which may have contributed toward such unfavourable developments were not pursued. The definition of national interests in Hullian terms demanded a defence of American investments in Asia. This again was a statement of preference being exercised.

Hence, in determining the shape of post-war Asia, and particularly with the Occupation of Japan, the United States in adopting the Hullian understanding of the causes of the Pacific War and Japanese aggression, was expressing through her foreign policy her conviction for the principles of free trade and equal access to natural resources for all nations (especially herself); the values for which she had fought.

The questions involving the treatment to be accorded a defeated Japan and the shape of post-war Asia were not mutually exclusive. Their relevance to a discussion of the trial of General Yamashita lies in my contention that one can best understand the nature of the charge and the reasons behind the behaviour and legal practice of the Commission that tried Yamashita, with reference to the overall strategy being applied to Japan.

The fate of General Yamashita and the future of Japan were inseparably linked. General Yamashita was sacrificed in a showpiece trial for the future of his country. His trial and the trial of other war criminals that followed it were designed as forums to illustrate American toughness with

Japan; the popular belief that Japan was responsible for initiating the war with her surprise attack on Pearl Harbour, coupled with announcements of Japanese atrocities, led to the adoption of the view that America had the right to demand that Japan be taught a lesson, that she pay for her folly. The trials of war criminals were important in seeming to uphold that view, in forcibly making the Japanese accept both their defeat and the disapproval of the Allies for their past behaviour, as well as placating domestic American demands for a harsh peace by portraying the image of justice being done.

The trial of Japanese war criminals further acted as a purging device for the Japanese. By blaming selected individuals within their midst—a token group—it was hoped that the Japanese would be able to relieve themselves of their guilt, and thereby cooperate with the Occupation and its goals.

Essentially, the trials also acted, and very significantly, as diversions, distracting popular attention away from the leniency of the Occupation. This was most obvious in the case of General Yamashita. In order to retain the friendship and cooperation of the Filipinos, it was imperative that they believe in the severity of the Occupation, given the hardships they endured under Japanese occupation, and their contempt for their oppressors. The trial of General Yamashita served as a deliberate and successful ruse; Yamashita having been the last Japanese Army commander in the Philippines made him an ideal scapegoat for this purpose.

There can be no doubt that this was the policy given the

behaviour of the Commission and the dramatic nature of the evidence presented before the court by the Prosecution. Small girls lifting their dresses in the courtroom before a gallery filled to capacity with interested civilians, and revealing multiple bayonet wounds was of a prejudicial and inflammatory nature, but normally would be of little probative value unless the wounds could be linked beyond a reasonable doubt to the actions of the accused. Such a linkage was never presented in this case.

The premise upon which American foreign policy attitudes were evaluated, and which led to the generation of war crimes trials, was, as mentioned before, the contribution made to the stability of the Asian region. Stability entailed, as a matter of course, the dominance of the United States in Asia, so that she could maintain a status quo favourable for her economic interests there, at the same time winning the respect of the Asians and preventing stimuli conducive to the spread of Communism from taking root. A two-pronged approach was dictated: the trials of war criminals were designed to placate the anti-Japanese sentiments of the Allies and those who suffered under Japanese occupation as well as assuring the Asian nations of American integrity, and an extension of the American defensive perimeter in Asia was envisaged in this context as well as being designed to counteract the weaknesses so starkly exposed at Pearl Harbour.

For the protection of United States' interests in Asia with the minimum commitment of resources, an ally in the region was desirable. Hence, there was the demand within

military circles for the retention of the Melanesian islands from which the offensive against Japan had been launched. The trust-territory system of the United Nations accommodated American wishes on this point. In the Philippines, due to be granted independence in 1946, the United States was successful in negotiating to retain military bases. The defensive perimeter was therefore secure from the Philippines to the south, where it merged with the defence lines of Australia and New Zealand. To the north, however, American security could not be guaranteed.

It was the belief of the American foreign policy planners, though, that Japan could be relatively easily reintegrated into the family of nations if economic stability, equated with free trade and free access to markets and resources was allowed to prevail. Whilst the United States had been successful in removing the British presence from the Pacific, and had won 'unconditional surrender' for Japan (which she understood to mean that as a victor she had the right to impose terms upon the vanquished), the intensity and ferocity of the Japanese defence to the American offensives caused the planners significant apprehension of the reaction the public would manifest to a lenient Occupation. The reticence was further reinforced by the decision to retain the Japanese Emperor, critical in their view for winning the confidence and cooperation of the Japanese people, and thus for the successful implementation of American goals of economic and political stability, and the full participation of Japan as an economic entity.

In this context, the trial of Japanese war criminals served a critical function in distracting popular attention away from the more lenient aspects of the Occupation, and focussing it on a series of showcase trials which, by their suspension of normal procedural safeguards, showed the Japanese in the worst light possible. At the same time, the trials, by verifying the guilt of the enemy and stamping it as evil and responsible for all war-induced misfortune had the effect of justifying the actions of the Allies and acting to vindicate the deaths of the Allied (especially American) war dead. By not trying Allied personnel the Americans established for themselves a reputation of moral superiority and self-righteousness. This meant that right and wrong were no more than subjectively defined relativist concepts, and that 'victor's justice' was a valid assessment of the exercise of war crimes jurisdiction after World War II.

In contradiction with this behaviour was the idealistic aspect of American thought, namely the underlying assumption that international criminal law could be impartially administered. This in effect meant that the acts of an accused person or nation could be measured in a judicial forum by some externally objective principles of the law of nature. As such, the verdicts rendered in these trials would be expressions of 'absolute justice'. No other case demonstrates better the folly of this belief than that of Yamashita.

The major source for this study was the trial proceedings, judgment and exhibits of the Yamashita case, which was available in the library of the University of Adelaide. The

International Military Tribunal for the Far East proceedings and judgment, also available at Adelaide, were used to examine the effect of the Yamashita judgment on the later trial, and to see how the principle of command responsibility was applied and developed. In relation to this, the United Nations War Crimes Commission reports on the trials of major war criminals were of critical importance. These are to be found in the Law Library of Adelaide University and also in the Australian War Memorial Library.

In addition, the course of Yamashita's trial will be compared and contrasted to the trial of Admiral Toyoda Soemu, Commander-in-Chief of the Japanese Combined Fleet, who was tried by a similar American Military Tribunal in Tokyo, in 1948, on command responsibility charges. A substantial part of the charge against Toyoda involved the same offences in the Philippines as those for which Yamashita (and others) were tried. The proceedings, judgment and exhibits of this trial were located, on a study trip to Canberra, in the National Library and the Australian War Memorial. Evidence and testimony presented to that tribunal which has relevance to or clarifies certain issues of Yamashita's case will be presented.

The Australian Archives in Canberra and Melbourne hold the complete collection of the post-war Australian trials of Japanese war criminals. These contain transcripts of the trials, records of evidence and verdict and the reports of the commanding officer of the courts to the Judge Advocate General in Melbourne. The report of the Judge Advocate

General to the Adjutant-General was sometimes appended. Some items of policy were also included. These records have been read in conjunction with the Parliamentary Debates (Hansard) of the Australian Parliament to present an Australian aspect on this topic.

Mr. David Sissons, of the Department of International Relations in the Research School of Pacific Studies of the Australian National University, provided invaluable assistance with the location and access to source materials, and in helping to direct my attention to the more problematic areas posed by the trials.

Underpinning and augmenting these sources are a selected range of secondary materials, largely derived from international law and foreign policy, and employed to analyse the case of General Yamashita within this type of framework. Accounts of the importance of public opinion in the formation of foreign policy and in diplomatic manoeuvres, and the mobilisation of public opinion by the media, and its effects, all have a direct bearing both on the question of war criminals and war crimes in general, and especially in the case under consideration.

To restate then, in conclusion, the basic concern of this thesis is, given the absence of a significant legal base supporting the charge against General Yamashita and the way in which the procedure of the Commission was conducted, whether there was any real chance of justice being practised at the trial. Justice, in this sense, is conceived of as being dependent on an impartial analysis of the guilt or

innocence of the Accused derived solely from the evidence presented by both the Defence and Prosecution in the context of a fair trial and with reasonable safeguards to prevent the intrusion of external factors into the deliberations.

It is my contention that the trial of General Yamashita was not decided upon the substantive issue, on the questions of guilt and innocence as evaluated from the evidence presented before the Tribunal. Rather, a series of procedural anomalies prevented this occurrence. Instead of creating an impartial atmosphere for such an evaluation of the facts of the case, these procedural anomalies, conditioned by factors external to the commission, served to generate a forum where the values and interests hostile to and unfavourable for General Yamashita were given greater scope for expression. The failure to protect the Accused from the effects of prejudicial and incompetent evidence, the extensive use of affidavits preventing cross-examination, and the danger of poor translations can only be seen to have had a negative effect. In short, the failure to assure the rights of the Accused, safeguards normally regarded as the cornerstone of Anglo-American jurisprudence and the subject of much pride, created a situation in which a miscarriage of justice was rendered a distinct possibility.

It is in this light that the trial of General Yamashita Tomoyuki will be studied.

Posterity will be his judge.

FOOTNOTES

- 1 The Japanese practice of placing the family name first will be followed throughout.
- 2 Lt. General Muto was later hanged as a war criminal by the IMIFE.
- 3 Swinson, A: FOUR SAMURAI, London, 1968.
- 4 Falk, Richard A, Gabriel Kolko and Robert J. Lifton, eds; CRIMES OF WAR: A Legal, Political-Documentary and Psychological Inquiry into the Responsibility of Leaders, Citizens and Soldiers for Criminal Acts in Wars, New York, 1971.
- 5 Redford, Larry H: THE TRIAL OF GENERAL TOMOYUKI YAMASHITA - A Case Study in Command Responsibility. Unpublished MA Thesis, Old Dominion University, Virginia, 1975.
- 6 Tsai, Paul Chung-tseng: JUDICIAL ADMINISTRATION OF THE LAWS OF WAR: Procedures in War Crimes Trials. Unpublished LLD Thesis, Yale University, 1957.
- 7 Belgion coined the phrase 'Victor's Justice' which was the title given to his book (Regnery Co., 1949) and later used by Richard Minear for his book VICTOR'S JUSTICE : THE TOKYO WAR CRIMES TRIAL.
- 8 Cohen, Bernard: THE POLITICAL PROCESS AND FOREIGN POLICY - The Makings of the Japanese Peace Settlement, Princeton, Princeton, 1957.
- 9 Green, Philip: 'Necessity and Choice in Foreign Policy', DISSENTER'S GUIDE TO FOREIGN POLICY, ed. I. Howe; New York, Anchor Books, 1968, pp. 131-156, p. 155.
- 10 Such attitudes cover the full spectra of a nation's international intercourse, attitudes about the nature of a nation's responsibility in and to the world community, attitudes about the other nations with which it interacts, and attitudes which govern the identification of the national interest, and so forth.

CHAPTER 1

CLEMENCY DENIED



'The War Department have been advised that the President will take no action on the petition for clemency filed by counsel for General Tomoyuki Yamashita. General MacArthur has been given this information. End.'

So stated the press release of the War Department, published on the afternoon of the 8th February, 1946. With these words, the last remaining legal barrier to the implementation of the death sentence against General Yamashita Tomoyuki, as handed down several months earlier by the military commission that tried him, were removed.

Yamashita, informed of the decision, accepted it with resignation and calmness. 'I am not ashamed,' he said,

'before God for what I have done when I have to die. But if you say to me "you do not have the ability to command a Japanese Army" I should say nothing for it, because it is my own nature.

I know that all your American military affairs officers have tolerant and rightful judgment. When I have had a good treatment, kindful attitude from your good natured officers who all the time protect me. I never forget what they have done for me even if I have died. I don't blame my executioner. I'll pray God bless them.' 1

He then asked that his thanks be conveyed to his Defence Counsel, Colonel Clarke, Lt. Colonel Feldhaus, Lt. Colonel Hendrix, Major Guy, Captain Reel and Captain Sandberg.

As he read the release in Washington, Captain Frank Reel's thoughts turned to the conversation he and his fellow counsel had the previous day with President Truman's military aide, Major-General Harry Vaughan. After having delivered an appeal for clemency on behalf of General Yamashita, for the attention of the President, Reel and his colleagues had

gone to see Vaughan to explain that they were available to answer any questions arising from the application. Having discussed the possibility of legal review by the Judge Advocate General, the conversation turned to a discussion of the mass meetings of American Army personnel in various theatres held to publicise their demand for immediate demobilisation.

'They're just a bunch of crybabies,' said the President's aide heatedly. 'If I were in charge, I'd put a stop to that sort of thing. You know what I'd do? I'd get after the sargeant's and the corporals - it's up to them to exercise some discipline.' He paused a moment, and then added: 'Damn it, I'd go even farther. I'd go after the lieutenants and the captains.'

I (Reel) couldn't resist asking General Vaughan: 'And would you go after the commanding general too?'

Vaughan looked at me as though bewildered. 'The commanding general?' he asked incredulously. 'What's he got to do with it?'

I told General Vaughan that he had just stated our objection to the theory of command responsibility as the basis for criminal punishment of General Yamashita.

'Oh,' he said, 'atrocities are different.' 2

In Tokyo, General of the Army, Douglas MacArthur, and now Supreme Commander for the Allied Powers, rendered his judgment, as reviewing authority, on his fallen enemy before the findings of the Supreme Court had arrived on his desk. Of General Yamashita he said,

I have reviewed the proceedings in a vain search for some mitigating circumstances on his behalf, I can find none... This officer of proven field merit and entrusted with a high command involving authority adequate to his responsibility, has failed his duty to his troops, to his country, to his enemy and to mankind. He has failed utterly his soldier's faith. The transgressions are a stain upon civilisation and constitute a memory of shame and dishonour that will never be forgotten 3

MacArthur continued his statement with a comment on the law

applied by the commission.

No new or retroactive principles of law, either national or international, are involved. This case is founded upon basic fundamentals and practice as immutable and as standardized as the most matured and irrefragable of social codes.

The proceedings were guided by that primary rational(e) of judicial purpose - to ascertain the full truth unshackled by any artificialities of narrow views or technical arbitrariness. The results are beyond challenge. 4

With this assertion, the death sentence against General Yamashita Tomoyuki was affirmed.

On the 4th February, 1946, in Washington, the justices of the Supreme Court assembled to deliver their verdict upon the petitions for habeas corpus and certiorari, that had been argued before it by Yamashita's defence counsel on his behalf. Mr. Chief Justice Harlan Fiske Stone announced that after due consideration had been given to what was a somewhat novel case, the court had decided that the petitions, both raising similar issues, must be denied. This was not, however, a unanimous decision by the bench; Mr. Justice Frank Murphy and Mr. Justice Wiley Rutledge both filed dissenting opinions to the embarrassment of the United States government. 5

As a preliminary to his discussion of the principles of law upon which the majority decision had been based, Mr. Chief Justice Stone articulated the grounds upon which the petitions had been based, and the legal issues raised therein. Habeas corpus writs, Stone explained, functioned to preserve individual liberty; their main purpose being to secure the release of a petitioner from unlawful imprisonment. However, the office of the writ was not to determine the prisoner's guilt

or innocence. Rather, the only issue it presented was whether the prisoner had been restrained of his liberty by the due process of law. Hence, the action pending judgment of the Court was one which alleged that 'the detention of the petitioner for the purpose of the trial (by military commission) was unlawful for reasons which are now urged as showing that the military commission was without lawful authority or jurisdiction to place the petitioner on trial.'⁶

Yamashita's defence counsel supported the petition for the writ by asserting that the military commission that tried and convicted him was not legally created. This argument rested on the understanding that no military commission could be lawfully constituted to hear a case against a petitioner for violations of the law of war after the cessation of hostilities between the belligerent nations concerned.

Furthermore, they contended, in the charge presented to Yamashita, no transgression of the law of war was presented. Over this, the military commission would have been exceeding its jurisdiction to try Yamashita and others in a like position.

The gravamen of the appeal, though, was directed against 'Regulations Governing the Trial of War Criminals', document drawn up by MacArthur's Headquarters, which permitted the tendering of depositions and affidavits in evidence, and freely admitted hearsay and opinion evidence. The commission was therefore without the authority and jurisdiction to try Yamashita because the procedural rules permitted the introduction of such damaging evidence, and because the rulings the commission made in this regard, were themselves in violation of

the Articles of War, articles 25 and 38, passed by Congress, and also in contravention of the Geneva Convention. The admission of such evidence, it was argued, served to deprive General Yamashita of a fair trial in violation of the due process clause of the Fifth Amendment.

The final ground of appeal cited the requirement of Article 60 of the Geneva Convention (1929) on Prisoners of War, to which the United States was a signatory, where advance notice of the trial of a prisoner of war had to be provided to the neutral power representing the interests of the belligerent nation involved. In this case the United States failed to officially advise Switzerland of the trial of Yamashita, a Japanese national, and for this reason the commission was found to be lacking the authority and jurisdiction to proceed with the trial of the petitioner.

Thus, the petition for the writ of habeas corpus was utilised by Yamashita's defence counsel to attempt to gain legal redress for what they believed to be his unlawful detention. The grounds above were invoked to show why his imprisonment was illegal, and the gist of these was that the trial had been grossly unfair and had disregarded the principles regarded as the cornerstones of Anglo-American jurisprudence.

In addition to the writ of habeas corpus the writ of prohibition was sought. Had it been successful, the writ, issued by the Supreme Court of the United States would have commanded the parties of the inferior court (i.e., the military commission) to cease from the prosecution of the case in hand, on the basis that the cause itself or a collateral matter

arising in the case, went beyond the jurisdiction of that court.

Defence counsel for Yamashita also filed with the United States Supreme Court an application for a writ of certiorari to the Supreme Court of the Philippines to review an order denying an application for the writs of habeas corpus and prohibition. Certiorari would have brought before the United States Supreme Court the means whereby it could re-examine the action of the inferior court and at the same time acquire further information on the case at hand, both of which were not accessible through the writs of habeas corpus or prohibition. The Supreme Court of the United States chose to deny the petition for this writ.

Mr. Chief Justice Stone then returned to his presentation of the majority opinion of the court, with a statement of the law applicable to Yamashita's case. He stressed that the court had earlier considered the sources and nature of the authority to convene military commissions for the trial of enemy combatants, such as Yamashita, for transgressions against the law of war. In Ex parte Quirin otherwise known as the German Saboteurs Case,⁷ the bench had drawn attention to the fact that Congress had, in effectuating the powers bestowed on it by virtue of Article 1, Paragraph 8, clause 10 of the Constitution under which it was able to both define and punish offences against the law of nations (of which the law of warfare is a part), identified the military commission, appointed by appropriate military command, as it had until that time operated, as being a suitable court for the trial

of infractions against the law of war under the provisions of the Articles of War (Article 10). Article 15 of the Articles of War stated that other accompanying articles which conferred jurisdiction upon courts martial should not be interpreted so as to deprive military commissions or tribunals of concurrent jurisdiction over offenders or offences that are prescribed by statute or the law of war. Furthermore, whilst Article 2 outlined the persons encompassed within the jurisdiction of the Articles of War, namely the members of the United States military, Article 12 expressly pointed out that this did not prevent the trial by military commission of any other person who may be subject to trial by military tribunal under the law of war, and under Article 12 tried by court martial, or under Article 15 by military commission.

Stone emphasised that by authorising the trial of enemy combatants for violations of law of war by military commissions, Congress was not undertaking a codification of the law of warfare, or seeking to define its perimeters.

Instead, by Article 15 it had incorporated, by reference, as within the pre-existing jurisdiction of military commissions created by appropriate military command; all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction. 8

From this the court had concluded in the Saboteurs case that Congress had sanctioned the adoption of military common law as applied by military tribunals, insofar as it was considered applicable by the courts, and subject also to the definition and augmentation of the Hague Conventions. 9

Stone went on to point out that questions of the guilt or innocence of General Yamashita were not involved here;

only the authority of the commission to lawfully try the petitioner on the charge preferred could be debated.¹⁰ The courts recognised by Congress in the Articles of War had their own system of review, either as provided by the regulations governing their constitution or as outlined in the Articles themselves.¹¹ The only judicial power granted to the system of civil courts over those of the military was through the issuance of the habeas corpus writ. However, Stone concluded his point with an unusual twist of phraseology.

If the military tribunals have lawful authority to hear, decide, and condemn, (he said) their action is not subject to judicial review merely because they have made a wrong decision on disputed facts.¹²

Whether this was a concession by Stone to the defence argument before the Court, remains in the realm of speculation, and will not be considered here.

Finally, Stone stated that Congress, by endorsing the trial of enemy combatants for breaches of the law of war by military commissions, had recognised the right of the individual to make a defence, and short of a suspension of the writ of habeas corpus, the political aim of the administration could not deprive the judiciary of its duty and power to inquire into the legality of the commission, such as could be made by the writ.

Mr. Chief Justice Stone then launched into his exposition of the findings of the majority of the court, and the reasonings upon which they were based. The question with which he dealt first, and upon which much of his later comment was founded, was whether the commission that tried General Yamashita had been lawfully created.

The appointment of the military commission to try General Yamashita had been made by Lieutenant-General Wilhelm Styer, commander of United States Army Forces, Western Pacific, whose command included the Philippine Commonwealth, where the crimes with which Yamashita was charged had been committed, where Yamashita had surrendered as a prisoner of war, and where at the time of the order convening the commission, he was detained as a prisoner in custody of the United States Army.¹³ The authority to convene a military commission in the United States army was held by officers of the rank of field commander, or by any officer who could appoint a general court martial, as could General Styer. Such power had been granted to Styer by the order of the President. Therefore, the commission had been appointed by an officer competent to do so. In addition, Styer's action had been undertaken in conformity with the order of his superior, General MacArthur, who specifically instructed Styer to proceed with the trial of Yamashita. MacArthur's directive was itself in response to the instruction he received from the Joint Chiefs of Staff, on the advice of the President, on September 12, 1945, to undertake the trials of suspected Japanese war criminals before appropriate military tribunals, as promised by the Potsdam Declaration. (MacArthur was acting in this instance, not as Supreme Commander of the Allied Powers but as the Commander in Chief, United States Army Forces in the Pacific). The Supreme Court thus concluded that the convening of the military commission was thoroughly in accord with the Congressional act (the Articles of War) governing the appointment of the same, that Styer's

action was appropriate in itself and was in accord both with the order from his superior and with established government policy.

The Court then considered Yamashita's contention that no military commission could be lawfully assembled to try suspected violations of the law of warfare on the part of enemy belligerents after the cessation of hostilities. It stated that,

'An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.' 14

From this premise, the Court reasoned that,

The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognised by the law of war. That sanction is without qualification...as long as a state of war exists - from its declaration until peace is proclaimed. 15

At this point the Court invoked the opinions of authoritative writers in the field, to substantiate their conclusion. No writer, they declared, had considered that the power of military commissions to try suspected breaches of the law of war terminated before the official proclamation of peace had been issued. 16 Notwithstanding this, the actual exercise of this power in the interim period between the cessation of hostilities and the official proclamation of peace was very much dependent upon the political branch of the Government, which may have been bound by the terms of an armistice or

similar agreement. By accepting the Potsdam Declaration and the surrender agreement, Japan had also accepted that those suspected of such violations would be brought to trial.

Given all of the above factors, the Court reasoned that not only was the military commission convened by an officer with the appropriate qualifications, it had been ordered by military command, and furthermore, was authorized by the United States Government, international law and usage, and by the terms of surrender of the Japanese Government. Hence, there could be no questioning of the validity of the military commission. Its credentials were impeccable.

Having settled this aspect of the problem put before it, the Justices then discussed the charge raised against General Yamashita, and its corollary, whether it constituted a violation of the law of warfare. Their conclusions on this aspect of the case were perhaps the most damaging to Yamashita personally and the legal principles for which his Defence Counsel were arguing. The Court adopted wholesale, the contentions advanced by the Prosecution in Yamashita's trial before the military commission, and by so doing sanctioned the precedent created by the original judgment, and gave it an aura of additional authority and respectability.

General Yamashita Tomoyuki, between October 9th, 1944 and September 2nd, 1945, in the Philippines

while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander, to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against (the) people of the United States and of its allies and dependencies,

particularly the Philippines; and he...thereby violated the laws of war. 17

With this, the original charge as their starting point, the concurring Justices drew attention to the fact that the military commission had ordered, at the request of the Defence Counsel, that the Prosecution file a Bill of Particulars relating to the charge against Yamashita. Dismissing any arguments alleging vagueness of these documents, with the assertion that violations of the law of war triable by a military tribunal need not be stated with the precision customarily practiced in a common law indictment, the judges went on to note that the Bill of Particulars and its supplementary, covered some 123 incidents of acts of violence, cruelty and homicide against both civilians and prisoners of war, and the wanton destruction of property by Japanese forces.

Juxtaposed with this statement, the Justices restated the stance taken by the Defence. General Yamashita in his defence did not deny, they said, that such incidents had occurred, nor that they were prohibited by international law and thus were recognised in the practice of nations as being violations of the law of war. Rather, the gravamen or thrust of his defence was directed towards the structure of the charge itself. It was the Defence position that the charge, in failing to ascribe to Yamashita any direct participation or condonance in the incidents alleged, had not indicated any violation of the law of war committed by him, and for which he could be held legally responsible. This reflected, the Justices believed, a failure on the part of

the Defence to identify the gist of the charge. Yamashita, the charge asserted, 'permitted' his troops to commit the atrocities outlined in the Bill of Particulars. Such permission clearly, is a transgression of the duty of a commander, whose responsibility is to control the troops in his command.

The question then, is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war; and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. - 18

That this was the central issue in the trial of General Yamashita was plainly stated by the Chief Prosecutor in his opening address to the military commission. Viewed from this perspective, the Court decided that recourse had to be made to the sources of international law, particularly the treaties and conventions defining the laws of war as at that time developed, in order to ascertain the degree of responsibility recognised therein as required of a field commander.

The premise upon which the Court based its reasoning was that the laws of warfare had evolved in an attempt by nations to restrict the barbarity of armed conflict to a minimum, and that the regulations thus were directed towards protecting civilians and prisoners of war from the ravages of armies involved in activities not immediately involved with the prosecution of hostilities. Therefore, to conduct military operations employing troops whose behaviour is not managed or controlled by the orders and actions of a commanding

officer would be to invite transgressions of department which it is the function of the law to prevent.

'Hence, the law of war presupposes,' they argued, 'that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.' 19

The Annex to the Fourth Hague Convention (1907) in Article I relative to the law of land warfare, stated, the Justices observed, that to qualify for recognition as a lawful belligerent (participating in an armed conflict), the armed force must be 'commanded by a person responsible for his subordinates.' 20 Nevertheless, this article in itself was insufficient to authoritatively attest to the degree of responsibility that could be expected of General Yamashita in the circumstances of combat in which his crimes were allegedly committed. Article 19 of the Tenth Hague Convention (Bombardment by Naval Vessels) further declared that the commanders of belligerent ships 'must see that the above Articles are properly carried out.' 21 This article imposes the obligation upon the commander for ensuring the observance of the provisions of the law of war, but again, it does not ascribe or even allude to the extent of legal culpability for failure to secure such observance. Similarly, Article 26 of the 1929 Geneva Convention on the Amelioration of the Condition of the Wounded and Sick Armies on the Field, renders it the 'duty' of the commander in chief of a belligerent force to supply the mechanisms whereby the provisions entailed in the convention can be implemented. 22 The article is also worded to extend that responsibility to cover 'unforeseen cases' as well as those envisaged by the scope of the agree-

ment. The strongest support for the conclusion reached by the Court, and which tolled most heavily against Yamashita, was Article 43 of the Annex to the Fourth Hague Convention (1907), whereupon it was demanded of commanders in charge of forces occupying enemy territory that they 'shall take all the measures in (their) 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. ²³

In summary, the Justices believed that

These provisions plainly imposed on (the) petitioner, who at the time specified was military governor ²⁴ of the Philippines, as well as commanding 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. ²⁵

That this was an acknowledged duty of a commanding officer in United States practice also was evident in the records of the military tribunals; infractions of this obligation had been prosecuted particularly as a result of the notorious Philippines campaign in 1900-01. ²⁶ Given that there was no conflict between the dictates of Congress and the United States constitution with international law, and the law of war in particular, the Court was bound to respect the latter, and to declare that there was sufficient precedent for a charge of command responsibility (negative criminality) to be raised against General Yamashita. ²⁷ As to the question of the sufficiency of evidence, the Court remarked that he breached his duty to control the operations of the men under his command, and as a result they perpetrated widespread 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. 28

The Justices with this statement, dismissed all Defence arguments pertaining to the ex post facto nature of the principle of command responsibility (negative criminality) and by so doing effectively eliminated any substantial chance for the legal salvation of General Yamashita. It was hardly a real prospect that the majority of Justices would take a radical view of the procedural aspect of the petition against the commission, given their attitudes to the rest of the questions raised.

Their deliberations on the question of the conduct of the proceedings before the military commission began with their cognizance of the rules governing the procedure as laid down by MacArthur. The most objectionable part to the Defence way of thinking was the provision wherein the commission was directed to accept that 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.'²⁹ Affidavits, depositions and statements taken by military officers assigned to that task were specifically admissible; the investigations and conclusions of such officers could thereby be included, even on such sensitive topics as Japanese atrocities and the so-called 'Rape of Manila', to the probable detriment both of Yamashita himself and the hallowed standards of American jurisprudence. The Defence contention was that by allowing the entrance of evidence by affidavit, and by the

use of hearsay and opinion evidence, over repeated objections, the commission violated the Articles of War. Article 25 of the Articles of War debarred the use of affidavits on behalf of the Prosecution in a capital case. Furthermore, Article 38 prohibited hearsay and opinion, the Defence argued, since 'insofar as (the President) shall deem practicable' the rules of evidence used in criminal cases in the United States district courts were to apply.

However, the Defence assertions again rested on the assumption that the Articles of War applied to Yamashita's case. Here, quite predictably, the majority of Justices sitting on the Supreme Court chose to disagree. After a reiteration of the Articles of War cited earlier as being relevant to the question, the Justices went on to comment that

By thus recognising military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. 30

Thus, General Yamashita was, by the Court's reasoning, not entitled to the benefits of the Articles of War, and so no restrictions upon the procedure to be followed by the commission were imposed by statute. Control over the procedure to be adopted in cases before military commissions remained in the hands of the military command. 31

A further argument advanced by the Defence to support their position on the applicability of the Articles of War, was also demolished by the Court. Article 63 of the 1929

Geneva Convention on prisoners of war, whereby it was provided that prisoners of war could only be sentenced by the same courts and with the same procedure as was applied to nationals of the detaining country, was held by the Court to relate only to prisoners of war being tried for crimes committed during their detention. This was not the case with the petitioner, they said. Evidence to support their view was entirely dependent on the positioning of Article 63 within the Convention. Article 63 appeared in part three, 'Judicial Suits' of chapter three, 'Penalties Applicable to Prisoners of War', of Section Five, 'Prisoner's Relations with the Authorities', a section of Title III - 'Captivity'.

On this basis, the Court concluded that the commission, in admitting the evidence to which the Defence was objecting, had violated no Congressional dictate, treaty or military command on this matter. The only question then, now remaining for consideration was the effect of the commission's failure to give notice of Yamashita's trial to the Japanese protecting power.

The fact of the failure to give adequate notice to the nation protecting the interests of Japan was meaningful only in a context where the 1929 Geneva Convention on Prisoners of War had been accepted as relevant to the petitioner's case. Having rejected the validity of its relevance previously, the Court was bound again to follow the same line of argument, and restate that the Defence had once more failed to prove that the commission lacked the authority to proceed with Yamashita's case. Article 60 of the Geneva Convention outlining the requirement that notice be given to the protecting

power in instances where charges had been preferred against a prisoner of war was only applicable to persons who were on trial for offences committed during their captivity and not whilst enemy combatants, the Court ruled. It did note in passing, though, that one of the items in the Bill of Particulars charged Yamashita with having permitted officers under his command to try and execute three named prisoners of war without giving notice of the intention to do so, of the verdict and the implementation of sentence to the appropriate protecting power. It suggested that if Article 60 was inapplicable to Yamashita, then it might also not apply in such a case, since it was apparent that the prisoners were charged with offences committed prior to capture, and hence, that Yamashita would then not be guilty of having failed to require that notice be given. Independent of this consideration, however, were other incidents upon which a conviction could be made, if supported by evidence.

The dismissal of this challenge to the legality and jurisdiction of the military commission concluded the case mounted by the Defence counsel on behalf of Yamashita. Mr. Chief Justice Stone reasserted the conclusion reached by the majority of the Supreme Court judges, that the military commission had been legally convened, that Yamashita had been tried for a violation of the law of war, and that the commission had the authority to proceed with the case, and in so doing did not violate any military, statutory or constitutional order. Therefore, the writs for certiorari, habeas corpus and prohibition were denied.

'We the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively beseiging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so wide-spread we will not bother to charge or prove that you committed, ordered or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.'

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Evaluated in the light of the combat situation in the Philippines during the period of Yamashita's command, it was apparent that the charges against him, when reduced to their essence, were best summarised by the statement above in the dissenting opinion of Mr. Justice Murphy.

Mr. Justice Murphy took particular exception to the majority decision upholding the procedure applied in Yamashita's case by the military commission. The core of the case before the Supreme Court was, he said, the question of whether a legally appointed military commission 'may disregard' those procedural rights and safeguards conferred upon a person accused of a crime by the Constitution, notably 'the due process' clause of the Fifth Amendment. The answer was clear cut. Mr. Justice Murphy declared that the protections of the Fifth Amendment applied to all persons accused of a crime by the political arm of the United States Government and its agencies. This was without exception, exception being contrary to the spirit of the Constitution

and the philosophy of human rights that under pinned it. Even though the existence of these rights were often not respected, they were 'immutable' he emphasised.

Murphy then went on to consider the conduct of the military commission from this standpoint. Its nonobservance of the requirements of the due process clause were both obvious and pronounced, he believed. General Yamashita had been the commander of forces which had crumbled under the heavy attacks of the United States, and during such offensives his men had committed atrocities and other 'high crimes'. At the conclusion of hostilities, Yamashita had voluntarily surrendered in good faith. Mr. Justice Murphy, in his direct but rhetorical style pointed out that Yamashita,

At that point was entitled, as an individual protected by the due process clause of the Fifth Amendment, to be treated fairly and justly according to the accepted rules of law and procedure. He was also entitled to a fair trial as to any alleged crimes and to be free from charges of legally unrecognized crimes that would serve only to permit his accusers to satisfy their desires for revenge. 33

A military commission, hastily convened, was appointed to try Yamashita for an alleged war crime, and yet there was no military necessity for this action, and its concomitant, the suspension of the protections of the due process clause. Mr. Justice Murphy attacked the charge - 'improper', - the insufficient time permitted for Yamashita's counsel to prepare an affirmative defence, and the transgression by the commission of the fundamental rules of evidence by which the accused was summarily sentenced to hang. 'Unseemly haste' and the lack of a serious attempt to prove the connection between Yamashita and the crimes for which he was being tried,

characterised the proceedings. Murphy emphasised that Yamashita had not been charged with having directed, condoned or actually participating in the acts for which his life was at stake. Neither had knowledge of the atrocities been attributed to him, and so the charge as it stood was, in the view of Mr. Justice Murphy, completely without precedent in the history of armed conflict and in the principles of international law. 'Such a procedure is unworthy of the traditions of our people,' Murphy commented.

The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army...can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. 34

With this comment Mr. Justice Murphy turned his attention to what he regarded as one of the 'red herrings' thrown before the Supreme Court to colour their perceptions of the questions involved. That atrocities were committed by the Japanese upon the Filipinos was an indisputable fact, Murphy said, and that those responsible for the crimes should be subject to justice was similarly beyond dispute. However, war by its very existence encouraged atrocities, and their perpetration, in turn stimulated the 'primitive impulses' of vengeance and retaliation. There was no justification for the abdication of the principles of justice in dealing with war crime suspects like Yamashita, he urged. Justice should not be governed by revenge, 'otherwise stark retribution will be free to masquerade in a cloak of false legalism,' 35 and

will reveal that whilst the Allies had won the war, they had lost their ideals, Murphy announced.

Mr. Justice Murphy gratefully acknowledged that the Majority Judges had seen fit to completely reject the 'obnoxious doctrine' advanced by the Government, that the trials of war criminals were political matters beyond the scope of judicial review, and to thereby ensure that law and justice retained their pre-eminence in such trials. Nevertheless, Murphy approached the use of the writ of habeas corpus, the vehicle for obtaining judicial review in this (and similar) instances, from a different point of view. He held that since the scope of the writ was within the jurisdiction of the judiciary (subject to the direction of Congress), and since the 'review of war trials calls for judicial statemanship,' the Court should free itself from the traditional guidelines set for review in cases where the accused involved was an ordinary criminal with access to the court system. Those suspects held by the military lacked direct access to the judiciary, so that for Murphy, it was essential that the judicial review available to such petitioners under the writ be broadened so that 'proper' standards of justice could be executed in these somewhat novel cases.

Whilst Mr. Justice Murphy accepted the decision of the majority regarding the latitude of the writ recognised by the Court at that time, and pursuant to that, their findings establishing the legality and authority of the military commission, he disagreed most profoundly on the vital question of whether Yamashita was charged with an identifiable violation of the law of war.

In outlining his views on this critical aspect of the case, Mr. Justice Murphy began with a brief analysis of the combat situation in the Philippines at the time of Yamashita's command, and the latter's difficulties in responding to the offensives of a superior American force, illustrating his points with extracts from the 'Biennial Report of the Chief of Staff of the United States Army to the Secretary of War', July 1943-June 1945. Murphy noted in passing that Yamashita upon surrender, became a prisoner of war and was imprisoned in accord with the dictates of international law; such protections as were afforded by prisoner of war status were retracted upon the service of the charge against him, when he was interned as an accused war criminal. Stressing that the Prosecution, for the Government, did not allege Yamashita's personal participation in the atrocities committed, his ordering of them, or his knowledge of their occurrence, Murphy pointed out that the military commission merely found that atrocities had been perpetrated by troops under Yamashita's command, and had not established the link between the commander and the crimes. No such charge, Murphy urged, had been envisaged in international law.

Murphy continued that international law nowhere tried to delineate the duties and obligations expected of a commander under 'constant and overwhelming assault.' Furthermore, no liability was imposed by that law for default in the performance of the functions normally required of a commander, in conditions of such combat intensity. The silence of the law on this issue was perfectly intelligible; with the differences in the battle situation, so changed the duties of a commander

and his ability to regulate the actions of his subordinates.

To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. 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 recognize such a judgment as a basis for a war crime, however fair the judgment... 36

With this indictment of the action against General Yamashita, Mr. Justice Murphy concluded his attack on the procedure of the military commission, and the findings of the majority, by a dismissal of the relevance of the conventions cited as establishing the legal culpability of the Accused. None of the conventions invoked as offering proof as to the legal liability involved indicated the type of responsibility intended, or to whom the responsibility was owed. Neither was the meaning clarified in referring to the authoritative writers on international law. Murphy also drew attention to the fact that the laws of war recognised by the United States hitherto did not make a commander criminally liable for the transgressions of his men whilst they were under heavy attack. Indeed, the exact meaning of paragraph 347 of the 1940 Basic Field Manual, Rules of Land Warfare (FM27-10) was obscure and had been reworded in the 1944 amendment (paragraph 345.1) to read:

'Individuals and organizations 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 culpab-

ility, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.' 37

From this the conclusion was inescapable, Mr. Justice Murphy said, that the United States only acknowledged individual criminal responsibility for breaches of the law of war where they had been committed by the person accused, or had been ordered or directed by him. Neither of these squared with the facts of the Yamashita case. Thus, it was apparent that the charge as framed, lacking suitable precedent and wide acceptance amongst the civilized nations, was merely a 'flexible method (by which) a victorious nation may convict and execute any or all leaders of a vanquished foe,' 38 through the application of whatever procedural regulations and standards of proof and duty as a commission determined. Such conduct, the use of judicial facade for political lynchings, was a blot on the tradition of Anglo-American jurisprudence, and these considerations, Mr. Justice Murphy said, had led him to dissent from the decision of the majority of Supreme Court judges.

Turning to the other dissenting opinion, that of Mr. Justice Rutledge, the basic difference between his view from that of the majority, as Rutledge explained, lay in the approach to the question of the application of the provisions and protections of the Articles of War, and treaty requirements to the Yamashita case, and its concomitant, the effect of their denial to the petitioner, on the authority and jurisdiction of the military commission, and the validity of the sentence it handed down. With Mr. Justice Murphy's discussion and conclusions on the substance of the crime Rutledge

agreed, but his major area of contention lay in the commission's flagrant procedural violations of fundamental constitutional rights normally accorded an accused person, and their departure from standard practices of jurisprudence.

Mr. Justice Rutledge asserted that the charge against Yamashita was without precedent, although that, in isolation, did not render it void. The law, he said, was not static, and there had to be room for growth and development since all precedents were once new. However, it was quite another thing for a person to be charged with a crime that was only defined after the behaviour, now said to be criminal, had taken place, and with an indictment lacking sufficient precision to enable him to mount an adequate defence. He went on,

Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and the power to do so. 39

Rutledge continued his attack of the 'fair trial' General Yamashita had received from the military commission by recounting the types of evidence that were made specifically admissible by the regulations governing the procedure of the military commission. These included hearsay; newspapers; motion picture films; official documents; diaries; affidavits and documents or translations thereof; and included documents prepared ex parte by the prosecuting authority, containing opinion but also significantly, conclusions of guilt, i.e. war crimes investigations. Under normal circumstances these types of evidence were not permissible and no conviction could

result from their use, Rutledge remarked.

Our tradition does not allow conviction by tribunals both authorized and bound 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. 40

Mr. Justice Rutledge declared it was his opinion that General Yamashita in facing his accusers, was provided with only one of the fundamental protections of the judicial system.

He has been represented by able counsel, officers of the army he fought. Their difficult assignment has been done with extraordinary fidelity, not only to the accused, but to their high conception of military justice, always to be administered in subordination to the Constitution and consistent Acts of Congress and treaties. But, as will appear, even this conceded shield was taken away in much of its value, by denial of reasonable opportunity for them to perform their function. 41

In his view, Rutledge said, the decision of the majority of Supreme Court judges served to put Yamashita and other petitioners in a similar position (i.e. enemy belligerents) beyond the reach of constitutional protection, despite the fact that hostilities had terminated and he had surrendered as directed by his Emperor. This could eventuate because the conclusion of peace with Japan had not been effectuated, and so the powers of the military continued unabated and unaffected by Japan's formal acceptance of the surrender terms as symbolised by the ceremony on the Missouri. Seen in this context, Rutledge urged, Yamashita's trial was conducted under the auspices of military necessity, a power

directly authorised by the President as Commander-in-Chief and his military advisers, and utilised to protect against military danger. It was not subject to the bridle of the law as interpreted by the judiciary.

Military necessity, Rutledge declared, could not justify the infringements of fundamental legal tenets and procedural safeguards that were routinely practised by the military commission in Yamashita's trial, since there was no danger as may have existed prior to the surrender.

In these facts is one great difference from Ex parte Quirin (Saboteur's). 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. 42

Whilst there was 'ample power' with which to punish the perpetrators of war crimes, discretion was needed, and justice had to be administered according to the law. The fact that the trial was a military one did not alter this mandatory requirement. Although the intention of war was the taking of human life, '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,'⁴³ Rutledge emphasised.

Mr. Justice Rutledge then proceeded to a fuller discussion of the procedural misdemeanors of the commission and the reasons why they invalidated the jurisdiction and authority of the commission, and the verdict it reached. Again taking the opportunity to denounce the regulation governing the admissibility of normally prohibited forms of evidence,

Rutledge concluded that 'the directive made the commission a law unto itself. It acted accordingly.' ⁴⁴ Not only was General Yamashita denied the opportunity for cross-examination to establish the credibility and reliability of prosecution witnesses, but he was prevented, through the use of documentary evidence, from ascertaining whether the crimes alleged had been committed by men in his chain of command or by naval and air force troops under parallel chains of command. Also to the prosecution's advantage, was Yamashita's subsequent inability to determine whether the atrocities committed were sporadic acts of individuals or whether they were perpetrated by units under the direction of officers in some 'pattern' as alleged by the prosecution, and upon which the case was predicated. This was of especial significance given the commission's finding; it was based on the extent and number of the atrocities, some incidents of which were 'proven' only by documentary evidence. Mr. Justice Rutledge felt that the prejudicial nature both of the rules of evidence and the materials presented as evidence could hardly be overemphasised, as untrustworthy, unauthenticated and unverified as it was.

The findings arrived at by the commission reflected the nature of the proof and the charge upon which General Yamashita was tried, Rutledge stated. Nowhere in the findings was it alleged that Yamashita personally participated in, directed, was present at the occurrence of, or ordered any of the incidents supposedly committed by men under his command: in addition, there was no 'express finding' as to whether Yamashita had knowledge of any or all of the crimes for which he was being held responsible, only the inference contained in the phrases 'permitted by', 'wilfully permitted by' and

secretly ordered by'. 'Vagueness, if not vacuity' 45
 characterised the entire proceedings, Mr. Justice Rutledge
 commented, and this

...affects the very gist of the offense, 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. 46

At a loss to prove whether General Yamashita had been con-
 victed of one or both alternatives, Rutledge concluded that,
 unless there was a 'fatal duplicity', and since the case had
 been conducted on the former basis,

...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 of control, although
 the Court's opinion nowhere expressly declares that
 knowledge was essential to guilt or necessary to set
 forth in the charge. 47

Furthermore, for the crime of which Yamashita was convicted,
 knowledge was an essential factor but the proof offered by
 the Prosecution, Rutledge stressed, was completely reliant on
 materials inadmissible in any other capital case conducted
 under American law, be it civil or military, and which
 Congress had stated should not be accepted by military
 commissions and other military tribunals.

A man's life and liberty were in jeopardy. Yamashita
 had been tried on an unknown and retroactive charge; tried by
 procedure which ignored the safeguards normally accorded an
 accused person, and which flagrantly disregarded the trad-
 itions of the common law and the Constitution, and which
 denied him adequate opportunity to prepare an affirmative
 defence. On this basis, General Yamashita, the 'Tiger of

Malaya' was condemned to hang, declared Mr. Justice Rutledge.

However, the most serious challenge to the majority opinion and hence to the authority of the military commission raised by Mr. Justice Rutledge in his dissent was that of the application of the Articles of War to the proceeding against General Yamashita. It was apparent to Rutledge that the majority decision had placed the petitioner and his case beyond the pale of the Articles; with this decision and its effect, the refusal to grant him the protections of the Constitution, he disagreed. Given that the Articles did apply, Rutledge said, as he thought they did, then the military commission not only lost its powers to award a sentence against Yamashita, but it also failed to gain jurisdiction to proceed with his trial, since article 16 of the 'Regulations Governing the Trial of War Criminals' (on admissibility of evidence) was clearly in violation with Articles 25 and 38 of the Articles of War, and so the directive by which the tribunal was convened was void.

Mr. Justice Rutledge then explained the provisions of Articles 25 and 38 of the Articles of War. Article 25, he pointed out, only permitted the use of affidavits and depositions in evidence in cases not of a capital nature, and where such evidence could similarly be adduced for the defence. Thus, Yamashita being on trial for his life, the use of depository evidence was obviously outlawed by Article 25, and the military commission in so accepting material, was acting in deviation from the Congressional standards as set out to apply to military trials.

Article 38 whereby the President was granted the power to prescribe rules of evidence for military trials, also served to place this power within strict boundaries. As far as possible the rules prescribed were required to coincide with those in use in the criminal cases of the district courts of the United States, and the President was further enjoined to ensure that 'nothing contrary to or inconsistent with' the Articles, specifically Article 25, be decreed. In addition, such rules as were drafted pursuant to this article were to be set before Congress annually. Neither of these criterion were met by the regulations made applicable to the military commission that tried Yamashita. To Mr. Justice Rutledge, these transgressions affected the authority of the commission; it did not possess the power to try General Yamashita, and hence the proceedings before it and the judgment were void.

Mr. Justice Rutledge then went on to argue pointedly that the Articles of War definitely did govern military commissions; by amendments to the Articles of War in 1916 military commissions were first brought within such jurisdiction. Previous to that time the Articles covered courts-martial only. According to Mr. Justice Rutledge's analysis, there were two reasons for this change; firstly, to give statutory recognition to military commissions (the common law court) without a loss of its prior jurisdiction, and most importantly, to accord those tried before military commissions some of the rights and protections allowed to those being tried before courts-martial. To implement the first purpose, Article 15 was introduced. Articles 25 and 38, and several lesser articles were proposed to satisfy the second purpose.

Having established this Mr. Justice Rutledge quoted from the statements of General Crowder, the major proponent of the 1916 changes, to illustrate his vital point that there were not two types of military commissions (one to which the Articles applied, and one to which they did not), but rather one type of commission, and one type of procedure, although the commission could exercise different types of jurisdiction dependant on the circumstances in which it was established and the purpose for which it was convened. Hence, as General Crowder pointed out, the field commander in time of war could, by virtue of Article 15, 'employ either form of court (court-martial or commission) that happens to be convenient. Both classes of court have the same procedure.' 48

If the decision of the majority were accepted, the field commander would have the far greater, and more potentially hazardous, power to choose not between two types of court with the same procedure, but could choose according to his need for a conviction, and the procedure which he wanted to see used. This was an encouragement to commit violations of fundamental principles of law and liberty. General Crowder's statement was further substantiated by reference to the major legal authority, Winthrop's Military Law and Precedents (2nd edition, 1920 reprint), which Mr. Justice Rutledge concluded proved beyond reasonable doubt that it was the intention of the proponents of the 1916 reforms to make military commissions subject to the Articles of War, and further that this objective had been achieved with the addition and modification to the articles outlined above. Thus, the military commission that tried Yamashita was, he reiterated, invalidly con-

stituted, and hence it lacked jurisdiction to proceed with the action brought before it. The sentence of death by hanging that it handed down was similarly void.

Rutledge then argued that even if it was disputed that the Articles of War, by their own authority as acts of Congress, were applicable to the petitioner's case, they would be made so by virtue of the Geneva Prisoner of War Convention (1929), particularly Article 63, which the United States had ratified. The trial of General Yamashita had in addition, not met the requirements as stipulated by Article 60 of the Convention. In dismissing the majority views on this aspect of the case, Mr. Justice Rutledge mentioned that there was a curious anomaly; whilst the majority argued the inapplicability of the Convention to Yamashita's case, on his surrender Yamashita was imprisoned pursuant to Article 9 of the Convention.

It was the majority attitude, Mr. Justice Rutledge said, that even though the provisions of the Convention were disregarded by the military commission in its trial of General Yamashita, this did not invalidate the action.

The argument is that our non-compliance merely gives Japan a right of indemnity against us and that Article 60 was not intended to give Yamashita any personal rights. 49

With this stance, Mr. Justice Rutledge could not agree. He went on,

The treaties made by the United States are by the Constitution made the supreme law in the land. In the absence of something in the treaty indicating that its provisions were not intended to be enforced, upon breach, by more than subsequent indemnification, it is, as I conceive it, the duty of the Courts of this country

to insure the nation's compliance with such treaties, except in the case of political questions. 50

It was hardly a real possibility that nations in adhering to such a Convention would have envisaged such 'ineffective relief'; 'executed men are not much aided by post-war claims for indemnity' Rutledge declared.⁵¹ This was especially so in view of the fact that Japan, as a vanquished nation, was in no position to exert leverage on behalf of her nationals, so that indemnity claims were hardly likely to be mounted to challenge the justice of such findings.

Given, what he felt were the flagrant departures from the established and fundamental tenets of Anglo-American jurisprudence, and the concomitant violations of the Constitution and treaty guarantees, Mr. Justice Rutledge stated that there was no option but to hold that the military commission was invalidly constituted and lacked the jurisdiction to proceed with the trial of General Yamashita, and thus, that the decision it handed down as a result of such proceedings before it, was void. There was nowhere within the system sanctioned by the Constitution, Mr. Justice Rutledge stressed, a power which placed people beyond the protection of the Fifth Amendment and enabled their trial by any process. Any departure from the absolute of the Fifth Amendment was to be resisted and deplored. Rutledge then closed his statement with a quotation from the patriot, Thomas Paine, which he felt to have particular significance for the case at hand.

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. 52

The incidents of a later war and the trial of Calley would prove the wisdom of these words. To contemporary critics of the dissenting opinions however the sentiments and concerns of Murphy and Rutledge, were purely idealistic and emotional outpourings symbolic of a too lenient attitude towards Japanese criminality. 53

The prevalence of the opinion that regarded the trial of Japanese war criminals as a generous concession in view of their manifest barbarity and criminality meant that General Yamashita's recourse to the civil courts was looked upon with extreme disdain and hostility. The fact that a military commission had tried and convicted him meant that his action in appealing appeared to the populace (particularly in the Philippines) as an attempt to avoid just punishment. Hence, Yamashita's appeal to the United States Supreme Court was lucky to have been heard; it was only due to the dedication of his attorneys to both himself and to concepts of justice and fair play coupled with their persistent and courageous actions in defending this, that the petition survived the obstructions placed before it in its passage through the inferior Philippine Supreme Court.

The novelty of the case demanded legal review, the defence attorneys argued, and novel actions in Yamashita's defence.

In receipt of an order by the Supreme Court of the United States staying the execution of General Yamashita in response to their petition, and bearing instructions to proceed to Washington post haste, Yamashita's defence attorneys on Sunday, December 23rd, 1945, secured permission to see their

client, who had been held incommunicado since the delivery of the sentence some three weeks previous. General Yamashita, in receiving the men in his cell in the prison camp, expressed his gratitude to them for the efforts they were making on his behalf, in going to America to fight his case in the Supreme Court, and sacrificing their Christmas break to do so. He understood, he told them, that the question of his guilt or innocence would not be at issue. Rather questions of a legal and judicial nature would be debated, questions which may affect the future peace of the world. 'And then he added with his familiar smile: "That is not to say that I don't realise I have a personal stake in the outcome."' 54

The decision of the Philippine Supreme Court had been no surprise. Circumstantial factors had played a significant role in signalling the outcome. In the heady aftermath of war, the justices of the Philippine Supreme Court had been accused of collaborating with the Japanese during hostilities, and the case before it provided an excellent opportunity to demonstrate the falsity of the claims. In addition, the Filipino newspapers were hostile to the judicial developments in the case, which they and their readers saw as attempts through legal trickery, to escape just punishment. It would have taken a courageous court to tender a judgment favourable to the petitioner in this case.

Furthermore, Reel points out that the Filipino justices could hardly be expected to pursue a course of action antagonistic to the expressed wishes of General Douglas MacArthur, their 'saviour'. 55 Whilst many dismissed Reel's statements on this subject as personal vindictiveness, the evidence

does support the conclusion that MacArthur was personally involved in the case and followed its developments closely.

Whilst very little is known of the deliberations of the Supreme Court of the Philippines on the writs for habeas corpus and certiorari brought before it, it is known that the decision to deny was not unanimous. Justice Perfecto, according to Tallow, and quoted also in Redford, adopted a stand similar to that of the American justices Murphy and Rutledge.⁵⁶ However, it was the majority view that the military commission had been validly constituted, and that given this it was not within the jurisdiction of the Court to consider the matter further. It would have been a 'violation of faith' for the Court, a Filipino instrumentality, to interfere with the acts of the United States Army, it asserted.⁵⁷ This decision was communicated to Yamashita's defence counsel on the day on which he took the stand in his own defence. It was clear that there was only one path left for his counsel to take in their fight to see justice done.

The pleading of the defence attorneys before the Philippine Supreme Court, although ultimately unsuccessful in achieving the desired goals, was not altogether without results. Subsequent to his argument before the Court, there was some considerable concern that Lieutenant-Colonel Hendrix may have earned for himself a court-martial. General Yamashita was quite upset at the prospects of this eventuating since it was on his behalf that Hendrix had incurred the displeasure of the military authorities, and Captain Reel had to reassure him that Hendrix would be all right. He then asked Yamashita,

'What would you do if you were in General MacArthur's shoes? Suppose, when you were at the height of your power, some young lieutenant-colonel had said such things about you? What would you do?' Yamashita burst out laughing. 'I wouldn't feel insulted,' he replied, 'I don't consider myself a lawyer.' - 58

Colonel Hendrix had been forthright, passionate and daring in his speech before the Court. The arguments he advanced in Yamashita's petition were essentially the same as those later advanced before the Supreme Court of the United States. The charge against the general, Hendrix said, did not state a recognised violation of the law of war, and since hostilities had ceased and the civil courts were functioning, the military commission lacked jurisdiction to proceed with the trial. However, the major thrust of his speech was directed at the procedural rules prescribed by General MacArthur to govern the operation of the military commission in its trial of General Yamashita, and their violation of the Articles of War and the United States Constitution. Hendrix urged that such a transgression rendered the commission impotent. 'We contend,' he went on, that

General MacArthur has taken the law into his own hands, is disregarding the laws of the United States and the Constitution, and that he has no authority from Congress or the President. He is a great soldier and general but not a great lawyer. His orders regarding this case are illegal.' 59

Bravely, Hendrix then drew the attention of the Court to the procedure practised by the commission; the admission of hearsay, affidavit and opinion evidence was specifically permitted by the Regulations. The 'probative value in the mind of a reasonable man' ruling was weak and vague, and no one could be certain how it would be applied by future

courts since reasonable men often did not agree on the value of evidence. In another military commission concurrently sitting in Manila, hearsay evidence was deliberately excluded. Evidence of such nature was highly damaging and abridged the right of the Defence to cross examination.

The commission has violated every law in the world... The members are not justices and lawyers...yet they are trying one of the greatest cases. If you could hear their decisions, you would be shocked and amazed. 60

The implications therefore tended towards a suggestion that General Yamashita was being 'railroaded'; that a miscarriage of justice had occurred and that this had been at least the tacit intention of MacArthur in framing the regulations which controlled the functioning of the commission. It is little wonder that the speech caused raised eyebrows given the manifest hostility of the Filipino population and the irritation of the Army authorities to the recourse by the Defence to the civil courts. 61

The passage in getting the petitions before the Philippine Supreme Court was anything but easy, and was characterised by antipathy and a lack of cooperation. Unsatisfied with the turn of events, the Army decided not to make an appearance before the Court, to register their non-recognition of the jurisdiction of the civil courts in military law. 62 The military commission refused to supply to the Defence attorneys, the sixteen copies of the mimeographed record of the proceedings of Yamashita's trial, that they were required to tender before the Court. Furthermore, Lieutenant-General Wilhelm Styer attempted to dodge being served with the summons and notice of process. According to evidence uncov-

ered by Redford, Styer's behaviour was at the direction of General MacArthur. On November 13th, 1945, Styer notified MacArthur that the Supreme Court of the Philippines was trying to serve him a writ of habeas corpus relative to the case of General Yamashita.⁶³ MacArthur instructed Styer that "under no circumstances" was he to "recognize (the) jurisdiction of (the) Philippine Supreme Court, nor (was he) to permit any interference with the trials of military commissions." MacArthur ordered Styer to "take all steps necessary to prevent (the) interference" of the Philippine judiciary. "The authority of the Commander in Chief in such matters," the message claimed, "is definitely established."⁶⁴ Nevertheless, Styer's behaviour was ultimately unsuccessful. Upon the submission of an affidavit by the process server, outlining the reception he received at Styer's office when he delivered the summons, the Court held that the process had technically been served, and the case was free to go ahead.

However, before the action could be commenced before the Supreme Court of the Philippines the litigant was required to pay a filing fee of twenty-four pesos (\$12 American). Since all of Yamashita's cash had been taken from him upon his surrender, and as a prisoner he was not entitled to receive money during his captivity, there were only two alternatives open if the case was to come before the Court. Either his defence counsel could donate the money to enable him to pay, or else Yamashita could sign a pauper's pledge. Although Yamashita's attorneys were willing to contribute, they felt that their action in so doing would cause the case to be looked upon less than impartially, should that course

be adopted. They wondered though, whether the signing of a pauper's pledge would involve a 'loss of face' for the general in Japan.

As he did when the question of testifying on his own behalf arose, General Yamashita showed more concern over American sensibilities and customs than over those of the Japanese.

"He says he is not worried about 'loss of face' at home," said Hamamoto, "the Japanese people will understand. But he wants to know what the American people will think. He asks whether they won't think it cowardly for a man who is being tried by a military commission to run to the courts while the trial is on?"⁶⁵

Reassured that it was an American custom to carry legal appeals before the highest authorities, and thus that it might be regarded as cowardly not to fight to the last, General Yamashita willingly signed the pledge to apply for a waiving of the filing fee.

The first steps had been made towards getting the case before the Supreme Court of the United States. As defence attorney Feldhaus said, in view of the unprecedented nature of the case (and such had been confirmed by Colonel Alva Carpenter, the Chief of the War Crimes Branch of the United States Army Headquarters in the Pacific) the only authority as to the law they could accept, was the United States Supreme Court.⁶⁶ In such an unorthodox and desperate case, unorthodox measures were needed, hence the appeals made to both Supreme Courts were initiated prior to the delivery of the verdict by the military commission.

Whilst such moves were of questionable procedural validity, Yamashita's defence counsel considered it imperative that there be a thorough legal examination of the new 'principle' and that this review not be rendered moot by the

hanging of the petitioner. For these reasons they applied direct to the United States Supreme Court for a staying of the sentence against Yamashita, after an adverse decision of the Philippine Court, so that the petition for certiorari could be heard by the former. Their petition concluded with the assertion that

the trial of a general of a vanquished nation by the victor nation on a charge that presupposes that he is the guarantor of all actions of all of his troops... is a novel concept, and...any such trial by a purported agency of the United States of America, should be carefully scrutinized by the Courts, and any attempt to avoid such judicial consideration should be circumvented. 67

With this philosophy not all parties to the trial agreed.

FOOTNOTES

- 1 Swinson, FOUR SAMURAI: A Quartet of Japanese Army Officers in the Second World War. (London 1968), p. 231.
- 2 Reel, THE CASE OF GENERAL YAMASHITA. (Chicago 1948), pp. 238-239
- 3 Swinson, op.cit., p. 231. Potter, A SOLDIER MUST HANG: The Biography of an Oriental General. (London 1962), pp. 192-3.
- 4 Potter, p. 193.
- 5 It is apparent from the evidence presented by Redford in his thesis entitled THE TRIAL OF GENERAL TOMOYUKI YAMASHITA: A Case Study in Command Responsibility. (Unpublished MA Thesis, 1975: Old Dominion University) that considerable pressure was exerted both by and upon the Chief Justice, Harlan Fiske Stone, for the presentation of a unanimous verdict in In re Yamashita.

This placed Stone in a somewhat invidious position since he took the view that war criminals should properly be tried by military commissions as there was ample precedent for this, but that there was no basis for the use of a judicial forum for political purposes. Stone's desire to keep the Supreme Court above politics led him to argue for a limited and narrow power of review over the Yamashita case; walking 'a tightrope between the affirmation of a narrow scope of judicial review by way of habeas corpus and the view that action of military commissions was under no circumstances within the Court's power.' (9 p. 56).

With this stand several other of the Justices felt they could not in conscience agree; it avoided the fundamental issue of whether General Yamashita was accorded a fair trial and hence appeared as supporting the action of the military commission in convicting him. Stone added material to his opinion in an attempt to appease the dissident Justices, but this in turn caused further dissention, some of which was not pressed in the interests of unanimity.

Thus, the majority opinion as Reel in his book, The Case of General Yamashita puts it, 'was a patchwork of ideas and statements, pieced together to satisfy the divergent views of men who were seeking to find 'good' reasons for a politically expedient result.' (p. 216). However, Redford is quick to point out that

Merely because the Court did not overturn Yamashita's conviction did not indicate that the Chief Justice had no misgivings about the case. There are indications...that Stone neither fully approved of the trial, nor, in retrospect, was satisfied with the Court's rendering in the Yamashita case. (Footnote 23, p. 50).

This would be little consolation for General Yamashita. See Redford, pp. 50-58, 76, 93.

- 6 American Journal of International Law, vol. 40, April 1946, p. 433.
- 7 327, U.S. Supreme Court Reports, Lawyers edn., pp. 499-545, October 1945 term.
- 8 American Journal of International Law, vol. 40, April 1946, p. 434.
- 9 As Perlman, the contemporary United States Solicitor-General expounded: The Yamashita decision reiterated the holding of the United States Supreme Court in Ex parte Quirin (Saboteur's Case) that combatant enemy aliens accused as war criminals have in certain circumstances, rights under the Constitution and the laws of the United States. This occurred where Congress had indicated by its legislation that it intended to grant rights of such nature. The Court had not held that combatant enemy aliens could make a claim of constitutional violation in the absence of a federal statute that could be construed as endowing them with these privileges as an act of grace. Combatant enemy aliens did not possess them as of right. See: Philip B. Perlman, 'Habeas Corpus and Extraterritoriality', 36 American Bar Association Journal 187 (March 1960), pp. 187-190, 249-252.

Woetzel, points out that the decision of Ex parte Quirin, which was used to support the contention that individuals could be held responsible under international law, had also been interpreted to show that national law applied to the individual and not international law, since Congress had incorporated by reference in the Articles of War to 'offender or offences that...by the law of war may be liable by such military commission', all offences which are defined as such by the laws of war. The individual is, therefore, held responsible under American military law rather than international law. See: Robert K. Woetzel, The Nuremberg Trials in International Law, London & New York, 1960, p. 103.

- 10 The Supreme Court therefore did not uphold the verdict of the military commission; it only verified the legality of its origins.
- 11 Appleman amongst others adopted a concurrent view. He argued that military commissions were not courts of the United States and that the proper course of appeal was through the superior reviewing authority of the military hierarchy. See: John A. Appleman, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES, Indianapolis, 1954. Fuqua also took this view. 'Judicial Review of War Crime Trials' in JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 37:58-64 (May 1946); also in ILLINOIS LAW REVIEW 40:546-53 (Mar/Apl 1946).

- 12 American Journal of International Law, vol. 40, April 1946, p. 434.
- 13 American Journal of International Law, vol. 40, April 1946, p. 435.
- 14 American Journal of International Law, vol. 40, April 1946, p. 436.
- 15 American Journal of International Law, vol. 40, April 1946, p. 436.
- 16 See American Journal of International Law, vol. 40, April 1946, p. 437, footnote 1.
- 17 As cited American Journal of International Law, vol. 40, April 1946, pp. 437-438.
- 18 American Journal of International Law, vol. 40, April 1946, p. 438.
- 19 American Journal of International Law, vol. 40, April 1946, p. 438. Emphasis added.
- 20 American Journal of International Law, vol. 40, April 1946, p. 439, reference 36 Stat 2295.
- 21 American Journal of International Law, vol. 40, April 1946, p. 439, 36 Stat 2389.
- 22 American Journal of International Law, vol. 40, April 1946, p. 439, 47 Stat 2074, 2092.
- 23 American Journal of International Law, vol. 40, April 1946, p. 430, 36 Stat 2306.
- 24 No precise definition of term 'military governor' has been found but it appears to refer to a commanding general who had, concurrent with his military or command powers, executive powers or the power of civil control. Its use in reference to General Yamashita is somewhat problematic.
- 25 American Journal of International Law, vol. 40, April 1946, p. 439.
- 26 As pointed out in footnote 3, American Journal of International Law, vol. 40, April 1946, p. 439.
- 27 Woetzel suggests that the Supreme Court majority decision in the Yamashita case could be interpreted as supporting the view that where international law and national law conflict, national law could be that applied (in the United States) to individuals.
Robert K. Woetzel: The Nuremberg Trials in International Law, London & New York 1960, p. 103.
- 28 American Journal of International Law, vol. 40, April 1946, p. 440.

- 29 From the Regulations Governing the Trial of War Criminals, as quoted in the American Journal of International Law, vol. 40, April 1946, p.440.
- 30 American Journal of International Law, vol. 40, April 1946, p. 441.
- 31 According to Campbell, before 1949 military commissions were not formally governed in the particulars of procedure, constitution or their composition. Quoting from the Digest of the Opinions of the Judge-Advocate General of the Army 463, N.5 (1901), Campbell made the point that
 'While (military commissions) have tended to resemble General courts-martial, any commission which departed from those rules of procedure in any respect would not necessarily be held to have been illegally constituted or administered.' Hence, Campbell said, 'this was the crux of the Supreme Court decision In the Matter of Yamashita; a majority held that no military, statutory or constitutional command had been violated and, therefore, denied habeas corpus, prohibition and certiorari. An evaluation of the weight of evidence was never at issue.' See: Robyn Moore Campbell Junior: Military Command Liability for Grave Breaches of National and International Law: Absolute or Limited. Unpublished PhD thesis, Duke University 1974, p. 172.
 Arthur Kuhn in his article, 'International Law and National Legislation in the Trial of War Criminals: The Yamashita Case' (American Journal of International Law 44: 559-562 (July 1950) argued that since Congress did not codify international law (the law of war) with the Ex parte Quirin case, military tribunals operating under American authority, tried two different classes of person, one to whom the Articles of War did apply, and one to which they did not. General Yamashita was included in the latter category. National legislation, therefore, was not applicable.
- 32 American Journal of International Law, vol. 40, April 1946, pp. 450-1.
- 33 American Journal of International Law, vol. 40, April 1946, p. 446.
- 34 American Journal of International Law, vol. 40, April 1946, p. 447.
- 35 American Journal of International Law, vol. 40, April 1946, p. 448.
- 36 American Journal of International Law, vol. 40, April 1946, p. 451.
- 37 1944 Amendment, Basic Field Manual, Rules of Land Warfare, FM 27-10; as quoted American Journal of International Law, vol. 40, April 1946, p. 453.

- 38 American Journal of International Law, vol. 40, April 1946, p. 454.
- 39 American Journal of International Law, vol. 40, April 1946, p. 456.
- 40 American Journal of International Law, vol. 40, April 1946, p. 457.
- 41 American Journal of International Law, vol. 40, April 1946, p. 457.
- 42 American Journal of International Law, vol. 40, April 1946, p. 458.
- 43 American Journal of International Law, vol. 40, April 1946, p. 458.
- 44 American Journal of International Law, vol. 40, April 1946, p. 460.
- 45 American Journal of International Law, vol. 40, April 1946, p. 461.
- 46 American Journal of International Law, vol. 40, April 1946, p. 461.
- 47 American Journal of International Law, vol. 40, April 1946, p. 462.
- 48 Speech of Crowder as reproduced in American Journal of International Law, vol. 40, April 1946, p. 470.
- 49 American Journal of International Law, vol. 40, April 1946, p. 477.
- 50 American Journal of International Law, vol. 40, April 1946, p. 477.
- 51 Ibid.
- 52 As quoted, American Journal of International Law, vol. 40, April 1946, p. 480 - from Complete Writings of Thomas Paine, vol. 2, ed. Foner, 1945, p. 588 (as quoted).
- 53 Appleman espouses this view, although in more moderation than other of his contemporaries. He said,
'It should be observed that the decisions of the United States Supreme Court split along very definite lines, and one is inclined to suspect that such a divergence arose, at least as far as certain dissenting judges were concerned, along emotional lines. This is not intended in any derogatory sense. The judges valued highly the concepts of liberty, and justice as understood in the ordinary American judiciary system, and were reluctant to see any deviation from such high standards, even in trials of a wholly different

character. As will be pointed out subsequently, much of the language of minority judges in speaking of due process reflects this reaction. One might say that those opinions were idealistic rather than realistic.'

John A. Appleman, Military Tribunals and International Crimes, (Indianapolis 1954), Chapter xxxix, 'The United States Supreme Court', p. 346, et seq.

- 54 Reel, A. Frank. 'Even His Enemy'; Ohio Bar Association Report 19:163-175, (3 June 1946).
- 55 Reel, THE CASE OF GENERAL YAMASHITA, op.cit., p. 170.
- 56 Tallow, Adamin A., COMMAND RESPONSIBILITY: ITS LEGAL ASPECT, Manila 1965, (orig. PhD. thesis).
- Redford, Larry, THE TRIAL OF GENERAL TOMOYUKI YAMASHITA: A Case Study in Command Responsibility, MA Thesis, 1975.
- 57 According to Swinson, op. cit., p. 228.
- 58 Swinson, op.cit., p. 227.
- 59 Swinson, op.cit., p. 227. Reel, op.cit., p. 195.
- 60 Reel, op. cit., p. 195. Swinson, op.cit., p. 227.
- 61 Redford, op.cit., pp.42-43 - Col. Torres, Philippine Judge Advocate volunteered to appear but was quashed.
- 62 Katona, 'Japanese War Crimes Trials', FREE WORLD, vol. 12, 1946, pp. 37-40. 'Anyone who lived in Manila during the Yamashita trial saw clearly that public opinion demanded and expected Yamashita's head. This public opinion was further incited by the press, by the spectacular publicity of the trial, and by hysterical outbursts of the witnesses who had been tortured by the Japanese. It was a device of atonement of Filipino national pride that one symbol of their Japanese oppressors was tried and condemned in their ruined capital.'
- 63 Redford, op.cit., p. 41, footnote 2.
- 64 Redford, op.cit., p. 41, footnote 3.
- 65 Reel, op.cit., p. 200.
- 66 Feldhaus, 'Trial of Yamashita', Current Legal Thought, vol. 113, August 1947, pp. 251-262.
- 67 Reel, op.cit., p. 200.

CHAPTER 2

' GUILTY AS CHARGED '

'You're the only man fat enough to wear this.' ¹

With these words, General Yamashita Tomoyuki, condemned now to death by hanging in the verdict of the military commission that tried him, handed to Lieutenant-Colonel Hendrix, one of his last remaining possessions, the leather belt which girdled his uniform. To the other defence counsel, Yamashita gave his campaign ribbons, Chinese good-luck coins, his spurs and a tea set. He took their hands and firmly shook them, in a gesture of thanks for the zealous efforts they had made for him, recently their enemy, in his trial.

Yamashita's fate would now be as he had anticipated it upon his surrender, and he approached it with calmness in this knowledge. Anger and grief he left to those around him. ²

The military commission had decided upon secret written ballot with two-thirds or more of the members concurring, that General Yamashita had failed to provide the effective control of his troops that was required by the circumstances and as a result 'a series' of atrocities and 'high crimes' had been committed by Japanese forces in the Philippines against the Filipino population, and that these crimes 'were not sporadic in nature' but had been 'methodically supervised' by commissioned and non-commissioned officers. The price for such a failure was death.

Given the opportunity to address the commission before

it announced its verdict, General Yamashita told the court that

In my capacity as Commander-in-Chief of the Japanese 14th Area Army I met and fought, here in the Philippines, numerically and qualitatively superior armed forces of the United States. Throughout this engagement I have endeavoured to fulfil to the best of my ability the requirements of my position and have done my best to conduct myself at all times in accordance with the principles of fairness and justice.

He went on,

I have been arraigned and tried before this Honorable Commission as a war criminal. I wish to state that I stand here today with the same clear conscience as on the first day of my arraignment and I swear before my Creator and everything sacred to me that I am innocent of the charges made against me.

Finally, he paid tribute to his American defence counsel.

With reference to the trial itself I wish to take the opportunity to express my gratitude to the United States of America for having accorded to an enemy General the unstinted services of a staff of brilliant, conscientious and upright American officers and gentlemen as Defence Counsel. 3
Thank you.

In its deliberations on command responsibility the members of the commission noted that General Yamashita had been a career army officer, and as such, had held positions not only in the Philippines but also in Singapore, Manchuria, Japan and in Europe in a period covering peace as well as war. He had, within this career, then, experience as a staff officer and as a field commander during combat operations.

From this premise, the commission went on to assert that clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility.⁴

They further commented that this had been the case in all

armies during recorded history, and that it was for the purpose of establishing and maintaining the discipline and control of their troops that commanders had been accorded 'broad powers (for) administering military justice.' 5

Whilst it was ridiculous to consider commanding officers murderers or rapists because a soldier within their command had committed these or like crimes, they said,

Nevertheless, where murder and rape and vicious, revengeful actions are widespread offenses, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them. 6

The members of the commission then pointed out that where there was evidence of the commanding officer having issued orders which led to the commission of the crimes being tried, the criminal liability was 'definite' and 'has always been so understood.' No mention was made of the other factors which could incur criminal responsibility under this ruling; personal participation, knowledge of the commission of the crime and the concomitant failure to take remedial action, and the condonance of such atrocity, amongst others, were ignored. More importantly, the statement implied that General Yamashita, in his capacity as Commander-in-Chief of the 14th Area Army in the Philippines, ordered or issued orders which led to the commission of atrocities allegedly involving some 65,000 men, women and children. Included within this estimate were mass rapes in the Bay View Hotel, in Manila. When viewed in this context, it becomes increasingly ludicrous to suggest the ordering of such incidents; no

commander would even contemplate issuing orders recommending the rape of female civilians, if for no other reason than there was no military advantage to be gained from these activities. The commission went on to claim that the Army Field Manual (FM 27/10),* The Rules of Land Warfare (edition unspecified) was clear and precise on that aspect of the law, the question of the ordering of breaches of the law of war.

Whilst this fact is not disputed, neither the Field Manual nor the commissioners were quoting circumstances appropriate to the Yamashita trial. The Prosecution had failed to produce evidence that could be adduced in support of the claim that the General had ordered the commission of, or had issued orders which had led to the perpetration of the alleged crimes. Neither had material been introduced as evidence to indicate that General Yamashita had been in receipt of orders from a superior, which he re-transmitted to his subordinates, and which resulted in the performance of the atrocities specified. Indeed, the entire thrust of the Prosecution case had been directed towards establishing the negligent completion of his duties by General Yamashita, and not his ordering of the atrocities.⁷ After all, a precedent which in future would allow further trials of commanders in like circumstances was far more valuable to set, given that the state of the law was clear and long existent in its treatment of commanders who ordered their troops to commit violations of the law of war. Orders could either be proven, or their existence disproved, but the standard of proof

* FM 27/10, Rules of Land Warfare 1914 or 1940 editions.

required to establish negligence on the part of the commander was as yet undetermined, and very much within the province of this commission to set.

The commission summed up its considerations on the question of the law applicable,

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 principle (sic) considerations of the commission... 8

On such a basis the members of the commission evaluated the evidence presented before it by the Prosecution and the Defence.

'The Defence,' the commission said

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 organization, equipment, supply with a special reference to food and gasoline, training, communication, discipline and morale of his troops. 9

In addition, the commission noted that the Defence 'alleged' that the late and abrupt consolidation of his command, with the transfer of the naval troops, presented 'almost insurmountable' difficulties for General Yamashita, in attempting the coordination and control of his human resources in their struggle against the Americans. Pursuant to the transfer came the failure of the naval troops, under the command of Rear Admiral Iwabuchi Sanji, to withdraw from Manila as directed, and the subsequent bloodbath (known as the 'Rape of Manila'). The failure to obey, the commission noticed, was said by the Defence to be attributable to the historic

division of command and rivalry between the services, and hence, that

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. 10

Next, the commission turned its attention to Yamashita's 'complete ignorance' of the crimes for which he was on trial, and the corroboration of this attitude by his staff officers, as well as Yamashita's statements that such acts, if they occurred, were in direct contravention of his policies and orders. Any hope for an understanding of the position in which Yamashita found himself, and hence for an appraisal of the evidence (assuming that the charge would be decided upon the evidence presented before the commission) from the outlook of the Japanese military structure and expectations was completely shattered by the inferences drawn by the commission from the above stated ignorance. Said the judgment,

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. 11

One is led to wonder what standards the Americans thought could be maintained in a situation of fierce combat against a numerically and qualitatively superior enemy, which made its landing in territory commanded by a general who had assumed a very divided and fragmented command some nine days previous. This consideration aside, it is difficult to

envisage the commission handing down a more prejudicial and damaging opinion of the functioning of the Japanese military command system, as it operated in the Philippines under General Yamashita, than it did. Such a statement as the members of the commission made above can only be said to have disclosed a serious discrepancy between this and their earlier comments regarding the evidence presented by the Defence, and was indicative of a failure on the part of the latter to convince the commission of the importance of understanding the Japanese system of command and of evaluating it in terms of its own requirements and expectations. The attitude the commission had taken for itself was more starkly revealed by its summary of the Prosecution evidence; there could be no doubt remaining about the way in which the Tribunal viewed the case before it. According to the commission's President, General Reynolds, evidence had been introduced by the Prosecution

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. 12

Not only did Reynolds' statement make patently clear the failure of the commission to understand the nature and scope of the charge with which General Yamashita had been indicted, but it was also a highly damaging and prejudicial comment completely unsubstantiated by the evidence presented before the Tribunal and against which the Accused could not speak. Contrary to Reynolds' words, the charge against Yamashita alleged dereliction of duty, negligence in the completion of his duties as commander, and this is quite inconsistent with

a suggestion of his secretly ordering the commission of the alleged atrocities for which he was now on trial.

In support of this assertion, the commission went on,

Captured orders which were 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 guerillas hostile to Japan. 13

With this one sentence, the commission sought to demonstrate proof for orders having been issued, albeit by subordinate officers of Yamashita, which directly resulted in the incidents for which the General was allegedly responsible. Such a statement also served to further the impression, never factually established, that the subordinate commanders were probably in receipt of orders from their superior officer, Yamashita, so directing them in their conduct. More significantly, the commission's statement neatly disposed of two of the most contentious issues raised in the trial in terms that were not suggestive of a controversy even having taken place.

In terms of probative value, one might justifiably have expected that the captured orders of Yamashita's subordinate officers would have been accorded little weight, since their veracity was not verified by other sources. Yet, the commission chose the less judicious path; the captured orders were accepted as 'proof', not as evidence of unproven reliability and authenticity which merely tended to support a conclusion of guilt against General Yamashita. Evidence, however, may lend itself to differing interpretations and conclusions, and these cannot, in justice, be ignored. What adds impress-

iveness to the case for an especial consideration of alternative conclusions here is the commission's laxity in its rulings on the admission of such captured orders and other captured enemy documents. It took the view that the presentation of a document in English translation did not mandatorily have to be accompanied by its Japanese original; the potential for abuses, and the infringement of the rights of General Yamashita as an accused, both in the lack of a facility in which to cross examine due to the documentary nature of the evidence, and in the difficulty of defence without a verification of the authenticity of the translation, were greatly magnified.

Thus, in terms of probative value one might justifiably expect that the captured orders of Yamashita's subordinate officers ought to have been accorded little weight, since their authenticity of interpretation through translation was never established. A further undercurrent of the Defence argument highlighted the eclipse of the rights of the Accused, notably that of cross-examination, which occurred with the acceptance of all documentary evidence, but even more critically so where the original language of the orders could not be determined, and was only available in a translation supplied by the Prosecution, and the issuing headquarters was unknown. However, the statement of the judgment on this point is not suggestive of a controversy having taken place; the captured orders clearly were accepted as 'proof', not as evidence of unproven reliability and authenticity which tended to add support to a conclusion of guilt against General Yamashita.

Secondly, the statement dismissed the question of the relevance of guerilla activity to Yamashita's defence in its reference to the captured orders having led directly to the extermination of civilians 'under the guise of eliminating the activities of guerillas hostile to Japan.' 14

It had been the Defence contention that the guerillas, in working for the advancement of the Allied cause in the Philippines, had undertaken action to disrupt Japanese supply lines and otherwise hamper their defence. In terms of the laws of war, the Japanese were entitled to view the guerillas as war criminals, and to take appropriate remedial action to curb their activities. Many of the incidents enumerated in the Bill of Particulars were of this character.

However, it was the Prosecution view that the alleged atrocities were unprovoked attacks against unarmed noncombatant Filipino civilians, any orders authorising remedial action were therefore illegal, and their perpetrators criminally liable.

The commission in its judgment adopted wholesale the Prosecution argument, and the evidence elicited by the Defence (within the severely circumscribed limits permitted it) was given minimal probative value.

The commission went on to note that

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. 15

Evidence dealing with the period before Yamashita assumed

command of the 14th Area Army in the Philippines (i.e. before October 1944) was specifically excluded as having little reference to the charge against him. Thus, the finding of 'criminal neglect' and 'complete failure' on the part of the senior commanders was one which had as its substance, a period in which there was severe and continual fighting between the Japanese and a superior American force, beginning at Leyte nine days after Yamashita took command. American air supremacy also led to a very efficient blockading of the Philippines, so that incoming food shipments from French Indo-China and elsewhere were drastically reduced, and in many cases did not arrive at all. In a situation where combat operations assumed supremacy, and were being mounted under strong American air pressure, it is not surprising that prisoners of war under Japanese control did not get as much food and medicine as they might have, but such conditions were to a significant extent beyond the capacity of the staff officers to influence. The Defence did attempt to show that such conditions as were experienced in this area were paralleled by the conditions experienced by the Japanese troops, and so, that contrary to the Prosecution assertion, the Geneva Convention was applied by Japan in her treatment of American prisoners of war so far as was practicable, given that she had failed to ratify it. Again, as a statement of factual summary, the commission was misguided in its comments; the Prosecution offered evidence which they hoped would support a conviction. They did not offer 'proof', proof being the result or effect of evidence tendered, the conclusion drawn from the evidence. 16

A brief review of the regulations by which the proceedings of the military commission had been governed, particularly with regard to the admission of evidence, and a resume of the charge and specifications, completed the comments of the judgment made by the members of the commission, handed down against Yamashita on the afternoon of the fourth anniversary of Pearl Harbour, December 7th, 1945.

General Yamashita as he took his place next to his Defence counsel greeted them with a slight smile, and without traces of nervousness and anxiety, calmly laid his notebook on the table. Despite the attention his arrival had attracted from the crowd assembled to hear the verdict of the commission, Yamashita retained an appearance of tranquil composure and assurance, such as he had characteristically exhibited throughout the trial. Outside observers would not have realised that December 7th was about to become doubly significant.

Major Jack Kenworthy, head of the military police detachment guarding General Yamashita, whispered to Hamamoto just before the members of the commission entered the courtroom to deliver their judgment:

'Tell General Yamashita that no matter what the Court says, I'll always think of him as a great guy - and as a real gentleman.' 17

After having heard the concluding statements on behalf of the Prosecution and the Defence, General Reynolds, at 4 p.m. on Wednesday 5th December, 1945, announced that the commission would recess to consider its verdict. This, the commission 'anticipated with confidence', it would be in a position to render at two o'clock on the afternoon of

Friday, December 7th, some forty-six hours hence. During this interim period, the members of the commission had set themselves the herculean task of reviewing over four thousand pages of the trial record in addition to the four hundred and twenty-three exhibits tendered as evidence, as well as deliberating on the findings and the sentence to be awarded General Yamashita. Once these tasks had been accomplished, the members of the commission had to draft their statement of judgment, their decision on the case. As Redford pointedly comments,

That General Reynolds could confidently promise a verdict only one day after concluding arguments suggests that Yamashita's guilt had already been determined. 18

Reel echoes similar sentiments, but goes on, that as Yamashita's defence attorneys

We certainly were not surprised at the commission's haste, but many observers at the trial expressed the belief that, in view of the length of the proceedings, it would 'look better' if the commission took a little more time over its decision. 19

Appropriately, General Reynolds took the opportunity to thank the court personnel for having aided the commission in seeing that the proceedings of the trial of General Yamashita had been conducted expeditiously and without incident. 20

The Chief Prosecutor, Major Kerr, had just urged that the commission find the Accused, General Yamashita, guilty of the charges as specified, and that the sentence be death, by hanging.

We say that if Yamashita is responsible in any measure for the violations of the laws of war committed by the men under his command in the Philippines, anything less

than the death sentence would be a mockery!,
he proclaimed.

Major Kerr's summation of the Prosecution case concentrated on two highly contentious aspects of the trial, the question of Yamashita's control over the naval troops subsequent to the transfer of command, and its corollary, whether the naval troops under the command of Rear Admiral Iwabuchi were engaged in naval or land operations in Manila at the time of the atrocities. This formed the basis for Kerr's discussion of the salient points of the law as the Prosecution felt they applied in Yamashita's case. It was only in the second half of Kerr's presentation that his arguments transcended the banal repetitions of points made by the Prosecution throughout the proceedings.

Essentially, the Prosecution stance on the problem of Yamashita's command over the naval troops was fraught with contradiction. Whilst it appeared that Major Kerr had finally come to accept the realities of the fragmented Japanese command structure, with its division between tactical and disciplinary command as well as between the services, it was revealed in his conclusion that this was not the case. Whilst conceding that General Yamashita could not punish the naval troops or order their court-martial, Kerr asserted that

he could restrain them, and that is all we ask of Yamashita in this case, that he restrain his troops, including the navy troops in Manila. 21

Without the power to discipline those troops, it seems unrealistic to claim that Yamashita 'could' have restrained

them. The only power remaining to him was the use of force to achieve his objectives with the navy troops, and to re-direct a portion of his army forces to bring them into line would have been quite unpracticable in a situation of fierce combat, especially where the Japanese were numerically (and qualitatively) inferior, and where communication between units was so inadequate.

Kerr then turned his attention to the issue of whether the naval troops were engaged in a naval mission in Manila, when the atrocities were committed, or whether it was a land operation. A resolution of this difficulty was imperative for establishing the operative command pipeline; naval troops were only under the Army chain of command (with Yamashita at its head) when they were engaged in land operations in land combat. It had been settled during the proceedings that at the time of transfer, the naval troops were still performing a naval mission, the destruction of naval facilities surrounding the port of Manila, but was this a land operation merely by virtue of it being conducted on land? The Prosecution argued that there was 'no element' of a naval operation about their conduct, they were not firing at ships in the harbour or defending the port, but attempting to repel the American advance from the landward side. Thus, the naval troops were under the tactical command of General Yamashita, and as commander, he was responsible for what they did.

Kerr's next points in his argument were distorted by his resort to parody. Kerr claimed that the alleged atrocities were 'not the acts of irresponsible individuals, acting at a

whim or while in a drunken orgy,' but that they were conducted under the supervision of officers, some of them (in Manila) being army personnel. ²² This led him to conclude that,

Obviously, it was a deliberate, planned enterprise. It may be that they were then assisting the military police ...in the suppression of guerillas by burning the houses and killing everyone around there. Of course, by killing everyone in the vicinity they would also kill any guerillas that might be there and that might have been their method of suppression. ²³

He once again stressed, that the troops were not acting in the heat of the moment but in a planned military enterprise.

Quoting from Prosecution Exhibit 404, 'a Report by XIV Corps', one of the disputed captured orders previously mentioned, Kerr sought to demolish the Defence proposition that there was no plan to defend the city of Manila. Kerr was careful here not to allude to the heated debate that had occurred in the proceedings over the meaning of the word 'Manila', whether it meant the city or the region, and this omission served once again to give a misleading impression of the facts, and to shake the credibility of General Yamashita. Kerr's intention in introducing the captured orders was to substantiate the Prosecution argument that the naval troops in their actions in Manila were acting according to the orders they received, and that such orders were a part of 'carefully and previously prepared plans' for the defence of the city.

Continuing his narrative, Kerr asserted,

Yamashita says that he didn't know that these things were happening in Manila. Our case is simply that it was his duty to know. It was possible to know. ²⁴

The Defence, Kerr said, had failed to show that Yamashita was in a position where it was 'physically impossible' for him to know of the events occurring in Manila. The headquarters of Lieutenant-General Yokoyama of the Shimbu Army, Yamashita's subordinate headquarters which controlled the Manila Naval Defence Force of Rear Admiral Iwabuchi, was in communication with the latter in February 1945, during the so-called 'Rape of Manila'. Further, Kerr pointed out, General Yamashita's headquarters had contact with that of Lieutenant-General Yokoyama. Thus,

He could have known if he had been interested. He should have known. It was his duty to know. If he had known certainly he could have taken steps to see to it that these orders - obvious orders - at whatever level they may have been were rescinded, withdrawn, and this calculated plan of extermination in the City of Manila would have been stopped. 25

Kerr then launched into the second and major part of his summation before the commission. The acts perpetrated by the troops under Yamashita's command, he claimed, violated not only the laws of war, but were illegal also 'under any standard of humanity that any civilized nation might recognize or apply.' 26 This point was not challenged by the Defence, he said.

Furthermore, the Prosecution would show, Kerr stated, that the failure of General Yamashita Tomoyuki as commander of the units who were involved in the alleged atrocities, to prevent their commission, was itself a violation of the law of war. 'Truly,' he continued,

the application of the laws of war to a commanding officer on this theory has not been frequently done or attempted. Nevertheless, we submit that it is well recognized in international law, even under international conventions, that a commanding officer does have a duty

to control his troops in such a way that they will not commit these widespread, flagrant, notorious violations of the laws of war. 27

Whilst the Defence did not question this understanding of the duties and obligations of a commander, they felt that the circumstances in which the command was exercised was critical, and this led them to reach a different conclusion than the Prosecutor was advancing.

Kerr then lapsed into an emotional description of the atrocities and massacres which had 'blanketed' the Philippines during Yamashita's command, and which, he reiterated, were perpetrated by organised units under the leadership of officers. Given this widespread pattern of conduct, Kerr deduced that there must have been a failure on the part of General Yamashita, as overall commander, to control the actions of his subordinates. General Yamashita had not, therefore, fulfilled the requirements of his position; he did not perform his duties satisfactorily.

Major Kerr then quoted from the Fourth Hague Convention (1899), on the definition of what constituted a lawful belligerent. This section of the Convention was frequently cited by the Prosecution during the proceedings to support their claim that the charge against General Yamashita was a legally recognised violation of the law of warfare, and had been anticipated by law (i.e. the Convention) as far back as 1899. An army had to be commanded by a person responsible for his subordinates, Kerr stressed again, and hence General Yamashita had a choice, in his defence pleading. He could either argue that yes, he was in command of an army, that the units under him were lawful belligerents, and that he as

commander was responsible for their actions, or alternatively, that he did not command an army but outlawed brigands, in which case the same responsibility did not hold.

Major Kerr then analyzed the meaning of the word 'responsibility' in the context used in the Convention. Responsibility, he contended, was that responsibility of commanders under international law to ensure that all members of the command conducted combat operations within the guidelines of the law of war.

General Yamashita, having elected to claim that he was in command of an army, was thereby required by international law to be responsible for the actions of his subordinates in the terms outlined by the Prosecutor above. His obvious failure in his duties, as shown by the widespread nature of the alleged atrocities, 'is enough,' the Prosecutor said,

as we see it, to establish the dereliction of duty on the part of Yamashita as a violation of the laws of war.²⁸

Quite unexpectedly, Kerr made a concession to the Defence regarding the uniqueness of the case awaiting the consideration of the commission.

Confessedly, this provision of the Hague Convention has not generally been so applied. In fact, I know of no case of any importance where it has been applied or where any effort has been made to apply it that way.²⁹

Unlike the Defence however, Kerr did not see that the novelty of the proposition was any impediment or a weakness in his case. Rather, he repeated the hackneyed argument advanced by proponents of war crimes trials that precedents had to have their origin somewhere, and that this point of issue was merely one of many upon which military tribunals had yet to pass judgment. In urging the commission to take cogniz-

ance of this principle, Kerr said that total reliance did not have to be placed on the Hague Convention article here. The common law of war, that fundamental behavioural understanding of civilised nations, from which the conventions emerged as codified aspects of the law, applied standards of conduct whereby a commanding officer was responsible for the actions of his subordinates.

It was at this point that Major Kerr sought to invoke statutory law to buttress his position. He pointed out that the criminal codes and customs of 'civilized nations' (i.e. statutory law) were 'constituted to apply' in the field of international law as part of the laws of war, while they had any bearing. On this basis, he introduced the principle of 'criminal negligence', much to the surprise of the Defence.

...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'. 30

He declared that the principle was applied in international tribunals and claims commissions where pecuniary damages were involved as a result of such illegal actions, and that there were no obstacles to its application in military law on a criminal basis.

Citing legal authorities, Major Kerr supported his position that a failure on the part of a person to do an act required constituted negligence, and further, that a person's ignorance of fact, if negligent or culpable, was no defence. Translated into Yamashita's case under military law, Kerr was arguing that General Yamashita was negligent in having

failed to discover and prevent the commission of the alleged atrocities, and that such ignorance of their occurrence, as he maintained, did not constitute any defence in law under the doctrine of criminal negligence, since it was his duty to have had the required knowledge.

Kerr held that it was reasonable to hold Yamashita responsible not only under this principle but also because it conformed to established patterns of behaviour in international relations. Japan as a nation could be held to account for the actions of Yamashita's troops, in terms of financial compensation for the injuries caused, and she was even further removed from the actual locus of the crimes than was General Yamashita, it was pointed out.

Major Kerr then drew the attention of the commission to the type of defence that had been mounted by his counsel on behalf of General Yamashita. The Defence, according to the Chief Prosecutor, had 'made out' that General Yamashita had done everything that he possibly could have done under the circumstances to prevent the occurrence of violations against the law of war. This was the 'customary defense' in a case involving manslaughter, he said, and he went on to highlight the parallel of logic he saw between such cases and the case before the commission. In many manslaughter cases, the basis of the charge was a failure to act, or a negligent as opposed to a deliberate and wilful act.

Where there has been a failure to do something which should have been done and which could have prevented the death, that may be manslaughter. It is immaterial that there was no intent to kill, that the person charged later deplored the consequences of his negligence. It is immaterial that if the situation were to arise again, he would take affirmative action to prevent the accident

or prevent the injury. That is all immaterial. The fact remains that he failed to observe a duty to take proper care. That failure of duty resulted in injury or death. If it is death, he may be charged and convicted of manslaughter. 31

Whilst the pattern of his reasoning had until now been fairly obvious, his desire to substantiate the charge of command responsibility against General Yamashita by demonstrating the prevalence of that form of legal logic in other jurisdictions of law, the Defence at least was somewhat baffled by the Chief Prosecutor's next statements.

I have in mind the case of the burning of a circus tent, I believe in Connecticut, a few years ago,

Major Kerr continued.

Officers and employees of the circus company were charged and, I am informed, convicted of criminal charges, and sentenced to prison terms. Not because they ordered that the circus tent be burned, not because they ordered that the innocent, helpless women and children there be killed, but because they failed to take action which, if taken, would have prevented that catastrophe... They had failed to take the steps which, if taken, would have prevented the tragedy, it was foreseeable, and they were charged with having had knowledge that, if they failed to take those ultimate precautions, such a tragedy might happen. 32

From Reel's account of the incident, it seems that the Defence attorneys could not understand how Major Kerr, who had repeatedly alleged that Yamashita was responsible for the murder of some sixty thousand Filipinos, could liken the case to a trial of circus officials for manslaughter. Colonel Clarke, the senior counsel, whispered to his colleagues, 'I think the man has joined our side!' and Captain Sandberg replied that Kerr would probably ask for a five year sentence on a charge of manslaughter. 33 This failure to appreciate the gist of Major Kerr's address is probably attributable to the belief on the part of the Defence attorneys, that General

Yamashita's case would be decided upon the evidence presented before the commission in the absence of any established precedent for the principle of command responsibility (negative criminality).

Major Kerr went on to highlight the crux of the case. He argued that Yamashita was aware of significant guerilla activity in the Philippines upon his arrival, such activity indicating that there was also a proportionate degree of hostility for the Japanese on the part of the Filipino population. In a situation of intense hostility, the Japanese troops were being harassed by the guerillas, and this acted to incite the reciprocal hostility of the Japanese for the Filipinos. General Yamashita ordered the suppression of armed guerillas, and it was reasonable to conclude that, given the circumstances, General Yamashita owed an 'affirmative duty' to ensure that his men did not commit violations against the law of war. The Chief Prosecutor stressed that,

If he himself did not condone, if he did not order, if he did not approve, if he did not direct these atrocities, he could have foreseen them, and, foreseeing them, he could have prevented them. And he failed to prevent them! 34

Kerr completed his drawing together of the threads of the Prosecution argument on a somewhat triumphant note.

We won't say that he failed to foresee them (the atrocities). We think he did foresee them and didn't care. We claim there is ample testimony in the record to support that conclusion. 35

As if these comments were not sufficient to upset and compromise General Yamashita's defence, Major Kerr then asserted that there was

affirmative proof in this record to the effect that he himself ordered these executions, these massacres. 36

Kerr did not, in resorting to this comment, merely allude to the possibility that General Yamashita might have ordered the atrocities, he affirmatively stated that he had. Should such a comment have had a basis in the trial proceedings, the Prosecution case would have been on legal terra firma, as the legal liability of commanders who ordered the commission of infractions against the law of war was clearly defined and recognised. However, the entire Prosecution case had rested on a dereliction of duty/criminal negligence thrust, and not the former. No concrete evidence was produced to link General Yamashita and the alleged crimes; neither was any order introduced by the Prosecution for this purpose.

Kerr completed his summation by proclaiming that unless a commander could control his troops, he was unfit to hold the position of commander.

If he is unfit to command them, sir, he is responsible to mankind for the results of his unfitness! 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, replace him with a man who would have saved humanity from these crimes. There is no evidence that he did that. He testified that he did not even communicate with the Southern Army, to say nothing of Tokyo, concerning the situation here with respect to guerillas and the hostile attitude of the people. 37

Needless to say, the Defence in its summation did not agree with the pronouncements of the Chief Prosecutor and instead urged the commission to award a sentence based on an appraisal of the evidence that reflected its understanding of the realities of the predicament with which Yamashita was faced. The ultimate success of this approach can be seen in the sentence handed down by the commission.

In planning their lengthy final argument before the commission, the Defence chose to split it into four parts, Lieutenant-Colonel Feldhaus opening with a resume of the background to the facts involved in the case. Colonel Clarke, as senior counsel, concluded the summation with a discussion of the legal points relevant to the theory of 'command responsibility'. Captain Sandberg and Captain Reel were left to handle the major part of the affirmative evidence presented by the Prosecution.

The thrust of Clarke's argument reiterated the basic Defence position, that General Yamashita was employed, to the exclusion of all other functions normally associated with command, in the deployment of men and material and matters of an operational nature, in view of the prevailing combat situation. The performance of these duties was made even more difficult by guerilla activity, enemy harassment and shortages of basic commodities.

Evidence adduced by the Defence, Colonel Clarke emphasised, showed that no orders were issued by General Yamashita directing or authorising the commission of illegal acts, and that neither he nor his headquarters received written reports indicating or suggestive of the perpetration of such acts.

General Yamashita therefore, did not know of the occurrence of the alleged crimes, but this did not make him liable for a dereliction of duty charge, Clarke concluded.

The evidence adduced by the Prosecution...does not establish that General Yamashita or his headquarters, issued orders directing the commission of the atrocities set forth in the Bills of Particulars, nor does it establish that General Yamashita or his headquarters had any knowledge thereof, nor that General Yamashita or his headquarters permitted the commission thereof, nor 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 as alleged. 38

It was Reel's major argument that there was no evidence before the commission indicative of Yamashita's ordering of the incidents, his condonance of them, or that he had any connection with them at all. This point was stressed through reiteration in context with the specific incidents the credibility of which Reel attacked. For example, some incidents involved troops not within the chain of command beneath Yamashita, and others lacked a credible connection between the alleged crime and the actor, as in the Batan Island incident. 39

Prefacing his extensive remarks on the guerilla situation in the Philippines, Captain Reel highlighted the abnormal war psychology under which soldiers on both sides operated. It was important for the commission to understand this, he said, because the killing of one's companions by guerillas for example, incited reprisals, and since

the essence of the charges against General Yamashita go to 'control', I think it is very important for this commission to realize that under such conditions men are not in any real sense of the word under 'control'. 40

Whilst the guerillas were looked upon by the American and Filipino populations as heroes, to the Japanese they were legally seen as war criminals against whom remedial action could justifiably and necessarily be undertaken. General Yamashita, Reel said, had not ordered, permitted, condoned, justified or excused the atrocities, punitive expeditions against guerillas in which small children also died. In

dealing with the dilemma facing him, General Yamashita had issued orders for the suppression of armed guerillas, but at the same time urged his subordinate commanders to treat the Filipinos with kindness and justice, so that the Japanese could win their confidence and gain a little cooperation from them.

Reel went on to stress that there had to be proven a connection between General Yamashita and the crimes before his guilt was established.

Now, the Prosecution will undoubtedly point out and claim that there were so many of these atrocities, that they covered so large a territory, that General Yamashita must have known about them. In the first place, a man is not convicted on the basis of what somebody thinks he must have known. It must be proven beyond a reasonable doubt that he did know; the test known to criminal law is not negligence but intent. 41

It was 'unreasonable' to expect that General Yamashita should have known of the commission of the atrocities, Reel said, since 'practically all' of the crimes had been perpetrated at times and in places where communication was made almost impossible. 42

Not only was he unable to know of the occurrence of these incidents because of the weaknesses and breakdowns of his communication network, it was 'ridiculous to suppose that he would be told about them,' Reel said. The orders issued by Yamashita were clear.

If there were any other orders, or if there were any orders to mistreat civilians, we may be sure that the able Prosecution, with their efficient staff of investigators and research men, would have produced those orders before this commission...43

Hence, such atrocities were committed in violation not only of international law but also of Yamashita's written

orders, and it was unlikely that he would have been informed of such occurrences.

The Defence did not contend that such incidents as were included in the Bill of Particulars did not occur, but argued that the witnesses produced by the Prosecution were the victims not only of the individual cruelty of the perpetrators, but also were victims of the horrors of war, produced in all wars 'because (of what) someone on the other side decided was military necessity.' ⁴⁴ Perhaps, Reel postulated, a subordinate commander decided that there was some military necessity for the actions for which General Yamashita was being tried.

If so, not only do we feel that he was wrong, but General Yamashita feels that the subordinate commander was wrong. ⁴⁵

But, General Yamashita, Reel stressed, did not make the mistake in judgment. Alternatively, if the perpetrators were not motivated by military necessity,

then they must have been guided by simply an insane impulse, the insane acts of insane people, and General Yamashita is no more responsible for them than he would be for the acts of any other persons who violated his orders and played directly into the hands of his enemies. ⁴⁶

Captain Reel then returned to make a synopsis of the major contention in the case, emphasising that

General Yamashita's problem was not easy. Harassed by American troops, by our Air Forces, by the guerillas, even by conflicting and unreasonable demands of his superiors, he was on the run from the moment he got here. Of course, he did not have time to inspect prisoners; of course, all he could do about the guerilla situation was to give orders to suppress armed combatant guerillas and befriend and cooperate with other civilians, and trust his subordinates to carry out his orders.

When we judge him, sir, we must put ourselves in his place, and I say that, unless we are ready to plead guilty

before the world to a charge of hypocrisy, to a charge that we supinely succumbed to the mob's desire for revenge, then we must find General Yamashita not guilty of these charges! 47

Captain Sandberg addressed the commission on the events surrounding the so-called 'Rape of Manila'. 'No one will ever know,' Sandberg began,

the complete story of what happened in Manila in those bloody days of February, 1945. The Japanese who participated cannot tell because undoubtedly they are all dead. But if there is one fact which emerges clear and unmistakable from the welter of conflicting reports, rumor and gossip, it is that General Yamashita did not want fighting in the City of Manila, and that what happened occurred not only against his judgment and his wishes but against his express orders. 48

From here, Captain Sandberg emphasised that there was no ruling in international law to the effect that commanders must abandon cities; Stalingrad being the most recent example of commanders choosing to fight to the bitter end in besieged cities. However, it had been General Yamashita's choice to abandon the city of Manila, not for humanitarian reasons, although they were significant, but because in strategic terms he considered it indefensible.

He then posed the question; why had General Yamashita not declared Manila an 'open city', given that he did not propose to defend it? The reason for this, Sandberg went on, was because, recognising the legal implications involved in such an action, Yamashita knew that to do so would have been 'a fraud'. Under international law, to declare a city open meant that it was free of military fortifications and supplies, and so was immune from enemy bombing attacks. Manila, however, contained considerable quantities of ammunition and other war-associated supplies, which had accumul-

ated over the period of the Japanese occupation, and General Yamashita lacked both the vehicles and motor spirit, as well as the time necessary to remove these. For as long as the Japanese navy utilised Manila as a major base, Yamashita was unable in conscience, to declare Manila open, especially since he had no command authority over naval operations. Thus, to have declared Manila an 'open city' when it was not free of military supplies would have meant that General Yamashita would have been in violation of the laws of war.

Instead, General Yamashita took the conservative course of moving to put Manila outside the area of battle without demanding any special status from the American forces for so doing. 49

Captain Sandberg then described the actions General Yamashita undertook to effect the withdrawal of Army troops and supplies from Manila City. For this decision, he did not demand any special status from the American forces such as would have occurred had Yamashita declared the city 'open'. This latter course General Yamashita considered was not available to him since military supplies remained in Manila; to have declared the City open when such supplies remained would have put him in violation of the laws of war. Instead, he concentrated his efforts on obtaining the withdrawal of as many troops and supplies from the City as his damaged transportation facilities could handle, so that by February 1945 only the 1500 Army troops of the Noguchi Butai remained in Manila City.

Significantly, Sandberg pointed out,

For these basic facts the commission does not have to rely on the testimony of General Yamashita and his subordinates. Our own official intelligence and operational reports, in evidence, refer both to large scale

troop withdrawals from Manila and to the presence of only small residual army elements in the city at the time of the Battle of Manila. 50

Encouragement was also given by the Japanese to the Filipinos to similarly withdraw from the city, so that they might move to the provinces where food was in greater abundance, Sandberg said, and this dismissed the rumour that the Japanese army imprisoned the Filipinos within the city and prevented them leaving.

Why then, Captain Sandberg asked, did General Yamashita's withdrawal plans fail and what led the naval troops under Rear-Admiral Iwabuchi to remain in the City of Manila? This question was the crux of the matter, he argued; it was only with a resolution of this issue that guilt could be assigned to the appropriate chain of command.

With the transfer of command on 6th January 1945, the naval troops became subject to the direct order of General Yamashita to evacuate. But immediately prior to the transfer, Iwabuchi's unit had been issued with a naval operational order to be fulfilled.

Vice-Admiral Okawachi had testified, Sandberg went on, that he had issued an order relative to the destruction of the naval facilities in Manila, during December 1944, and that on January 6th 1945, (the date of the transfer of command) to the best of his knowledge, it had not been completed. Since the tasks assigned by the order were naval rather than land operations, control over same did not transfer to General Yamashita; it could not be revoked or superceded by him.

Thus, Rear-Admiral Iwabuchi was faced with two conflicting

orders; the Army commander, General Yamashita ordered the withdrawal of his troops from Manila, and a previous naval order of Admiral Okawachi directed him to remain in the city until his naval duties were completed. It seemed that Iwabuchi chose to complete his latter duties, and by the time this was achieved withdrawal had been made impossible by changes in the combat situation.

Sandberg then progressed on to discuss the atrocities committed in Manila. These, he said, were perpetrated mainly by naval personnel, as the extensive testimony identifying the anchors on the caps of the offenders showed. This was also to be expected due to the proportion of naval to army personnel; some 20,000 naval troops and 1800 army men; and reference to a city map revealing the location of each atrocity further substantiated the point that naval personnel were largely responsible, given that the atrocities were most dense in areas of their control.

Sandberg then consolidated the major Defence argument. He maintained that it was extremely doubtful whether the naval troops in any real sense of the word had come under the command of General Yamashita. Admittedly, Sandberg conceded, they were transferred to his command on paper, but was it also not a fact that the only order Yamashita gave the naval troops, they failed to obey? The rivalry between the services and their traditional parallel chains of command were partly attributable here, he said. But primarily responsible was the unusual fragmentation of the Japanese command structure that pertained even after the transfer of command. This meant that Iwabuchi's troops were under General Yamashita's

command for land operations only, and under Okawachi for naval operations.

In addition, even so far as land operations were concerned, General Yamashita's authority was limited to the tactical, the order to advance or retreat. Over supply, personnel, billeting and, most important, discipline - he had no control. 51

Captain Sandberg then asked the commission to consider the practical aspects of this situation that General Yamashita faced.

How can the man possibly be held accountable for the action of troops which had passed into his command only one month before, at a time when he was 150 miles away - troops which he had never seen, trained or inspected, whose commanding officers he could not change or designate, and over whose actions he has only the most nominal control? 52

The Manila atrocities were not planned occurrences, Sandberg contended, but the frenzied actions of individuals trapped within the city, with only a few days at the most to live. Could it seriously be suggested, Sandberg asked, that General Yamashita had ordered the rapes at the Bayview Hotel? If he was not charged with having ordered the Manila atrocities, what then was the charge?

Sandberg chose then to discuss the Report of the Liason Committee of the Japanese Army (currently sitting in Tokyo), a document that had been tabled by the Prosecution shortly before the close of testimony. As Reel points out, the document was based on the recollections of staff officers, and not actual records because upon the surrender these had been destroyed. 53 As such, the information contained therein was not guaranteed to be 'absolutely correct', but had been submitted by the Prosecution to support their claim that there

had been an Army plan to defend the city of Manila, and that in fact Yamashita had been ordered by Field Marshal Count Terauchi, the commander of the Southern Army and Yamashita's superior, to defend Manila 'to the utmost'. Captain Sandberg was at some pains to point out that it was only in the period after the removal of Field Marshal Terauchi's headquarters to Saigon, and before his own withdrawal to Baguio (November - December 26th, 1945) that General Yamashita had conducted civilian liason and had contact with the Kempei Tai, Sandberg said, and in view of the severity of the combat situation, and the fragmented command structure General Yamashita had little choice but to rely on subordinate commanders and established patterns of procedure in dealing with this aspect of his duties. General Yamashita did take as much action as he could when he received reports of over zealousness on the part of the Kempei Tai but it was not within his power to effect the removal of Colonel Nagahama, the head of the unit, himself; this was the decision of his superiors. Nevertheless, Yamashita recommended his suspension and it was during the period when this recommendation followed its torturous route to Tokyo that most of the incidents for which Yamashita was blamed, occurred. It was quite apparent, therefore, according to Captain Sandberg that General Yamashita had taken all the measures that were within his power in order to prevent a recurrence of such excesses, and could not be charged for dereliction in the performance of his duty.

Lieutenant-Colonel Feldhaus completed the final comments of the Defence by placing the atrocities allegedly committed by his subordinates within the contextual framework of General

Yamashita's personal background, the scope of his command, and the operational and societal conditions which confronted him upon his arrival in the Philippines.

Particularly stressed were General Yamashita's association with the pacifist element in the Japanese Army, his concomitant espousal of the need for the maintenance of friendly relations with Britain and the United States, and his opposition to the policies of Prime Minister Tojo Hideki. Feldhaus pointed out that General Yamashita had a reputation as a strict disciplinarian, and that this won for him the respect and cooperation of his subordinates. He had never volunteered for any of the military appointments that made up his extensive career, Feldhaus told the commission.

Briefly, Feldhaus recapitulated on the difficulties Yamashita faced on his assumption of command in the Philippines; the limited and fragmented system of command in the Japanese armed forces, the poor communication and transport facilities, the extreme shortages of basic commodities - food, petrol, the low morale and physical standard of the troops, and the gross inefficiencies and laxity in the previous commander's administration.

These flaws, General Yamashita set about overcoming. But aggravating the already colossal task that had been set for General Yamashita, Feldhaus said, were the conflicting orders from his superiors relative to the combat operations involved in the defence of the Philippines. Some nine days after his arrival in the Philippines, stressed Feldhaus, the Americans attacked Leyte, and on December 7th before many of the units external to his command had been consolidated, General Yam-

ashita was faced with the American landing at Lingayen, Luzon. There could be no other conclusion, Feldhaus summarised, than that

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

In the circumstances in which Yamashita exercised his command there could be no doubt, Feldhaus concluded, that he had done all that was within his power to control the operations of his troops.

With this decision the commission obviously disagreed.

FOOTNOTES

- 1 Reel: Case of General Yamashita, p. 175, and in Swinson: Four Samurai, p. 226.
- 2 General Yamashita had convinced his staff officers of the necessity for his personal surrender with the words that

Any delay is bound to make matters worse for my troops. If I'm wrong about this, then I'll accept the blame. The troops are half-starved and I want them fed just as soon as possible. I want the sick and wounded attended to also. Every day the surrender is delayed hundreds more will die.

It was only as he was departing and the final farewells had been said, that Yamashita prepared his officers for his fate. 'Once I go down the mountain,' he said, 'I shall be arrested, and they'll never release me. So do the best you can in everything and don't grieve for me. Your job will be to build a new Japan.' (Swinson, p. 219).

Some of General Yamashita's staff officers did not however agree with his decision to surrender, and a representative, a Major Kuroda, made a desperate plea for him to commit seppuku to atone for his failure as a samurai. Kuroda felt that by not acceding to this traditional custom, Yamashita would have tarnished his image as one of the finest samurai warriors Japan had produced. With that benevolent paternalism for which General Yamashita was renowned amongst his men, he smiled at Kuroda and explained to him the realities of the predicament with which he was now faced.

You're just a boy and you don't understand. I've killed many people here in the Philippines, both Japanese and the enemy, and I expect to pay for it. I don't expect to see Japan again. But if I die first, who takes the responsibility? You see - it's quite impossible. There's only one person who can be responsible and that is myself. (Swinson, pp. 218-219).

In this estimation, General Yamashita was ultimately proved correct.

- 3 Judgment, p. 4062.
- 4 Proceedings, p. 4061.
- 5 Ibid.
- 6 Ibid.
- 7 Redford quotes personal letter from Prosecutor (20 November 1974) to this effect - Larry Redford, The Trial of General Yamashita, MA unpublished Thesis, 1975: Old Dom-

inion University, p. 26. The pertinent part of the letter reads:

'It was my understanding that General MacArthur desired the trial of Yamashita to be on the basis of the charge of dereliction of duty in having failed to control, or to make reasonable effort to control, the conduct of the troops under his command, rather than on the basis of direct or specific orders by Yamashita which led to the atrocities. I accordingly generally avoided opportunity or effort to show such commands...'

- 8 Proceedings, p. 4061.
 9 Proceedings, p. 4059.
 10 Proceedings, p. 4060.
 11 Proceedings, p. 4060.
 12 Proceedings, p. 4059, emphasis added.
 13 Proceedings, p. 4059.
 14 Proceedings, p. 4059, emphasis added.
 15 Proceedings, p. 4059, emphasis added.
 16 See Black's Legal Dictionary - 'Proof', pp. 1380-1381.
 17 Reel, op.cit., p. 169.
 18 Redford, op.cit., p. 36.
 19 Reel, op.cit., p. 167.
 20 Captain Sandberg cynically whispered to his fellow counsel, according to Reel's account,

'He omitted the most important person. He should have added: "The commission thanks General Yamashita without whose presence this trial could not have taken place."' (Reel, op.cit., p. 166.)

- 21 Proceedings, p. 4035.
 22 Proceedings, p. 4035.
 23 Proceedings, pp. 4035-36.
 24 Proceedings, p. 4041.
 25 Proceedings, p. 4041.
 26 Proceedings, p. 4041.
 27 Proceedings, p. 4042.
 28 Proceedings, p. 4044.

- 29 Proceedings, p. 4044.
- 30 Proceedings, pp. 4046-47.
- 31 Proceedings, pp. 4050-51.
- 32 Proceedings, p. 4051.
- 33 Reel, op.cit., p. 166.
- 34 Proceedings, p. 4052.
- 35 Proceedings, p. 4052.
- 36 Proceedings, p. 4052.
- 37 Proceedings, p. 4053.
- 38 Proceedings, p. 3985.
- 39 On Batan Island, where three Americans who arrived in a rubber boat were later executed, and where there was no prisoner-of-war camp, the Prosecution introduced a witness who testified 'that he was told by a second party that a third party had received a telegram purportedly sent by a fourth party,' the latter being General Yamashita, the telegram allegedly reading, "'Kill all American prisoners of war in the Philippine Islands!'", Proceedings, p. 3044. Not only was the Japanese used in the telegram not idiomatic, it was also most unusual, so that the credibility of the witness was called into doubt, but in addition, there was no logic inherent in sending an order relative to prisoners of war to an island where none were interned. Quite obviously the order must have been disobeyed by General Yamashita's subordinate commanders (if it existed at all) since prisoners of war were not all killed, Reel summarised.

Some incidents which appeared in the Bills of Particulars, Reel pointed out, involved troops or units that were not within the command of General Yamashita. An example of this was the transport of prisoners of war, such as occurred in the 'Oryoko Maru' case, Reel said, when the unit responsible for the provision of shipping and its operation was the Third Maritime Transport Command, a unit quite independent of the army chain of command. Even had Yamashita's command encompassed that unit, the commission would have lacked the authority to decide on the issue since General Yamashita's responsibility, as delineated also in the charge, was confined to the Philippine Islands and not the sea.

- 40 Proceedings, p. 3949.
- 41 Proceedings, p. 3967.
- 42 Reel then outlined the forms of communication possible,

and the efforts made by Yamashita to augment these. Land communication had been severed soon after the American landing, and wireless communication was 'apparently somewhat worse than ours at its worst,' and was therefore reserved only for matters of operational significance. General Yamashita had tried to use aeroplanes for communication purposes but, although his command incorporated an air unit, the few planes it did possess were not mechanically operative. A plan to send staff officers to outlying units had also failed.

- 43 Proceedings, p. 3967.
- 44 Proceedings, p. 3970.
- 45 Proceedings, p. 3971.
- 46 Proceedings, p. 3971.
- 47 Reel, op.cit., p. 164. Proceedings, p. 3972.
- 48 Proceedings, p. 3913.
- 49 Proceedings, p. 3915.
- 50 Proceedings, p. 3915.
- 51 Proceedings, p. 3918.
- 52 Proceedings, p. 3918.
- 53 Reel, op.cit., p. 154.

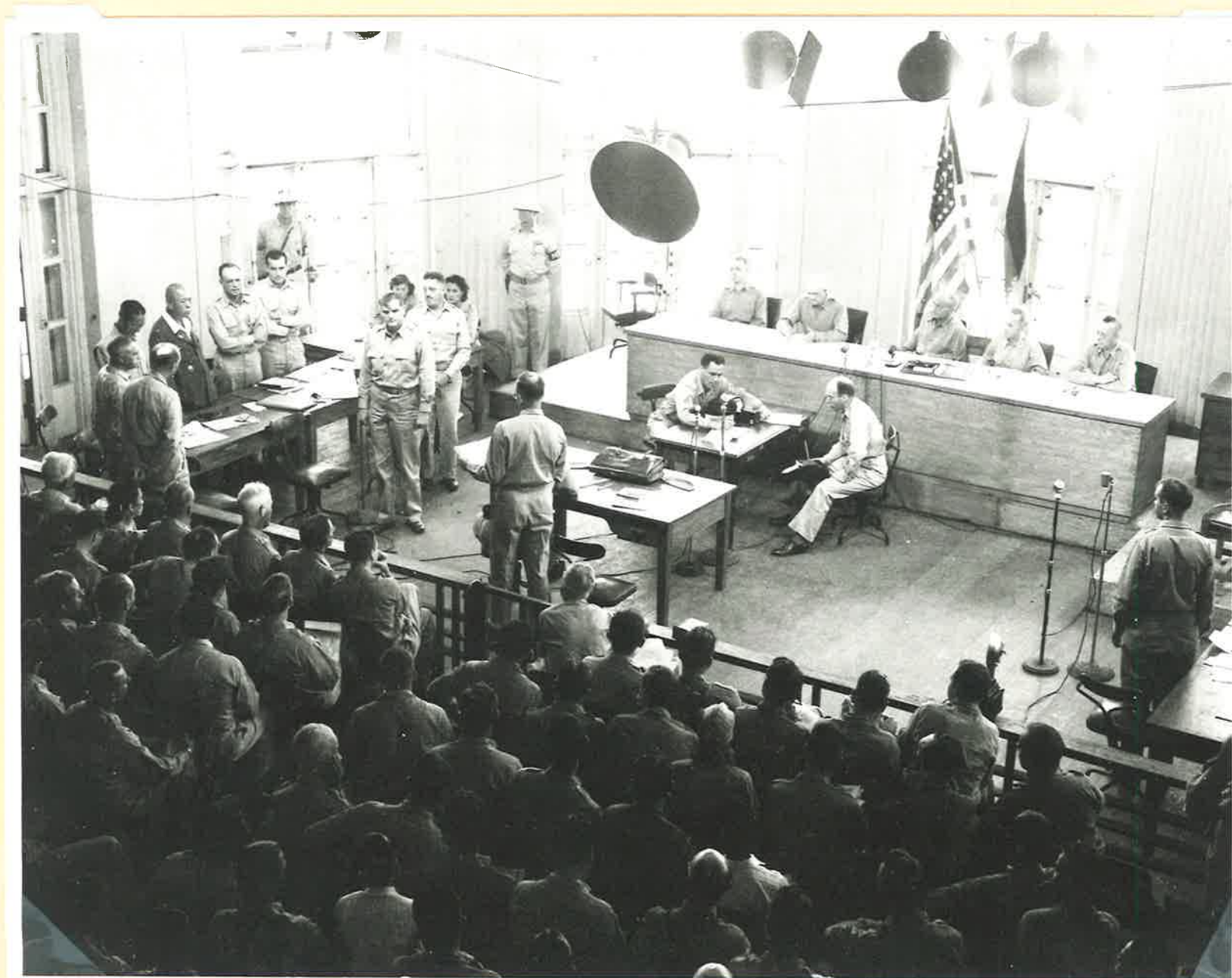


Photo: Australian War Memorial

CHAPTER 3

DEFENCE CASE

I believe that under the foregoing conditions I did the best possible job I could have done. However, due to the...circumstances, my plans and my strength were not sufficient to the situation, and if these things happened they were absolutely unavoidable. They were beyond anything I could have expected. If I could have foreseen these things I would have concentrated all my efforts toward preventing it. 1

With a commanding mien and an unwavering voice, General Yamashita concluded his statement in his own defence before the military commission. Stressing that he did not order the massacre of all Filipinos, he promised with conviction, to punish the wrong-doers 'to the fullest extent of military law', if he was given the opportunity. 2

Under the cross-examination of the Chief Prosecutor, Major Kerr, General Yamashita explained to the court that upon his arrival in the Philippines he had been unfamiliar with the Philippine combat and command situation, and that he was continually harassed by enemy attack, culminating in the Leyte battle, which developed some nine days after his assumption of command. In these circumstances he was under considerable pressure to plan and study tactical means to employ his scattered units against the superior American forces. This absorbed all of his time, he said. Yamashita went on to point out that this preoccupation with strategy to the exclusion of all other duties prevented him from personally inspecting his subordinate units and coordinating them effectively. The fragmented system of command in the Japanese army was also of significance here; making his duties 'ex-

tremely complicated' and preventing him from fully unifying his command. The problems were exacerbated by the poor standard of the Japanese communication facilities. When General Yamashita tried to augment his inefficient and meagre communications network with the use of aeroplanes (with the transfer to his command of the 4th Air Army) he found that they were inoperational. Trying to overcome this difficulty with the despatch of staff officers to outlying units, General Yamashita discovered that this achieved little because the guerillas active in the Philippines attacked such messengers and cut them off. The communication system deteriorated to the point where, with the American success in Leyte, it became completely disrupted, thereby making it exceedingly difficult for him to follow the combat situation with the other units.

In his efforts to consolidate his command, General Yamashita emphasised that such thorough going reorganisation required quite some time to effect, and that various units were integrated into his command singly, creating further complications in the duties required of him.

The source of command coordination within a command lies in trusting in your subordinate commanders. Under the circumstances I was forced to confront the superior United States forces with subordinates whom I did not know and with whose characters and ability I was unfamiliar.

He added,

Besides this I put all my efforts 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 maintenance of discipline. However, they were inferior troops and there simply wasn't enough time to bring them up to my expectations. 3

Troop morale was low, General Yamashita said, due to their

prolonged exposure to the tropical climate, coupled with a previously inefficient command, and in the case of new replacements, because of the strafing they experienced from the enemy during their transport to the Philippines. The lowering of morale rendered the successful implementation of his defence plan even more difficult.

The cross-examination by Major Kerr was rigorous for Yamashita. This gruelling experience lasted some fourteen hours, during which time the General did not lose his composure or reveal any inconsistencies in his account of the events surrounding the final stages of the Japanese defence of the Philippines.

Frustrated in his attempt to break through Yamashita's impenetrable barrier of calmness and consistency, at one point Major Kerr was moved to resort to shouting at the witness. 'I ask that you look at the two maps to your rear,' he bellowed at General Yamashita.

The map on your left represents the Philippine Islands. Each red pin or disc represents a major violation of the laws of war, which according to testimony in this case was committed by your troops. According to the evidence, approximately 60,000 unarmed men, women and children were killed in the Philippine Islands by men under your command.

Do you deny to this commission that you knew of or ever heard of any of these killings? 4

Slowly, General Yamashita turned from the maps to face the commission, and with his eyes reduced to slits by the brightness of the Klieg lights bearing down on him, he addressed the crowded courtroom, in a steady voice,

I never heard of, nor did I know of these events. 5

Again Major Kerr attempted to upset General Yamashita's equanimity.

Can you explain to the commission how all of these murders could have been committed from one end of the Philippine Islands to the other for a period of over seven months without your ever having heard of it? 6

To this General Yamashita replied,

'I absolutely know nothing about it.' 7

A large part of Kerr's cross-examination concerned the question of discipline in the Japanese Army command system and the responsibility of commanders for the action of their subordinates. In response to Kerr's questioning, Yamashita stated that

(I) gathered together the commanding officers of units and chiefs-of-staff, and I instructed them that my idea was that each unit must instruct its subordinate units, and those subordinate units must instruct their men as to my desires; and people who did not obey would be dealt with. Each unit has this responsibility of educating and instructing its subordinates. And from a practical standpoint, I took every possible available means. 8

Major Kerr then asked General Yamashita whether the responsibility of a commanding officer ceased in the Japanese army once he had taken action to punish his men for their wrongful acts. Through the translation of Major Pratt, General Yamashita replied that,

This would depend on the nature of the offense, and the offender will be legally punished, and if the offender's superiors have condoned or permitted or ordered these offenses, then they, too, would be punished.

However, if the commanding officer has taken the necessary precautions and means to prevent it, then he is subject only to administrative reprimand. 9

He went on to stress the importance of the point he was making and his desire that there be no mistake in the translation.

Finding that in the Japanese Army there were two types of responsibility, criminal and administrative, Major Kerr asked General Yamashita what type of responsibility was incurred in a situation where the commanding officer failed to take 'proper action' to control his troops, and they committed excesses. General Yamashita answered that the circumstances and facts of the case would decide which type of responsibility would be involved. Criminal responsibility, Yamashita explained, would be invoked

In the case when a commanding officer should order murder or other such actions, or in the case when he orders it, permits it or condones it, that would be criminal responsibility. 10

General Yamashita was then asked whether a commanding officer would be held criminally liable for the actions of his men where, knowing that his troops might commit wrongful acts, he took no action to prevent them.

Acts such as this must be stopped, (Yamashita conceded), but the location of the commanding officer and the time and the circumstances must also be taken into consideration. 11

General Yamashita's final word on the topic was delivered the following day in a written statement read before the commission by Major Pratt to clarify any remaining misinterpretations that may have occurred during oral translation. It read,

As regards the crime of a subordinate, his commanding officer will receive either criminal punishment or administrative punishment in accordance with the nature of the crime. That is to say:

(1) If the commanding officer ordered his subordinate, permitted or condoned the crime which was committed, then that commanding officer will also receive criminal punishment.

(2) If in spite of the fact that the commanding officer took all possible means to prevent the crime of the subordinate beforehand, in event of a crime committed by a subordinate at a time and place unknown to the commanding officer, then that commanding officer bears administrative responsibility to his superior officer only. 12

Given that the above statement encompassed the relevant points of Japanese military law, Yamashita was again requested to face the maps behind him, and to explicate to the commission how the multitude of atrocities (represented again by red pins) could have occurred in the City of Manila without his knowledge. Coolly, General Yamashita replied that the reasons for this were identical with those he had earlier articulated in response to a similar question the Chief Prosecutor had asked. He then went on to stress that the combat that had developed in Manila was not ordered by him and occurred both without his knowledge and in opposition to his expressed ideas and orders. Furthermore, it was tactically unsound, he said. These comments Major Kerr interpreted as an effort by General Yamashita to lay the blame entirely and squarely on the shoulders of his subordinate commanders. In a denial, General Yamashita took the opportunity ungraciously offered him by Kerr, to apprise the commission of his views on the subject. He advocated that,

The persons who perpetrated these crimes should be punished, and the immediate superior units should be subject to investigation and upon the findings they should receive either criminal punishment or administrative punishment. 13

Tersely, Major Kerr then pressured General Yamashita, hoping to extract from him an admission of his failure to control his troops. This took little cognizance of Yamashita's repeated reiteration of the point that the wrongdoers in the

majority of Manilan incidents at least were not encompassed within his command umbrella, and thus again he refused to break down before the Prosecutor's sullied attack.

Q: You admit, do you, that you failed to control your troops in the Philippines?

A: I have put forth my maximum effort in order to control the troops, and if this was not sufficient, then somehow I should have done more. Other people might have been able to do more, but I feel that I have done my very best.

Q: Did you fail to control your troops? Please answer 'yes' or 'no.'

A: I believe that I did control my troops. 14

Continuing his attempt to trap Yamashita into an admission of responsibility for war crimes, Kerr, noting that Yamashita was a professional soldier, asked him whether he was proud of his service to his country. Receiving a reply in the affirmative, Kerr then threw a barrage of questions at the witness.

'Are standards of ethical conduct by professional soldiers substantially the same throughout civilized nations?'

Yamashita accepted that this was the case.

'Is it a recognised duty, among soldiers, of a commanding officer to control his troops so that they do not commit wrongful acts?'

Again, Yamashita answered that this was the case. Barely waiting for a reply, Kerr quickly asked whether Yamashita believed it was a wrongful act for a soldier to commit rape. - 'Not only for soldiers is that a wrongful act' - whether it was wrongful to kill unarmed civilians without trial, and whether it was wrongful to kill guerillas without trial? Kerr was unsuccessful in securing the admission of failure on the part of General Yamashita in his ability to control his troops, as must have been his intention here.

Kerr then suggested that General Yamashita had told the Philippine Cabinet that he would give General MacArthur thirty days to get out of Leyte or he would smash him, and that he would drag MacArthur into the cabinet room to sign surrender on his (Yamashita's) terms. Yamashita politely told Major Kerr that he had not ever met the cabinet as a whole, and that the accusation was false.¹⁵ Even in strategic terms, it would have been unreasonable to expect that MacArthur would relinquish Leyte which he had just recovered (at some human cost), and as an accomplished strategist Yamashita surely would not have expected this. It would further, have been little more than folly to make such statements; the realities of the operational situation would have made a mockery of any like comments by Yamashita.

In his cross-examination, Major Kerr repeatedly returned to the question of guerilla activities. His intelligence reports and local unit commanders confirmed, General Yamashita said, that guerilla activities increased in severity and frequency in anticipation of, and subsequent to the American landings in the Philippines, and it was apparent that the guerillas were gathering along with the American advance. The guerillas, General Yamashita went on, gathered on the main roads connecting Manila with the provinces, particularly the Manila-Lingayen route, and in Batangas Province and the San Fernando area. Guerilla activities along the main highways involved frequent ambushings and the attack of small groups of Japanese military personnel and transport convoys, disrupting not only Japanese movement of troops and materials, but also communication. Manila-Baguiο communication was

severed on the 11th January, 1945, Yamashita added. ¹⁶

Kerr asked whether, given this activity, and his responsibility to provide food and protection, General Yamashita had made any examination of the condition of the civilian population. He replied that he had not since operational factors had militated against this, and the provision of food to the civilian population was not solely his responsibility. ¹⁷

Beginning with a probe to determine whether the Kempei Tai investigated the cases of suspected guerillas, Major Kerr went on to ask Yamashita further questions about guerillas which led General Yamashita to state that it was only against armed guerillas (or armed bandits) that his orders had been directed since it was only armed guerillas that could be recognised in their status as unprivileged belligerents. To Kerr's suggestion that many of the supposed guerillas executed by the Japanese without trial were merely pro-American, Yamashita pointed out that that would be 'in their heads', and that the Japanese would have no way of ascertaining the same. Only armed guerillas were subject to trial as war criminals since it was only they whose role could be identified; no sympathisers or supporters were included in the ambit of the law as understood by the Japanese, he said. ¹⁸ Other questions, intended to suggest a discrepancy between General Yamashita's answer and the practice of the Japanese in certain parts of the Philippines, followed in rapid succession.

Would being the wife of a guerilla be a serious crime?
 Would being the child of a guerilla be a serious crime?
 Is living in the same town as a guerilla a serious
 crime? ¹⁹

General Yamashita testified that upon the removal of his headquarters into the mountains he did not leave the 'pre-

rogative' of dealing with guerilla suspects to the Kempei Tai in Manila, as Kerr intimated. Yamashita also said that he had reviewed only forty to forty-four military tribunal proceedings involved with guerillas, and that he certainly did not approve or order the death sentence against one thousand people in Batangas Province.²⁰ Kerr then asked that,

If 25,000 men, women and children, after having been taken into custody, tied, were killed by members of your forces in Batangas Province it necessarily follows, does it not, that those people were murdered? 21

After difficulties in translation, the question was dropped.

The Chief Prosecutor then sought an answer from General Yamashita regarding his familiarity with the provision of the international conventions relative to the treatment of prisoners of war and civilian internees, and the state of international law (the law of land warfare) on the subject. General Yamashita told him that he was fully cognizant of the regulations and of his duties and obligations under them.²² He further stated that he had not approved the implementation of any death sentences against prisoners of war or civilian internees, none had been referred to him by the judge advocate's department of his headquarters. Thus he was led to conclude that no such sentences had been awarded against these prisoners since, for the camps under the control of his headquarters, sentences of this type required his authorisation.²³

Kerr proceeded to discuss the question of the food supplied to the prisoners of war and civilian internees, alleging that both quantitatively and qualitatively it was inferior to that the Japanese supplied their troops in the

Philippines. General Yamashita asserted that he was aware of his responsibility under international law and the convention to supply food equivalent in both of these respects to the detainees, and in response to the reports of Lieutenant-General Koh, the officer in charge of the camps, he had tried to procure more food for the inmates. However, such food as was provided was equal to that supplied to the troops, he said. It was the case that there was a serious food shortage affecting both civilians and the troops throughout the Philippines, Yamashita pointed out, and that the inmates got as much as could possibly be provided for them under the circumstances. Whilst efforts had been made to secure relief supplies of rice within the Philippines, the transportation factor on the one hand and the fact that the Philippines was traditionally a rice-importer (i.e. not self-sufficient in foodstuffs) meant that these moves were unsuccessful. Rice requested from the Southern Army did not arrive in sufficient quantities to radically change the levels of supply as shipping movements into the Philippines were under continual enemy attack. Nevertheless, it was his order, General Yamashita said, that one month's supply of foodstuffs should be left at the camps for the use of the detainees, upon the landings of the Americans on Luzon, when Japanese camp authorities abdicated their control. As far as he was aware, these instructions had been followed. ²⁴

A final area of investigation for the Chief Prosecutor centred around the debate as to whether it was General Yamashita's intention to defend the City of Manila, and hence by implication, whether, despite his denials, the bloody combat

that embroiled the city occurred pursuant to his operational strategy and orders. General Yamashita testified in response to Kerr's questioning that it had been his decision not to defend the city, a decision which his staff had helped to formulate and in which they concurred. His strategy plans for defence of Luzon had been submitted to Field Marshal Count Terauchi's Supreme Southern Command headquarters by radio on the 6th or 7th December 1944, and approval was transmitted on the 7th or 8th December. He had received no other orders or instructions relative to the defence of the City of Manila specifically; indeed, such messages as were exchanged between the headquarters did not even mention Manila, but rather were concerned with Luzon as a whole, Yamashita averred. Neither did he receive 'Orders From Tokyo'. Any orders for him from Imperial General Headquarters (Dai Honei) were routed via the Southern Army, and he did not receive any from that source, he said. No instructions were received from any superior headquarters urging the defence of Manila, or the destruction of its port or other facilities, General Yamashita emphasised.

General Yamashita was then confronted with Prosecution exhibit number 405 (which had not as yet been admitted into evidence), a document produced by the Liason Committee in Tokyo after the cessation of hostilities. It purported to record the orders issued from the Southern Army to General Yamashita regarding the defence of the City of Manila. The salient points of this document as quoted by the Prosecution in the trial record read that,

The 14 Area Army will hold the sea and air bases firmly, If it becomes necessary to relinquish them, see that

the enemy cannot use them...

Furthermore, in the event that the area army is forced to give up its sea, air and military bases, these facilities will be completely demolished to prevent enemy use. Manila will be defended to the utmost, and in event of its loss, its use to the enemy will be hampered by cutting off its water supply and by other such measures. 25

General Yamashita told the commission in the definite article that he had never received instructions either identical or substantially similar 'to those the document contained, and that as the contents of the document as presented by the Prosecution were not of a military nature,' it was unlikely that he would ever have received such communications. It was also not a fact, as the Prosecutor had alleged, that he had told President Laurel that Manila would not be declared an open city because to do so would incur dishonour upon Japanese arms. 26

The intention of Major Kerr at this juncture appears to have been to establish that there was a Japanese Army plan to defend the City of Manila, and that General Yamashita transmitted the order for the defence of the city to his subordinate commander. Thus, the battle within the city could be held to have been ordered, and General Yamashita's liability could be more clearly drawn. Since the Prosecution attitude was that the division between actual and administrative (disciplinary) command in the Japanese armed forces was merely a nit-picking exercise on the part of the Defence, the Prosecution was hoping to establish the above mentioned so that direct responsibility for the atrocities, which should have been foreseen or anticipated by General Yamashita as a possibility given his orders to defend a city of one million people, could

be imputed to him.²⁷

Whilst the damage had been done with the introduction of that exhibit, the Defence attempted not only to highlight its inaccuracies and errors, but to show that the word 'Manila' had two different meanings depending on the context in which the Japanese used it. Manila, when used as a word by itself, referred to the broad region in which the city was located, General Yamashita pointed out. Defining Manila area, he said that the region was generally held to be that area embraced north of Nichols Field, and Lake Laguna, and bordered by a line through Antipolo, the mountainous area to the north, through Wawa and Ipo and then extending southwest to the Pampango River and the shores of Manila Bay.²⁸ Manila proper, however, was designated as Manila City in Japanese communications, General Yamashita continued. It was only when the term 'Manila' was so understood that any semblance of meaning could be gleaned from the Prosecution exhibit. His strategy for the defence of Luzon, Yamashita stated, did not involve the fortification and defence of Manila City, but by utilising the defensive mountainous positions of Ipo, Montalban, Wawa, Antipolo and adjacent areas it was his intention to retain control of the central plain on which Manila was located. Furthermore, these positions practically encircling the city perimeter in the hilly surrounds were defensive only in relation to frontal attack from the plain; they therefore could not be used to defend the city from enemy attack from the foothills, General Yamashita concluded.²⁹

The strongpoint of Japanese forces in the hills to the east of Manila was one of three throughout Central Luzon,

General Yamashita told Colonel Clarke. A second major stronghold General Yamashita developed in the mountainous terrain at Baguio and the Balete Pass, which gave him control over the entry to the main Luzon food-producing area, the Cagayan Valley. The other mountain stronghold was located west of Clark Field (in the San Fernando Valley).³⁰ It was his intention, he said, to take advantage of the rough terrain to fight a strong delaying action on Luzon. Colonel Clarke then asked General Yamashita why he had chosen to fight a delaying action rather than the 'decisive battle' as demanded by Tokyo. General Yamashita replied that,

In view of the Leyte operations, I realized that a decisive battle was impossible. Therefore I decided on a delaying action to divert as much American forces in Luzon so as to keep them from attacking Japan as much as possible. In my experiences with the Leyte operations I realized the American Air Forces and Navy were exceedingly superior to ours and also the fire power of the ground forces were superior and very mobile. Therefore I knew that I could not conduct a warfare on flat land. Therefore I employed a delaying action in the mountains. 31

Asked where the City of Manila fitted into this strategic plan, General Yamashita informed the commission that,

I decided to put Manila outside the battle area. First, the population of Manila is approximately one million; therefore it is impossible to feed them. The second reason is that the buildings are very inflammable. The third reason is that because it is flat land it requires tremendous number of strength to defend it. For these three reasons my policy or plan was to leave Manila outside combat zone. 32

Temporarily leaving aside the problem of the battle that developed in Manila and the atrocities that had occurred therein, General Yamashita portrayed for the commission the conditions he discovered upon his assumption of command, and the orders which regulated his actions.

There were shortages of all supplies, he said, but most severe were the deficiencies in food, motor spirit and transportation facilities. Considerable antipathy existed between the Filipino population and the Japanese troops. For the defence of the Philippines, General Yamashita anticipated that a minimum of five additional divisions would be required.

He then reiterated the problem he encountered with his staff officers. Not only were they, in the main, at lower levels men with whose characters and capacities he was unfamiliar, there was minimal continuity between the headquarters staff of the previous commander and his new administration. Only three of the old staff remained, and the chief of staff was ill. This meant that the new staff members could not be rapidly apprised of combat conditions in the Philippines, and indeed, that they were painfully unfamiliar with the islands as is evidenced by the following anecdote.³³ Lieutenant-General Muto Akira, when he arrived in late October to take up his appointment as Yamashita's Chief of Staff, was informed that there was combat at Leyte. "'Very interesting,' he said. 'But where is Leyte?'"³⁴

To these handicaps were added conflicting orders from superior headquarters which cost the Japanese dearly in casualties, shipping and the efficient deployment of their extremely limited resources. General Yamashita's orders upon his assumption of command (October 9th, 1944) required that he cooperate with the naval and air forces in a 'decisive battle' to repel the American landings on the island of Leyte.³⁵ It was envisaged at this time however, that the major thrust of the Army defence of the Philippines would be

centred on a strong delaying action mounted on the largest island, Luzon. Thus, Lieutenant-General Suzuki Sosaku who commanded the 35th Army on Leyte could not expect reinforcements; it was his role to delay the American advance sufficiently so that General Yamashita would have the necessary time in which to mount his defence of Luzon. However, on October 22nd, 1944, General Yamashita received new orders relative to the Philippine defence. These instructed him to direct the greatest troop strength to Leyte, rather than Luzon, so that they could 'assist in the decisive battle with the Navy and Air Corps.'³⁶ General Yamashita told the commission that he despatched 50,000 troops from Luzon to Leyte but with air and submarine attacks, only one half of these troops arrived at their destination.³⁷ Whilst it became apparent to him with the American landing on Ormoc Bay (December 7th, 1944) that the Japanese had lost the battle for Leyte, General Yamashita again received orders from the Southern Army commanding him to continue with the Leyte campaign. Pursuant to this order, General Yamashita mustered additional troops and ordered a counter-attack on Carigara Bay.³⁸

Concurrently with these actions, General Yamashita attempted a rationalisation and unification of the command framework, which he viewed as being an indispensable preliminary to his defence of Luzon. General Yamashita's orders at the time of the Leyte campaign, he said, required that he cooperate with the naval and air forces to achieve a 'decisive battle', and he was somewhat dismayed to find that Southern Army and Imperial Headquarters expected him to achieve close cooperation and liason in combat conditions with the

other branches of the service with a command framework that was both fragmented and inefficient. Not only did he not have command over the air and transport commands, he stressed, neither was his command over Army troops complete and nor was he the supreme commander in the Philippines, upon his arrival. General Yamashita's power of command was, therefore, quite limited and complicated in nature, the commission was told.

Field Marshal Count Terauchi's headquarters had been moved to Manila in May 1944 after it had been reported to Imperial General Headquarters that the previous 14th Area Army commander, Lieutenant-General Kuroda Shigenori, preferred golf and geishas to the performance of his duties. With the rapid advancement of the American thrust towards the inner reaches of the Japanese Empire and home islands, such a state could not be allowed to pertain. * These considerations led to the appointment of General Yamashita. However, it was not until November 11th, 1944, that Terauchi relocated his Supreme Southern Command at Saigon.

In the Philippines, General Yamashita said, there were 30,000 troops directly under Terauchi's command. These included those troops en route to the Indies and Southern areas stranded upon their transfer at Manila, those returning from hospital treatment in the home islands, and those whose transports had been sunk by enemy fire.³⁹ General Yamashita's 14th Area Army or Shobu Army command did not include these personnel until early December when they were trans-

* Kuroda was appointed by Tojo and it was only upon fall of Tojo cabinet that Kuroda's removal could be safely sought.

ferred to the Manila Defence Force (Army) under Major-General Kobayashi. At this juncture, the Manila Defence Force was renamed the Kobayashi Heidan.⁴⁰ This unit was under the command of Lieutenant-General Yokoyama's Shimbu Shudan,

The 4th Air Army, under the command of a Lieutenant-General Tominaga, was also under Terauchi's direction, so that any liaison between the air force and General Yamashita had to be undertaken through Terauchi. This remained the case, General Yamashita said, after Terauchi's removal to Saigon, and until the 19th January 1945, when the unit was brought within his command.⁴¹

A similar situation occurred with the 3rd Maritime Transport Command, under Major-General Inada. This group was only gradually consolidated into Yamashita's command between mid-January and mid-February 1945. Until that time General Yamashita had to work through Terauchi's headquarters in order to liaise with the transport command in Manila so that he could have prisoners of war removed to Japan, and more importantly, troops despatched to Leyte.⁴²

The Shimbu Shudan under the command of Lieutenant-General Yokoyama Shizuo was activated in early December 1944, the commission was informed. It was composed of the 8th Division, the unit of the Shimbu commander, which formed the nucleus of the group. In addition there was the Kawashima Brigade, and the Kobayashi Heidan with the Noguchi Butai as a component unit of the latter. It was to this formation, the Shimbu Shudan, that the naval troops under Rear-Admiral Iwabuchi Sanji were made subject for the purposes of land combat on January 6th, 1945.⁴³ General Yamashita took pains

to point out that whilst Iwabuchi's naval troops (or marines in the American parlance) were placed within his tactical command for land operations, at no time did he gain command over the navy itself, for land or naval operations. 44

General Yamashita was then called upon to explain to the commission the meaning of the Japanese idea of 'tactical command' and how it applied to the Manila situation. In reply, Yamashita stated that the transfer of the command of Iwabuchi's unit had been governed by

the long standing orders which was an agreement between the Army and the Navy in Tokyo and according to this in the event that the Navy would operate in land warfare they would come under the command of the Army. 45

Such command powers as were granted to the Army in this transfer were applicable only to land operations, Yamashita emphasised. The power of command over Iwabuchi's troops that he acquired through the transfer

was only tactical command, for instance, command to advance or to retreat. It did not include such things as personnel, punishment, billeting, supply. 46

Having earlier given the commission an exposition of his strategy for the defence of Luzon, in which he claimed that the City of Manila had been placed outside of the combat area, General Yamashita was now asked to offer an explanation for the fact that combat had occurred in the City and that naval troops over which he had at least some degree of control, had remained in the City in considerable numbers.

An order had been issued by himself, General Yamashita apprised the commission, to Major-General Kobayashi of the Manila Defence Command (Army) and to Lieutenant-General

Shimono of the Line of Communication command. The withdrawal of all Army troops from the city with the exception of the Noguchi Detachment, was envisaged by the order. The Navy headquarters and the headquarters of the 4th Air Army, not being encompassed within General Yamashita's command, were told of his intentions by Lieutenant-General Muto Akira, his Chief of Staff. 47

During the period between the promulgation of the order in mid-December 1944 and the time of the battle in Manila, in February 1945, the Army withdrawal had been effected. The only Army troops remaining within the city were the men of the Noguchi's Detachment, 1500 strong, whose task it was to guard military supplies and the supply route out of the City, and to procure supplies of oil. 48

On the 13th February, 1945, General Yamashita continued, he received a report indicating that whilst a part of Iwabuchi's naval troops had withdrawn from the City of Manila, the bulk of them remained therein. 49 Upon hearing this information, Yamashita from Baguio,

immediately sent an order to the Shimbu Shudan. The order was to the effect that, in accordance with our original plan, to evacuate immediately all the Navy troops from Manila. 50

No direct reply was received, but on the 14th or 15th February, General Yamashita said, a report from Lieutenant-General Yokoyama was received. This disclosed that a portion of the Shimbu Shudan was advancing on the rear of the United States forces at Novaliches and Maraguina as a diversionary tactic to allow the naval troops to withdraw from Manila. 51 Yamashita explained that upon the activation of the Shimbu

Shudan his intentions with regard to the exclusion of Manila City from the combat sector were included in its operational order, and in addition staff officers received training in a scale model to this effect. The

Shimbu Group fully informed Admiral Iwabuchi of these plans, and he should have been fully cognizant of them. 52

Referring to the alleged atrocities in Manila, General Yamashita asserted that he did not issue orders or receive reports from subordinates indicating the killing or mistreating of civilians in Manila. Neither did reports reach him suggesting that any subordinate commanders had ordered the killing of civilians or prisoners of war.⁵³ The only communication he received from Tokyo on the subject was an order in April 1945 to determine the conditions of treatment of Spanish civilians in Manila, which he instructed the Shimbu Shudan to investigate. Their inquiries were fruitless and Yamashita's report to the Southern Army indicated this. 54

General Yamashita further stated that neither did he issue orders nor did he receive reports showing that property was being destroyed in Manila City. He did, however, order the destruction of militarily important bridges on the road from Lingayen to Aparri and in between Manila and Batangas. These were though, not within the City of Manila. 55

On the topic of guerillas, General Yamashita testified again that he had ordered only the suppression of armed guerillas, not non-combatant civilians, and that this order was clearly conveyed to all subordinate units within his command at a conference of the chiefs of staff on October

11th, 1944. Indeed, it was even the case that the order in question, entitled 'Philippine Operation Plan Summary', had been introduced into evidence by the Prosecution as their exhibit 4, and it was this that General Yamashita had later identified for Colonel Clarke as his command.

In view of the special characteristics of the Philippine operation, subversive activities of the residents and attacks in our rear by airborne raiding forces must be considered. In order to avoid mistakes in conducting the operations, take precautions against armed guerillas, subjugate them quickly and put a stop to their activities. 56

Clearly, the killing of noncombatant civilians was not envisaged by the order, and thus the latter was within the bounds of international law. Moreover, General Yamashita continued, he had instructed his subordinates at the same conference as well as at a later time, to handle the Filipinos carefully, to cooperate with them and to get as much cooperation as possible from the Filipino people.' 57 Such cooperation was critical to the success of the Japanese defence of the Philippines, and this being the case it was both paradoxical and foolhardy not to act in recognition of the same.

In the same context, the use of torture by the Kempei Tai as a means through which to extract information was similarly counterproductive. These methods were not ordered or authorised by General Yamashita, he asserted, and he did not receive reports suggesting that such practices were employed, or that suspected guerillas were being routinely executed by the Kempei Tai.

Completing his testimony on the guerilla question,

Yamashita told the commission that in the area between his headquarters at Fort McKinley, Nielson Field (airbase), and Pasig, guerilla activity had been fierce, and the Kempei Tai had been successful in unearthing a large cachet of arms in the area and a package of explosives under the floor in the officers' mess at his headquarters. It was for their efficiency in preventing further loss of life and inhibition to the Japanese defence, Yamashita said, that he had sent the unit a letter of commendation, and not, as had been suggested, as an endorsement of any illegal activity.

Colonel Clarke then directed General Yamashita's attention to the question of the prisoners of war and the food provided for them by the Japanese. General Yamashita stated that he had made no inspections of any prisoner of war or civilian internee camps during his period of command. This included Cabanatuan and Santo Tomas where the Prosecution witnesses alleged that his car had been sighted, and that he had made an inspection and seen the deprivations suffered, but had done nothing to rectify the situation. Neither had he ordered the rifling of Red Cross packages for American cigarettes, General Yamashita asserted. 58

Whilst he had been totally absorbed in tactical matters to the exclusion of all other considerations, General Yamashita informed the commission that with regard to prisoners of war,

My policy was that they should be treated exactly the same as officers, non-commissioned officers and enlisted men of the Japanese armed forces. 59

Despite the food shortage prevailing throughout the Philippines, he ordered that the quality and quantity of food to be provided to prisoners and internees was to be equivalent to that supplied to Japanese troops, and to achieve that goal frequent requests were sent to the Southern Army for the importation of rice. However, General Yamashita said, only one ship arrived (in early November), others having been attacked by American aeroplanes and submarines. Attempts made to procure food from the Cagayan Valley in central Luzon were thwarted by guerilla attack and by the strafing of American aircraft.⁶⁰ Nevertheless, he was in receipt of reports from Lieutenant-General Koh detailing the conditions in the camps, and no mention was made therein of any divergence from his orders in the provision of food to the inmates, General Yamashita commented. Given that he received no reports from any source indicating that his orders were being disregarded, and with the combat situation as it was, General Yamashita had little choice but to assume that his instructions were being followed, the commission heard.

In summary, General Yamashita offered the commission a statement of his position. 'The matters which are referred to in the charges,' he averred,

I have known for the first time from the testimony of the witnesses before this court. And if such acts were committed by my subordinates, they are in complete disagreement with my own ideas.

And if such acts did occur, I feel that they occurred at such a time and place that I could not have known of it beforehand.

I never ordered such things, and I never have condoned such actions, nor have I ever recognized such actions; and if I had known of them in advance,

I would have taken every possible means to have caused them to stop. And if I had found out about them afterwards, I would have punished them to the fullest extent of military law. 61

The testimony provided by General Yamashita in his own defence did not, however, stand alone. It was the Defence strategy to have other witnesses, namely Yamashita's staff officers and subordinate commanders, amplify the specialised details missing from his commentary, and prove the veracity of his evidence by recourse to character affidavits and the American intelligence reports prepared for the use of the Allies in their re-conquest of the Philippines. In this way the commission would not have to rely solely on the evidence of one man, the Accused.

Beginning with the problem of the treatment accorded prisoners of war and civilian internees, the Defence presented evidence from Major-General Kira Goichi, in charge of the Intendance Department in the headquarters of the 14th Area Army, on the question of the supply of food to internment camps. 62

Kira told the commission that, upon his arrival in the Philippines in August 1941, he found that American submarine activity, although strong, had not prevented the arrival of all rice shipments from Saigon. From that time, though, enemy aircraft had also begun participating in attacks on Japanese shipping in the region, and the added intensity of the attacks rendered it increasingly (and exceedingly) difficult to procure imported food. The changes in battle strategy with the Leyte campaign, which meant the diversion of Luzon-bound foodstuffs, exacerbated an already critical

situation, Kira said. As a consequence, the food allocation for both troops and internees in Luzon dropped.

Questioned by Captain Reel, Major-General Kira asserted that there was absolutely no difference between the type and quantity of the rations supplied to internment and prisoner of war camps, and that provided for the Japanese troops. ⁶³ General Yamashita's policy on this point was quite explicit, Kira stated, and he took an active personal interest in the problems of food supply.

General Yamashita often mentioned the food supply situation in internment camp and in the prisoner of war camp, and seemed to have had much concern regarding the situation...He expressed his desire that internees and the prisoners of war should be well taken care of; I have heard his desire that the food situation in the camps shouldn't be worse than the army... 64

Despite the severe shortages of food in Luzon, upon General Yamashita's instruction, food supplies were left with the internment camps sufficient for at least one month from the time of the American landing at Lingayen, Kira related to the commission. Los Banos and Cabanatuan camps had between two and three months supply and the Manila camp, he said, had food to last until the end of January 1945.

The testimony of Lieutenant-Colonel Ishikawa Kikuo, the member of Yamashita's staff responsible for the transportation aspects of supply, and also in charge of rations during operations, corroborated the points made by Kira, pointing out that theoretical daily ration allowances were often not filled in reality due to the shortages, which were in turn heightened by the spoilage that occurred with the difficulties in shipping. Ishikawa further stressed that

Yamashita, on his own initiative, had overridden the order from Imperial General Headquarters instructing that food should be left for camp inmates upon the American approach; he had embellished it to read that food should be left upon the American landing, and that prisoners were to be treated with courtesy upon the Japanese withdrawal. ⁶⁵

Nevertheless, despite Yamashita's concern for the welfare of the internees, it was Ishikawa's opinion that he was ultimately responsible for the treatment of the prisoners 'since prisoner of war camps are within the command of the Army commander.' ⁶⁶ Whilst this would normally be a reasonable expectation, it seems more than a little incongruous in the context of the food supply question.

It is reasonable to postulate that had Japanese shipping of food stuffs been allowed to continue unhampered by enemy attack, the food supply situation would not have deteriorated with such severity (and the Japanese delaying action would have been more prolonged). But given a situation in which the Americans chose to attack Japanese merchant shipping destined for Philippine ports in an assault on the Japanese resource base, then it seems an inevitable consequence that the non-combatant population would be similarly affected by such an action given the food importation history of that nation.

There can be no doubt that the Americans knew that their attacks on shipping on route to the Philippines would involve interruptions to the food supply; the starvation tactic is the principle of the siege. ⁶⁷ The question then is, if the attack on merchant shipping was an acceptable tactic

according to the dictates of international law (the laws of war) then was it not inconsistent as Justices Murphy and Rutledge pointed out, to hold General Yamashita legally responsible for its success and human consequences?

Furthermore, supposing that the Japanese had chosen, in the light of the severity of the food shortages, to apply a discriminatory policy (contrary to the 1929 Geneva Prisoner of War Convention) to give preference to the feeding of their front-line operational troops, then the human cost within the camps could have been disastrous. This surely, would have been an immense risk to run, given the repeated reports during hostilities that the Japanese had failed to observe international law and conventions.

The conclusion therefore reached is to suggest that General Yamashita was only and could only be held legally responsible due to his and his nation's surrender, in a situation where the blame for the Philippine conditions could be transferred to him thereby absolving the Allies of any responsibility. The means through which this was achieved was the judicial process of the military and a novel 'principle' of law, and the power that enabled the conviction was one of righteousness, such as only victors possess. Put colloquially, the governing principle of the trial was 'might is right'.

With Allied intelligence material attesting to the existence of substantial guerilla units in Luzon, and the particular locales favoured by the units for their attacks on the Japanese, as well as confirming that the movement had

American support, and latterly, leadership and coordination, the Defence was hopeful of convincing the commission of their thesis that what the Prosecution had alleged were ostensibly Japanese atrocities committed against innocent non-combatant civilians, were in fact, anti-guerilla operations. Evidence adduced from Defence witnesses and documentary sources revealed that those areas where the alleged Japanese atrocities were the worst were those areas where guerilla harassment of the Japanese was the greatest. Here it is most significant that the testimony also divulged that women were not unknown in guerilla units, and moreover, that the Markings Organisation, one of the largest units, and operative in Batangas Province, had a female leader. Hence, women could not be assumed as a matter of course to be innocent non-combatant civilians.

The introduction of this evidence did little to sway the opinions of the Chief Prosecutor; he continued to maintain that guerilla activities had no relevance to the charge and specifications with which General Yamashita was being tried.

Having thus discussed the prisoner of war and guerilla aspects of the case, the Defence directed its enquiries into the closely interrelated problems of the chain of command, communication and the Manila atrocities, in which special emphasis was placed on achieving an understanding of the Japanese viewpoint on the critical issue of responsibility for discipline.

Lieutenant-General Muto Akira, as Yamashita's Chief of Staff, was the principal Defence witness in this phase of

the case, providing the detailed information for the benefit of the commission, which his position bestowed upon him, thereby continuing, and verifying, the narrative of his commander. Muto explained that General Yamashita's mission was the defence of the Philippines, but that this task was rendered exceedingly difficult to perform by a combination of many interplaying factors. In Yamashita's experience, the number of troops he had at his disposal was insufficient; there were also extreme shortages of all basic commodities, particularly rice, petrol and working transport vehicles, and defensive preparations were virtually non-existent. Furthermore, the physical standard and morale of the troops was low, Muto commented, this itself being aggravated by the prevalence of guerillas and their tactics of harassment.⁶⁸ Coupled with these problems within his command, was at a personal level, Yamashita's own newness to the Philippines, and the lack of any knowledge or experience of Philippine conditions amongst his headquarters staff, thrown together at a critical stage in the war for Japan, Muto went on. Hence, General Yamashita's mission was virtually impossible to fulfill, he concluded.

Touching on the division and fragmentation of command as existed at the time of Yamashita's arrival, and his 'authority to correct only a mere fraction of these conditions' Muto continued on to outline the original Japanese plan for the defence of the Philippines, in which Leyte, although a 'decisive battle', was to be only a preliminary to the major defence of Luzon, as General Yamashita described.⁶⁹ Expanding on Yamashita's comments,

Muto said that

if the Americans should land on Leyte, the 16th Division then on Leyte, together with such naval and airforces as were on the island would engage in decisive battle on the shores of Leyte Gulf. In the meantime, the 35th Army of Cebu would send as many reinforcements as possible from the other points in the Visayans or Mindanao.

According to the plan, no troops were to be sent from Luzon. 70

The naval forces and the airforce troops were to be directed by Field Marshal Terauchi, Muto explained, and General Yamashita was to command the Army through the 35th Army of Lieutenant-General Suzuki.

A sudden reversal of plans meant that General Yamashita was required to dispatch as many troops as possible to Leyte in preparation for a major battle. Protestations to the Southern Army were ineffectual. Such a fundamental change in strategy created 'grave problems and difficulties', Muto continued.

First, since there had been no plan to transfer troops from Luzon to Leyte, there was no shipping and shipping...was under the control of the Third Maritime Transport Headquarters, which was not under General Yamashita. 71

Consequently, there was considerable difficulty in both assembling the ships due to shortages of vessels and fuel, and American air attacks; problems in achieving close liason between units in different commands. In addition to this difficulty, Muto informed the commission, the formations on Luzon had been dispersed into their defensive positions and now had to be regrouped, a problematic function given the severe shortages of transportation and fuel. From the dispersed formations

it was necessary...to withdraw certain units and assemble them. After assembling such troops defects would manifest themselves, which had to be corrected before they could be shipped to Leyte. Supplies for these troops, according to their original assignments, had been concentrated according to the original plan and this new plan necessitated the regrouping and re-storing of the supplies for the troops withdrawn. 72

As if this formidable task was not sufficient, air cover for the transports had to be arranged, Muto said, through Field Marshal Terauchi, to the 4th Air Army, and because of prior assignments neither this unit nor the 3rd Maritime Transport command fulfilled General Yamashita's requirements to his satisfaction. ⁷³ American bomber and submarine attacks meant that nearly all ships dispatched from Manila for Leyte were sunk en route, and that only the First Division arrived on Leyte complete.

To complicate his duties more, General Yamashita was instructed by the Chief of Staff for Operations in the Imperial General Headquarters, to attack the American troops landing on Leyte rather than a continuing of the defensive actions there. This was contrary to General Yamashita's view, Lieutenant-General Muto pointed out. At that time, early December 1944, General Yamashita had concluded that the battle for Leyte had been lost and he prepared to divert his energies towards the Luzon campaign. However, he conceded to the higher authorities and planned to counter-attack at Carigara Bay, but whilst preparations were being made, American manoeuvres revealed to the Headquarters representative and Terauchi the fact that Leyte was lost, and General Yamashita was then free to concentrate on his plans for Luzon. ⁷⁴

Having established the context for his later comments, Muto then discussed the remaining difficulties for General Yamashita in his defence of Luzon, namely the requests to Tokyo for reinforcements and the attempted consolidation of the command framework. He was adamant that the City of Manila had been placed outside of the area of command, for the reasons outlined by General Yamashita. Muto added that General Yamashita had not wanted to exacerbate Filipino antipathy for the Japanese, as this would have been militarily disadvantageous, and this added further weight to the consideration to abandon Manila.⁷⁵ Although the successful removal of ground troops had been accomplished by the time of the Lingayen Landing, the evacuation from Manila of military supplies and material was only one-third complete in Lieutenant-General Muto's estimation.⁷⁶ Called upon to account for this failure, Muto stated that the primary reason was the lack of operative transportation facilities and the shortage of fuel, coupled with the repeated enemy air attacks on 'practically every day when weather permitted.'⁷⁷

Also, among those who were not under General Yamashita's command, there were a number of officers who were opposed to his idea of withdrawing from Manila and leaving it outside of the area of operations.

A third reason is that there was a reluctance on the part of many to leave the City of Manila and take up their existence in the mountainous country, and they were not prompt about starting out of the city.⁷⁸

It was apparent, Muto concluded, that few of the other unit commanders appreciated the imminence of the American landing. By moving his headquarters to Ipo General Yamashita hoped to convince them of their fallacies of thought on this

point. The Shimbu Shudan, upon its activation in December 1944, was in receipt of the orders for withdrawal, Muto verified.⁷⁹

The 4th Air Army command was personally informed by Muto of General Yamashita's desires regarding withdrawal, and upon the consolidation of the unit into his command, written orders were issued.

Whilst there were only 1500 to 1600 Army troops remaining in Manila whose duties involved the maintenance of order and the protection of military supplies and supply routes out of the city, Muto stated that at the time he was not clear on how many naval troops were in the City, but that it appeared to be two or three battalions from the 31st Special Naval Base Force Unit under the command of Rear-Admiral Iwabuchi. He did not know why they had not been evacuated.⁸⁰

General Yamashita did not order the commanding officer of the Navy to effect the withdrawal of his naval units; he had no power of command over the Navy, which retained a parallel and separate chain of command to that of the Army, Muto explained. However, the naval commander and his chief of staff were aware of General Yamashita's intention to remove all Army troops from the City of Manila and his desire to place the City outside of the combat area, since Muto had personally informed them, he said.⁸¹

Rear-Admiral Iwabuchi received his orders to withdraw from the Shimbu Shudan, once the former had been brought within its command on the 6th January 1945 for the purposes of land combat. The Shimbu Shudan, as previously stated,

had been fully instructed on this point, by General Yamashita himself and by his staff officers transferred to the unit to direct the withdrawal. Iwabuchi's failure to withdraw Muto attributed, to the dilemma he faced in having two missions, one Army and one Navy, and the precedence he probably felt the naval mission warranted, given that it was in naval matters that he exercised his command. 82

Over the Iwabuchi unit, General Yamashita exercised only very limited control, Muto asserted. This was confined to operational matters relative to land combat only, and did not extend to control over training, discipline or personnel. Such control over Iwabuchi as General Yamashita did have was exercised through Lieutenant-General Yokoyama of the Shimbu Shudan.

Muto then continued his testimony with an explanation of the Imperial General Headquarter's instruction on the transfer of command over naval troops engaged in land combat. Prefacing his comments with a reiteration of the absolutely discrete nature of the Army and Navy chains of command, Muto said that

recently, there has been revealed a strong tendency to jealously guard all of their rights and prerogatives of both services. As a result, it has been impossible to do as is done in the American forces, for Washington to issue an order whereby Naval forces and Army forces can be put together in a single chain of command. 83

But, Muto pointed out, there arose situations where the objective of the operation required that the two services be combined in order to achieve same, such as occurred in Manila.

Therefore, the Army portion of the Imperial General Headquarters, and the Navy section of the same headquarters, conferred and determined what I am now going to relate: that wherever Naval forces were stationed ashore, where land operations, land battle, should develop, under those circumstances those Naval forces should pass for operational control under the command of the Army Commander also stationed there. 84

This policy applied to all zones of battle where both branches of the service were present and land battle developed. The actual details of the execution of the policy were left to the local commanders to negotiate, Muto said. 'Operational control for land operations' excluded from Army control matters pertaining to training, punishment or discipline, personnel, pay and supplies, according to Lieutenant-General Muto. Army control over transferred naval units therefore was confined to instructions such as 'forward march', 'halt' or 'withdraw'. 85

Before the commission was the Defence exhibit drawn by General Muto and illustrating the chain of command both upon General Yamashita's arrival in the Philippines and later during the Luzon campaign. 86 Briefly Muto explained some of the features of the diagram, particularly the transfer of command over the Iwabuchi unit, and reiterated the limits of Army command over the group. The dotted line, he stressed, indicated partial control over the unit, and this did not include discipline, training or matters of personnel; it was purely for tactical matters. Some confusion thereby being generated over the command status of the Noguchi Butai (Detachment) itself a unit of the Kobayashi Heidan (Army) and transferred to the command of the Iwabuchi unit, Muto told the commission that for matters other than tactical

concerns, (re discipline) the Noguchi Butai received orders from the Kobayashi Heidan. 87

At this juncture the President of the commission, General Reynolds interrupted the proceedings. 'There is a possibility,' he addressed the court,

that the confusion results in a misunderstanding of the term 'responsibility for discipline'. Let us inquire along this channel:

One responsibility would be that discipline was maintained. Surely the witness does not wish to state that a commander is not responsible that discipline is maintained within the units reporting to him. But it might well be that he means 'responsibility for the procedures or the mechanics by which discipline is maintained.' - That would be quite logical, because the Naval force would be governed by Naval regulations as to the maintenance of discipline and the Army force would be governed by regulations provided by the Army.

So there is a real difference in the meaning: responsibility that discipline is maintained, and responsible for the procedures or mechanics of carrying it out. 88

However, for all this, Reynolds, soon found to his dismay that the division in the Japanese command structure rendered it meaningless, and hence that if responsibility and blame were to be laid upon General Yamashita for the Manila atrocities, it had to be shown that General Yamashita had the both types of disciplinary responsibility, if the trial was to adopt a criterion of guilt that recognised the Japanese standards applicable in the context.

Returning to the question of control over discipline in the Noguchi Detachment, Muto averred that the units were still subject in that respect to the Kobayashi Heidan. This covered the matter of the wearing of the uniform, and the discipline between the officers and men. Discipline therefore was controlled by the parent organisation.

Colonel Clarke asked Lieutenant-General Muto what powers Admiral Iwabuchi would have had over members of the Noguchi Detachment, who during the Manila battle, turned and ran. Muto replied that Iwabuchi could report the incident to the commander of Noguchi Butai's superior unit, in this case the Kobayashi Heidan. Iwabuchi could not try Army personnel in a naval court-martial. Legally he could not order the men concerned to fight, but because he was an officer he had a reasonable chance of getting his orders obeyed. Iwabuchi had only powers to similarly report a deliberate refusal to obey orders or a behavioural misconduct with an officer.⁸⁹ If some members of the Noguchi Detachment were caught looting or killing civilians, by Iwabuchi, the latter's powers extended to securing the arrest of these responsible, but he could not punish them, this function being reserved by the Army.⁹⁰ A court-martial would have been arranged by the Kobayashi Heidan on receiving Iwabuchi's report, and informational reports (including the trial verdict) would have been forwarded to the Shimbu Shudan and from that headquarters to the Shobu headquarters of General Yamashita in this fictional situation. 'Now, General Muto, let us attack this from a somewhat different approach to see if we cannot gain a clear understanding of your meaning,' Reynolds suggested.

Let us assume that General Yamashita gave you a specific combat mission. Let us next assume that he provided you two military forces with which to execute the mission. Let us next assume that one belonged to the Army and one belonged to the Navy. You tried to accomplish your mission but failed to do so. The reason you failed is because the commander of the naval unit and his personnel refused to carry out your orders, and even withdrew when you ordered them to attack...Whom would General Yam-

ashita hold responsible for the failure to execute the invasion which he had ordered? 91

Muto answered that General Yamashita would have recognised it as the commander's (i.e. Muto's) responsibility. Reynolds then countered with an assertion that the Manila situation was a direct parallel; Lieutenant-General Yokoyama had been provided with a combined force with which to achieve his military objective, but discipline broke down and he was unable to control the naval forces of Iwabuchi. As the commanding general of the Shimbu Shudan he was surely the person responsible to General Yamashita? Muto, with difficulty replied

What I am trying to convey is the responsibility as a commander and the accomplishment of the mission. However, the commander has -- however, the responsibility of individual crimes or discipline is a different story. 92

This prompted Reynolds to ask whether Muto was now saying that the commander was responsible for the maintenance of discipline, to which Interpreter Yajima replied that he was. Nevertheless, no reply was requested from Muto. When Reynolds further tried to establish this point with Muto, the latter answered that the commander was

subject to administrative reprimand, but is not subject to criminal arrest, criminal punishment. 93

At this point no further questions were asked, and no real resolution was reached. General Reynolds appeared happy with what he must have undoubtedly taken as Lieutenant-General Muto's acquiescence or admission to the final point, but the problem remains as to whether this was what Muto intended to convey.

Here, the Prosecution argument was to the effect that Lieutenant-General Yokoyama 'permitted' or condoned Iwabuchi's actions and as such incurred criminal liability. ('Permit' is a necessarily vague notion, a broad and dangerous concept which is exceedingly difficult to defend against, as pointed out in relation to the charge mounted against General Yamashita). By implicating Yokoyama criminally, the Prosecution hoped to indict General Yamashita since the former was Yamashita's most senior subordinate officer and in charge of the largest formation, the Shimbu Shudan. If Yokoyama knew about or 'permitted' the conduct of excesses, the Prosecution hoped to allude that General Yamashita must similarly have known. The link between General Yamashita (and indeed Lieutenant-General Yokoyama) and the commission of the Manila atrocities was one of supposition only, and did not carry the legal strength that a direct and positive link would have done. No doubt the exhumation of Rear-Admiral Iwabuchi would have solved this difficulty, either for the Prosecution or the Defence, but in the interim, the Prosecution was hopeful of damaging the credibility of Yamashita's repeated denials of any fore- or after-knowledge of the commission of the atrocities in Manila.

Appleman in his book suggested that a field commander, to protect himself from the consequences of irresponsible acts (i.e. prosecution and trial as a war criminal) should undertake four functions. He should select and secure responsible junior officers and non-commissioned officers; he should issue strict orders as to the conduct to be

observed by men in the field; he should instill a discipline into his troops by training, drills, censure, punishment, reward and promotion; and keep in close contact with daily occurrences in order to determine offenders, and by creating examples, to deter others from offending. 'If a commander does all of these things, he has little cause for concern upon the question of criminal guilt,' Appleman proclaimed.⁹⁴

If we apply Appleman's criteria to the responsibility the commission alleged Lieutenant-General Yokoyama of the Shimbu Shudan held, the result is telling. Whilst Yokoyama had the responsibility (to an indeterminate degree) to secure efficient and diligent subordinate commanders for his Army formation the Shimbu Shudan, the evidence was conclusive that this power did not extend to cover the appointment of officers for the Iwabuchi Naval Detachment, which was placed in his command for tactical purposes only, as of January 6th 1945. Power over this aspect of naval organisation was not subject to transfer; Admiral Okawachi as Iwabuchi's naval superior retained this responsibility. Furthermore, the transfer of command was made during the confusion surrounding the post-Leyte American invasion of Luzon, when it would have been impractical (as well as impossible) for Yokoyama to replace Iwabuchi. To have attempted the latter would assuredly have alienated the naval troops, given the jealousy between the services, and would have been unwarranted as Yokoyama would have been no more familiar with the capacities and capabilities of any other naval officer in land combat conditions. Lieutenant-General Yokoyama, not having the authority to choose his

naval subordinates, could clearly not have undertaken the first of Appleman's criteria.

The second function, the issuance of strict orders for the conduct of the troops is similarly clear cut. Yokoyama was in receipt of orders, which were transmitted to his subordinates, that called for fair treatment of Filipinos, good behaviour on the part of the Japanese troops, and which ordered the withdrawal of troops from Manila City. It does not seem, from the evidence, that Yokoyama was at fault here.

Appleman's third duty of a commander, the instilling of discipline through training, drills, censure, punishment, reward and promotion, was inapplicable to the situation of Lieutenant-General Yokoyama's command over the Iwabuchi Detachment. It will be remembered that Yokoyama did not have power over promotion, punishment drills or training, he could only, during land combat, order the naval troops to advance or withdraw. He could arrest subordinates for misconduct, but had no power to punish them; on reporting the incident to the naval unit superior to Iwabuchi, court-martial proceedings would then have been conducted. Obviously, such functions as Appleman stipulated have a basis in non-operational circumstances but in the confusion of combat and where the power of command was divided between Army and Navy, it is unrealistic to expect that Yokoyama could fulfil such requirements.

Finally, it appears that Lieutenant-General Yokoyama maintained as close contact with the daily occurrences of all of his subordinate units as he could possibly have done

with his poor state of communication facilities and the confusion of combat. Iwabuchi, of course, was the only commander in Manila City, and Yokoyama's headquarters were at Wawa in the eastern foothills, so that Yokoyama had little choice but to accept what Iwabuchi reported since no other means of verification was currently available to him. Moreover, Yokoyama was entitled to expect that he could trust Iwabuchi given the latter's rank and responsibilities; the command of 16,000 naval troops would not normally be given to men of no leadership qualities. Of course, given the traditional rivalry between the Army and Navy it is plausible that Lieutenant-General Yokoyama was unfamiliar with the extent of Iwabuchi's naval mission in Manila, since he would not have been receiving progress reports of the same, and his response to the situation may well have been determined by this factor. Nevertheless, irrespective of this, Yokoyama would have had to have been personally present on Manila to make examples out of wrongdoers, to discourage the repetition of offences, but his headquarters was located in the midst of his main force (Army troops) in the eastern hills, the area to which Iwabuchi was expected (and ordered) to withdraw.

Lieutenant-General Yokoyama then, could not fulfil the criteria outlined by Appleman to designate an efficient (and therefore blame-free) commander, but such inability was not the product of his own negligence and inaction as much as a grave and fundamental weakness or flaw in the Japanese military command system and in the services

themselves. *

Noting Yokoyama's failure to meet the demands of the criteria, the question then is, was he guilty, was he to blame for the atrocities that allegedly occurred in Manila in February 1945? The Filipino answer was a resounding 'yes'. After a prolonged trial, Yokoyama was sentenced to death for war crimes.

An appraisal of his guilt following the Japanese system of military responsibility would have noted the extenuating circumstances on which Lieutenant-General Yokoyama exercised his command, and the peculiarities of the powers of command that he possessed over Iwabuchi and his Manila Naval Defence Unit. As General Yamashita told the commission,

(1) If the commanding officer ordered his subordinate, permitted or condoned the crime which was committed, then that commanding officer (would) also receive criminal punishment.

(2) If in spite of the fact that the commanding officer took all possible means to prevent the crime of his subordinates beforehand, in event of a crime committed by a subordinate at a time and place unknown to the commanding officer, then that commanding officer bears administrative responsibility to his superior officer only. 95

The evidence before the commission did not include proof of Lieutenant-General Yokoyama's ordering of the Manila atrocities. (What the Prosecution attempted was a suggestion that he 'permitted' or 'condoned' the actions of the Iwabuchi unit, since he took no action against the perpetrators or Iwabuchi for 'wilful disobedience' of his withdrawal orders. The difficulties of the Anglo-Saxon understanding here will be reserved for later discussion). On

* The mentality that permitted only such limited cooperation between services, contrary to expressed goals of combat, can be considered nothing less than futile and disastrous from any point of view.

the contrary, evidence was tendered which substantiated the view that Yokoyama had discharged the duties expected of him. When Iwabuchi's unit had been transferred to him, Yokoyama had apprised him of General Yamashita's orders and intentions regarding the withdrawal from Manila, and the behaviour standards expected.

However, at this point other factors intrude into the picture. Rear-Admiral Iwabuchi and the Manila Naval Defence Force had been placed under the command of Yokoyama's Shimbu Shudan for the purposes of land combat only. Lieutenant-General Yokoyama's Army mission was to conduct a delaying operation in the hills east of Manila, and this is where his subordinate Army units had been positioned. Yokoyama had located his headquarters at Wawa. Hence, for the Shimbu Shudan to utilise the Manila Naval Defence Force for land operations pursuant to General Yamashita's withdrawal order from Manila, the mission bestowed upon the Shimbu Shudan, and his tactical and strategic considerations, it was essential for Iwabuchi to withdraw to the mountains near Wawa. Withdrawal to the mountains was to have been effected after Iwabuchi's men had completed their naval task, the destruction of the docks, harbour and naval facilities in Manila, assigned to the unit by Admiral Okawachi prior to the transfer of command. Lieutenant-General Yokoyama probably adopted the view that since Iwabuchi did not withdraw, his naval mission had not been completed. Logically therefore, Iwabuchi could not have been engaged in land operations under Yokoyama's tactical command. Instead, the operative chain of command would

have been that of the navy, culminating with Admiral Okawachi and not General Yamashita, given that there were only naval duties remaining at that time in the City of Manila.

Criminal responsibility would most likely attach to Rear-Admiral Iwabuchi under this theory, but only administrative responsibility to Yokoyama.

An alternative view with the assumption that Iwabuchi was engaged in land operations in Manila, but that this was in contravention of the orders of Lieutenant-General Yokoyama and General Yamashita that should have governed his behaviour, leads to the conclusion that Iwabuchi was similarly at fault. Wilful disobedience of a subordinate in a situation where the command was limited to the tactical aspect necessitated in the Japanese approach, a report being lodged with the superordinate naval authority, in this case Admiral Okawachi, with his headquarters at Baguio. Upon the receipt of such a report, it would have been the latter's responsibility to initiate court-martial proceedings. Lieutenant-General Yokoyama did have the power of arrest (but not of punishment) but given the combat situation and the size of the naval unit, amongst other factors, it seems highly problematic to require him to have arrested either Iwabuchi or the majority of his unit for the commission of excesses. * The fact remains that Yokoyama was powerless in any real sense of the word to enforce discipline; there was no means available to him by which he could immediately enforce his commands, and the

* Especially since it would have required sending of Kempei Tai from Wawa to Manila in combat conditions to arrest any number of naval personnel up to 16,000 men.

route to Okawachi at Baguio would be described as tortuous at best.

Rear-Admiral Iwabuchi would thus have attracted criminal responsibility but Lieutenant-General Yokoyama did all that could possibly be expected of him in the circumstances and so he would be administratively responsible to General Yamashita in this thesis.

Whilst either of these patterns of thought may have conditioned the response of Lieutenant-General Yokoyama, the significant point about both is that the system of responsibility operative in the armed forces of his own nation, the Imperial Japanese Army, and the only valid standard by which he should have been judged, would have absolved Yokoyama of criminal responsibility and held that the previous naval order and the combat situation were extenuating circumstances.

Hence, the criminal implication of Yokoyama with the excesses committed by Iwabuchi's troops in the City of Manila, as advanced by the Prosecution, was at best speculation. This rendered the Prosecution attempt at connecting Yamashita with Yokoyama's alleged responsibility and involvement as even greater conjecture and lacking any legal substance, when viewed according to the standards of the Japanese operative in the circumstances. It is argued therefore, that the overriding necessity for the conviction of General Yamashita and its critical dependence on the criminal implication of Lieutenant-General Yokoyama led the commission to adopt a stance on

the standards of guilt that were to be applied to the former that denied the validity of the Japanese approach, and so effectively reduced the probative value of much of the evidence introduced on behalf of the Defence. This was particularly noticeable in respect to evidence on Japanese standards of military responsibility and command functions, and in the character references that prominent Japanese made before the commission on behalf of General Yamashita. The fact that many of the affiants may have been about to stand trial themselves as war criminals would not have augmented their credibility.

Despite the commission's reserve in according significant probative value to the commentaries on his character, the affidavits tendered attested to the respect with which General Yamashita was regarded by his contemporaries. A man of high ideals, great integrity and personal dignity emerged from the judgments of his fellow Japanese, a man who was a strict disciplinarian and who valued the time-honoured principles - truth, righteousness - and customs of his society.

Lieutenant-General Amakasu Shigetaru of the Japanese Army Reserves, a close friend of Yamashita's for forty years, stated under oath that

General Yamashita believed very greatly in righteousness. As a leader of troops, he was well disciplined. If the manner of the troops was not good, he would deal with them sternly and if their behaviours were good, he would praise them. His righteousness in dealing out discipline to the men is well known. While his disciplines are stern, he is very kind. And furthermore, he is a humanitarian.

Adding a peculiarly Japanese conclusion to his comments, Amakasu said that

At first glance, his body is very big, and although it does not seem as if he could probe into small points, he does so rather well. And in treating his subordinates, he is very kind. 96

General Yamawaki Masataka, whose affidavit was read before the commission, had been friends with General Yamashita since their youth in the late 1890s. His comments pointed to the interplay between Yamashita's personal qualities and his success as a field general. An upright, honest and sedate citizen, Yamashita was known to have aided his family financially during his earlier years as a poor, young officer, Yamawaki stated. He also had the ability to make and retain his friends for many years.

His kindly and human disposition has endeared him to all who have served with him and particularly, to those who have served under him. He is known as a strict disciplinarian, requiring a high degree of conduct and performance from his subordinates but at the same time is an officer who has never mis-used privileges attending his high rank and position. Always he was known to make absolutely certain when any mistake had been made that upon reflection, he would determine whether he himself might have been at fault instead of the subordinate before taking action against that subordinate, but then taking action swiftly, and surely. 97

As a strategist and tactician his reputation was well established, Yamawaki noted. Having read the charges laid against General Yamashita, Yamawaki averred that the general would not have ordered or permitted the commission of the atrocities if he had known of them and had been in a position to prevent them.

Knowing his personal character and his upright and honest nature I am sure for that reason if for no other, that he would always require a high degree of personal conduct from those serving under him. 98

This opinion was shared by Colonel Hosoda Hiromu, who had served with Yamashita in Singapore. He related to the commission an incident that occurred during his tour of duty there to illustrate his point that General Yamashita administered a strict but fair discipline and demanded high standards of his subordinates. The incident to which Hosoda referred was one in which a non-commissioned officer was charged with the assault of a native woman; this was not rape but a case where the soldier had shot her at night without first determining who she was. The non-commissioned officer was court-martialled and sentenced to two years confinement, and his immediately superior officer severely reprimanded, according to Hosoda. The details of the incident were promulgated throughout all of General Yamashita's subordinate units as a deterrent to others, so that such wrongdoings could be prevented. The responsibility of officers in the Japanese Army for the actions of their subordinates was a moral rather than a legal responsibility, Hosoda pointed out. After the officer had done all he could to prevent such occurrences, he would not be punished. 99

It could not be denied that General Yamashita was a man of no mean calibre, Colonel Clarke told the commission. In his Opening Statement, he recounted how Yamashita had arrived in the Philippines with a mission to secure its defence only nine days before the American landing on

Leyte, how from the time of his arrival in the theatre he found himself in a state of siege and lacking adequate quantities of all basic commodities (including troops), but despite this, he had faced up to his task with courage and the determination to perform his duties to the best of his ability.

As a result of the combat situation it was a picture, Clarke said,

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,

he told the members of the commission. Attempting, to cement and emphasise this point, Clarke went on,

The picture will be quite different from that of a well-staffed commander who had his time to make frequent inspections and who could afford to go behind the reports of the officers upon whom he must and should rely. 100

The circumstances surrounding the exercise of General Yamashita's command were critical for an understanding of the events that later happened and for which General Yamashita was now standing trial for his life, Colonel Clarke stressed. The core thesis of the Defence, elaborated through the witnesses, was composed of three contentions:

- (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. 101

The so-called-Palawan Incident, in which it was alleged that prisoners of war were illegally employed in air field work in hazardous conditions contrary to the provisions of the Geneva Convention, was cited as an example of the latter contention. The prisoners of war had been under the control of the Air Army, a quite separate command from that of General Yamashita at that particular time.

Clarke then briefly mentioned the Manila case. The naval troops, even on paper, he asserted, only came under Yamashita's nominal command; they 'were obviously not under his control when they disregarded an Army order to evacuate because of a previous Navy order to stay and complete a Navy Mission.' ¹⁰² This situation, was one that was repeated with many of the items of the Bills of Particulars, Clarke said. Moreover, since the Accused had no actual control over the perpetrators of the offences, he could not (and did not) order the commission of atrocities, or give permission for their undertaking, and neither did he know of their perpetration, or could he be expected to know. General Yamashita, summarised Clarke, performed the duties associated with his command under 'indescribably difficult' conditions to the best of his ability.

One is led to postulate on the patterns of thought that led Colonel Clarke and his Defence colleagues to interpret the word 'permit' as used in the charge against General Yamashita, as pertaining only to the express act of giving verbal or written permission to the performance of an act. However, the meaning of the word was by no means as narrowly interpreted by the Prosecution; they were

therefore able to exploit its breadth of definition so as to shift the burden of proof from themselves and onto General Yamashita, in such a way that the mounting of an affirmative and satisfactory defence was rendered almost impossible.

'Permit', as defined by the Oxford English Dictionary covers the following states:-

- (1) To admit or allow the doing or occurrence of; to give leave or opportunity for.
- (2) To allow, give leave to (a person or thing) to do (or undergo) something.
- (3) To allow oneself to indulge in or commit, not to refrain from. 103

Similarly, Black's Legal Dictionary defines 'permit' as being

to suffer, allow, consent, let; to give leave or licence; to acquiesce, by failure to prevent, or to expressly to assent or agree to the doing of an act. 104

Hence, the word 'permit' represents not a single idea but a range of notions from the express agreement (i.e., a positive action), to acquiescence through the failure to prevent, an action of omission. Had there been written proof of General Yamashita's warranting of atrocities, or testimony of witnesses indicative of his verbal assent then the case at least would have been clear cut, but the failure to unearth evidence of this nature could not be said to prove their non-existence, but instead shifted the level of connection between Yamashita and the crimes towards that amorphous and dangerous concept of omission. Whereas the Prosecution would have to prove that any order they introduced as evidence was in fact ordered by General

Yamashita (supposing that there was such an order), the non-existence of the order positively linking commanding general and crime meant that the burden of proving that the two were not connected rested upon the Defence and was far more difficult to establish.

On this point it is hard not to agree with Appleman's dictum:

The manner in which this case was tried by Defence counsel is of considerable interest, and perhaps some of the responsibility for the result should be shared by them, if the result is criticized as being erroneous. 105

It is clear that the Defence attorneys failed to appreciate the possibilities and scope of the charge that had been mounted against General Yamashita, but then, given the novelty of the charge, this is not surprising. On the other hand, they did play a dangerous gamble in taking the approach that the Prosecution had established no case, but their reasons for so acting were sound; they assumed, perhaps naively, that the case would be determined by recourse to substantive law, and that (quite correctly) substantive law did not sanction the prosecution of a commander upon the charge as drawn up and in the circumstances of combat. It was this consideration, their trust in the fair play and justice of the law, that led them to conduct the defence in the manner they did. But again, would any other defence strategy have been more successful?

The Defence motion to dismiss the case was enthusiastically and emphatically rebutted by the Prosecution. The Chief Prosecutor, Major Kerr, took relish in pointing out

that the context in which many of the atrocities had been committed was quite different from a situation in which single soldiers committed excesses whilst on leave.

But when that same man or others with him embarked upon military operations under the command and control of commissioned officers, engaged with the enemy, commits the same acts as a military unit, commits those same violations of law, the laws of humanity, the laws of war, then that definitely is the responsibility of the overall commander because he is using those troops for a military operation in accordance with his duty and he is responsible for what those people do in carrying out his mission. 106

The Prosecution insistence was therefore, that General Yamashita had 'permitted' the perpetration of atrocities, committed on a widespread scale in the Philippines during his command, since it was his responsibility to prevent such occurrences. The testimony was clear that he was in command of the Army troops, Major Kerr asserted, and that Yamashita also commanded the naval ground forces in Manila at the time the excesses were committed.

And the fact remains that there never was a Naval operation in Manila Bay. That naval attack or attack from the Bay by the American forces never materialised. There were no Naval operations in Manila. Instead those Naval troops found themselves defending against an American attack from the land. Therefore, they engaged themselves in land operations and in doing so they were under the command of Yamashita. 107

Major Kerr went on that the record also 'strongly' supported the conclusion that General Yamashita not only permitted the atrocities but ordered their commission; but the Prosecution case was not dependent on the issuance of direct orders, he said. There could be absolutely no doubts firstly, that the atrocities had been committed, and secondly, that it was General Yamashita who was responsible for having permitted

them, Kerr claimed. The Defence discussion on guerillas, for example, was only introduced in an effort to drag red herrings across the path of the commission, he alleged, and counsel had tried to erase the effectiveness of the evidence by impugning the motives and characters of the witnesses. Despite this slur, the testimony of Iapus and Galang (branded by the Defence as collaborators) remained uncontroverted. In a final tour d'force, Major Kerr asked the commission what more convincing proof there could be of the commission of the atrocities than the scars of the victims.

...the Prosecution feels sure that the commission, recalling the witnesses before it; recalling their direct, sworn testimony to the commission; recalling the horrible scars, mutilations which they themselves exhibited to the commission and to which they testified in all candor, frankness and honesty they suffered at the hands of the Japanese soldiers...we feel sure in evaluating that testimony could not reach the conclusion that the charge at present is not supported. 108

Kerr's confidence in the judgment of the commission was evident; not only was he in possession of evidence of more emotional sway, the prejudicial testimony of the victims revealing their wounds, but it was exceedingly unlikely that the commission would entertain any threat to its jurisdiction with favour. These considerations automatically operated to reduce the effectiveness of any argument the Defence could mount to substantiate its motion.

Colonel Clarke based his argument on a very brief summary of the Prosecution's failure to directly link General Yamashita with the crimes which he allegedly permitted, thereby unlawfully disregarding and failing to discharge his duties as commander. It was the Defence

assertion, also, that no evidence had been presented by the Prosecution to establish the avowed dereliction on the part of General Yamashita; in fact, the only evidence adduced by the Prosecution remotely connecting the Accused and the crimes was that of the self-confessed collaborators, Lopus and Galang. Clarke was severe and thorough in his attack. Lopus and Galang were trying to earn protection for themselves by testifying against General Yamashita, he urged,

presenting as their testimony hearsay statements of persons who are dead and cannot contradict the statements made by these witnesses. 109

Whilst other witnesses could not contradict their testimonial statements, Clarke encouraged the commission to recall Lopus' contradictions of his direct testimony under cross-examination. Not only was Lopus' testimony hearsay (and from a dead source) but it was 'unworthy of belief'. Other attempts at linking Yamashita and the crimes were of a similarly untrustworthy nature, Clarke concluded, and hence there was no evidence of any legal substance that could be invoked to support such a charge as had been laid against General Yamashita. Clarke thereby moved that the commission render a finding of not guilty as to the charge and specifications. Quite predictably, this was rejected, and the trial continued.

FOOTNOTES

- 1 Proceedings, p. 3656.
- 2 Proceedings, p. 3656.
- 3 Proceedings, p. 3655.
- 4 Proceedings, p. 3654.
- 5 Ibid.
- 6 Ibid.
- 7 Ibid.
- 8 Proceedings, p. 3650.
- 9 Ibid.
- 10 Proceedings, p. 3652.
- 11 Proceedings, p. 3653.
- 12 Proceedings, p. 3674.
- 13 Proceedings, p. 3652.
- 14 Proceedings, p. 3660.
- 15 Proceedings, p. 3640.
- 16 Proceedings, pp. 3583-4.
- 17 Ibid.
- 18 Proceedings, p. 3597.
- 19 Proceedings, p. 3598.
- 20 Proceedings, p. 3643.
- 21 Proceedings, p. 3644.
- 22 Proceedings, p. 3588.
- 23 Proceedings, p. 3598.
- 24 Proceedings, pp. 3585-7, 3606-08, 3543.
- 25 Proceedings, pp. 3832-3, 3626-7.
- 26 Proceedings, pp. 3626-7.
- 27 Proceedings, p. 3834.
- 28 Proceedings, p. 3664. See map in Appendix.

FOOTNOTES

- 29 Proceedings, p. 3664.
- 30 Proceedings, pp. 3526-7.
- 31 Proceedings, p. 3527.
- 32 Proceedings, p. 3527.
- 33 Proceedings, p. 3520.
- 34 Reel, Case of General Yamashita, p.19.
- 35 Proceedings, p. 3522.
- 36 Proceedings, p. 3523.
- 37 Proceedings, p. 3524.
- 38 Proceedings, p. 3524.
- 39 Proceedings, p. 3521.
- 40 Proceedings, p. 3521.
- 41 Proceedings, p. 3521 and 3525.
- 42 Ibid.
- 43 Proceedings, p. 3588.
- 44 Proceedings, p. 3525.
- 45 Proceedings, p. 3526.
- 46 Proceedings, p. 3526.
- 47 Proceedings, pp. 3527-8.
- 48 Proceedings, p. 3528.
- 49 Proceedings, p. 3528.
- 50 Proceedings, p. 3529.
- 51 Proceedings, p. 3524. See map in Appendix.
- 52 Proceedings, p. 3533.
- 53 Proceedings, p. 3534 and 3536.
- 54 Proceedings, pp. 3534-35.
- 55 Proceedings, p. 3535.
- 56 Proceedings, p. 3550.

57. Proceedings, p. 3551.
58. Proceedings, p. 3537.
59. Proceedings, p. 3538.
60. Proceedings, pp. 3539-40.
61. Proceedings, p. 3558.
62. The term 'internment camps' is here used in a broader sense and covers prisoner of war camps also.
63. According to Kira's estimation he was responsible in January 1945 for feeding some 250,000 men, including 10,000 people interned in camps under the control of the Shobu Headquarters.

The Defence used these figures to argue that the Japanese in Luzon did not apply a discriminatory food policy; what they would have saved in not feeding the camp inmates would have been a drop in the bucket with such a small percentage of internees.

64. Proceedings, p. 3195 and 3192.
65. Proceedings, p. 3585 and 3543. The change in the order earned General Yamashita a stern reprimand from Field Marshal Count Terauchi, the Supreme Southern Commander.
66. Proceedings, pp. 3252-3. The chain of command with regards to POW responsibility were

General Yamashita Tomoyuki
 Commanding General _____ responsible to Tokyo
 14th Area Army

|

Lieutenant-General Muto Akira
 Chief of Staff
 14th Area Army

|

Lieutenant-Colonel Ishikawa Kikuo
 Member of staff in charge POW Affairs
 14th Area Army

|

Lieutenant-General Koh Shiyoko
 Commanding Officer
 Line of Communications Unit (Hei Tan)

|

Individual Camp Commander

67. In addition, Allied intelligence in the Terrain Study on Central Luzon (Allied Geographical Section, South West Pacific Area, Terrain Study No. 94, Central Luzon - volume 1: Philippine Series, Texts and Maps,

Restricted Security Classification, 18 October 1944) was well-informed as to the food supply situation in the Philippines. According to the Manual, Filipinos subsisted mainly on fish, rice and vegetables, and as local production of fish and rice were not sufficient, large quantities were normally imported. 303,182 tonnes of food were imported annually into the Philippines, largely for consumption in the Manila area. In 1939 the main imports listed by the manual were:

(tonnes)	wheat flour	102,025	vegetables	38,594
	rice	83,632	canned fish	14,366
	dairy prod.	24,950		

The manual also noted that carabaos, the major Filipino meat source, had declined in numbers and their slaughter was the subject of a Japanese prohibition. Native pigs were not suitable for meat and imported cattle could not survive on native foliage, thus leaving small native chickens as a source of meat. This contraction in the available range of locally produced food and in the quantities procurable was exacerbated by the halting of off-shore fishing due to fuel shortages. What needs to be strongly emphasized about the figures presented above is that they are pre-war statistics. This means in essence, that the tonnage imported in 1939 was intended to supply a Filipino and European peace-time population only, that food imports logically should have risen significantly after the commencement of the Japanese occupation with the influx of the occupation troops peaking to an extra 300,000 adult mouths to feed near the end of the war, and with the contraction of local sources of supply. Whilst shipping figures are not available for the period of occupation, the commission heard testimony showing that American blockading tactics became increasingly effective with the decline of Japanese air power (and consequent rise of American air attacks) from September 1944, so that only two rice-bearing ships docked at Manila in the last quarter of that year. No shipments of other foodstuffs were revealed in the testimony; thus in Luzon the situation was one of a severe reduction in the supply of the basic food staple rice, with commensurate and compensatory rise in no other staples, and this was coupled with a contraction in local meat and fish supplies, in turn fostering greater dependence on imports. Hence, the shortfall in food supplies even at the pre-war population level, would have been anything but insignificant. For these reasons then, whilst there was undoubtedly a severe food shortage in the Philippines, it seems inconceivable that General Yamashita could be held solely accountable for this, and the possible ramifications it had in individual camps, when his orders were explicit and his immediate subordinates did not detect any behavioural misdemeanours contrary to his instructions.

68 Muto said that he was surprised on his arrival in the Philippines to learn of the existence of guerillas,

especially between Manila-Ft. McKinley and around the headquarters at Ft. McKinley as in his previous posting in Sumatra it was quite safe for Japanese officers to travel alone.

- 69 Proceedings, p. 3001.
- 70 Proceedings, p. 3004.
- 71 Proceedings, p. 3005.
- 72 Proceedings, p. 3006.
- 73 Ibid.
- 74 Proceedings, p. 3007.
- 75 Proceedings, p. 3013.
- 76 Ibid. Supplies from Manila City were being removed to the defensive positions in the hills surrounding the City - to Antipolo (east) San Jose (north) and Rosario (northwest).
- 77 The Allied intelligence Terrain Study of Central Luzon, (op.cit.), in its section on Manila transport particularly, noted the damage to roads and railways occasioned by the bombings and guerilla activity, and the inability or inactivity of the Japanese in effecting repairs. The impairment of transportation facilities was further hampered by the shortages of fuel, the study said.
- 78 Proceedings, p. 3014.
- 79 Written orders were given, were issued, at the end of December, and the staff officers...Colonel Kobayashi and Major Ishikawa, who were in charge of the withdrawal, were dispatched to the Shimbu group...They were transferred to the Shimbu group command to act as staff officers there, thoroughly familiar with all the desires and plans of General Yamashita. (Proceedings, pp. 3015-6.)
- 80 Proceedings, p. 3017.
- 81 Proceedings, p. 3018.
- 82 Proceedings, p. 3019.
- 83 Proceedings, p. 3049.
- 84 Proceedings, p. 3050.
- 85 Ibid.
- 86 See map in Appendix.
- 87 Proceedings, p. 3419.

- 88 Proceedings, pp. 3421-2.
- 89 Proceedings, p. 3424.
- 90 Proceedings, p. 3428.
- 91 Proceedings, pp. 3428-9.
- 92 Proceedings, p. 3429.
- 93 Proceedings, p. 3429.
- 94 Appleman, p. 304, Military Tribunals and International Crimes (Indianapolis 1954).
- 95 Proceedings, p. 3674.
- 96 Proceedings, pp. 468-9.
- 97 Defence Exhibit BB 3473.
- 98 Ibid.
- 99 Proceedings, pp. 3501-8.
- 100 Proceedings, p. 2961.
- 101 Proceedings, p. 2960.
- 102 Proceedings, p. 2960.
- 103 Oxford English Dictionary, Oxford, 1933, vol. VII, p.711.
- 104 Black's Legal Dictionary, Rev. 4th Ed., 1968, p. 1298.
- 105 Appleman, op.cit., p. 342.
- 106 Proceedings, p. 2953.
- 107 Proceedings, p. 2952.
- 108 Proceedings, p. 2949.
- 109 Proceedings, p. 2946. The Defence, in its case, presented exhibits, identified as the official files of Lapus and Galang held by the American Counter-Intelligence Corps (and taken over by the office of the Philippine Special Prosecutor). These files contained materials illustrating the motives of these men. For example, the documents of exhibit 'E' were letters addressed to 'the Chief' of the Counter-Intelligence Corps of the United States Army in Manila from Narcisso Lapus in Bilibid Gaol. He requested that an operative be sent to meet him to discuss his offer to provide information in return for the 'favourable consideration' of his case and other concessions, which included financial support for himself and his family, and relocation in another country after the completion of his services. (Proceedings, pp. 2972-4).

CHAPTER 4

THE PROSECUTION CASE

The threads of the Prosecution argument against the innocence of General Yamashita coalesced around, and were dependant upon the recognition and acceptance of certain assumptions regarding the command powers exercised by General Yamashita, and the functioning of the command system within the Japanese armed forces. As has been previously stated, it was the Prosecution viewpoint that as commander of the Japanese Army in the Philippines, General Yamashita Tomoyuki also had command over, for the duration of his office, the naval and air force personnel, prisoner of war and civilian internees management, the Kempei Tai, and labour camps. His power over such units, furthermore, was unequivocal. The inference was also made that the transmission of orders, directions and reports were passed efficiently through the pipeline, and hence, that Yamashita as commander in chief, had effective communication with all subordinate units. The Prosecution approach to the case consequently revealed their belief that the functioning chain of command in the Japanese armed forces paralleled that operative in the forces of the United States, and by implication, that the working of a nation's armies could be objectively evaluated by the standards prevailing within another country's forces. This stance further implicitly assumed that such standards were both objective and external, and so could be applied to all armed forces.

From these premises, the Prosecution chose to argue that General Yamashita had failed in his obligation to maintain

discipline and order amongst his troops. General Yamashita was to be tried for dereliction of duty; his insufficient attention to the duties involved in his command led directly to the commission of atrocities against innocent civilian Filipinos, perpetrated by Japanese troops under his command. It was not the gravamen of the charge that General Yamashita had ordered the commission of these crimes against humanity, despite the introduction of innuendoes suggestive of this. Rather, that General Yamashita had knowledge (or the means to acquire it) of the misconduct occurring under his command - the crimes were so widespread that he should have known - and that he had both the power of command and the duty to take action to halt and prevent the recurrence of such behaviour. The assertion was made therefore, that General Yamashita failed to take any appropriate action and as such he became criminally liable for his dereliction of duty.

Evidence was presented to support the contention that all of the atrocities outlined in the Bill of Particulars were committed against innocent non-combatant civilians. Crimes were committed against churchmen and church property. This was contrary to the spirit of the Laws of Warfare. Defence suggestions of provocation by the church through its association with guerilla activities were dismissed. It was the Prosecution intention to subsume all of the anti-guerilla policies of the Japanese into the category of atrocities against ordinary and innocent people and thereby deny the importance of discussing them from the standpoint of the guerilla problem. This meant that such activities were therefore contrary to the Laws of Warfare, whereas anti-

guerilla operations were considered to be a part of combat and not criminal actions in the terms of the law.

The thrust of the evidence presented by Prosecution witnesses with regard to the administration of prisoner of war and civilian internment camps was to highlight the dietary deficiencies experienced by the inmates, and to infer that the Japanese soldiers were given food of better quality and greater quantity. This was supposedly the policy of General Yamashita. Furthermore, Red Cross parcels allegedly were 'rifled' for cigarettes, and Japanese military equipment was kept within camp confines. Such behaviour on the part of the Japanese Army under Yamashita contradicted her assurances to the world that she would apply mutatis mutandis the provisions entailed in the 1929 Geneva Convention on Prisoners of War.

In seeking to present its case, the Prosecution relied heavily on much evidence that would normally have been prohibited. The rules governing the admission of evidence upon which the Tribunal operated enabled it to admit virtually anything which it determined to have probative value. The practise of this ruling was far from impartial and led to many disputes, which the commission considered to be, with its lack of legal expertise, an obstruction by the Defence of the Tribunal's overriding goal - the achievement of expeditious procedure. Many instances may be found in the trial record of infringements of the basic rights due to an Accused and much evidence was tendered by the Prosecution solely for the prejudicial effect it created in the courtroom. These disputes over evidence bore directly upon the whole trial.

Through the exploitation of rules of evidence in which minimal safeguards for the protection of truth were not mandatory, the Prosecution was able to shift the onus of proof from themselves onto General Yamashita; he was guilty until proven innocent.

(a) Chain of Command

An evaluation of the structure and functioning of the command system in the Japanese armed forces in the combat situation was the most critical issue to be debated in the trial of General Yamashita Tomoyuki. It was also that issue in which the conflicting attitudes and assumptions of the Defence, on the one hand, and the Prosecution and the Tribunal on the other, were most clearly portrayed.

For the Prosecution, discussion of the command system was the key with which they sought to coordinate and integrate the threads of their arguments in the other facets of the case, and to link them with their pre-eminent concern, the negligence of General Yamashita in the pursuit of his duties as Commander of the Imperial Japanese Army in the Philippines, his responsibility for the atrocities allegedly committed as a direct result of his default, and his duty to have prevented such occurrences.

As commander, General Yamashita Tomoyuki had unequivocal authority over all subordinate units, in all operations, according to the Chief Prosecutor. It was the Prosecution viewpoint too, that the atrocities committed by Japanese troops in the Philippines were so widespread, both in time and location, and of such a serious nature that General Yamashita must have known of their commission unless 'he took affirm-

ative action not to know.' ¹

Hence, it was obvious that the Prosecution assumed that the functioning of the chain of command in the Japanese armed forces paralleled that operative in the army and navy of the United States. Furthermore, they also upheld the belief that the transmission of commands was passed efficiently through the pipeline, and that General Yamashita as Commander-in-Chief had effective communication with all units within his command.

Yet, with the trial of a Japanese commander for his charged dereliction of duty, the only valid definition of Army and Navy duties and responsibilities would have been that provided by the Japanese, irrespective of the prosecuting nation. But the Prosecution and the members of the commission showed great disinterest in ascertaining the validity of the former's perception of the Japanese command system as it operated under Yamashita during the Luzon campaign of 1945. Not only was the commission prepared to try General Yamashita according to what they, as Americans, thought should have been the command framework, they appeared even anxious to do so. This issue, of course, was further complicated (and obscured) by the variance between the theoretical Japanese command structure, as it existed in the regulations governing the armed forces, and the operational command, which the Defence insisted was the chain upon which the inquiry should concentrate.

The testimony concerning the chain of command question involved two aspects; the responsibility for prisoner of war and civilian internee affairs, and the responsibility for the

commission of atrocities, particularly in Manila. Discussion upon the first point was brief; Lieutenant-General Yokoyama, one of the main Prosecution witnesses in this phase of the case, explained to the commission that General Yamashita only assumed command over the group of officers in charge of prison camp administration with the transfer of Field Marshal Count Terauchi's headquarters to Saigon on November 17, 1944. Until this time, the responsibility for such affairs had been Terauchi's.²

Simplicity, clarity and brevity did not characterise the court debate surrounding the question of command responsibility for the commission of atrocities, however. This was particularly evident in discussions focussing on the so-called 'Rape of Manila', in which most of the atrocities were committed by navy land-based personnel, or marines in the American parlance.

Basically, the problem that concerned the Tribunal was that, pursuant to an agreement reached in the Imperial Headquarters, Tokyo, between the Army and Navy General Staffs, the naval ground forces or marines were to be transferred to the command of the Army for utilisation in necessary land operations. Such an occasion had arisen after the Japanese defeat at Leyte, whereby the marines of the 31st Special Naval Base Force (Manila) were transferred to the command of the Army for the purposes of land combat. The difficulties arose when attempts were made to clarify the orders issued to and received by the marines in this connection, and the type of command that the Army could be expected to have, and actually did exercise over such units.

The resolution of this issue was imperative; the fate of a man hinged on its outcome. For General Yamashita and his defence counsel, the issue was of grave significance from the standpoint of tracing the correct and operative command channel and of thereby establishing whether he had actual disciplinary as well as administrative responsibility for the actions of the marines. From the position of the Tribunal though, it seemed that this was an area of the proceedings studded with mines, and their repeated explosions in the courtroom shattered the commission's hopes of achieving its overriding goal - the desire for expeditious procedure - and led them to see the legal arguments being presented before them as pettifogging distractions. Consequently, the evidential and procedural arguments that characterised other parts of the trial, also had a significant part here.

It was due to the deterioration in battle conditions, namely the Japanese defeat at Leyte and the subsequent American landing at Lingayen, Vice-Admiral Okawachi, commander of the South West Area Fleet, told the commission, that led him to estimate that combat would soon occur in and around Manila. In view of this, Okawachi felt it imperative to transfer the command of the 31st Special Naval Base Force, under the command of Rear Admiral Iwabuchi Sanji, and stationed in Manila, to the command of the Army for the purposes of land combat. The authorisation for such a transfer was based on a directive of the Imperial General Headquarters.

Okawachi claimed to have been motivated by two factors. Firstly, the Japanese Army on Luzon was clearly in need of as much manpower as it could obtain, in its desperate struggle

to repel the Americans, and little remained of the Japanese Navy after Leyte, so that the troops could best be utilised in land combat. Vice-Admiral Okawachi was also of the opinion that the transfer of command was vital to an avoidance of combat within the densely-populated Manila area, a goal he shared with General Yamashita.

Naval operational plans for Manila did not entail the defence of the City. Instead, it had been Okawachi's intention to deny the use of the harbour and its facilities to the enemy; hence, the destruction of piers, docks and other harbour facilities were envisaged. The bulk of the naval troops were to be withdrawn to the mountains so that street fighting would not occur. In attempting to implement the evacuation plan, Okawachi found that repeated enemy bombings had impaired the functioning of the transportation means, seriously curtailing the rate of evacuation, so that upon the transfer of command there was still a large number of naval troops within the City of Manila.

Immediately prior to the transfer of command, Okawachi instructed Iwabuchi to destroy the docks and to scuttle any craft still afloat. He was told of the change of command but was not informed of his superior officer in the Army chain of command.

In order to effect the transfer, Okawachi notified the headquarters of General Yamashita; receipt of the notification was acknowledged. Lieutenant-General Yokayama of the Shimbu Shudan, as the Army officer responsible for the Manila zone, was similarly notified by Okawachi, the transfer becoming effective from zero hours, 6 January, 1945. His duties

completed, Okawachi withdrew his headquarters from Manila to Baguio, ostensibly in an effort to achieve closer coordination between the Army and Navy.

Okawachi stressed that the transfer of command involved only land-based naval troops, no sea-faring personnel were involved. After 6 January, he was no longer vested with any power over the marines in any matter to do with operations. This was now the responsibility of General Yamashita and the subordinate commanders through whom he conducted operations.

Following Yamashita's acceptance of the transfer of the 31st Special Naval Base Force to his command, an order was sent from his Shobu headquarters to the Shimbu Shudan commanders, reaching Yokoyama according to his recollection, on 10 January 1945. This instructed him, he told the commission, that for the purposes of land combat, land-based naval troops were now under the command of Army divisional commanders.³ Because of certain 'anticipated inconveniences' Yokoyama did not physically assume command of the unit with receipt of that order, but instead issued a preparatory 'order' to Iwabuchi on 19 January, 1945. It directed the unit to halt the impending American advance towards Manila, in their prepared defensive positions, twenty kilometers north of the city, and three or four kilometers to the south. Yokoyama continued,

...Making a stand against the United States forces on those two islands, it was my desire to withdraw all other troops in the City of Manila to the hills. However, with respect to those naval forces who were along the shoreline, who were placed there for purely naval duties, my orders did not include them. 4

General Yamashita was immediately notified of the issuance of the order.

The administrative framework that existed within the Japanese Army and Navy in Luzon during the early part of 1945 was clearly described in the testimony before the commission. Expecting land combat resulting from the continual thrust of the American ground forces from Lingayen towards Manila, the naval land troops of the 31st Special Naval Base Force were transferred solely for the purposes of such land combat, to the command of the Army. This was to have taken effect upon the completion of their naval tasks, the destruction of the harbour facilities of Manila. Hence, Iwabuchi was placed under General Yamashita's command, exercised through Lieutenant-General Yokoyama, the commander of the Shimbu Shudan. All operational command powers over that unit were relinquished by Admiral Okawachi at this time. Pursuant to the transfer, General Yokoyama issued orders to Iwabuchi instructing his unit to assume their positions outside of the City of Manila, in preparation for the imminent advance of the Americans. Nevertheless, despite these orders and the common desire of both the Japanese Army and Navy to avoid combat in the Manila area, a brutal and savage battle engulfed the city.

The dispute therefore is one of obedience and responsibility. In attempting to answer the questions, 'Why did the battle occur?' and 'who was responsible?' the Tribunal was bound to address itself to an analysis of the chain of command operative in the battle situation. The commission, however, was reluctant to recognise that the only valid definition of

Army and Navy responsibilities, and thereby, the correct chain of command to bear responsibility for the atrocities would have been that provided by the Japanese themselves. Rather, the Tribunal chose to view the problem from the standpoint of what they thought should have been the command framework: that since the Army had assumed command of the marines, the command pipeline indicated Army responsibility and the culpability of General Yamashita. This once again reflected upon the standard of justice administered in this case.

As a result, much of the discussion on this aspect of the case involved Defence probings directed towards the presentation of the facts concerning the true state of command in the Japanese armed forces; the limited and fragmented powers of command, the confusion as to what men in what branches had authority over whom, and how, in the strain of battle with the collapse of the rudimentary lines of communication, these problems were exacerbated. It is in this context that the debate should be understood.

According to Okawachi, Iwabuchi's unit remained in Manila to complete the destruction of naval facilities, as was required by naval strategy. It was his understanding that when the naval mission was completed, Iwabuchi's Manila Naval Defence Force would be utilised by the Army under Yokoyama's direction, to reinforce troops already in position in the defence line encircling the city. Whilst he believed the order had been fully implemented, he could not be sure of it since the men who would have known were dead. Nevertheless, it was established that the order had never been revoked, and that, in Okawachi's view, it covered naval operations as

distinct from land operations. ⁵

No Army troops, with the exception of the 1800-man Noguchi Butai, remained in Manila, the bulk of the troops having assumed their positions in the foothills surrounding the City from where they were to execute a strong delaying action. It was the duty of the Noguchi Detachment to guard the transport of munitions and supplies from the City to the hills, Yokoyama stated.

Confirming Okawachi's testimony, he went on, that the naval troops in Manila had been in the process of evacuation at the time of the transfer of command. Unsolicited, Yokoyama moved to a map of the Manila zone and pointed out the areas Iwabuchi had told him that he intended to take over. The exchange had taken place on a visit made to the City in early January 1945 by Yokoyama, to inspect the terrain, in his anticipation of gaining command over Iwabuchi's unit. Yokoyama told Iwabuchi that this was in contravention with the tactical plans of both General Yamashita and himself, he reported to the commission, and he was about to state the nature of a suggestion he had made to the subordinate commander when General Reynolds intervened.

Since the witness has acknowledged his command responsibility for the entire area, the commission is not greatly interested in the breakdown of responsibility between his subordinate commands, and unless the Defense can state some reason for exploring the details, the commission will ask it to pass on to other matters. ⁶

Reynolds had made it plain that the Tribunal was not prepared to entertain testimony that suggested anything other than General Yamashita's absolute responsibility for the crimes that had been committed. Yokoyama was delineating a conflict

of objective between himself, representing the strategic viewpoint of his superior, General Yamashita, and a naval commander supposedly subject to his decisions. Whilst such a discovery could be expected to have been followed by discourse on Yokoyama's disciplinary powers over a dissident subordinate officer, the commission deliberately directed the attention of counsel elsewhere.

Captain Reel drew the attention of the commission to the fact that Yokoyama's comments had not been prompted by Defence probings, but had originated with the witness himself. Continuing, Reel asked Lieutenant-General Yokoyama whether it had been the intention of General Yamashita to have the naval troops remain in Manila City, to which the witness replied,

While it was necessary to leave in the city those naval forces necessary for purely naval duties, it was my idea - and I am confident that it was General Yamashita's idea - that all other naval forces should be withdrawn from the city before engaging. 7

Captain Reel then proceeded to solicit General Yokoyama's opinion (as had been previously done with Vice-Admiral Okawachi) as to the reason why the naval troops failed to evacuate from the city. Again, the cross-examination was interrupted by the commission with General Reynolds asserting,

...that since the navy forces were under this witness's command, it is immaterial what his opinion may be. Proceed to other matters. 8

This provoked a long exchange between Defence and Prosecution counsel and the commission. The exchanges which occurred in this debate are worth citing in full as a fairly typical example of the attitude with which the case was con-

ducted by bench and Prosecution.

Captain Reel: Well, sir, the testimony has been, I believe, that the naval forces were under the General's command for land operations only. Now, this question had to do with what was a naval operation; the question was so phrased, and it was the testimony given yesterday. This does not have to do with land operations; this is a question of whether or not the navy didn't stay to complete a naval operation: The destruction of harbors and docks and naval stores, the previous naval order. We have had testimony to that effect yesterday.

General Renolds: Still the navy forces had passed from General Yamashita's control to under the witness's control.

Captain Reel: Only, sir, for purposes of land operations; the testimony has been clear on that.

Major Kerr: Is it the contention of Counsel that you are now referring to demolitions at sea?

Captain Reel: No, sir. Harbors, docks, and naval stores as part of a naval order to destroy the harbor. It includes the ships and the adjacent territories, piers, docks, and so forth.

Major Kerr: It would appear to us, sir, that that would be a land operation.

General Renolds: Defense is splitting hairs. These docks and other buildings are ashore. The Defense will proceed to other subjects. 9

With these comments, the commission attempted to close debate on what was a crucial point in establishing the correct Japanese definition of the separation between Army and Navy duties, which would have laid the basis for an examination of what was the appropriate command pipeline to bear responsibility for the misconduct of the marines. It was apparent that the commission were not interested in such an examination; the trial was that of General Yamashita and his responsibility for the atrocities which occurred because of his negligence in the conduct of his command could not be disputed. The dualities and fragmentation in the Japanese command system were of no consequence to the Tribunal; it was their inter-

pretation of what should have been the command framework that carried probative value.

However, the Defence persisted in pressing for a reversal of the ruling that caused the dispute, arguing that Yokoyama as Iwabuchi's superior officer might offer some insight into the perplexing problem surrounding the failure of the naval troops to withdraw. The Chief Prosecutor was moved to remark that,

as we recall the testimony of Admiral Okoochi (sic), he further stated that when the army took over in January (1945) they took over the performance of that order. 10

Whilst Captain Reel pointed out the error of the statement, Major Kerr was disinclined to accept the correction, but the interchanges between Prosecution and Defence were interrupted by the decision of the bench, 'unable to see what value there would be attached to that answer,' to allow the inclusion of the forbidden question.

Yokoyama, given the privilege of a reply, told the commission that he concurred with the opinion of Vice-Admiral Okawachi, that Iwabuchi remained in the City to complete the destruction of the port facilities. In addition,

there were two other naval duties, one to guard the mouth of the Manila harbor from and around the Island of Corregidor, and the other in the event American naval craft entered the harbor, to attack them and repel them with torpedo boats based on the shore. 11

These were naval operations, Yokoyama said, and their performance under the command of Okawachi

was an order which took precedence over any order I could give him. 12

A possible reason, therefore, for Iwabuchi's reluctance

to leave the City despite Yokoyama's encouragement to do so, was his slowness in completing the naval tasks assigned to him, until he was in a position where evacuation was either perilous or impossible to achieve. Given Iwabuchi's inability or refusal to leave Manila, and the imminence of battle there, the question becomes, what measures did his superiors make in an effort to prevent combat in the City? But central to a correct understanding of the issues involved here is an appreciation of the Japanese system of command, the division of power between the administrative and operational spheres, and the functioning and efficiency of the communications network. It is only then that dereliction of duty on the part of a commander can be accurately appraised, the standards and expectations of one nation's military services cannot be used judicially to make decisions relative to the functioning of the services of another state, especially where the cultural backgrounds are disparate.

It was the testimony of Yokoyama that the Shimbu Shudan troops had been placed in their defensive positions as swiftly as possible after Yamashita's order of 2 January, 1945, but that the naval forces were not therein included, since the transfer of command had yet to be effected. Yokoyama stated that he did not receive orders from General Yamashita instructing him to secure the withdrawal of the Iwabuchi unit to the defensive perimeter until 12 or 13 February.¹³ This command was transmitted to Iwabuchi, portions of whose main force were already in the process of evacuating.

Nevertheless, it was not the first indication Iwabuchi had received of the Army intention to have his force withdraw;

Yokoyama had earlier urged the naval commander to evacuate, but he did not actually order it.¹⁴

Communications between the Shimbu Shudan and Iwabuchi lacked regularity and consistency, but, Yokoyama said,

Until about the 10th of February I was able to get them through comparatively successfully. From then until the 20th, I was able to receive messages on several occasions. On the other hand, the important messages which I sent out did arrive regularly.¹⁵

The exact meaning of Yokoyama's relativist terms was not explored, and unlike other aspects of this phase of the case, no comparison with American communication standards was made. Communications between Yokoyama at Wawa and Yamashita at Baguio were 'fully operative' until mid April 1945, so that there were 'no interruptions' preventing the transmission of the former's reports to Shobu headquarters.¹⁶ Such reports as Yokoyama received from Manila were re-transmitted to Yamashita at Baguio, and any orders he received for Iwabuchi were similarly relayed.

Communications contact between Iwabuchi in Manila and Vice-Admiral Okawachi in Baguio * did not break down until 20 February 1945, but during the period subsequent to the transfer of command and before the break down, Okawachi received occasional reports of the military situation directly. No instructions relative to operations were given by Okawachi or requested by Iwabuchi.¹⁷

As the battle situation in Manila deteriorated, Rear-Admiral Arima, Chief of Staff of the South-West Area Fleet Headquarters radioed Iwabuchi for Okawachi suggesting that he

* His Baguio headquarters were located 1 km from the Shobu Army headquarters of Yamashita.

evacuate Manila and execute a strong delaying action outside of the city. Okawachi, not having command over Iwabuchi with regard to land operations, had no power or authority to order a withdrawal, but had to be content with having his feelings known.¹⁸ The suggestion not eliciting the desired effect, Okawachi's Chief of Staff then went to see Lieutenant-General Muto Akira, Chief of Staff at Yamashita's headquarters, to propose that it be ordered by the Army. He was told that such an order had already been sent.¹⁹ Presumably, this was the order of mid-February. Nevertheless, as the battle toll shows, Iwabuchi's troops did not withdraw in accord with both Army and Navy plans. The reasons for this will never be fully understood, given that Iwabuchi himself as well as his entire force perished in the bloody battle that ensued.

Since no records of the reports Iwabuchi made to his superiors survived the war, it is difficult to ascertain their adequacy. Hence, the assumption that must be made is that either

- (a) Iwabuchi did not report the atrocities that occurred in the battle for Manila, (it being a very dubious proposition that he may not have known of their commission), or
- (b) that the nature of the crimes committed were concealed at higher levels of the command pipeline, for any number of different reasons.

Working through the first proposition, it can be asked, why Lieutenant-General Yokoyama did not send one of his staff

officers to investigate the battle situation in Manila, or go there himself. In reply, Yokoyama said that

The attack came at such a totally unexpected time that no staff member from the group command made such a visit. However, Staff Officer Hashimoto of the Kobayashi Unit Group which came from the Noguchi Unit was there. 20

The Lingayen landing having come earlier than had been anticipated, the Japanese defence had been thrown into utter confusion, and much had to be done in order to mount that last-ditch effort that was required. Yokoyama went on,

For the purpose of preparing the eastern defences and preparations with respect to munitions and provisions, training of emergency-created military units for defence purposes and for using a certain portion of the troops for offensive action, with respect to air fields; for these reasons I was distressed with a lack of sufficient staff officers. I had no other recourse excepting to be satisfied with the messages that came to me from Iwabuchi by radio and later by ground telephone and buzzer and runners. 21

As a commandant of Imperial Japanese Navy Forces, it was only reasonable for Yokoyama to expect some integrity and responsibility in the preparation of reports by his subordinate officer. But even had he known of the commission of such crimes by Iwabuchi's force, he was unable himself to discipline the troops responsible. Cross-examination of Yokoyama on this topic was, however, not permitted by the Tribunal.

Vice Admiral Okawachi testified at length on this subject, so reliance must be placed on his statements. Although Iwabuchi's unit had been transferred to the command of the Army, this was for tactical or operational purposes, restricted to land operations only. As a result, a dual

command situation arose, with the Army commanding Iwabuchi in operational matters and Okawachi retaining the powers of naval administration. Such duality normally existed, but it was only in instances where both powers were not enjoined in the one person or service that the problems associated with the division became apparent. Administrative control, according to Okawachi,

...consisted of such things as personnel, supply, supplies and so forth, and I had no control, no responsibility, over the land operation. 22

In addition to these powers, Okawachi also retained the power of discipline, promotion, demotion and court-martial over the naval troops. This was brought out in cross-examination of the witness by Captain Sandberg.

- Q: Now, after January 5, could General Yamashita have promoted a navy officer in Manila?
- A: No.
- Q: Could he have demoted a navy officer or non-commissioned officer in Manila?
- A: No such authority.
- Q: Suppose General Yamashita had been dissatisfied with Admiral Iwabuchi; could he have removed him from command?
- A: Of course, in case I was dissatisfied with certain land operations, he could have done that through me. However, that is in fact impossible.
- Q: That is, he could have recommended to you a change in Admiral Iwabuchi's assignment?
- A: Well, as a matter of fact it is impossible, because during that time there were (sic) no other commanders who could lead the navy land force in Manila.
- Q: Now, could General Yamashita have court-martialled navy personnel in Manila?
- A: I don't think so.
- Q: That power remained with you?
- A: If there were such occasions, I was to be notified, and I will punish them, and I would take necessary action. 23

Okawachi pointed out that with regard to promotion or demotion of naval troops, he could make a recommendation to the Navy Department in Tokyo, but the final decision was theirs. 24

General Yamashita never requested that Okawachi exercise disciplinary powers over Iwabuchi, and the naval troops in Manila, who were responsible for the atrocities committed during the land operations he was conducting. Similarly, Okawachi did not of his own discretion take disciplinary action over troops under the administrative side of his command since he was not concurrently in command of operations.

Evidence thus produced on the chain of command in the Prosecution case clearly established a duality of command, operational and administrative, within the Japanese Navy. Whilst General Yamashita was responsible for the command of Iwabuchi's marines for land operations after January 6th, 1945, he could not supercede the naval orders given the latter prior to the transfer of command, and neither could he of his own volition, discipline the troops. For this, he had to request the cooperation of Vice-Admiral Okawachi. Iwabuchi's troops remained in Manila despite Army orders and Naval encouragement to evacuate, and the battle ensued. The problem of why Iwabuchi did not evacuate and the contents of his reports will never be fully resolved, but the evidence is clear that the Japanese armed forces could only be understood in their own terms and not through the application of Western conceptions based on expectation and appearance rather than reality.

Such confusion surrounding the exercise of command, administrative and operational, rendered a judgment of full responsibility for the commission of the Manila atrocities against General Yamashita suspect. The inadequacies of his

command power were well recorded by the testimony of his fellow officers. Nevertheless, the record of the trial proceedings tends to suggest that the commission was an exponent of the view that General Yamashita was in indisputed overall command of the forces who were responsible for the atrocities, and that he failed to both inform himself of their actions and to take corrective disciplinary measures. Such a default amounted to dereliction of duty and thereby rendered him criminally liable for the orgy of violence that occurred because of his negligence. The inability of the Defence counsel to convince the commission of the necessity to view the chain of command in question through a Japanese perspective, and the problems of maintaining balance and fairness in the admission of evidence rendered a conclusion of guilt against General Yamashita Tomoyuki virtually inevitable.

(b) The Guerilla Question

It had become obvious to the Defence as the Prosecution presented the evidence it had assembled against General Yamashita, that many of the crimes supposedly committed by the Japanese against innocent non-combatant civilian Filipinos were in the nature of anti-guerilla operations. Pursuant to this observation, the Defence strove to highlight Japanese suspicions of guerilla activity in the areas where the alleged crimes had been committed, the existence of underground guerilla activity, and witnesses' contact with, and support of such groups. This was crucial to the development of the Defence strategy. Guerillas, under the laws of warfare, were regarded as unprivileged belligerents and their execut-

ion, after a trial establishing their identity, was permitted. Hence, the killing of guerillas in a mopping up operation was not a crime or atrocity under international law, but a part of a legitimate combat action. As a result, no charges could be laid; General Yamashita could in no way be held responsible.

However, the Prosecution, with the agreement of the Tribunal, argued that the Defence's stand on guerilla activity was quite extraneous to the issue for which the commission had been convened, and the Defence insistence was serving only to prolong the sitting. In effect, what the Prosecution was attempting to do was to gain support from the Tribunal with an appeal to expeditious procedure so that it could more effectively deny the validity of the Defence's argument. It was important in the interests of a conviction that the Prosecution disregard the importance of discussing the atrocities from the stand point of the guerilla problem, and to insist on subsuming the anti-guerilla tactics of the Japanese into the category of atrocities against innocent civilians. Nevertheless, they were not successful (in legal terms) in convincingly proving the connection between General Yamashita and the alleged atrocities, but one can only conclude that the Tribunal evaluated the evidence presented before it, in its own way and reached an independent opinion as to the guilt of the Accused.

The Valdes-Guido case (Bill of Particulars paragraph 23) demonstrated the Defence contention. It was the Prosecution allegation that the seven male members of these families were murdered by Japanese troops. However, it was revealed

that Guido had been a Lieutenant-Colonel in the Philippine Army and a chief of its intelligence section, and Valdes too, was a retired Lieutenant-Colonel. Upon an examination of the family house by Japanese marines, army uniforms, and more significantly, a 'toy' radio set (which the Japanese 'presumed' to be operational) were discovered. It was at this juncture that the men were led away, under suspicion as the Defence pointed out, of being anti-Japanese guerillas, and were later found dead. ²⁵

Other cases also bore the stamp of having been part of anti-guerilla operations rather than random, unprovoked attacks on an innocent population. In the case involving paragraphs 3 and 10 of the Bill of Particulars, in which the Prosecution alleged the torture of one Ignacio Lizo and others, it became apparent that Lizo had been taken to Cortabitarte Garrison for questioning about his involvement in the lighting of flares at night for the direction of American aeroplanes. The Japanese tried to extricate information from him as to the extent, nature and workings of the underground movement, but as he was afraid of implicating his companions who also actively aided the guerillas, he remained uncooperative and hence was tortured. Two other witnesses admitted having either directly or indirectly helped the guerillas. Yet the Prosecution was still moved to argue that testimony on guerilla activities was irrelevant, to which Captain Reel replied by defining, for the benefit of the commission, the legal position regarding guerillas.

Sir, we don't state that the rules of land warfare, the rules of International Law, permit of torture, but we do state that the rules of International Law and the

rules of land warfare do permit of actual execution of proved guerillas, where there has been, as here, a complete surrender. 26

Thus, information on guerilla activities was vital, Reel stressed, in presenting the complete picture of events under scrutiny, and in assessing the guilt or innocence of General Yamashita.

It was in connection with this case that the Prosecution demonstrated that it was not their intention to suppress (or request suppression of) all the evidence pertaining to guerilla activity. Instead, only to that part of the evidence which went contrary to their interests would any objections be raised, and any sections which bolstered the case they had prepared against General Yamashita would be utilised to the fullest extent. The testimony of Miyasaki Fermin, who had been an interpreter with the South Manila branch of the Japanese Kempei Tai, or military police, fell into the latter grouping. 27

Miyasaki testified that the Kempei Tai unit for which he worked had received a personal commendation for its work in the suppression of guerillas from General Yamashita, in December 1944. The intention here was clear. The Prosecution was hoping that the commendation would link Yamashita with the crime in the sense that it offered his condonation of the crimes to which the earlier witness had testified. In the legal sense, the connection was at best very shaky, and was further weakened by the Defence observation that, although the letter was written in Japanese, the Japanese word for guerilla (gerira) was omitted, the English word appearing instead. This example was typical of the Pros-

ecution strategy throughout the case; the linking of the Accused and the crimes which supposedly were his responsibility purely through insinuation rather than positive proof. 28

While other cases belied similar guerilla activities as a provocation to Japanese retaliatory action, it was in the case involving paragraphs 1 and 49 of the Bill of Particulars - the destruction of human life and property in Batangas, and specifically in the municipality of Lipa, Batangas - that the question assumed critical significance for the fate of General Yamashita.

First Lieutenant James Healey, Jr., attached to the United States War Crimes Detachment in Batangas, told the commission that his duties involved the collection of interviews and statements of witnesses to atrocities and their correlation with intelligence reports. In his investigations, it had been Healey's practice to inquire of the respondent his view of the cause of the atrocity. Reel asked whether the answers usually involved guerilla activities, to which the witness replied that,

Usually, if you want me to give you the usual answers, it was that the actions were taken as a pretense of guerilla activities, because most of the witnesses were, or a lot of them were women and children. 29

Healey did not 'believe' that any of the witnesses were connected with guerilla activities. However, as Lieutenant Healey admitted, the War Crimes Branch did not make specific independent investigations of guerilla activities in the province (i.e. identity of leaders, relative strengths) so that his information lacked comparative evaluation. The

motives behind such information as he received were likewise not scutinised.

Other witnesses, who testified that the Japanese forced seven hundred men, in groups of five, to jump into a well, whereupon shots were fired into the depths and escape prevented by the hurling of sewing machines into the top of the well, were heard. One survivor, Pamfilo Umali, admitted that he had given 'a little aid' to the guerillas, but he did not know the unit to which he had contributed, nor the identity of their leaders or the extent of their organisation in Lipa.

Captain Sandberg on cross examination asked Umali whether he could recall an instance in which twelve Japanese soldiers had been found dead, beheaded by 'boloe' knives, (the weapon commonly used by guerillas). Before Umali could answer, the Chief Prosecutor objected strenuously, arguing that the line of questioning was

incompetent, irrelevant, immaterial, it has nothing to do with the issues involved in this case. The question of whether or not Japanese were found beheaded would certainly not offer an excuse or justification for the mistreatment or murder of the people, as testified to by this witness. It is absolutely irrelevant. 30

General Reynolds issued a summary ruling upholding the objection and thereby preventing a continuation of the Defence questioning on guerilla activities.

The Defence, however, through their cross examination of witness Victor Manquiat, strove to demonstrate the importance and relevance of the guerilla aspect to the Yamashita case as a whole. Lipa, it was contended, lay on the only usable road link between Manila and Batangas, and hence was in

frequent use by Japanese convoys for the transport of supplies, making the area a frequent target of the guerillas, and Japanese retaliation. Captain Reel then addressed the Tribunal in a plea for a reconsideration of the ruling against the materiality of guerilla activities to the trial of Yamashita.

We feel that this matter is material to the issues, to the charges of the Batangas activities. The charge in this case charges the Accused with having failed to discharge his duty to control his troops.

Insofar as this Accused is concerned, going to the gravamen of that charge, we feel it is important to throw light and to explain some of these occurrences. It is a well-known psychological phenomenon that when a soldier or group of soldiers finds that their companions and fellow soldiers have been killed, and in many cases mutilated, their reaction is difficult, if not impossible to control. And it goes to the very basic element, sir, of this charge.

Therefore, I ask at this time to be permitted to examine this witness and to have the Defence examine future witnesses on this subject of guerilla activities. 31

Major Kerr urged that the commission not accept the Defence position;

no matter what the guerilla activities may have been in a particular area they could not possibly justify or explain or serve as a defence against the charge, 32

he said. Continuing, Kerr stressed that

if we are to be required to go into the entire subject of guerilla activities in the Philippine Islands, we shall have embarked upon a most extensive enterprise, and I submit that it would unduly and unnecessarily, and unjustifiably extend the period of the trial. 33

After a short withdrawal, General Reynolds announced a modification in the Tribunal's position; it would now entertain a limited amount of evidence on guerilla activities so that it could gain a more accurate appreciation of the situation behind Japanese lines. However, Reynolds continued,

the commission cannot accept such activities as justification of acts of cruelty. Since counsel will have a sufficient opportunity to develop this phase of the Defense by his own witnesses and since the witness is not the best source of the information, the objection of the Prosecution is sustained. 34

In effect, the commission had handed down a ruling whereby the Defence was ostensibly given limited license to pursue the line of questioning, but which in reality offered them no concession. Behind the word 'justification' could easily be read 'explanation', 'contributing cause' or another word of synonymous meaning. The commission would let pass a restricted discussion on guerilla activities, but this had to be with Defence witnesses only. The best evidence ruling too, was here being applied to curtail Defence probings in a sensitive and relevant area, when previously its adherence had not been demanded from the Prosecution, so that it was free to introduce evidence from sources that would normally have been excluded. Thus, while some evidence on guerilla activity was admissible, the commission did not recognise the logic behind the line of questioning and so it was likely that any evidence so solicited was to be accorded little probative value. This meant that the Defence had little chance to develop their argument on the legal status of anti guerilla operations in international law during the Prosecution case (i.e. using Prosecution witnesses) and hence challenge the validity of the case against General Yamashita. The commission, through its actions, had demonstrated its agreement with the Prosecution standpoint; not even the provocation of guerillas could mitigate the 'guilt' of the Japanese, and especially General Yamashita. The Defence was again rendered impotent; 'justice' would take its course.

(c) Civilian Internees and Prisoners of War

General Yamashita, the Prosecution alleged, was directly responsible for the deficient supply of food, hygiene and medical products which the Japanese allowed to prevail in their Philippine civilian internment and prisoner of war camps during the later period of the war. It was hoped to show that General Yamashita was guilty of culpable negligence; that he was aware of the situation in the camps and the detrimental effect that it was producing in the health and well-being of the internees, but that he chose to do nothing to remedy the inadequacies. As he was also in command of the judge advocate section, the Prosecution sought to lay the blame on General Yamashita for what they argued was inappropriate legal treatment of prisoners of war, according to the specifications laid down in the 1929 Geneva Convention on Prisoners of War.

Hence, the charges against General Yamashita were extensive in their implications; they represented American censure of the entire Japanese Philippine campaign.

In this aspect of the case, the major Prosecution witness was Mr. A.V.H. Hartendorp, an American citizen resident in Manila who attested to the conditions in the Santo Tomas Civilian Internment Camp in which he was interned.³⁵ Mr. Hartendorp had acted as the internees' unofficial camp historian and had compiled a record of life in the camp. It was on this basis of expertise that his testimony was predicated. The provision of food supplies to the camp inmates, and the cuts in these allowances composed the core of his evidence before the Tribunal.

Hartendorp began his statements by drawing the attention of the commission to the fact that in the period after Yamashita assumed command in October 1944, no medical supplies had been furnished gratis to the camp hospital, although the Japanese had given the internees the opportunity to purchase some. A similar state existed with Red Cross parcels.

Initially, the Japanese camp administrators had paid the internees committee a head rate with which food was to be purchased. This was later discontinued in favour of a direct feeding programme, which was in operation during Yamashita's command. Theoretically the rations to be provided per person per day were 100 grams of fish, 400 grams of cereal (rice, corn or camotes), 200 grams vegetables, 20 grams cooking oil, 25 grams of salt, 20 grams of sugar and 1 gram of tea. This allowance was sufficient to yield 1200-1500 calories a day, but was supplemented by the purchase of food from outside sources with camp funds, the money being provided to the inmates by the American Red Cross. However, by October 1944, the average ration yielded 1100 calories per day as items were cut down or not supplied.

The doctors amongst the internees conducted an examination of the health of the interned camp children in June-July 1944 to evaluate the impact of the diet on their nutritional state. Despite the fact that the interned adults had voluntarily limited their food consumption for a considerable period so that the children and the ill could have the nutrition they so urgently needed, the doctors discovered serious nutritionally based defects (poor teeth, underweight) in 95% of the children. In response, the adults decided to forego

a further portion of their ration in favour of the children. The physical well being of the adults deteriorated significantly as a result, with weight losses of 15 kilograms being common. This was coupled with cuts in rice and cereal provisions (plus other commodities which failed to appear) imposed externally. Hartendorp stressed that the Japanese controlled food shipments into the camp, and also food distribution internally, the latter being arranged on a daily basis. Whilst unfamiliar with the Japanese soldiers' diet, it was the general camp belief, said Hartendorp, that the Japanese soldiers were better fed, given their healthier appearance.

Hartendorp's testimony was corroborated by Miss Elvessa Stewart, an American teacher of home economics, whose responsibility in the camp was to monitor the type and quantity of food provided by the Japanese each month. ³⁶

Further evidence from other witnesses established that death due to nutritional factors (malnutrition, starvation) was never recorded on the death certificates. However, the effect of poor diet upon mortality could be seen where patients had died from heart attacks for instance, which often were a complication of the nutritional disease beri-beri. Thirty-two deaths attributed to this cause occurred in January 1945. ³⁷

The crux of the Prosecution case against General Yamashita with respect to the food supply was that the Japanese, having declared that they would apply the regulations of the 1929 Geneva Convention mutatis mutandis were thereby bound to supply food of equal quantity and quality to prisoners of war

as that given to their own soldiers. The implication therefore, was that they were not upholding their obligation, although no factual evidence was introduced to support such a contention. Hartendorp's comment was based on observation only; the Japanese being smaller in stature, it would be reasonable to assume that they would cope better on the rations designed for them, than would the larger Europeans. It was also a feature of pride for the Japanese leaders that their army consumed little out of a spirit of frugality and sacrifice.

Thomas Poole, the camp electrician at Santo Tomas, testified on the difference between the internees' and Japanese diets. His evidence was based on his observations made of the soldiers' food when working in the officers' mess hall. He also stated that the internees' rations had begun to decrease in regularity and quantity prior to October 1944, and hence before General Yamashita assumed command in the Philippines, but that this trend accelerated after that date. 38

Poole continued by mentioning that the Japanese often withdrew their vehicles into the safety of the Santo Tomas compound; General Yamashita's car had been there on several occasions, although he had not seen anyone inside. The registration number had also escaped his attention. 39

As a piece of insinuation, Poole's evidence was only matched by the acceptance into the record of Prosecution exhibit 239, the affidavit of Major Ralph B. Scheibley. 40 The document alleged that whilst the affiant was on a cleaning detail in General Yamashita's Manila office, he noticed

that the Japanese had confiscated Red Cross packages and rifled them for cigarettes. Captain Reel for the Defence objected to the admission of the document because no opportunity had been given for the Defence to know that the statement was being taken and so to file a cross-interrogatory document. He went on, that this was most damaging to any concepts of a fair trial for the Accused, since he had no opportunity to confront the witness who accused him and to present the findings before the Tribunal. 'The statement is carefully drawn;' Captain Reel stressed, 'the questions are carefully drawn to avoid all dates, anything that would properly place these occurrences. We strongly object to this. 41

General Reynolds in his reply stated that the authority of the commission to accept evidence in the form of affidavits was clearly established, and he did not wish to hear further objections on an issue in which a ruling had already been made. Reel, in his book, provides an insight into the effect of such evidence on General Yamashita, and describes the utter helplessness of the Defence counsel in their attempts to protect his rights as an Accused. He says that,

(The) implication that a Japanese commanding general would steal cigarettes annoyed Yamashita by its very pettiness. "Do they really think I would do that?" he asked. 42

The accusation was made more implausible since Japanese cigarettes were never in short supply, and as General Yamashita had given up smoking. But,

there could be no cross examination. How did the witness know he was in General Yamashita's headquarters? What made him think these were the general's rooms? Was it hearsay? If so, who told him? And how did his informant know? 43

To the Defence, the short-comings of the evidence were obvious, but they were powerless to challenge it. Reel continued that,

Actually, General Yamashita never had a headquarters in the city of Manila. His nearest office and residence was Fort McKinley, some distance out of town. The "evidence" was false evidence, but there it was unassailed, and if believed, it would furnish grounds for finding, at the least, that the Accused knew that Red Cross packages had been rifled and withheld from American prisoners. 44

The Prosecution's reliance on evidence of such dubious authenticity, under the protection afforded by the tendering of affidavits, was again demonstrated with the offering into evidence of the affidavit of an American prisoner of war named Memmler. After a description of the conditions of the camp and the treatment meted out by camp guards, he asserted that,

General Yamashita, Philippine Japanese commander, visited the camp twice, saw the conditions there, and did nothing to improve the situation. 45

This was quite obviously evidence of a prejudicial nature, put in for prejudicial reasons and admitted under the safety of the affidavit to render the Defence again quite impotent.

After a brief discussion of conditions at Los Banos Internment Camp, which was sufficient to indicate their similarity with those experienced at Santo Tomos, the Prosecution then moved on to the main thrust of their argument, which concerned the legal aspect of the treatment of prisoners of war by the Japanese. 46 It was alleged that in Los Banos, two internees had been shot by the camp guards. One of the men had been shot whilst attempting an escape, and when brought

back to the camp compound, he was refused medical aid. The reason behind this, according to witness Paul Henneson, was that it was beyond the Commandant's power to save the man as he had orders from the 'Imperial Headquarters of Manila' to kill anyone attempting to escape.⁴⁷ The witness' authority was based on a statement to the above effect he had seen on the bulletin board of barracks fifteen. However, the order did not specify its origin or authorisation; it did not mention prison headquarters or the headquarters of the commissary. Despite this weakness, the Defence was unable to seriously attack its credibility.

The Prosecution alleged that in their legal treatment of prisoners of war the Japanese again defaulted from their obligation to enforce the provisions of the 1929 Geneva Convention. In this connection, Miyasaki Fermin was recalled to give evidence in support of paragraph 80 of the Bill of Particulars. He stated that in his capacity as an interpreter with the South Manila Kempei Tai, he had participated in an execution party in mid-November 1944, to the North Cemetery, Manila. There, 27 prisoners from Cortabitarte prison were knelt singly before a large hole and decapitated. Prisoners for execution, such as these men, did not go before a court martial, Miyasaki said. He then claimed that 3rd Lieutenant Tachibana, Sargeant Kataoka and Private (first class) Akiyama of the Cortabitarte garrison were later commended by General Yamashita for their good work.⁴⁸ Although the shortcomings in the commendation supposedly sent by Yamashita to the South Manila Kempei Tai had already been made patent by the Defence during Miyasaki's earlier test-

imony, in no way did their attack on the credibility of the evidence reduce its impact on the courtroom. Both General Yamashita's knowledge and his positive acceptance of the crimes had been attested to by the commendation; such evidence, despite its legal fragility was difficult to convincingly refute, particularly where legal understanding was in short supply.

The damage to General Yamashita's case caused by the letter of commendation was further augmented by testimony which described the usual court martial procedure followed at Yamashita's headquarters, and evidence which suggested that torture had been commonplace at Fort Santiago prison, but had increased in severity after October 1944, the date upon which Yamashita assumed command.⁴⁹ Against such a barrage there was little the Defence could do, except to object and protest where necessary, but these measures were ineffectual.

It was Richard M. Sakakida's testimony on the workings of the Japanese system of military justice that proved most devastating. Sakakida, an American of Japanese parentage, had been an interpreter with the headquarters of the 14th Area Army (General Yamashita's) since his capture in February 1943, and he retained his office until the surrender. In this capacity, he was involved in the translation of court martial proceedings, and his observations of procedure formed the core of his evidence before the Tribunal.

An investigation by the Kempei Tai of the crime alleged to have been committed by the prisoner of war was the first stage in the Japanese court martial procedure, as practised by Yamashita's headquarters, Sakakida claimed. From here,

the record of the interrogation and the recommendations of the investigating officer, were forwarded on to the judge advocates section where they were distributed to the judges allocated to the case. The 'evidence', the interrogation record and recommendation, was scrutinised and discussed by the case judges and the Chief Judge Advocate, and a verdict was decided upon. The prisoner was then brought from detention at Old Bilibid prison to appear before the court. At this juncture, the charges were read to the prisoner, and if the case was not for a capital offence with a guilty verdict, the decision would also be read. However, in the latter event, the prisoner would not be informed of the verdict, and he would not realise his fate until he arrived at the cemetery. Prisoners of war did not have the right to have persons appear on their behalf, to have counsel, or to appeal to a higher authority. Whilst such regulations may seem unjust from the Western standpoint, it should be noted that under the Geneva Convention rulings, Japan was obligated only to try prisoners of war in the same manner as her own soldiers. The application of military justice for prisoners of war under Japanese control did not differ substantially from that accorded Japanese soldiers. Nevertheless, without an understanding of international law the significance of this point was lost upon the commission.

Hence, the evidence amassed against General Yamashita Tomoyuki alleged disregard of duty and the failure to control the actions of his troops with regard to the management of prisoners of war and civilian internees. General Yamashita, as commander of the Imperial Japanese Army in the Philippines

was thereby responsible for the failure of his subordinates to honour Japan's obligation to the rest of the world in upholding the provisions of the Geneva Convention. He was further responsible for 'permitting' them to default in that obligation, and for the crimes that were committed against prisoners of war and internees that eventuated as a consequence of that action. Evidence was presented to the Tribunal that revealed that Yamashita had knowledge of the inhumane treatment of prisoners and internees, but that he chose to do nothing to remedy the situation. He was also aware, according to the Prosecution argument, of the improper use of prisoner of war camps, such as for the storage of spare parts and ammunition, but he again remained inactive. The letter of commendation to the Manila Kempei Tai was indicative of General Yamashita's acceptance and condonation of the policy pursued by his subordinates.

In rebuttal, the Defence drew the attention of the Tribunal to the weaknesses of the Prosecution evidence. Particularly stressed was the enthusiasm of the Prosecution to hide behind the safety of the affidavit to prevent cross examination of the witness, and its reliance on prejudicial and incompetent evidence. Whilst to the Defence this reflected a lack of substance in the Prosecution case, especially the connection drawn between General Yamashita and the crimes, its assessment of the case was clearly at variance with that of the commission. Although such evidence may have lacked legal substance, when coupled with the descriptions of torture and other atrocities, it could not fail to have a powerful influence, notably where no legal training, experience or

appreciation could act as a temperising factor. Here, the Prosecution gained credibility, and this further tipped the scales of justice against General Yamashita.

(d) Crimes Relating to the Church

For an understanding of the crimes in which the Church was involved it is a necessary prerequisite to examine Japanese aspirations for the role of the Church in the creation of their 'New Order', the Greater East Asia Co-Prosperity Sphere, the reaction Japanese moves provoked amongst the Filipino population and how the responsibility for the atrocities was placed by the Prosecution on General Yamashita.

The functioning and the theoretical underpinnings of the Co-Prosperity Sphere which dictated its necessity in the Japanese view, are well known and need no amplification here. Suffice it to say that given the primacy the Japanese placed on the implementation and successful operation of the Greater East Asia Co-Prosperity Sphere, it is not surprising that the media, the education system and the Church were singled out as very significant means through which to extend the influence of Japanese thinking. Simply stated, the Japanese intention with the Church was to utilise it as a vehicle of social control and persuasion; to dilute the significance of Western cultural institutions and values, and to encourage Filipino traits in a mould acceptable to the Japanese. In this context, the Church was of particular importance since over 90% of Filipinos followed the Christian path and because of the way the Church manipulated the popular mentality.

Japanese efforts to solicit the cooperation of the Catholic and Protestant Churches in the Philippines began with

'friendship masses' held in Manila on the second Sunday following the commencement of the Japanese interregnum. However, the Japanese attempts to utilise religion for the purposes of convincing Filipinos of the indispensibility and intrinsic worth of the Co-Prosperity Sphere did not remain at a covert level. The repeated machinations of the Japanese lacked the subtlety necessary for credibility and acceptance. Whilst they were professing their belief in freedom of religious expression and universal brotherhood (under the benevolent guidance of the Emperor), they were at the same time contradicting themselves by the imposition of fiscal and operational controls on the Churches. Coupled with other factors, this was a fundamental cause of the alienation of the Filipinos. Nevertheless, the reasons for their inability to elicit the desired behavioural changes in the native population seem to have eluded the Japanese.

The Japanese were therefore faced with a situation in which the Filipino population remained uncooperative towards the implementation of the New Order, and instead engaged in guerilla activities against their new overlords. Due to the social instability and turmoil, Church attendances rose to bumper proportions, and thereby extended the already powerful influence of the Church. To the Japanese then, it seemed that there was a connection between the two phenomena. The fact that Church personnel were drawn largely from the United States, Britain and Holland further raised Japanese suspicions as it was apparent that financial support and material goods were being provided to the guerilla movement from overseas sources. With its overseas network, the Church was

placed under immediate suspicion. Consequently, the Japanese sought to redirect the Church to make it more compatible with their political aims, but the use of religion for propaganda purposes was regarded by the Filipinos as sacreligious, and further increased the antipathy between the people and their imposed political masters. It was in such an environment of tension that the crimes committed against the Church occurred.

The De La Salle College Case (Bill of Particulars paragraph 17) was a case in point.⁵⁰ The Brothers of the religious order running the college, mainly German and an American, resided there along with the college servants and their families, and civilian families given hospitality because of war damage to their homes. In the evidence given by Father Francis Cosgrave, it emerged that the college had been searched by the Army on 7th February 1945, under the suspicion of guerilla association. Japanese Marines arrived on 12th February (during which time the Japanese were engaged in their last-ditch fight against the Americans in the area) and questioned the inhabitants regarding the concealing of guerillas therein. Two servant boys were taken by the officer in command after receiving a negative reply to his probings. Shots were heard, and upon return one boy was hurt. The officer then issued a command, and the bayoneting of residents began. Part of the college buildings were ignited, but the residents were rescued by American troops. It is clear that the suspicion of guerilla support or activities on the part of churchmen was the primary motive behind the crimes committed.

In the hearing of evidence on paragraph 109 of the Bill

of Particulars, which involved the murder of 2 American fliers and 5 Filipinos by the Kempei Tai at Cebu City, it became apparent that the Japanese concern for the linking of the Church and the guerilla movement was not groundless.⁵¹ One of the two American airmen, the victim of a crash, had arrived at Manadaue in Cebu. Civilians then brought him to the local convent, where he was given medical attention and accommodation by Sister Paz San Buenaventura and Sister Angelica Teruel. A Japanese soldier and a member of the pro-Japanese Makapili movement later arrived at the convent and threatened violence unless the airman was produced. With the arrival of a further contingent of Japanese, Paul Marcella, the flier was bound and taken away. With this case, the active involvement of the Church in the underground resistance movement is clearly defined and quite obviously was recognised by the Filipinos, who joined together to help.

The two cases above are the clearest indication that Japanese suspicions of a relationship between the Church and the underground guerilla movement stood behind the crimes that were committed. The same theme re-emerged in several other cases, particularly in the Santa Rosa College and Santo Domingo Church cases (heard in conjunction), but the Prosecution evidence on these particulars was presented to the commission before the significance of the guerilla question as an explanation for the horrendous events that had taken place, occurred to the Defence. As a result, the guerilla aspect received little attention in these cases.⁵²

That there was some substance to the Defence standpoint on the issue of Church complicity in the guerilla movement

can be substantiated by reference to sources external to the evidence tendered in the trial of General Yamashita. A.V.H. Hartendorp, testified before the Tribunal in his capacity as camp historian at Santo Tomas Civilian Internment Camp, and presented in his history a number of incidents indicative of this, including occasions when arms were found on Church property, confessions were heard from guerillas and guerillas infiltrated into Manila dressed in the habit of clergymen.⁵³ He reported also an occasion when a group of American and Canadian Sisters of Immaculate Conception and Maryknoll Sisters were interned in Fort Santiago. The charge against the Maryknoll Sisters was the provision of illegal assistance to prisoners of war at Cabanatuan.⁵⁴ The reinternment at Los Banos Civilian Internment Camp of many Catholic and Protestant Church people towards the close of hostilities, as reported by the Manila Tribune newspaper, was also noted. According to Hartendorp, the paper

had stated that the missionary group had been reinterned because many of them had abused the generosity of the Japanese and had extended aid to the guerillas and engaged in other anti Japanese activities.⁵⁵

But it was the popular view that the imminence of the American arrival prompted the Japanese action, since they wanted all enemy nationals securely out of the way. The two explanations are not, however, inconsistent.

The crimes were perpetrated in an atmosphere of tension, between Japanese and Filipino, where the former witnessed evidence of Filipino antipathy and obstructionism, but were unable to evaluate the causes, and where an enemy-controlled

Church exerted a powerful influence over the people. It was a natural conclusion for the Japanese to link the guerilla movement and the Church, and incidents were bound to occur, especially in the later, more desperate stages of the war, when Filipino protestations of innocence were liable to be interpreted as tactics of non-cooperation and concealment.

Whilst it cannot be disputed that crimes were committed against the Church and civilians, no evidence was produced to satisfy the conclusion that General Yamashita ordered, participated in or in any other way was responsible for such incidents. Nevertheless, the Tribunal and the Prosecution refused to consider that factors such as those above could have had any effect on the type of crimes that were committed and the reasons behind them. Instead, they chose to argue that all of the crimes had been committed against innocent non-combatant civilians and a sacred institution without any form of provocation, and so denied the validity and importance of examining the evidence from the perspective of guerilla activity. Rather, General Yamashita was ipso facto guilty because the crime had occurred and had been performed by members of the Japanese military. This attitude became most noticeable in the discussion on the guerilla question, an appraisal of which follows in greater detail.

(e) The Problem of Evidence

As can be seen from the foregoing discussion, the dispute between the Prosecution and the Defence over the acceptability and admission of evidence was a very real one. In fact, the Tribunal was the forum for such disputes from the commencement of its proceedings until the conclusion of

the trial. Such disputes literally held the key to the life or death of their client, General Yamashita, in the Defence perspective. Thus, they fought with exceptional zeal, and to the intense annoyance of the commission, to keep the trial on an impartial level, and to prevent the biassing or prejudicing of the case against him, judging the latter to be the Prosecution intention. In the stands made by the Prosecution relative to the evidential aspect were revealed their principal strategies (and weaknesses) of their case against General Yamashita.

The dissension over the admission of evidence coalesced around the questions of the reliance on affidavits and other documentary material; the problem of translation; the use of hearsay, incompetent and prejudicial evidence, and the resultant inequality of the Prosecution and Defence before the commission with its effect on the principle of a fair trial for the Accused, General Yamashita. The debate on these issues was debate which was essentially centred on the Regulations Governing the Trial of War Criminals: this directive permitted the use of such normally prohibited types of evidence, but it was the Defence view that in so sanctioning, the regulations were unconstitutional and hence null and void. Nevertheless, the commission had been vested with a discretionary power over the admission of evidence - they did not have to admit these types of evidence - and it was the Defence intention in objecting to its introduction, to have the Tribunal consider this, and act accordingly.

The debate surrounding the Prosecution's presentation of exhibit 7, the signed statement of Utsonomiya Naokata, illus-

trates this point. In introducing the exhibit and offering it into evidence, Major Kerr, the Chief Prosecutor, specifically pointed out its accordance with the Regulations, but this did not satisfy the Defence. Captain Sandberg addressed the commission in an attempt to elucidate the Defence reasons for its objection to the affidavit. 'The Defence,' he asserted,

objects to the introduction of this statement on the ground that it is specifically barred by Act of Congress of the United States. Article 25 of the Articles of War prohibit the introduction of depositions by the Prosecution in a capital case. The Article specifically sets forth that this prohibition applies not only in court-martial proceedings but also in proceedings before a military commission.

Furthermore, he continued,

this is one of the few instances...in which the Articles of War by their very terms refer to 'military commissions', and it is in no wise extraordinary that it does so, for it is one of the most firmly founded principles of American justice that the Accused in a capital case, whatever his nationality, should have the opportunity to openly confront the witnesses against him and to cross-examine them on their testimony.

This proceeding is before a military commission. It is for an offence alleged to be capital. It is clear and uncontrovertible, therefore, that the admission of testimony by deposition would be in violation of the laws and statutes of the United States. 56

In reply, Major Kerr cited a memorandum of Major-General Kramer, the Judge Advocate General in Washington, to the effect that Congress was held not to have intended the Articles of War to apply to cases trying civilians or enemy belligerents for war crimes.⁵⁷ Captain Sandberg in his rebuttal claimed that the Judge Advocate General's views were unknown to Defence counsel, although they (with one exception) had been seconded from that department. Sandberg

then quoted the Article relevant to the debate, and drew the attention of the commission to the fact that the Defence had received no notice of the Prosecution's intention to examine the affiant.⁵⁸ Consequently, they had not been given an opportunity to cross-examine the witness and to submit a cross-interrogatory to the Tribunal. Neither was the interviewing officer made available for cross-examination, so that there were no means available to the Defence to assess the credibility and reliability of the affiant, even if such affidavits were admissible as evidence in a capital case. But, Sandberg concluded, the Judge Advocate General, the commission and the Prosecution did not have the power, either individually or collectively, to repeal an Act of Congress.

After a short in camera deliberation, the Tribunal announced that the objection was not sustained. The discrepancy between the regulations specified in the Articles of War as being applicable to cases before military commissions and those prescribed by MacArthur's Headquarters were presumably regarded by the commission as constituting no real impediment to a continuation of the case. It may be suggested that this attitude of disregard for the law was motivated by the lack of legal expertise amongst members of the commission, coupled with an unbridled desire for an expeditious trial free of what they saw as legal technicalities and delaying tactics.

The same attitude revealed itself repeatedly throughout the trial, and in relation to many Defence arguments over the judicial propriety of admitting normally-prohibited

forms of evidence. The so-called Red Cross case is an interesting example of the different approaches of the Prosecution, Defence and commission to the question of hearsay evidence. The case involved the alleged shooting and bayonetting of civilian refugees and patients by Japanese marines in the Manila Red Cross headquarters. In addition to the hearsay evidence the Prosecution was desirous of having accepted into evidence, photographs of the wounds received, naturally of great impact and sensationalist value, were tendered.

In response to the Defence objection, Captain Hill for the Prosecution argued that a military commission was analogous to an administrative tribunal, and not a court of law with a jury. Therefore, he said,

We cannot get bogged down in legal technicalities or else we will be here for months. 59

Hill's claim was countered by the Defence recitation of the 38th article of the Articles of War, which stated that military commissions and tribunals should as far as 'practicable' apply the rules of evidence utilised in the criminal jurisdiction of the District Courts of the United States, and should not introduce regulations inconsistent with the same. ⁶⁰ Continuing, Colonel Hendrix went on that

There has been presented to the commission a letter which the Prosecution has mentioned on numerous instances and no doubt will throughout this trial, which letter is dated the 24th of September, 1945, concerning the regulations governing the trial of war criminals, and so forth. We contend that this particular letter, setting out the procedure such as evidence, bringing in hearsay, bringing in affidavits, bringing in what witnesses heard from other people, is absolutely null and void; that General MacArthur, in preparing this letter, did not have

authority from Congress to make any rules or procedure of a military commission. The only man in the world that has such power from Congress is the President, and he has not done anything about prescribing any rules as far as the record in this case shows. 61

However, the Defence objection was overruled by the commission, but a standing objection against the utilisation of this type of evidence was recorded.

Whilst a standing objection may have been noted by the commission and incorporated into the record, the continued admission of hearsay evidence (along with the introduction of affidavits and incompetent evidence) had a detrimental effect on Yamashita's defence. For example, in the Paco Massacre (Bill of Particulars number 48) ⁶² where there was alleged to be a substantial number of dead and wounded in Singalong, Manila, caused by the actions of Japanese marines, there were two separate debates on the admission of evidence.

The first incident involved the testimony of one Ricardo Esquerro, who claimed that he was forced to go with Japanese soldiers (Army). A Lieutenant Yamamoto took him to an unknown destiny. Under the direct examination of Captain Calyer the following interchange was reported by the witness.

Then the moment we reached there, we were two - I don't know the name of the other companion. When I was there, a Japanese - he is a soldier - he tied my hands back.

I said, 'Why?' Well, they just tied me up. I had a pass in my pocket, and I told the Captain, 'Pass! Pass! Tomodachi!'^{*} I said. Then the officer got the pass from my pocket and read it. After reading it, he threw it out.

'Why? That very good pass,' I say, 'OK, OK,' I say. Then the other officer get the pass and read it. After

* Tomodachi means friend.

that he came near me, and brought out a pistol in his hand, and told me, 'Your pass is good. You very good man,' he said, 'but you die.'

'Why?' I said.

'Order.' he said, 'order from higher officer; kill you, all you,' Because he speaks a little English. 63

Clearly, the last statement of Esquerra should not have been admitted in the record since it was not within the competence or actual knowledge of the witness. The failure to disqualify such types of evidence was all the more damaging in this incident since the statement admitted bore directly on the question of the guilt or innocence of General Yamashita, and was of a highly prejudicial nature. Even had Captain Reel's objection against the admission of 'hearsay from an unidentified source' been successful, the damage to Yamashita's defence and credibility could not have been repaired. 64

The second debate revolved around the admission of an official report of the War Crimes Investigation Branch made to the Judge Advocate General in Washington. The Prosecution desired the admission of the document in its entirety as a short-cut method to establish the identities of the dead and wounded. The Defence objected to the document on the grounds that it contained hearsay, and 'hearsay upon hearsay'; neither did its recommendations for trial include General Yamashita, but were confined to the low level perpetrators. 65

A similar argument was advanced by the Defence against the Prosecution exhibits 280 and 281 which again were official reports of the War Crimes Investigation Branch. Not only

did the Defence object to the proving of specifications only by deposition, made possible by the reversal of the Tribunal's ruling, ⁶⁶ which Captain Sandberg told the court changed 'the nature of the proceeding from a trial to a proceeding in the nature of an ex-parte investigation' but, he went on,

This is a report of the War Crimes Branch. It is a self-serving document of the Prosecution. It would be as logical to admit this document, as it would be to prove the entire case by putting the Prosecution on the stand and hearing their testimony. It is full of conclusions, both of fact and of law. It is not only inadmissible for that reason; it, in effect, amounts to a usurpation by the Prosecution of the functions of the commission to make findings of fact in this case, and to make the conclusions of law. For these reasons the Defence objects to this exhibit. 67

The Prosecution, in response, sought to circumvent the gravity of the argument by stressing their independence from the War Crimes Branch (despite the fact that most members of the Prosecution had been seconded to the case from the Branch), and citing the evidential provisions of the War Crimes Act of Britain, proclaimed by Royal Warrant at the Court of St. James on 14 June 1945. The intention here was to demonstrate that the British, with their hallowed standards of judicial practice, had prescribed rules of evidence and procedure that were essentially similar to those drawn up by MacArthur's Headquarters for the trials of war criminals. ⁶⁸ From his examples, Major Kerr was led to conclude that hearsay, to which the Defence had objected during the proceedings, was clearly allowable in parallel British trials; the Act also stated unequivocally that the procedural rules of courts-martial were not applicable in such instances. Major Kerr summarised his argument thus:

I submit, sir, that that refutes the frequent innuendos and charges by Defense counsel that the regulations covering this commission are unreasonable, unconscionable, and far broader than any other civilized government would prescribe. It is well known that the British Government is very particular about its method of administering justice, and its standards are extremely high in that field. 69

Whilst Major Kerr chose to view this document as corroborating the evidential and procedural standpoint expressed in MacArthur's regulations, an alternative option existed. This saw the British, and later especially the Australian War Crimes Acts as being corroborative also; but in the negative sense. These Acts sought to deny to suspected war criminals the reasonable protections of the law and to jeopardise their rights, in trials by nations which espoused the values of democracy and justice. In other words, the Acts were corroborative in the base level of justice rather than in the 'extremely high' standards they provided.

This was not the issue, as Captain Sandberg was quick to point out. He stated that the British Act did not 'sanction the introduction into evidence of reports and recommendations of the Prosecuting Branch, which is the issue involved here.' 70 However, Sandberg was abruptly interrupted by General Reynolds, who ruled that the document would be admitted into evidence for such probative value as the commission chose to accord it.

General Yamashita was therefore tried by a commission which itself lacked legal expertise, and which procedure was governed by Regulations which did not require the presentation of live witnesses, which freely admitted hearsay, incompetent and otherwise prejudicial evidence in contravention

of the Acts of Congress and to the detriment of the Accused. It was also a Tribunal that, in its exploitation of the broad scope of the regulations underpinning its existence, determined to place such documentary evidence as was tendered by the Prosecution beyond challenge by not requiring as mandatory the concurrent presentation of the original Japanese document with its English translation. Granted that the Regulations did not require this, the use of its discretionary power by the commission on this aspect could only have been to its advantage if the pursuit of truth was the goal of the trial. Some semblance of a fair trial may then have remained. For the expeditious and safe handling of the case against Yamashita, the avoidance of railroading charges - victor's justice - was surely necessary, or at least desirable. The Tribunal, if its actions are any guide, did not agree and so the Defence was endowed with little success in its attempts at achieving for their client, what they saw as minimum standards of evidential proof in respect of translated documents.

The initial argument over translation, the first of many, was one where the Defence raised an objection to the tendering of captured enemy documents in translation, without the presentation of the originals. Although the translated copies were verified by Captain Norman Sparnon, head of the Allied Translator and Interpreter Service (ATIS), the official Allied language organ in the Pacific, when called as a witness by the Prosecution, the Defence objected to

the introduction of this document in evidence on the ground that this is not the best evidence of the Japanese documents in question. The Japanese documents are

available, and should be submitted as the best evidence so that they may be translated openly in court. There is a well-known and established rule that where the primary evidence is available, secondary evidence is not admissible. In this case, there is no reason either in law or in practicality for introducing secondary evidence. 71

Major Kerr in his rebuttal dismissed the 'best evidence' maxim, arguing instead that the commission was empowered to admit any evidence deemed to have probative value. Indeed, under paragraph 16.5 the Tribunal was able, specifically, to admit

'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.' 72

The original document in question had been shipped to Washington prior to the termination of hostilities, Major Kerr claimed, and there was little chance of the documents becoming available within the anticipated judicial time span of the hearing. The Japanese originals could not be obtained from the Allied Translator and Interpreter Service, Kerr concluded, and hence the commission was acting within its jurisdiction in admitting translations.

It became apparent during the presentation of the Prosecution case that the continual objections of the Defence on questions of evidence, particularly the issue of translations, were regarded by the commission as obstructionist tactics to which General Reynolds retaliated by refusing to hear any objections to documentary evidence that fulfilled the requirements of the Regulations. To exhibit 238, a deposition taken from Lieutenant-General Koh by Captain Jerome Richard of the War Crimes Investigation Branch and

dealing with the treatment of prisoners of war and civilian internees, the Defence had two objections.⁷³ The first objection concerned the lack of any indication on the face of the document to attest to the fact that the affiant had been apprised of his rights (including the right not to incriminate himself).⁷⁴ The second objection originated from the fact that the affidavit had been taken from a Japanese-speaking witness, but the document as presented was in the English language, 'apparently a translation or an interpretation, or it is based on a translation or interpretation.'⁷⁵ The original document was not tendered. Given the difficulties in translation, particularly since Japanese could not be literally translated, there was much room for misinterpretations and error, but this could be clarified if the original document was produced for the court in conjunction with the translation.

General Reynolds overruled the second objection with an exception. The courtroom exchange here deserves to be quoted in full, as it is illustrative of the mentality which pervaded the trial and with which the Defence had to cope.

General Reynolds: As to the second objection, a similar ruling applies except if there is any particular statement which the Defense feels is material and should be considered in Japanese, the commission will consider the necessity for such additional translation.

Captain Reel: If we do not get the original then there is no way of knowing if there was any question of translation and interpretation. If we got this, we could comply with the commission's suggestion.

Major Kerr: Sir, the Defense has available a wealth of Japanese talent to interpret this back to General Koh. General Koh is personally available to the Defense. We see no reason why the Prosecution should be burdened with the necessity of translating this back into Japanese.

Captain Reel: I am afraid, sir, that the Chief Prosecutor does not understand. It isn't a case of translating back. It is a case of getting the original question and answer that General Koh gave, not of the translating back but of the original, so that we can see if this is correct, and if there are any errors.

General Reynolds: Well, it is the opinion of the commission, that we have gone far enough. The bulk of these statements do not pertain to the charges against the Accused. If there is some special statement which the Accused or his counsel questions with respect to accuracy of translation, if they will present the subject to the commission, we will then consider whether it is sufficiently material to take that additional time. 76

The decision handed down by the Tribunal not to require as mandatory the presentation to the court of the original document in the Japanese language along with the English translation effectively denied the court, but notably the Defence, the opportunity to validate the accuracy of the translation or the meaning intended, should a problem arise. This was tantamount to saying that the English translations were perfect.

Clearly, translation is of critical importance in any trial where the Accused and the court do not converse in the same language, but especially in a case of such a controversial and emotive nature. Logically, translation between two languages can never be 100% accurate, particularly where their social roots and customs are so different. A ruling that facilitates accuracy and minimises the chances of error is what is needed. The question therefore arises as to whether the ruling handed down in this instance fulfilled the requirements.

Rather than maximising accuracy in translation it could be said that the ruling hindered it, and instead, accentuated the possibilities of error for the following reasons. By

not requiring the presentation of the original document to the Tribunal along with the translation, any difficulties with the latter could not be readily clarified, and hence there was less room for argument on this ground. Since the translation could not be so checked, the standard of translation did not have to be as high, as it was put above challenge. Furthermore, the practice following from the ruling was very easily open to abuse. The Tribunal and the Defence were forced to accept the validity and authenticity of the translations without being given the opportunity to check their accuracy. The Prosecution attitude to this was that the English translations could always be re-translated back into Japanese, but this was to accept the correctness of the English version as espoused by the Prosecution.⁷⁷ The dangers here are evident, particularly when one recalls that the Prosecution controlled all of the translation and duplication facilities.

Given the stand taken by the commission on the admission of evidence, and particularly the above ruling, not requiring as indispensable the presentation of the original document when a translation was offered in evidence, and coupled with the external circumstances in which the trial was conducted especially the oppressive force stressing expeditious procedure, and the hostility of the Filipino population, it can be seen that such an inflammatory situation could easily have militated towards (or facilitated) a miscarriage of justice. Indeed, it could further be pointed out that the said ruling detracted from the purpose of the trial, which presumably was the discovery of truth in relation to the

charges against Yamashita. To summarise then, the ruling can only be described as one in accordance with the trial maxims of expediency and undue haste, and a deplorable exercise of 'victor's justice'. The effect of this ruling on the case cannot be over emphasised.

From the standpoint of the Defence counsel, the insistence by the Prosecution on using types of evidence normally prohibited, such as hearsay and affidavit in a capital case, and to deny to the Accused such fundamental safeguards as the tendering of exhibits in their original language when offering the translation for use by the court, was a conclusive demonstration of the indispensibility of such material to the Prosecution case, and hence, by implication, the weakness of the case against General Yamashita. Here they overestimated the analytical powers and legal expertise of the commission. Paradoxically, whilst reliance on this type of evidence reflected the standard of evidence from which the Prosecution could draw (since the strongest proof is usually that presented before the Tribunal) it also effected the greatest damage to the presentation of the Defence case, through the prejudices which it whipped up in the courtroom. Nevertheless, whilst serious in themselves and detrimental to the Defence case as a whole, these incidents were eclipsed in both magnitude and severity. The propaganda film 'Orders From Tokyo' and the 'surprise' testimony of the collaborators Narcisso Lopus and Joaquin Galang dropped a bombshell on the Defence counsel and irretrievably damaged their case.

'Orders From Tokyo', owned by the Government of the Commonwealth of the Philippines and made by the American Office

of Strategic Services (O.S.S.), was filmed immediately during and following the liberation of Manila by the United States forces in February 1945. The 'domestic version' of the film, shown to the commission on the evening of 15 November, 1945, was introduced by Brigadier-General Carlos Romulo, the Philippine Resident Commissioner to the United States during the war.

Prior to the viewing of the film, the commission refused to hear any objections to it; any Defence objections would be limited in effect by the prejudicial influence of the evidence upon commission members. Despite the irreparable damage to Yamashita's defence and credibility, Captain Sandberg for the Defence persisted in asserting the Defence viewpoint. 'We must protest very strongly,' he declared,

that the showing of the film, with its highly inflammatory commentary, was highly prejudicial to the Accused, and is not at all conducive to the calm, dispassionate sifting of the facts which has always been the cornerstone of American justice. 78

Two arguments were put forward against accepting the film into evidence. The first of these paralleled the reasoning applied in the case of affidavits. Because there was no opportunity for General Yamashita to confront the witnesses who testified against him, and to determine their credibility through cross-examination, this was a substantial disrespect for his rights. Captain Sandberg then stressed that in addition to this deprivation of rights the film added another, which amounted to a new departure in Anglo-American jurisprudence. The commentators in the film had not been administered the oath, and yet the commission had shown itself willing to accept such unsworn testimony. Not only

could credibility and consistency not be determined through cross-examination, but there was no safeguard against adulterated evidence. In such a way, through the lack of regard for the fundamental rights of the Accused, the Prosecution gained much 'conviction mileage' at General Yamashita's expense, and demonstrated that equality of Prosecution and Defence before a military commission was no more than a myth where the rights of an enemy alien were concerned.

The most objectionable part of the film was the commentary in respect of a scene in which an American soldier bent down and removed from the pocket of a dead Japanese serviceman, a piece of paper which he read. The commentator stated that the soldier had found the 'Orders From Tokyo' for the destruction of Manila, and that 'this is evidence which will convict General Yamashita.' No explanation of how the soldier was able to read Japanese was offered. Moreover, the Prosecution had not introduced into evidence any such 'order', but had argued instead that their case did not depend on the issuance of an order by the Accused. Had an order been produced by the Prosecution, it would have strengthened the already strong chance of conviction, as undeniable evidence of Yamashita's positive complicity in the commission of the alleged atrocities. But to have produced an order would have shifted the legal principle on which the Prosecution case was based; the 'principle' of command responsibility through negative criminality would not have been developed as Yamashita would have been convicted on conventional command responsibility charges. Thus even if such an order did exist, the Prosecution could not afford to tender it in evidence.

The only path available to the Defence though, was to call for the production of the alleged order, confident that the Prosecution was unable to produce same, in which case the Defence calculated that their own case would thereby be strengthened. Hence, Captain Sandberg argued,

If the United States forces have such an order as the film says they have, it is the duty of the Prosecution to introduce the order into evidence, and if the United States forces do not have such an order, it is most improper for the Prosecution to introduce into evidence a film whose sound track says they do.

The very title and theme of this film prove its irrelevancy. If there were in fact an 'Order From Tokyo', its materiality would lie not in the trial of this Accused but of the Emperor of Japan. 79

Captain Sandberg then requested that the full text of the film's commentary be read into the trial record, so that the reviewing authorities could have before them the complete film.

Major Kerr reiterated, in his reply, the argument that the Defence objection had no legal foundation as no contravention of the procedural and evidential regulations had occurred. Indeed, Kerr made it plain that in his view, the film was of great significance to the Tribunal:

Now, sir, the Prosecution knows of no possible evidence short of the commission itself having been present when those films were taken, present when the victims of the Japanese themselves were being removed from or being liberated from the scenes of the atrocities, no evidence short of the commission's presence at that time and at those places, that could have as strong probative value as that film. 80

However, the film notwithstanding, Major Kerr once again stressed that the Prosecution case was not dependent on 'Orders From Tokyo', but rather that General Yamashita had

'permitted these widespread, continuing atrocities to be committed.' ⁸¹ Countering Sandberg's reference to the culpability of the Emperor, Kerr averred that,

The mere fact that an order from the Emperor, if it were a fact, or if we should establish it as a fact, did come down to the commanding officer here, and that he acted pursuant to that order, would not in any way absolve the person who acted under that order from the responsibility for the crimes which he thereby committed. That is well settled, I believe: that orders of the superior officer to commit an illegal act, either under the laws of the area where the act is committed or under international laws of the laws of war, is no defense. ⁸²

Major Kerr concluded his comments by drawing the attention of the Defence to the fact that the commission was not a jury and that it was 'fully competent' to evaluate and weigh the evidence brought before it.

The Tribunal, in this instance, acceded to the Defence request to have the film commentary included in the trial record.

The testimony of Narcisso Lopus, presented before the Tribunal in support of paragraphs 15 and 25 of the Bill of Particulars, represented the Prosecution effort to link General Yamashita conclusively to the crimes committed, the evidence of which had passed before the commission steadily since the commencement of the trial, but the liability for which had hitherto remained unproven. The Prosecution alleged that whilst only a small proportion of evidence would be given in relation to the gravity of the charge it would 'present the broad plan conceived by the Japanese High Command, being headed by Yamashita, to prove the plan of executing the murders and destruction of property' in Manila as involved with these charges.

Narcisso Lapus had been the secretary to 'General' Artemio Ricarte, a Filipino patriot who was one of the leaders of the 1896 armed revolt against Spanish colonialism, and who subsequently took political refuge in Japan, arriving back in the Philippines in 1942, with a mission to ensure the cooperation of the Filipinos, for the Japanese.⁸³ The Japanese intention seems to have been the commendation of Ricarte to the Filipinos as a patriot who had never lost his zeal for independence from the white man, and to install him with this popular support, as the president of the new regime. The move failed.⁸⁴ Ricarte occupied himself with touring the Philippines and exhorting its inhabitants to cooperate with the Japanese; it was in this context that Lapus was employed.

Unable to ascertain the purpose behind the Prosecution's line of questioning, the commission asked Captain Pace to explain. He replied that,

The Prosecution intends to prove through this witness, certain conversations, certain directions, that were issued by this Accused to General Ricarte; and in order to place these conversations in their correct light, so that they will appear to be reasonable and probable under the circumstances, it is necessary to show the relationship between Ricarte and Yamashita, whether one was a subordinate of the other, whether they were equals, or what the status was between them, sir. 85

To this, Captain Reel, visibly upset, exclaimed,

Sir, any such evidence would be completely incompetent. The Prosecution has just stated that the evidence intends - the so-called evidence he intends to bring in now, is evidence apparently from the mouth of this witness, as to what another man told him, as to what a third man said. I submit, sir, that is beyond all the realm of competence. 86

However, the Prosecution was permitted to continue. Intent upon clarifying where Ricarte and Lapus stood in

relation to the Japanese authorities, Captain Pace asked Lapus how the Japanese ranked the leading Filipinos. Lapus replied that 'in accordance with the conception of the Japanese there as I have experienced and witnessed,' Ricarte was put above all other Filipinos, including President Laurel. Lapus justified his impression of Ricarte's status by referring to a statement by General Nagasaki, the Director of Military Administration in Luzon, who allegedly told Ricarte, 'You are not a human being. You are God, because you could not endure so much suffering for over 40 years if you are a human being.' 87

Captain Reel objected to this testimony on the grounds that it was based solely on hearsay, and was beyond the personal knowledge of the witness. Lapus was merely expressing his own opinion with regard to Ricarte's status under Japanese hegemony.

Captain Pace retorted that,

Even in a court of law under the strictest rules this testimony could go in because it is the type of testimony that a witness has to give based upon discussions and opinions drawn from his affairs in public life. 88

Ultimately, the commission was swayed by the Prosecution argument, and Lapus' testimony was accepted as having probative value.

At this stage, the Prosecution in its direct examination of Lapus, sought to establish the connection between him and Ricarte, to support their belief that he was in a position to know the facts about which he was subsequently to testify and to portray him as a credible witness before the commission. After having shown that Lapus was secretary to Ricarte and

dealt with the Filipino side of his affairs, and that he was working in this position at the time 'Yamashita came to the Philippines for the second time,'⁸⁹ Captain Pace sought to use this as a basis of knowledge from which Lapus could credibly impute the occupational capacity of General Yamashita, substantiated by his conversations with Ricarte.⁹⁰ A Defence objection to the admission of such material on the grounds of incompetency was not sustained by the Tribunal.

It became apparent that the previous line of questioning had been intended as a preliminary to the surprising revelation that General Ricarte and General Yamashita had met several times during the final stages of the war. What the Prosecution was here attempting to prove was that during the meetings between Yamashita and Ricarte, the former had told the Filipino of his general order for the killing of all Filipino citizens, and had refused to revoke the command when pressured by Ricarte. In this way, General Yamashita's active complicity in the commission of the crimes for which he was on trial was to be substantiated, through the evidence of one man testifying as to what a second party told him a third party said. Further, he was to be disparagingly characterised in the same mould as Allied propaganda had painted all Japanese during the recent hostilities. The Prosecution obviously estimated that the presentation of such evidence was of a type for which the Defence could find no answer, and which would at the same time convincingly clinch their conviction.

The Defence took the only action available; it had the commission permit the record to show that the Defence had a

standing objection to the admission of any evidence based on conversation, particularly that between Ricarte and Lopus, and where Lopus was told what a third party may have said. This was especially crucial here since Ricarte was presumed dead, and hence, no verification of his oral conversations or the documents he allegedly showed Lopus, and upon which the latter based his evidence, could be made.

Lopus claimed that the first meeting between Ricarte and General Yamashita was convened at the latter's request, conveyed to Ricarte in a personal message through his Japanese secretary, Lieutenant-Colonel Ota. Lopus was at Ricarte's house both when he left in the morning to visit General Yamashita and when he returned home in the afternoon, as he was anxious to hear the news of the meeting.⁹¹ According to Lopus, Ricarte told him that it was a 'terrible situation'. Given the significance of the conversation to the trial, it will be reproduced in full:

'Why, General?'

He said, 'There is a general order issued by General Yamashita all over the commanders of the military posts in the Philippine Islands to wipe out the whole Philippines, if possible.'

I asked him, 'Why, General?'

'Because General Yamashita,' he said, 'was very sore. He said to me,' he said 'before the first stage of the war we, the Japanese,' he said, '- we did not take the Filipinos as enemies, because we considered their political status as only an instrument to the American people. That is why they fought us. But now,' he said to General Ricarte, 'we take the Filipinos 100 percent as our enemies, because all of them, directly or indirectly, they are guerillas, or helping the guerillas,' according to revelation from General Ricarte to me. 'That is why,' he said, 'in a war with the enemies we don't need to give quarters. The enemies should go.'⁹²

After another Defence objection on the grounds of the

hearsay rule was not sustained, Lapus was allowed to continue with his account of the conversation he had with Ricarte concerning Yamashita's attitude toward the Filipinos:

...The revelation of Ricarte told me that Yamashita was going to move all the troops of the Japanese forces in the mountains of Montalban, San Mateo, Bosoboso, and going to the mountains in Antipolo and put there the heavy guns, and also they will put there the airplanes they have. They said that they have plenty of airplanes. And then they will let the Americans come into Manila, and as soon as the Americans come in they will make a movement of considerable force, and there will be blanket bombing, and if they wipe the Americans that will enter Manila, there will come to Manila the Japanese forces, and there will not be a single Filipino living in the City of Manila. 93

Once the Defence objection had again been rejected, Lapus continued that Yamashita had gone on to tell Ricarte that only minimal key forces would remain in the lowland Manila area, to engage the Americans and that the most populous area and the commercial centre of Manila were to be destroyed by orders from his superiors.⁹⁴ This was in addition to the general order mentioned earlier, which Lapus explained involved the mass killings of all Filipinos who exhibited signs of pro-American movement after the landing of the enemy.

Captain Pace then attempted to clarify the relationship between the general strategic plan of Yamashita and the order of which Lapus had spoken. Lapus replied that the plans correlated with the order, and Captain Pace then asked him whether the destruction of property and the defence of Manila was part of the order or the plan. Captain Reel lodged an objection against the admissibility of the exchange because it was of the nature of hearsay. In this case, it was hearsay four times removed (an order, General Yamashita, Ricarte and

the witness). The objection was overruled, and the witness was able to answer that it was a part of the order. 95

The second visit by Ricarte to Yamashita allegedly occurred some ten days after the first meeting. At this stage in his testimony, Lapus was asked where the meetings occurred. He replied that the first or second meeting was held in the house of President Quezon in Pasay, which Ricarte told Lapus was one of the houses used by General Yamashita. The purpose General Ricarte had in meeting with General Yamashita the second time was to try and get him to reverse the ruling on the massacre of the Filipinos. The other point under discussion was the removal of the Japanese headquarters to Baguio and whether Ricarte should accompany them there. 96

The substance of the second and third meetings between Ricarte and General Yamashita concerned the latter's strategy for the forthcoming battle with the United States, and Ricarte's efforts to halt the implementation of the alleged order for the massacre of the Filipinos. Ricarte told Lapus on his return from the third visit in mid-November 1944, that

I did everything...I appealed to the heart of this man, but he has no heart...He would not listen...The order was given and he could not change it. 97

Lapus had accepted the authenticity of the statement Ricarte had given him 'because I never experienced any lie from that man for the long years that we have been related.' 98

Ricarte had then gone on to apprise Lapus of the extent to which General Yamashita had confided his strategy details to him. The General, as mentioned before, planned to withdraw the majority of the Japanese troops and equipment to the

hills region of Baguio. With him were to be President Laurel and his cabinet, Ricarte and his secretary, Ota. Lapus was to remain in Manila.

Yamashita reportedly was to leave for Baguio soon after the 15th December 1945, with Laurel following on the 25th or 26th December. Ricarte and Ota left on the 31st December. The command of the unit remaining in Manila after Yamashita's departure was under General Muto and Colonel Utsonomiya, the Chief and Assistant Chief of Staff, respectively. Such command was supposedly exercised from their headquarters within Manila city. Until Ricarte and Ota left, the latter conducted his dealings with the Japanese High Command, through these officers.⁹⁹ With the move to Baguio, the operations of Ricarte's office ceased.

The incompetency of the testimony given by Lapus and its prejudicial effect on the Accused's case was only paralleled by the evidence solicited from Lapus' close friend and prison compatriote, Joaquin Galang. Being also a collaborator, Galang was in gaol on treason charges.

Galang had become involved with Ricarte when two of his five sons and sons-in-law (all of whom were guerillas) had been imprisoned. Ricarte had interceded and secured their release and that of friends in a similar predicament. Galang had been at Ricarte's house during a meeting between the Filipino and General Yamashita, and it was concerning this incident that he testified.

Ricarte sent Galang to find his grandson so that he could interpret the conversation between the Japanese and himself.

Galang was told by Ricarte that the lone Japanese visitor, dressed in a green woollen suit with a closed collar, 3 stars on his lapel and a saber at his side was General Yamashita. Galang did not know him. According to Galang, the conversation went as follows:

General Ricarte through the interpretation of the grandson said, 'I would like to take this occasion to ask you again for you to revoke your order to kill all the Filipinos and to destroy all the city.'

Q: What did Yamashita say?

He stood. He was very angry. He was frowning. You could see it in his face, and his hands were clinched, and he said,

'An order is an order, is my order. The order is my order. And because of that it should not be broken or disobeyed. It ought to be consumed (sic) happen what may happen.' 100

Galang identified the Accused in the courtroom as being the same Japanese as had come to Ricarte's house, although he had not seen him either before or after that meeting. Furthermore, Galang claimed that he had only become aware of the trial of General Yamashita with press reports of Mr. Lapus' testimony and he had thereby decided that he must also testify. He had only told his story to the Prosecution on the evening before his court appearance and had not swapped stories with Mr. Lapus. Again, the testimony he produced could be objected to on the grounds of the hearsay rule, but it was accepted by the Tribunal in disregard of any fairness to Yamashita.

Through the actions of the Tribunal in admitting evidence of such dubious authenticity as that given by the collaborators Lapus and Galang, by the ready acceptance of hearsay

and affidavits in what was a capital case, and the denial of the importance of checks on the translation of documents tendered in evidence (since the originals were not compulsorily required for joint presentation), the commission, whilst it acted in accordance with the very sweeping regulations that governed its operation, called into dispute the standards of proof that were required before guilt could be established. The weaknesses in such types of evidence were clearly highlighted by the Defence. However, it became apparent that the Tribunal members' lack of legal expertise again played a decisive role, as they chose to weight the probative value of the evidence highly, if the final outcome of the trial can be regarded as any indication.

Indeed, in the Saint Paul's College Case, and also in the discussion of Paragraph 112 of the Bill of Particulars, the Tribunal went so far as to demonstrate its willingness to adduce Japanese guilt without first accurately defining the causal relationship between the actor and the crime, let alone the identity of the actor.¹⁰¹ It should also be stressed that these incidents are just several of many variations on the same theme.

Under the Regulations Governing the Trial of War Criminals as drawn up by MacArthur's Headquarters, and applicable in the Pacific theatre and hence to the trial under discussion, the commission was empowered to admit any evidence which it deemed to have probative value (under the assumption that it was representative of the mind of the reasonable man). Such a loose ruling provided both the scope for the widest possible interpretation of the acceptability of evidence (and

its practice) and paved the way for an abuse and disregard of the rights of the Accused, to an extent which would have been found intolerable in any trial of a national by the judiciary of his own country. The exacting standards usually applied to determine guilt were absent here. Instead, the Prosecution was content to present evidence of crimes which suggested Japanese guilt as ipso facto confirmation of the responsibility and guilt of General Yamashita, without having linked the two with substantial corroborative evidence. As has been explained, the Prosecution relied on such forms of evidence as hearsay (even up to four times removed and involving the statements of a deceased person), incompetent evidence and that which tended to convey an erroneous impression of the real situation. The Tribunal was content to allow the Prosecution the extensive use of this normally prohibited material. Its willingness to accept affidavits as the sole evidence in support of some specifications, thus preventing a Defence rebuttal either through cross-examination or through the filing of cross-interrogatories reveal this.

The Tribunal had a discretionary power. It did not have to apply the regulations concerning the admission of evidence in their widest sense. The fact that it chose to do so can be seen as sufficient demonstration of intent. It is not surprising, therefore, that the finding against General Yamashita was one of guilt. As the Tribunal was constituted, so did it function.

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- 1 Proceedings, p. 100.
- 2 According to Lieutenant-General Yokoyama, it was an officer named Lieutenant-General Koh who had assumed responsibility for the management and operation of prisoner of war and civilian internment camps. His immediate superordinate was Lieutenant-General Shimono Ikaku, who was in charge of the commissariat or line of communication troops, similar to supply divisions in other armies. Yokoyama then went on to say that Shimono's unit was a part of the 14th Area Army headquarters, therefore that Shimono was a member of General Yamashita's headquarters and hence, was subject to his command. However, under cross-examination, it was revealed by Yokoyama that General Shimono's unit had been attached directly to the Supreme Southern Command under Field Marshal Count Terauchi Hisaichi, the headquarters of which had been located for a short time in late 1944, in Manila. Since General Yamashita was also subordinate to Count Terauchi, and so, under his command, it was not possible for him to have administrative or command superiority over Shimono and Koh until a re-organization of command was made. Such a re-organization occurred with the removal of the Supreme Southern Command headquarters back to Saigon on November 17th, 1944. As a result, General Yamashita could only be tried on command responsibility principles for neglect of duty in the management of prisoner of war and civilian internee affairs for the period commencing from November 18th, 1944 until the surrender. Suffice it to say, the chain of command in this aspect of military affairs had been clearly defined, and therefore, the question of responsibility was a relatively simple one.
- 3 Yokoyama assumed that this change had been induced in response to the directive from Tokyo, prompted by further order. Sea operations and sea-going naval personnel were precisely exempted from Army command. (See Proceedings, pp. 2670-1.)
- 4 Proceedings, p. 2673.
- 5 Proceedings, p. 2548. The implication therefore was that the responsibility for the execution of the Naval plan was not transferred to the Army upon their assumption of command, since it involved only Naval matters.
- 6 Proceedings, p. 2687.
- 7 Proceedings, p. 2688.
- 8 Proceedings, p. 2688.
- 9 Proceedings, pp. 2688-9.

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- 10 Proceedings, p. 2692.
- 11 Proceedings, p. 2693.
- 12 Proceedings, p. 2693.
- 13 Proceedings, p. 2681.
- 14 Proceedings, p. 2686. If read at face value, this was inconsistent with Yokoyama's earlier comment about the issuance of a 'preparatory' order', although the possibility of an error in translation cannot be excluded.

Presumably, if Yokoyama accepted the pre-eminence of the naval mission, then he could not order Iwabuchi to ignore its performance and withdraw, for, if it was exposed, Yokoyama would have rendered himself liable for court-martial and disciplinary action. The most he could do, in that case, was to strongly urge Iwabuchi to leave the City, as he claimed to have done.

This explanation of an apparent anomaly is, however, only meaningful within an understanding of the Japanese command structure. To the Western observer, Yokoyama's command over Iwabuchi would be assumed to have been absolute (i.e., operational and administrative) and hence Iwabuchi's failure to withdraw could be attributed to the Army's desire to have the naval troops employed against the enemy within the City confines, as evidenced by the failure to discipline Iwabuchi for his insubordination in refusing to evacuate. The two approaches to this question lead to quite different conclusions, as can be seen above, and to a different assignment of guilt.

- 15 Proceedings, p. 2674.
- 16 Communications between Shimbu and Shobu Headquarters were not severed until June 1945, according to Yokoyama.
- 17 Proceedings, p. 2542.
- 18 Proceedings, pp. 2552-3.
- 19 Proceedings, p. 2551.
- 20 Proceedings, p. 2679.
- 21 Proceedings, p. 2680. Radio does not mean voice - transmission in Japanese military parlance - use of Morse code.
- 22 Proceedings, p. 2511.
- 23 Proceedings, pp. 2544-5.

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- 24 Proceedings, p. 2554.
- 25 Proceedings, pp. 200-62.
- 26 Proceedings, p. 880.
- 27 This was also the first mention of the Accused in the proceedings - it occurred on the seventh day of the trial - 3 November 1945.
- 28 A similar situation arose with Paragraph 54 - the Tanuan massacre in Batangas. The witness Isidoro Magnaye testified on cross-examination that he supported the guerilla movement and had joined in their activities when asked, including the ambushing of Japanese soldiers, but he was prevented from expanding on this comment by an objection by Captain Pace.

If it please the commission, this witness hasn't testified that the Japanese injured him and I don't see how his guerilla activities can bear on his testimony. (p. 2193)

Captain Sandberg replied that it was the Defence view that open warfare existed in Batangas and that the alleged murders were deaths during combat operations. After the cross-examination was complete, Captain Pace in redirect examination asked:

- Q. Were some of the 55 people killed women and children?
- A. There were men, women and children too.
- Q. Were the women and children guerillas?
- A. No, sir.
- Q. Did they give these men, women and children a trial before they bayoneted them to death?
- A. No, sir. (p. 2194)

In such a manner, Captain Pace sought to discredit the Defence. Of course, no rational defence theory could repair the prejudicial effect of prosecution evidence from witnesses who, for example, had seen their pregnant sister's distended belly slashed open and the foetus' head cut off.

- 29 Proceedings, pp. 1488-99. Emphasis added.
- 30 Proceedings, p. 1504.
- 31 Proceedings, p. 1512.
- 32 Proceedings, p. 1513.
- 33 Proceedings, p. 1513.

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- 34 Proceedings, p. 1514. Emphasis added.
- 35 Bill of Particulars No. 2, pp. 1340-1484. Hartendorp's evidence, pp. 1391-1404.
- 36 Proceedings, pp. 1485-93.
- 37 Evidence of David Bogueslave, p. 1404.
- 38 The battle for Leyte, which occurred in October 1944, escaped the attention of the witness.
- 39 Proceedings, testimony of Thomas Poole, p. 1420.
- 40 Proceedings, pp.1457-9, and introduction into evidence over objection p. 1462.
- 41 Proceedings, p. 1460.
- 42 Reel, Case of General Yamashita, p. 140.
- 43 Ibid.
- 44 Ibid.
- 45 Reel, op.cit., p. 141.
- 46 Covered Bill of Particulars no. 13, 69 and 122.
- 47 Proceedings, pp. 1940-8.
- 48 Proceedings, pp. 2151-6.
- 49 Proceedings, p. 2209, Bill of Particulars no. 68, (extension g.52).
- 50 Proceedings, pp. 263-322.
- 51 Proceedings, pp. 2097-2137.
- 52 The Santa Rosa College, in the Intramuros or Walled City of Manila had been acting as a hospital for civilian casualties of the war, and was operated jointly by church and civilian staff. On the 6th February, in the midst of the heavy battle for the Intramuros, the Japanese suffered heavy losses and damage at their nearby gun placement. A group of some 20 Japanese soldiers entered the hospital and began a detailed inspection. Their purpose, they alleged, was to search for evidence indicative of hospital communication with the Americans, as they had been informed, was occurring. They held that this was the cause of the heavy losses they had suffered. The staff were then ordered to prepare for evacuation, and all except 5 bedridden patients (who burned to death

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in the hospital) were moved to Santo Domingo Church. There, many were killed.

- 53 Hartendorp, op.cit., vol. 2, pp. 74-6.
- 54 Hartendorp, op.cit., vol. 2, p. 77.
- 55 Hartendorp, op.cit., vol. 2, p. 283.
- 56 Proceedings, p. 123. The Defence did not argue that all articles of the Articles of War applied, but only those specifying military commissions.
- 57 Proceedings, p. 125.
- 58 The Article read:
 A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital. (Quoted - in Proceedings, p. 126).
- 59 Proceedings, p. 172.
- 60 Article 30 states: 'The President (of the United States) may by regulations which he may modify from time to time, prescribe the procedure, concluding modes of proof, in cases before courts-martial, court of inquiry, military commissions and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the District Courts of the United States, providing that nothing contrary to or inconsistent with these Articles shall be so prescribed, provided further, that all rules made in pursuance of this Article shall be laid before Congress annually.' (Proceedings, p. 173, emphasis added).
- 61 Proceedings, pp. 641-3.
- 62 Proceedings, pp. 796-869.
- 63 Proceedings, pp. 832-3.
- 64 The Defence objection was not sustained because the regulations did not prohibit such evidence.
- 65 Recommendation 4: The perpetrators of these offences, including Captain Sata, Nakahara and Yamamoto, whose ranks and first names are unknown, if and when ascertained, be tried for murder and attempted murder. (Proceedings, pp. 868-9.)

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66 Initially, the Tribunal had adopted the view that live witnesses had to be produced in court before their affidavits could be accepted. This meant that the affidavits were made available for cross-examination by the Defence, and hence, their reliability and veracity could be ascertained. But with the reversal of ruling (one of many), the Prosecution was allowed to introduce documentary material as the sole evidence in the support of specifications. The Accused therefore was denied the right to confront the witnesses against him, leaving affidavits and other documentary pieces unchallenged, and thus removing one of the most fundamental powers of Western jurisprudence from the Defence.

67 Proceedings, p. 1794.

68 At any hearing before a military court convened under these regulations the court may take into consideration any or all statements or any document appearing on the face of it to be authentic, providing the statement or document appears to the court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a field general court-martial and without prejudice to the generality of the foregoing in particular.

In rebuttal of the Defence contention that the best evidence ruling applied to such a proceeding, and only direct evidence was admissible, Major Kerr went on to read the British ruling.

If any witness is dead or is unable to attend or to give evidence or is, in the opinion of the court, unable so to attend without undue delay, the court may receive secondary statements of evidence made by or attributable to such witnesses.

69 Proceedings, pp. 1796-7.

70 Proceedings, p. 1797.

71 Proceedings, p. 113.

72 Proceedings, p. 13, Regulations Governing Trial of War Criminals, AG000.5, 24 September 1945.

73 Introduced into evidence, p. 1456.

74 Since this indication was missing, the question of whether the affidavit had been gained under an unfair pretense was raised by the Defence.

Major's Kerr rejoinder was predictable. He stated that:

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'Inasmuch as the Articles of War do not apply to this proceeding, there is no requirement that in a statement of this sort, the affiant be warned of his rights, because he has no such rights. I believe that this is very clear, sir. If the commission has ruled (and I believe it has) that the Articles of War do not apply to this proceeding, then it necessarily follows that there are no rights against self-incrimination of which he need be warned before his statement is taken.

I assume, sir, that the commission's function is to find the truth by whatever fair method may be employed for that purpose?'

Phrasing his argument thus, the Chief Prosecutor was playing on the lack of legal expertise of the commission, to achieve his goal.

75 Proceedings, p. 1563.

76 Proceedings, p. 1564.

77 For example, in the initial debate on the translation question after Captain Sandberg had made a plea for the presentation of the original Japanese documents, Major Kerr highlighted the fact that there were 40 translators 'at work providing the translations the Defence require,' and that the supply of linguists with proficiency in translating English into Japanese * and vice versa was not infinite. As was brought out in further discussion, what the Prosecutor meant to do was to supply to the Defence, documents in the Japanese language for the use of their client, but which had been translated from the English translations of the Japanese originals. Hence, General Yamashita would not have been furnished with the original * documents as requested, but an exhibit that had twice been translated between two languages of incompatible social origins, and was therefore subject to significant margins of error. It was for this reason, presumably, that the Defence requests were regarded by both the court and Prosecution as being obstructionist in nature.
* my italics.

78 Proceedings, pp. 2424-2425.

79 Proceedings, p. 2425.

80 Proceedings, p. 2426.

81 Proceedings, p. 2427.

82 Proceedings, p. 2427.

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- 83 Ricarte was one of the leaders of the 1896 revolt against Spanish colonialism, with Emilio Aguinaldo and Apolinario Malbini. The revolt was suppressed between 1898-1902 with the intervention of the United States, the new colonial overlord. Amnesty was offered to all rebels prepared to pledge allegiance to the U.S. Ricarte could not accept this oath, and so was exiled to Hong Kong in 1903. Returning to the Philippines later as a stowaway hoping to work for Philippine independence, he was apprehended, tried and condemned to a six-year gaol term. Upon release, again refusing the pledge, he was returned to Hong Kong. With the onset of war in 1914, he and his wife moved to Japan, where Ricarte taught in a university and wrote on Philippine independence. He returned to the Philippines in 1942 with Japanese support.
- 84 The moves to install him as President of the New Philippines failed because the new generation did not know Ricarte, and because he was now an octogenarian he lacked the physical stamina for the job.
- 85 Proceedings, p. 918.
- 86 Proceedings, pp. 918-9.
- 87 Proceedings, p. 921.
- 88 Proceedings, p. 922.
- 89 Proceedings, p. 928.
- 90 The reasoning here is a little curious. The Defence in their objection argued that

This witness, not being General Yamashita, cannot answer or, not being somebody who sent General Yamashita, there is nothing in this witness' personal knowledge which would enable him to answer such a question. (Proceedings, p. 928).

The commission decided to reserve its judgment until the Prosecution had determined the competency of the witness through an examination of his background.

The logic here transpired to be that

- (1) It was Lopus' observation of his superior that Ricarte when dealing with the Japanese High Command in the Philippines, always dealt with the highest commander. Therefore Ricarte could not conduct his business with the High Command unless he knew who was in charge.
- (2) Lt. Colonel Ota, Ricarte's Japanese secretary (appointed by Tojo Hideki) also dealt with the High Command.
- (3) Therefore on the basis of Lopus' conversations with

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Ricarte and Ota he was able to claim that General Yamashita was the 'highest commander of the Imperial Japanese Forces in the Philippine Islands.' (Proceedings, pp. 929-930.

- 91 Proceedings, p. 937.
- 92 Proceedings, p. 938.
- 93 Proceedings, p. 939.
- 94 Ibid.
- 95 Proceedings, p. 941.
- 96 Proceedings, 943.
- 97 Proceedings, p. 947.
- 98 Proceedings, p. 948.
- 99 Proceedings, pp. 948-9.
- 100 Proceedings, p. 1069.
- 101 The standard of proof was at issue in the Saint Paul's College case, for example. Here, many civilian Filipinos were herded into a large room and were tempted with enticing food. Witnesses saw false black lights, which were hanging from the ceiling, and connected by cords to the passage outside, drop, this occurring simultaneously with loud explosions. The Prosecution was content to accept this as proof of Japanese guilt. The Defence argued however, that given the constant aerial shelling by nearby American forces, it was not possible to state with any certainty the actual causes of the explosions. In other words, positive proof demonstrating the causal connection between the Japanese forces and the explosions which killed the civilians was necessary; guilt could not be assumed merely because a conviction was required.

Similarly, Prosecution exhibit 307 was the statement taken from a Japanese prisoner of war captured in Cebu Province. The substance of his statement dealt with the rape of the daughters of the family. Whilst he did not actually participate he shared a tent with 4 Japanese soldiers who each claimed to have raped the girls. The family was not identified, and he did not hear them say that they used force. The Japanese word for rape was not a part of the statement. For these reasons and because its base was conversations with others, the Defence unsuccessfully objected to its admission into evidence.



Photo : Australian War Memorial

CHAPTER 5

PROCEDURAL PRACTICE

In the opinion of probably every correspondent covering the trial, the Military Commission came into the courtroom on the first day with the decision clearly in its collective pocket. 1

These were the words of the Newsweek reporter covering Yamashita's trial. They perhaps best epitomised the feelings expressed by many contemporary observers about the quality of the 'justice' General Yamashita was about to receive at the hands of his victors. By their summary rejection of the Defence counsel's motion calling for the dismissal of the case against Yamashita, coupled with the haste and lack of legal precision with which the case was prepared, the military commission did little to silence such dissident commentaries.

The Prosecution urged the commission to take this course of action. It adopted the somewhat unusual view that, as the military commission had express orders from General MacArthur through Lieutenant-General Styer to try Yamashita, it therefore did not have the authority to dismiss the charge, as the Defence wished. Hence, if the Defence chose to voice its objections, the Tribunal was not the appropriate forum. Instead, any such objections should be directed to the Convening Authority, Major Kerr claimed. But Yamashita must be tried.

The Defence argued however, that the charge against General Yamashita be dropped on the grounds that the military commission lacked the jurisdiction to hear the case. Such an attack on the legality of the trial, to the Defence way of

thinking, clearly overrode any of the Prosecution considerations.

Supporting their motion, the Defence argued that the charge upon which Yamashita had been indicted, and the Bill and Supplemental Bill of Particulars which had been later supplied to him all failed to demonstrate the complicity of the Accused, either directly through active participation, or through orders issued or transmitted by him, in the events for which he was now on trial with his life. Similarly, Yamashita's alleged condonance of the illegal acts of his subordinates was not presented. Whilst the Prosecution held that Yamashita disregarded his duty in failing to control his troops, the Bills of Particulars only presented the Defence with a list of 'atrocities' and no documentation of the supposed contraventions that would have linked him as the Accused, with the crimes listed. Hence, the Defence could only conclude that General Yamashita Tomoyuki was not on trial because of any legal principles, whether commission or omission, but because he was an enemy commander of a nation which had been defeated in warfare, who had come into American hands not through the personal defeat of his troops but through surrender ordered by the Japanese Emperor. In other words, Yamashita was on trial because of his position as Commander of the Japanese Army in the Philippines, although no such principle had (ever) been recognised by American jurisprudence or the laws of war. The Defence continued by respectfully submitting that

neither the laws of war nor the conscience of the world upon which they are founded, will countenance the support of any such charge. It is the basic premise of all civilized criminal justice that it punishes not

according to status but according to fault, and that one man is not held to answer for the crime of another. 2

The import of the Defence allegation was that the indictment against General Yamashita thereby failed to state a recognisable violation of the law of war committed by him. Accepting the validity of this point then, would have meant in practice, the denial of the jurisdiction of the military commission to hear the case since no infringement of the laws of war - the jurisdictional bounds of such courts - was involved. Alternatively, should the charge have articulated an infringement of national statutory law, the national criminal courts of the Philippines would have been the appropriate judicial tribunal to hear the case. These state courts had reopened after the cessation of hostilities, the Defence pointed out, and no legally valid argument could be advanced for not utilising them. 3

A second argument invoked by the Defence was directed against what they saw as the lack of authority to convene the military commission to hear Yamashita's case. The Defence stated that the military commission was convened under the orders of the Commanding General of the United States Forces in the Western Pacific, Lieutenant-General Wilhelm Styer, under an authority delegated to him by the Commander-in-Chief of the United States Forces in the Pacific, General MacArthur, by virtue of order APO500 dated 24 September, 1945. 4 However, the granting of authority from the President of the United States (Mr. Truman) as Commander-in-Chief of the American Armed Forces to General MacArthur enabling him to command Styer to constitute the Tribunal, was not included in the trial record. This omission caused doubt to be cast

on the legality and propriety of the Tribunal's constitution.

Nevertheless, this was a minor point in relation to the major thrust of the argument. Citing Winthrop (Military Law and Precedents, page 936) as their authority, the Defence maintained that

in the absence of express statutory authority, a military commander has the power to appoint a military commission only, and to exercise a martial law, exercise a military government in occupied territory or at an instant of military operations during a period of hostilities. 5

Hostilities in the Philippine theatre, it was pointed out, had ceased as of 2 September, 1945 and so the authority to convene military commissions in that nation had lapsed from that date. The order from MacArthur to Styer, post dating the cessation of hostilities, was thereby rendered improper and invalid, and any proceedings held pursuant to it should be regarded as null and void, the Defence concluded.

Furthermore, the Defence went on, General MacArthur recognised the integrity and governmental responsibility of the Philippine Commonwealth, as could be seen from various entries in the Official Gazette.⁶ His proclamation of 22 August 1945, in which he ordered United States forces to cease from their participation in the civil administration of the Philippines as from 1 September, 1945, since there was no longer any operational necessity for such intervention, specifically pointed to MacArthur's acceptance of Philippine sovereignty, leaving little room for doubt, the Defence claimed.

There could be no grounds, therefore, under which the institution of proceedings against any Japanese war criminals

in the Philippines by American military commissions could be justified.

Moreover, under the 'Regulations Governing the Trial of War Criminals' (document AG000.5, 24 September 1945) as drawn up by MacArthur's Headquarters and which bound Yamashita's tribunal, section 3 stipulated that

The military commissions established hereunder shall have jurisdiction over all of Japan and other areas occupied by the armed forces commanded by the Commander-in-Chief, United States Army Forces, Pacific. 7

In this connection, the Defence drew the attention of the court to the fact that the Philippines was not under military occupation, according to the definition contained within the United States' Department of the Army Basic Field Manual, The Rules of Land Warfare (FM27-10, 1914 and 1940 editions). On this point, the Manual incorporated article 42 of the Fourth Annexe to the Hague Convention (1907), which stated that an occupation was said to be in existence, for the purposes of the convention, when territory came under the authority of a hostile army. The period of Japanese control over the Philippines would in this context be considered an occupation, the Defence suggested, but since the United States was a friendly power vis-a-vis the Philippines, her return would be better described as a mission of territorial recovery and a return to the original status quo.

The effect of this line of Defence reasoning was again to deduce that the orders authorising the convening of the military commission were invalid, and hence that the military commission as assembled was not a legal instrument by which General Yamashita could properly be tried. The commission

consequently had little reasonable alternative but to dismiss the case since it lacked the jurisdiction necessary to try the Accused, the Defence maintained.

But the Defence in urging the commission's recognition of the serious legal flaws in its establishment was endowed with no more success than they achieved in their efforts to secure a continuance of two weeks duration prior to the trial's commencement, so that they could prepare an affirmative defence to the additional 59 specifications contained within the Supplemental Bill of Particulars tendered by the Prosecution a mere two clear days before the trial was due to begin. The Defence attorneys took the view that since the number of specifications had now doubled, and given the novelty of both the charge and the jurisdiction and the attendant difficulties faced in mounting a case before the commission, the Tribunal's arbitrary denial of their plea constituted an unfair ruling. It prejudiced that right of an Accused to make a proper and adequate defence. Nevertheless, the Defence argument that the refusal to grant extra leave for this purpose was an infringement of the rights of the Accused, General Yamashita, to the benefits of 'due process of law' under the Fifth Amendment of the United States' Constitution, did not win the favour of the commission.⁸ Indeed, the Prosecution retorted that despite the terminology used in the Amendment, the rights and privileges bestowed by the Constitution applied only to citizens of the United States and not to 'any person' irrespective of nationality, as the Defence was wont to claim.⁹ The decision of the commission appeared to be tacit acceptance of this view.¹⁰

Whether the Tribunal's ruling actually was based on an acceptance by the members of the Prosecution argument is not clear, as its in camera deliberations were never made public, but in its defence, it is evident that the commission assumed that the Prosecution would present its case on the original Bill before starting on that relevant to the Supplemental Bill. Hence, the commission, with its lack of legal training and experience, probably did not perceive the manifest injustice such a ruling perpetuated by denying Yamashita (and his counsel) the opportunity to fully prepare their case prior to the commencement of the proceedings. It should be stressed therefore, that the manifest injustice handed out to Yamashita would not have been as great (if such things can be differentially measured) as that which occurred if the Prosecution's abandonment of the principle had not been allowed to continue.

Yet, it should be stressed that the granting of a Bill of Particulars, (from whence the continuance argument erupted) by the military commission was anything but automatic. According to the Regulations Governing the Trial of War Criminals under which the procedure applied by the Tribunal was regulated, Yamashita as an Accused was 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 offense charged.

(b) To be represented prior to and during trial by counsel of his own choice, or to conduct his own defense. If the accused fails to designate his counsel, the commission shall appoint competent counsel to represent or advise the accused.

(c) To have his counsel present relevant evidence at trial in support of his defense, and cross-examine each adverse witness who personally appears before the commission.

(d) To have charges and specifications, the proceedings and any documentary evidence translated when he is unable otherwise to understand them. 11

The Prosecution took the view that under these regulations the necessity for the presentation of a Bill of Particulars was not outlined. Rather, the Accused was only entitled to a charge and specifications as of right. Hence, the Prosecution felt that it was under no compulsion to agree to a Defence request for such a document, and secondly, that any Defence motion made in this regard was an attempt at imposing upon the commission the 'technical objections and rules of evidence, pleadings and procedure which might apply in a court of (criminal) law.' 12

The Defence, after an initial motion calling for the dismissal of the case against General Yamashita due to the failure of the charge to state a violation of the law of war committed by him, and its subsequent rejection by the Tribunal, felt itself forced to petition the court for a Bill of Particulars to expand upon and correct the deficiencies they saw in the charge. The wording of the charge, it was argued, was too vague to enable them to prepare an affirmative, intelligent defence on behalf of their client. Counsel stressed that Yamashita had a right under the regulations governing the trial, to be presented with a charge that was 'worded clearly to apprise the Accused of each offence charged.' They therefore moved that the charge and cause be made more 'definite and certain by particularising as to the time, place and dates wherein the Accused disregarded and failed to discharge his duty as Commander to control the operations of the members of his command, as alleged.' 13 A

greater precision in the cataloguing of the crimes committed - the type of crime, location, date, and identity of the perpetrators - was called for.

The Defence did not base their argument either in part or in full on the right of the Accused, under the regulations, to 'have his counsel present relevant evidence at trial,' as might have been expected, although there can be no doubt that it was an awareness of this difficulty that prompted the call for greater detail in the charge and specifications. To have called the commission's attention to this clause could only have strengthened the Defence argument.

In this instance, the Tribunal ruled in favour of the Defence over the objections of the Prosecution. Clearly, though, the commission regarded its power in this regard as discretionary; the Regulations did not specifically state that a Bill of Particulars was required, and with its lack of legal expertise it, in all probability viewed its action as concessionary, despite Defence arguments citing the necessity for a clearly worded charge. One is left to speculate as to the type of proceedings that could have ensued following a rejection of the motion, since no standards for the evaluation of the adequacy of a charge's clarity were prescribed. The power left in the hands of the commission was therefore quite arbitrary and dangerous from the point of view of the rights of the Accused, particularly when coupled with a lack of legal understanding.

However, any 'concession' here gained by the Defence was rapidly undermined by the decision of the Tribunal, upon petition by the Prosecution to allow the latter the right

to present a Supplemental Bill of Particulars at a later date, should they choose to do so.¹⁴ Defence objections raised against the propriety of conducting a case concurrently with the filing of additional specifications, were overruled.

Such a decision highlights starkly the dangers of entrusting the administration of justice - the responsibility for human fate - to individuals inexperienced in the legal profession, particularly where the procedural rules under which the trials are held do not guarantee any of the safeguards normally applicable, which operate to minimise the opportunities through which external factors may influence the decision, and a miscarriage of justice may occur. This is not to argue of course, that a miscarriage of justice would necessarily follow from such practice, but rather that the powers entrusted to military commissions were broader and more discretionary than was normal, and as such the potential for such a travesty to occur was much greater. Such a tendency could very easily have been exacerbated by the inflammatory social climate in which the war crimes jurisdiction was exercised, thereby contributing to a regrettable swing away from the lofty principles of Anglo-American jurisprudence:- equality before the law and a fair trial for all.

The Regulations Governing the Trial of War Criminals as laid out by MacArthur's Headquarters, granted to the military commissions it authorised, a very broad jurisdiction and powers. Over territory, the military commissions were granted jurisdiction over Japan and other areas occupied by armed forces under the command of the Commander-in-Chief of the

United States Army Forces in the Pacific, and within this area, any person, or military or naval unit, or an official or unofficial group (whether or not still in existence), could be charged with criminal acts or complicity therein, and tried by military commission.

The jurisdiction over offences was equally broad. It covered murder, the torture or ill-treatment of prisoners of war or persons on the high seas, the killing or ill-treatment of hostages, crimes relating to slave labour, plunder of public or private property, wanton destruction of towns, devastation or damage to public or private property not justified by military necessity, as well as persecution, extermination, enslavement or deportation of civilian populations. Included also was the 'planning, preparation, initiation or waging of a war of aggression, or an invasion or war in violation of international law, treaties, agreements or assurances.' ¹⁵

The Regulations covered conspiracy; persons participating in a conspiracy could be held responsible for all acts performed by any other person in the execution of the common plan. It was immaterial to the exercise of its jurisdiction, whether the crimes before the military commission were not justiciable within the domestic jurisdiction of the nation where the crime allegedly occurred.

The Regulations authorised the appointment of alternate members for a commission, as well as principal members; such alternates were required to attend all sessions of the commission, and to act in place of a principal member should an incapacity arise. However, the Regulations included the

clause,

Any vacancy among the members or alternates occurring after a trial has begun may be filled by the convening authority, but the substance of all proceedings had and evidence taken in that case shall be made known to that new member or alternate in open court before the trial proceeds. 16

In municipal criminal law, where members of the court are incapacitated, the trial is declared void and a new court appointed. Here, assuming that any notion of justice was involved, there is an implicit supposition made - that the evidence of a case is objectively perceived and cognitized by members of a commission, and that this information can be impartially given to a new member. This of course, is far from the truth and hence opens up an avenue through which injustice may be created.

Each commission was required to have a minimum of three members, persons whom the convening authority determined

to be competent to perform the duties involved and not disqualified by personal interest or prejudice; provided, that no person shall be appointed to hear a case which he personally investigated, nor if he is required as a witness in that case. 17

Commissions could be composed of personnel from one service, or from several, or be a mixture of service personnel and civilians. The Regulations suggested that

if feasible, one or more members of a commission should have had legal training. 18

This was however, far from being an absolute requirement. The senior member of the appointed commission, if not so named, was to act as presiding member.

The convening authority was, in addition to his responsibility to appoint the commission members, also the person

who designated the prosecutor and his assistants. Under the Regulations, it was the prosecutor's role to

determine the offenses and the offenders to be tried before the commission in addition to those specifically ordered by the convening authority. 19

Having done this, the prosecutor was to draw up the charges and specifications against the accused party, and to present these to the commission. The prosecutor then prepared the case for trial and conducted the prosecution of each case before the commission.

The commission was directed to

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. 20

It was to deal summarily with any contumacy or contempt. Witnesses could be summoned by the commission, documents could be demanded, and special commissioners could be appointed to take evidence.

It was the breadth of the provisions regarding evidence that attracted the most criticism, since types of evidence normally inadmissible in municipal criminal courts were not prohibited, and because of the considerable discretionary powers allowed to the commissions, thus making the administration of justice somewhat less constant than normally allowed. The Regulations instructed that

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. 21

Without limiting the scope of this paragraph, the Regulations

specified that documents appearing to have official origin in an armed force of any nation, or to have been issued by the International Red Cross, a medical doctor, intelligence officer or other official acting in the course of his duty could be accepted without verification. Affidavits, depositions, diaries, letters or other documents could also be admitted. Paragraph 16(5) further provided that

a copy of any document or other secondary evidence of its contents (was admissible) if the commission believes that the original is not available or cannot be produced without undue delay. 22

The potential for abuse here cannot be denied; no standard of proof by which the inaccessibility of a document could be measured was included in the Regulations, so that once again the commission was provided with a discretionary power and the fate of the accused was placed even more so in the hands of the court since there was no external authority controlling the procedure employed in the trial of war criminals.

Judicial notice of facts of common knowledge, official documents of any government, and the proceedings and findings of military courts or other agencies of the Allied nations was permissible.

Where the accused before the convened commission was charged with an offence involving the concerted criminal action of a group or organisation, evidence which was previously tendered at a trial of another member of the group relative to that crime, was allowable as prima facie evidence that the accused was similarly guilty (paragraph 16(d)). Paragraph 16(e) extended this further. The findings and judgment of a commission in any trial of a group with respect

to the criminal character, purpose or activities of the group were to be given 'full faith and credit in any subsequent trial' by the same or any other commission of an individual member of that group.

Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein. 23

In other words, an accused in a conspiracy case where other members of the same group had already been convicted, was guilty until proven innocent.

The Regulations stipulated that the official position of an accused could not absolve him from responsibility nor be considered in mitigation of punishment. Similarly, the defence of 'superior orders' - criminal action committed pursuant to an order of the accused's superior officer or government - was not recognised as a defence but it could be considered in mitigation of punishment 'if the commission determines that justice so requires.' 24

The judgment of the military commission upon the accused was to be rendered in open court, but it was not mandatory that the reasoning of the officers be stated. Commissions were empowered to award the death sentence (by hanging or shooting), life imprisonment or lesser terms, fines or other 'proper' punishment, but sentences had to be approved by the officer who convened the commission, or his successor, before they could be implemented. In the case of capital sentences, the approval of General MacArthur as Commander-in-Chief of the United States Army Forces in the Pacific, was required.

Reviewing officers were granted the authority to approve, mitigate, remit, commute, suspend, reduce or otherwise alter the sentence imposed, but they were unable to increase its severity.

It was under these regulations, therefore, that the trial of General Yamashita by military commission was authorised, the powers to do so having been bestowed on General MacArthur by the President of the United States. It was document APO707, dated 1 October 1945, under Special Orders 112, from the headquarters of Lieutenant-General Wilhelm Styer, commander of the United States Army Forces in the Western Pacific, that appointed the members of the commission to try Yamashita.²⁵ This order was made pursuant to a delegation of authority from General MacArthur.

Appointed by Styer to try the case were Major-General Russel B. Reynolds, the presiding officer and 'legal member' of the commission, Major-General Leo Donovan, Major-General James A. Lester, Brigadier-General Morris Handwerk and Brigadier-General Egbert F. Bullene.

Of critical significance in view of the subsequent developments during the course of the trial was the inferiority in rank of all members of the commission to that of General Yamashita, and their lack of any combat experience at a level commensurate with his. These deficiencies were compounded by the absence of any legal experience or expertise amongst the members of the commission, despite the designation of Major-General Reynolds as 'law member'. Legal training was not a mandatory requirement for membership of a commission, and for some reason unspecified, it had been considered not 'feasible'

to appoint any members with such qualifications to the commission trying Yamashita.

Not only was the commission inferior in rank to the Accused it was appointed to try - itself an undesirable practice due to its undermining effect on the principle underpinning this type of proceedings, trial by one's peers - but it was composed of administrative or 'desk' generals. This meant that any combat experiences they may have had would have been only at very low levels of responsibility, and hence such commission members would probably be unable to understand or appreciate the problems and difficulties encountered in a combatant command, especially under the conditions encountered by General Yamashita. There would have been very little in common, for example, between the Sixth Service Command of Major-General Reynolds, which encompassed the states of Michigan, Wisconsin and Illinois, and that of General Yamashita's 14th Area Army in the mountains of Luzon.²⁶ Yet, these were the 'peers' selected to evaluate and judge General Yamashita in a judicial forum watched by the world.

Attention was focussed on the proceedings themselves, but also on the law and justice brought to bear on the case. There was no doubt in the eyes of many contemporary observers that the commission's combined inferiority in rank, and want of combat command experience, particularly when coupled with the absence of legal training or experience and the outside pressure for a quick conclusion to the trial, weighted the scales of justice in favour of the prosecution.

Such fears and suspicions were hardly alleviated by the composition of the prosecution team and the rumours surround-

ing them. It was reputed that the Chief Prosecutor, Major Robert Kerr, an attorney in civilian life but not attached to the Judge Advocate General's Department in the Army, said that he had come to the Philippines to shoot 'Japs', but he was quite prepared to hang them.²⁷ He was assisted by Captain M.D. Webster, Captain William Calyer, Captain D.C. Hill and Captain Jack Pace, all of whom were district attorneys in civilian life with a wealth of trial experience on which to draw. Major Glicerio Opinion, a Filipino attorney and Judge Advocate of the Philippine Army was a late addition to the prosecution team, being appointed by Styer's headquarters under paragraphs 22 and 23 of Special Orders 117, dated 6 October, 1945. It is understood that he was nominated as a Filipino representative for the prosecution of Yamashita by General MacArthur, who thought it desirable that the Philippines appear to take an active role in the proceedings against the person being held responsible for much of their war-induced misfortune. The Prosecution was also provided with two trial assistants, Lieutenants Mountz and Yard, whose duty it was to undertake the lesser, time-consuming chores leaving the Chief Prosecutor and his assistants free to concentrate on the trial.

One is led to wonder why Colonel Harry Clarke as senior Defence Counsel, and his assistants, Lieutenant-Colonel Walter Hendrix, Lieutenant-Colonel James Feldhaus, Major George Guy, Captain Frank Reel and Captain Milton Sandberg did not, in view of the composition of the tribunal and its apparent deficiencies, challenge the composition of the commission. Although counsel were aware of the difficulties

they could encounter with a tribunal so constituted, it would seem that they felt such an action to be fruitless, and that it may even have prejudiced their case, judging from the court's attitude to challenges of its jurisdiction.

A problem which the Defence anticipated with regard to the structure of the court but about which it could do nothing even though it proved justified in the event, was that the persons usually appointed to hear such cases before military commissions were selected from the regular army. Appointed to adjudicate cases in tribunals convened by superior authorities on whom they might at some stage be dependant for promotion meant that those officers, in the Defence view, could not be expected to hand down decisions or act contrary to the desires or expectations of their superiors. Hence, the judicial independence of such military courts was severely circumscribed.

Nevertheless, the commission did render a decision that was quite controversial and unusual; that was to accede to General Yamashita's request to allow Lieutenant-General Muto Akira, Yamashita's Chief of Staff, and Major-General Utsonimiya, Assistant Chief of Staff to act as associate defence counsel. The request was motivated by the possession of certain relevant information being held by these two officers upon whom Yamashita relied for the day-to-day running of his headquarters. Since he was in charge and duties were delegated to them, Yamashita himself was not in possession of the information. Initially, the request was denied, as the commission felt that it was improper and irregular for these officers to be present during court proceedings as the Defence

was desirous of calling them as witnesses during the presentation of their case. In response, the Defence argued that the two officers would be present only during the prosecution case, and they 'had information which the General does not have, and which we will need in order to conduct this trial, and properly cross-examine witnesses.'²⁸ Major Kerr for the Prosecution pointed out after the request had been granted that it

is the present intention of General MacArthur's War Crimes officer to prefer charges as war criminals against the two men named by the Accused to be present during the prosecution of General Yamashita. Furthermore, the Prosecution, for the benefit of the record, does not and will not recognize the men named as Chief of Staff or as Deputy or Assistant Chief of Staff. We maintain, sir, that the day when Yamashita had his Chief of Staff or Assistant Chief of Staff is over.²⁹

The ruling of the court, unusual given the pending actions against the officers, was not reversed. This was probably the only concession to the Defence of General Yamashita that was of any import, and it is likely that it was granted either due to the legal inexperience of the commission members or to redress what was an obvious imbalance between prosecution and defence in the proceedings on a novel charge. Any accusations of railroading had to be avoided.

But there could be no doubt that the decisive factors shaping the trial of General Yamashita Tomoyuki were the regulations under which the Tribunal was constituted, particularly as practised by a commission that lacked legal expertise or experience and was subject to military command influence in a period of time that was not renowned for its tolerance and judiciousness.

FOOTNOTES

- 1 Potter, A Soldier Must Hang, op.cit., p. 180.
- 2 Proceedings, p. 87.
- 3 Clearly the Defence was suggesting that the only substantial (although not legally valid) argument against using Philippine national courts of criminal jurisdiction was the fear that the case against General Yamashita was not of sufficient legal strength to withstand the vigors involved in its presentation in a civilian court of law with the operation of legal safeguards and high standards of proof required. If there was no case, the court could then decide to drop the charges.
- 4 This order can be found in Proceedings, p. 19.
- 5 Proceedings, p. 89.
- 6 Eg. Official Gazette, April 1945, May and September 1945 - see Proceedings, pp.86, 91.
- 7 Proceedings, 'Regulations Governing the Trial of War Criminals', reprinted in full, pp. 6-18, p. 7.
- 8 Proceedings, p. 81.
- 9 Proceedings, p. 80.
- 10 This decision was subsequently confirmed by the majority decision of the United States' Supreme Court upon appeal, but was the subject of a strong dissent from Justices Wiley Rutledge and Frank Murphy.

The U.S. Solicitor-General (Philip Perlman) in his article entitled 'Habeas Corpus and Extraterritoriality' (36 American Bar Association Journal, Mar. 1950, pp. 187-190, 249-252) claimed that the decision of in re Yamashita (i.e. Supreme Court decision) reiterated that rendered in ex parte Quirin (the Saboteur's case). This, he said, meant that combatant enemy aliens who were accused as war criminals did have, in certain circumstances, rights under the Constitution and laws of the United States. The majority decision on the rights of enemy aliens indicated, according to Perlman, that the court had held such aliens entitled to the protections of the U.S. Constitution and laws where Congress had shown by its legislation that it intended to grant rights of that nature to them. The court had not held that 'enemy war criminals' could file a claim of constitutional violation in the absence of a federal statute which could be construed legally as endowing them with such privileges as an act of grace. In other words, it was Perlman's view that alien enemies on foreign soil did not possess them as of right.

11. Proceedings, Regulations Governing Trial of War Criminals, pp. 11-12.
12. Proceedings, p. 37.
13. Proceedings, p. 34.
14. Proceedings, p. 36.
15. Regulations Governing Trial of War Criminals, p. 8.
16. Regulations Governing Trial of War Criminals, p. 9.
17. Regulations Governing Trial of War Criminals, p. 9.
18. Regulations Governing Trial of War Criminals, p. 9, paragraph 8.
19. Regulations Governing Trial of War Criminals, p. 10, paragraph 12(a).
20. Regulations Governing Trial of War Criminals, p. 11, paragraph 13(a).
21. Regulations Governing Trial of War Criminals, p. 12, paragraph 16.
22. Regulations Governing Trial of War Criminals, p. 13, paragraph 16(a)(5).
23. Regulations Governing Trial of War Criminals, p. 14, paragraph 16(e).
24. Regulations Governing Trial of War Criminals, p. 14, paragraph 16(f).
25. Proceedings, pp. 20-21. This order appointed the members of the commission, prosecution and defence, and included a precis of the trial regulations from AG000.5 (24 Sept. 1945).
26. Reynolds was transferred to the Philippines for Yamashita's trial.
27. Swinson, Arthur, Four Samurai, op.cit., p. 222.
28. Proceedings, p. 27.
29. Proceedings, pp. 28-29.

CHAPTER 6

QUESTIONS OF LEGALITY

General Yamashita was facing trial for his life to answer a charge which alleged that,

'At Manila and other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its Allies (he) 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 the people of the United States and of its allies and dependencies, particularly the Philippines, and he, General Tomoyuki Yamashita, thereby violated the laws of war.'

But the crucial question was: what basis was there in law for the trial of General Yamashita as a war criminal on charges alleging command responsibility through negative criminality?

Was the principle of command responsibility through negative criminality a valid principle of law or an ad hoc weapon designed to remove enemy leaders from the post-war world?

In the answers to these questions lies the key to a revelation of the attitudes that led to the political approach which resulted in the trial of General Yamashita Tomoyuki and which shaped the procedural conduct under which the trial was expedited.

By seeking to resolve these issues, we are not necessarily limited to the arguments postulated by the Prosecution and the Defence at Yamashita's trial; what will be examined are the legal bases that existed prior to his trial that

supported such action being undertaken, particularly as it was debated by the extensive body of legal and other contemporary scholarship that surrounded what was popularly acknowledged to be a novel trial. This task itself raises two quite discrete lines of inquiry:

- (1) what basis was there in law - or what precedent existed for the trial of an alleged war criminal?
- (2) what basis was there in law for a charge of command responsibility based on negative criminality (or the principle of omission)?

To satisfactorily answer the original questions, a full assessment of both of these factors must be made. It is only then, that the motives surrounding the trial of Yamashita will be thrown into stark reality and will become visible for what they were.

As Schwarzenberger points out, if states conduct war according to rules which are intended to be more than morally binding, then it is reasonable to assume that some degree of legal responsibility would pertain to violations of such laws of war.¹

Furthermore, in common with other facets of international law (of which it is a part) the law of war is grounded on the expectation of its own self-enforcement. The working principle behind this assumption is one of reciprocity; a reciprocity of interests between belligerents tends to act as a medium of restraint and generates stability in an otherwise precarious situation. However, it is those rules of the law of war that do not seriously interfere with

military necessity that benefit most from this principle behind the operation of the law.

Where the standard of civilisation, a humanitarian aspect of the law, overrides military necessity, or the law reflects a compromise between these two factors, the working principle of reciprocity has less influence. The danger to the sway of the law here comes not from the illegal acts of individuals but from the temptation to belligerent governments to suspend adherence to the various provisions of the law of war in order to gain military advantage, or to stave off impending defeat.

A belligerent faced with enemy lawlessness may choose between two alternative courses of action. He may decide to act immediately to correct the situation. Under the law of war, the belligerent is permitted to undertake reprisals against the enemy, subject to the limitations contained in the Hague Conventions of 1899 and 1907.² The raison d'etre originated because the benefits accruing to one belligerent who has suspended his observation of certain clauses of the Convention, whilst the other party still adheres to them, are gained through unfair advantage. The second party can therefore undertake reprisal action to a level generally comparable to the degree of non-observance of the first party, and thereby eliminate the advantages so illicitly gained. Reprisal action may involve the disregard of identical or other rules of warfare to induce the enemy to comply with his legal obligations. Should reprisals be of a non-identical character, it is difficult to ascertain at what point they become excessive. In this manner, the

principle of reciprocity is made to work against the interests of the first party, and in favour of the second, so as to stabilise the situation into one of self-regulation once again. Reprisal action, nevertheless, must not disregard or contravene any rules which belligerents have agreed to observe at all times, as then the behaviour of the second party would have dropped to the level of the lowest common denominator.

An alternative course of action, and the one popularly adopted by the Allies during World War II, was to rely on the effects of the other belligerents' misdemeanours on public opinion both in the Allied and neutral countries. At the termination of hostilities (as opposed to the conclusion of peace) the enemy could be held to judicially answer for his conduct under the jurisdiction granted over war criminals by international customary law.³ Whilst the German efforts to try its own functionaries allegedly responsible for the commission of war crimes stricto sensu after World War I (the Leipzig trials) by a national court under international law, at the demand of the Allies, this had met with little success (in the view of the Allies) and so prompted them, in the later war, to bring before their own, or international tribunals, those enemy nationals so accused, who came into their hands. The trials held under this jurisdiction could be then viewed as an exercise in an individualised form of reprisal.⁴

Hence, detaining states have at their disposal a discretionary power with regard to the exercise of war crimes jurisdiction. International law does not view war crimes as

crimes per se, in that there are no penalties laid down for their commission, but it rather allows for an extraordinary form of jurisdiction of which belligerent parties may choose to avail themselves.

By deciding not to deal with General Yamashita Tomoyuki summarily, and choosing instead to try him in a judicial forum, the United States impliedly submitted to the body of laws governing such forums.

Inherent in the concept of a trial is the involvement of the law. Yamashita was to be tried according to the law, tried according to that set of norms by which the conduct of individuals is judged. However, the law - the body of customary or enacted principles recognised as binding by a community; in this case the community of so-called civilised nations - is itself regulated in its practice by ethics, by principles, a code of behaviour.

The fundamental basis of law is justice; it is the function of the law, particularly when there exists no codification of the principle involved, to examine the facts of the case, to ascertain the equities, and to arrive at a just decision.

As Appleman points out, it is imperative to realise that Yamashita, when before the military commission in the context of his trial, was no longer an 'enemy' but a defendant entitled to a fair trial.

The 'demands of public conscience' are not the test (for guilt) but, rather, the requirements of the law. 'Crimes and atrocities' prejudice guilt, and 'retribution' is a different thing from 'punishment',

he stresses. ⁵

And yet, such contradictions abounded in the decision to try General Yamashita and the other Japanese accused of war crimes, before judicial forums.

The rationalisation for the trials - that they were the 'just and effective solution' and that the condemnation of war criminals after a trial would 'command' public support and the 'respect of history' - would have been reasonable had the function of the trials been to ascertain the truth.

In trials held under national codes of criminal law, the truth is elicited, as Tsai notes, by the court's evaluation of

- (a) findings of law: did the acts charged against the accused fall within the 'behaviour-circumstances' of any particular penal law?
- (b) findings of fact: whether the acts charged did actually occur, and,
- (c) identification: was the accused responsible for the acts committed? 6

It would have been expected that, had objective truth been the goal of the war crimes trials the same process of the evaluation of guilt would have been followed.

But it was made quite obvious that an impartial assessment of guilt was not to be made. Not only had the Axis powers

developed aggression into a system, defied the most primitive canons of humanity in a deliberate assault on civilization and committed war crimes on a scale and with a brutality symptomatic of an even deeper malaise: the conscious relapse of nations which had emerged long ago from primordial savagery into a state of mechanised barbarism, 7

but,

Such men, leaders and followers alike, had forfeited any claim to be dealt with under law. To be granted the privilege of an extended application of the law of reprisal as a standard by which to measure the deeds of the worst offenders, was a concession they did not deserve but a boon granted to them because, although they acted like beasts they wore the faces of men. 8

This grossly malevolent attitude could be used to countenance any departures from normal standards of judicial practice in the trial of war criminals.

The trials were those where the victors judged the vanquished.

But more importantly, the conduct of the Allies was exempted from the purview of the courts. It was apparent that the trials had as their goal two contradictory aims - the vindication of the Allies war action and rightness of their conduct, as well as the dispensation of 'objective' justice.

These factors meant that the trials supported the view that the Allies, as the friends of the prosecuting nation, could do no wrong, whereas the enemy was always wrong.

But was this the truth?

It was the American preference to view the events of the war in such a manner, generated as a result of her own action to set herself up as the guardian of the international community interest and thereby assuming the competence to pronounce on the propriety of the conduct of other states. In other words, the United States had adopted an attitude of self-righteousness, and the behaviour of other states was evaluated from her point of view as to what constituted right and wrong. Victory and its concomitant, righteousness, gave the United States the authority to try alleged war-criminals, and hence the medium through which she served out her pronouncements of right and wrong.

Jus gladii, the right of the sword.

But what of justice, the supposed function of the law?

It was through the judgments of the tribunals that justice was measured.

In the case of General Yamashita Tomoyuki, the United States approved of the decision of the military tribunal, and of the judgment handed down by her Supreme Court on appeal. It suited American socio-political, economic and strategic considerations; therefore, justice had been done. Hence, it is fair to say that the justice of the Yamashita judgment provided the United States with freedom and comfort.

Did the judgment against Yamashita suit him?

Yamashita was philosophical, saying that,

My command was as big as MacArthur's or Lord Louis Mountbatten's. How could I tell if some of my soldiers misbehaved themselves? It was impossible for any man in my position to control every action of his subordinate commanders, let alone the deeds of individual soldiers. The charges are completely new to me. If they had happened, and I had known about them, I would have punished the wrongdoers severely. But in war someone always has to lose. What I am really being charged with - is losing the war. It could have happened to General MacArthur, you know. 9

Justice is always biased; it is justice only from one point of view. This justice has no relation with lofty concepts of reason and fairness. Justice simply 'is'. As Yamashita came before her, so she judged him. As justice was established, so she was administered.

These points are emphasised in the case of General Yamashita because it was the trial by a victor of the vanquished (although Yamashita had never been defeated in the field). The trial was held in the emotive atmosphere of the

immediate post-war period, in a city in which the Japanese, and Yamashita in particular, were especially hated. This also lends weight to the injunction that an accused should never be before a judge under such conditions when he will pass a verdict upon one unfairly. Yamashita, of course, was powerless to change the time or place of his trial.

Justice, therefore, is an establishment organised to be of service. It is adjusted by the laws and conditioned to obtain results.

The judgment against Yamashita was conditioned into sentences; certain words and their meanings portray the intentions of the judges who tried him. Whilst our opinion today, of the propriety of the trial or the justice of the verdict may differ from that expressed then, nothing can alter these words. They are the judgment of that time, and judgment and justice are relative to the laws of society at a given time. But one thing is certain, the trial of General Yamashita Tomoyuki rested on assumptions of jus gladii.

Throughout history it has been the popular practice of victorious armies to punish the vanquished, but this was usually undertaken without the involvement of the law in the context of a trial (i.e., judicial proceedings based on recognisable principles of law). Actual judicial trials of alleged enemy war criminals have been very few in number, and the number of trials by army authorities of their own numbers for such activities have been equally sparse in global military history. As Friedman points out, 'the historical precedents for war crimes trials are few and uncertain,' and do not therefore offer the definitive statement of national

practice that was often claimed in the arguments surrounding the trial of Yamashita, the Nuremberg International Military Tribunal, and other trials in the immediate post-war period.¹⁰

The trial by international tribunal in 1474 of Peter von Heiganbach,* the governor of the territory of Breisbach, for the commission of atrocities he had ordered committed against the civilian population whilst in command of the city, is often cited as the forerunner of modern war crimes trials. The court, composed of Swiss, German and Alsatian judges rejected the defence offered by Heiganbach, that he had been acting under the orders of his superior (i.e. the defence of superior orders), the Duke Charles of Burgundy. He was thus found guilty of ordering murder, rape, arson, robbery, illegal taxation and the wanton confiscation of private property, all of which were violations of the customary practices of war, and he was sentenced to death.¹¹

Other trials were held in medieval times by heraldic courts under the chivalric code, but records of these are at best fragmentary, so that their contribution towards a strong precedent for war crimes trials is difficult to assess. Free companies (ecorcheurs) rambling through France during the One Hundred Years War, pillaging as they went, were tried before court-martials of the regular army, if captured. Charges against such persons were usually treason or murder, but these were committed beyond the bounds of the law of war and hence were justiciable.

The records of the trials of war criminals in the nineteenth century show a new departure in the exercise of the

* Also spelled von Hagenbach.

war crimes jurisdiction. Courts established their power not only to try their own soldiers who had violated the law of war, but also to try such of the enemy as fell into their hands and were similarly accused. The trial of Major Henry Wirz, a Swiss doctor in charge of the Andersonville prison camp for the Confederates during the American Civil War was condemned to death as the result of judicial action on the part of the Union army.

During the Philippine campaign of 1899-1902, the United States tried some of her own soldiers in court-martial for acts of atrocity. A similar action was taken contemporaneously by Britain against the excesses of her troops in the South African campaigns of the Boer War.

The experiences of World War I led the Allies to constitute a 'Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties' to investigate and recommend action on war crimes. The majority report to the Versailles Conference recommended the establishment of a high tribunal to try enemy soldiers who violated the 'laws and customs of war, and the laws of humanity'. Over the dissent of the American members, Scott and Lansing, Article CCXXVII of the Treaty of Versailles (1919) demanded that Kaiser Wilhelm II be tried before an international tribunal. Article CCXXVIII stipulated as a condition of peace, that the Germans hand over to the Allies all persons accused (by the latter) of violating the laws of war, so that they could be tried by military commission. For crimes committed against more than one nation, a mixed military tribunal with representatives from nations involved, were to hear the case.

The trials, as required, were never held. German leaders, after receiving the Allied list of 896 alleged war criminals, argued that Germany would collapse under insurrection if the government attempted to deliver the persons listed to the Allied jurisdiction, but they offered to try them in the Supreme Court of the Reich, at Leipzig, under international law. Of the forty-five persons on the revised Allied list for trial, the Germans agreed to try twelve persons, and the sentences handed down by the Germans to their own nationals were widely criticised for their leniency. Predictably, the Allies were enraged.

World War II saw the Declaration of St. James in January 1943, in which the Allies stated their intention to punish, 'through the channel of organised justice' those responsible for the commission of war crimes. Presumably, this statement referred only to those enemy responsible for war crimes. In relation to the question of Japanese war crimes, the Potsdam Declaration also promised that 'stern justice' would be meted out to war criminals, especially in relation to crimes against prisoners of war, so that there was ample evidence of the Allied intention to subject enemy suspected war criminals that fell into their hands to the judicial process, despite the dubious legal standing of such declarations.¹²

There is evidence, therefore, that whilst the trials of alleged war criminals had, during the course of history, been few, considering the prevalence of war and military conflict, there had in recent time been an increased tendency towards subjecting such persons to judicial proceedings rather than taking summary action. From World War I onwards and during

World War II, the justiciability of war crimes was conceptually viewed as being limited to the infractions of the law of war committed by the enemy, however. Despite this consideration, there was some precedent for the United States trying General Yamashita as a war criminal, although it could not be regarded as constituting the established practice of nations. At most, it could be said to have been an embryonic trend, rather than the definitive statement of national practice claimed for it.

Thus, the law of war made applicable to the predicament of General Yamashita was not decisively a product of any of the three primary law-creating processes. It did not have its origins in international customary law, nor was it based on treaty agreements or jus cogens - the general principles of law recognised by civilised nations. (It could not be argued then, that jus cogens had been used in order to give content to the law when practice was found insufficient to create custom). Neither had it come into existence through the agency of secondary law-creating processes, such as recognition or consent. The decision to try enemy war criminals bore far more the hall mark of an act of positive law creation.

Here, the problem of the discrepancy between the provisions of the law of war and the practice of warfare is of significance. There is the tendency when reviewing the law of war to create the impression of a greater degree of certainty than is attained in the field, due to the desire of the belligerents to maintain their freedom of action. Similarly, the tendency to equate a sectional description of the law with *lex lata* is a temptation to be avoided. In this

instance, the precedents invoked by supporters of the Allied decision to judicially try Axis war criminals, to justify and rationalise that course of action were often cited as an example of lex lata instead of de lege ferenda, and about which legal opinion and practice was far from united.

Nevertheless, having elected to try war criminals and thereby impliedly submit to the laws governing such judicial procedures, it would have been anticipated, that, in order to fulfil the objectives of the United States in trying these persons, at least the semblance of an adherence to the law would have been maintained. To have fully won the approval of contemporary critics and of history, however, a judicial administration of war crimes trials was called for. Tsai, in his thesis entitled The Judicial Administration of the Laws of War, suggests that

A judicial administration of war-law is the employment of familiar trial process and the protections of justice to those charged with war crimes for the determination of the extent and nature of individual guilt. 13

He continues by outlining the elements he considers to be essential to a fair trial conducted with familiar procedure. Foremost amongst these factors is the necessity for there to be an ascertainable standard of guilt; fairness to the individual demands that the standard of guilt must be made ascertainable to him by previous laws, hence the principle nulla poena sine lege (no punishment without pre-existing law) or the injunction against ex post facto punishment are valued. Tsai recommends that the tribunal selected to hear cases against alleged war criminals be impartial but also an appropriate choice according to the values at stake in such

prosecutions.

The accused should be free from illegal arrest and wrongful detention. He should receive adequate notice of the charges against him so that he can make an intelligent, affirmative defence; he should have the right to communicate with his counsel during his detention. The court proceedings must be made understandable to him.

Tsai strongly urges that the process of accusation be responsible, permitting the accused and the court protection from frivolous or untimely charges. The accused should be given the opportunity to defend himself through testifying himself and by the hearing of witnesses on his behalf, under the guidance of counsel. He should have a right to a speedy, direct and public trial. Most importantly, the Defence and Prosecution should be in an equal position before the tribunal hearing the case, with the accused being presumed innocent until proven guilty.

In obtaining evidence to present before the court, the freedoms from unreasonable search and seizure, from coerced confession and from compulsory self-incrimination should be preserved.

As to the effect of the trial, the accused has a right to be protected from cruel and unusual punishment, multiple harassment and to have fair remedies or course of appeal after conviction, Tsai held.

Only when these standards are applied to the prosecution of alleged war criminals will the charges of jus gladii or 'victor's justice' be avoided, Tsai argues, as then persons

convicted would have been condemned under strict provisions for the protection from external influences and intrusions militating towards an a priori conclusion of guilt.

It will be observed that Tsai placed pre-eminent importance on an ascertainable standard of guilt; the gravamen of the debate in the Yamashita case relative to the applicable law concerned this critical issue. Did General Yamashita Tomoyuki have a reasonable indication that the illegal acts of his subordinates which he neither knew of, participated in, ordered or condoned, would render him criminally liable before a military commission of the United States for alleged violations of the law of war? Could he have possibly known this, or was the charge of command responsibility through negative criminality an ex post facto and ad hoc attempt to 'get' an undefeated enemy commander?

The law, as mentioned earlier, is itself regulated in its practice by a code of behaviour. This code has adopted as an ethical principle (rather than as a codified rule of law) an exhortation against the use of ex post facto law, as a protection for the individual from governmental tyranny. Here, it is important to distinguish between ex post facto and retroactive legislation, since, despite their differences, usage confuses their meaning. Black's Legal Dictionary defines retroactive law as

Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. 14

In other words, retroactive legislation involves the passing of an act which is then held to apply to the period before its

enactment as well as subsequent to it. Retroactive legislation can be both positive or negative, in that one's obligations may be reduced under the new statute, or alternatively they may be increased, thus diminishing one's status. Both changes to status with the introduction of the new statute are termed retroactive.

The maxim, nulla poena sine lege (no punishment without pre-existing law) seeks to protect the individual from the injustice of

arbitrary changes in the legal consequences of men's acts after the acts occur, and in particular, the punishment of acts the guilt of which the actor could not have known at the moment of commission. 15

The principle does not denounce all retroactive legislation (although it does not look upon it with favour) but confines its censure to that negative form of retroactive law which militates towards easier conviction, or increase the duties of an individual, or the penalties against him for the commission of certain acts, such that he could not have foreseen, at the time of their undertaking.

The legal argument behind this principle holds that fairness to the individual demands that the standard of guilt be made available to him by previous laws; it is contrary to accepted conceptions of justice to inflict on an individual a sanction for an act which was not criminal at the time of its commission, or to render him liable to increased penalties for the act, which he could not have anticipated at the time. If ex post facto law was allowed to prevail, no national could be sure that he was not to be subjected to the invocation of negative sanctions against him for acts not patently

criminal. 16

In juxtaposition to the need for fairness for the individual, there is the need for fairness to society. This has been generally interpreted as the need for the punishment of any socially undesirable act, even where there is no previous law expressly proscribing such an act. These considerations have given rise to the maxim nullum crimen sine poena or no crime without punishment. Thus, whilst precedent fulfils an extremely valuable function in determining the construction of doctrines of international law, and their application in specific factual situations, it is not binding on the courts operating under this jurisdiction. Precedent may be overthrown in order to achieve - to quote Appleman - 'substantial justice', and in the absence of a world legislature, making international law more innovatory since it proceeds on an ad hoc basis, and thereby lacking definitive codification, the maxims condemning ex post facto law must be applied mens legis rather than in form.

Hence, whilst there is an injunction against the use of ex post facto law the principle nullum crimen sine poena acts as a recognition of the fact that whilst negative retroactive legislation is not considered normally acceptable (or desirable) there are some extraordinary circumstances when states cannot afford to dispense with it in order to achieve justice. The need to hold war crimes trials was popularly claimed to be such a set of circumstances. Akehurst can be cited as being representative of this mentality when he argues that although the abandonment of the principle of nulla crimen sine lege may lead to injustice 'anyone who thinks that justice demanded

the acquittal of men convicted at Nuremberg (and presumably elsewhere) has a very peculiar idea of justice.'¹⁷ Others, such as Woetzel¹⁸ claimed that rulings against ex post facto were only incorporated into municipal law with extreme reservations and exceptions, and did not exist at all in Britain and her Commonwealth, although it might have been practised. (It is interesting to note, though, that nulla poena sine lege was a well-established principle in American national law, having been made a limitation on the legislative power of the states by virtue of Article 1, paragraph 10 of the Constitution). If no injustice was worked through the abandonment of the principle, then it followed that there had been no violation of the principle where it was unjust not to prosecute. It should be pointed out that these same arguments could have been invoked by the Nazis in Germany to support their municipal abandonment of nulla crimen sine lege in favour of nullum crimen sine poena (no crime without punishment); an act loudly condemned in the West as the basis of 'totalitarian lawlessness'.

For the purposes of argument, conceding the necessity to punish war criminals as Yamashita was supposed to be, Tsai suggests that, in the absence of pre-existing law appropriate to the case at hand and which could have acted as an indication to the accused of the international society's view of particular conduct,

men's knowledge concerning the standard of conduct can be obtained from the predominant opinion of the legal community even without the benefit of any written express provision. It is therefore not unjust to punish a person for an international crime if it was condemned by world opinion. Nevertheless, nulla

poena sine lege applied in international law must require that this 'predominant world opinion' should amount to such degree that a man of common intelligence could not doubt its existence at the time of commission. 19

Even using Tsai's criteria, would a person of 'common intelligence' have realised the criminality of General Yamashita's 'actions' at the time of their commission, had he not been led to think that way by Allied publicity? Public opinion did denounce the barbarities of warfare, as it was led to do, but did it do so from the standpoint of law, that all criminals of war should be brought to trial, or from motives of vengeance and the need to vindicate the war-dead? Legal theorising on the entire question of war crimes and criminality was both confused and convoluted, with justification and rationalisation being the overriding concerns of Allied lawyers.

On the one hand, tacit admission of the novel nature both of the trial of war criminals and of the principle on which Yamashita in particular was indicted - the lack of previous legal guidance in the form of precedent, past judgments - and the validity of ex post facto law in such circumstances, abounded. Juxtaposed against this line of argument was that represented by Kuhn,²⁰ who contended that the widespread nature of the crimes committed by Yamashita's troops and the warning given by General MacArthur on his return to Leyte were sufficient to support the conclusion that General Yamashita could be held personally, criminally liable for his failure to prevent the excesses of his troops on charges of negative criminality.

A third strain of argument attempted to draw props for

the charge from any available legal source, treaty law, conventions and national or municipal law.

It should be pointed out that there is no basic disagreement with the assumptions upon which the trial of a commander is based. The raison d'etre of such trials allegedly was to keep the barbarities of war at a minimum, and to limit the interference to the lives of civilians by encouraging adherence to the laws of war in the regulation and control of armies in the field. This is always an objective of military law and discipline. Since the essential quality of an army is its capacity to kill, it is always at its core a dangerous entity, so that discipline and obedience must prevail if it is to fulfil its purpose.

In line with this then, is the assumption that in an orderly army all ranks are subordinate and obedient to the commanding general who maintains this system of equilibrium by his authority. Such authority cannot be solicited through force, but through the actions of those in authority to awaken their enthusiasm and confidence. The commanding general then should be in the midst of his army, in touch with it and sharing the fortunes of war with them. This alone makes him equal to the heavy demands made upon him. In this position, the commander should be able to circumvent any unjust acts occasioned by the passion and delirium of war, which would not meet with general approval and acceptance. Therefore, on this basis, it would be reasonable to expect the men in the ranks, since they yield to prestige, authority and the power of example, to benefit from the criminal punishment of their commanding general for responsibility for atrocities committed

by the rank and file members of his command. It would also be reasonable to expect from the American viewpoint that the commander would have been aware of any unjust acts at the time of their occurrence, given the close links he should have had with his men and subordinate officers. There can be no argument against such propositions.

In order to render a commanding general criminally liable for the actions of his men, there already existed a doctrine of command responsibility based on positive criminality. However, in the absence of any direct orders issued by General Yamashita urging the commission of any or all of the alleged atrocities, and no evidence indicating his actual participation, the prosecution was forced to introduce a new principle of command liability - that of negative criminality, and to tread a seemingly more difficult line, legally and evidentially. It is with this course of action that the argument lies.

Legal theorists from this third school of opinion most commonly argued that the responsibility of commanders for the actions of their subordinates was encompassed within the provisions of the Hague Convention, Fourth Annexe, 1907. They were led to make such a conclusion by the wording of Article 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 article had its origins in the unratified Declar-

* Emphasis added.

ation of Brussels, (August 27, 1874) which was a statement of the 'Laws and Customs of War as adopted by the Conference of Brussels.' It was subsequently incorporated into the 1899 Hague Convention and signed and ratified by most of the twenty-six states involved. There could be no doubt that by 1907, when some forty-four nations were involved in the Hague Convention discussions, that such an article was declaratory of international law and thereby bound all states of the international community to adherence. No argument could therefore be raised on this aspect.

The wording of the article does not lend itself to the interpretation above, however; it is merely a statement of the qualifications necessary in order for a body of troops to be considered legitimate (or privileged) belligerents, and hence covered by the protections offered by the Convention. No implication of command responsibility through negative criminality is made; neither is any liability expressly stated. Indeed, some adherents of this interpretation did recognise its weakness, but this did not affect their utilisation of it. Major Kerr, for example, the Chief Prosecutor in Yamashita's trial admitted that, as Redford reports,

'confessedly' the provision had not so generally been applied. He knew of 'no case...where it had been so applied or where any effort has been made to apply it in that way.' 21

It is extremely unlikely that no form of command liability was envisaged or assumed in the Hague Conventions. As Colby pointed out, international law at that stage of its development was held to be applicable only to the conduct of nations, and not the individuals within states.²² Hence,

the Hague Conventions were premised on the assumption that individual members of belligerent armies would be held responsible to the governing body of their armed forces (i.e., high command) for their conduct in line with national military rules and regulations. But between the armies, the nation-states were responsible for the conduct of their functionaries.

It is clear that a degree of command liability did exist at the time of the Hague Conventions; to have a position of responsibility without the authority to implement and enforce one's decisions or policies would have been a ridiculous position in which to place a commander and one hazardous to army discipline and power. Authority without the accountability for one's decisions would also have been folly. Further, the workability of the Hague Conventions, and the later Geneva Conventions was based on the belief on the part of signatories, that reciprocity would be observed. * Such a belief rested on the trusting assumption that the other signators could guarantee a responsibility for their political and military actions and hence meet their international obligations. This administrative efficiency and reliability could not be achieved if individuals in positions of authority were not called on to account for their actions.

The Hague Conventions then, could be invoked to support the contention that commanders were responsible for the actions of their troops, but to a degree only. This liability

* The Conventions would in fact be self-enforcing and self-regulatory since the expectation was that in a situation of conflict, both parties would uphold the provisions contained therein. Hence, the working principle behind the Conventions was one of reciprocity with both sides benefitting equally.

generally extended to cover those commanders who either issued orders for the commission of operations that were palpably illegal, or who participated directly in the said offences. Furthermore, those commanders who, with actual knowledge of the crime, did not take appropriate action to prevent a recurrence of the act, could also be held accountable before tribunals constituted on the basis of national military regulations. 23

In addition to the Hague Convention, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, (the report of which was presented to the preliminary Versailles peace conference in March 1919) is often cited as a precedent for the principle of command responsibility through negative criminality. The Commission resolved that;

'All persons belonging to enemy countries, however high their position may have been without distinction of rank, including chiefs of states, who have been guilty of offences against the laws and customs of war or, the laws of humanity, are liable to criminal prosecution.' 24

It was proposed to try such suspects in a mixed commission or international tribunal, entertaining charges

'Against all authorities, civil or military, belonging to enemy countries, however high their positions may have been, without distinction of rank, including the heads of states, who ordered, or, with knowledge thereof and with power to intervene, abstained from preventing or taking measures to prevent, putting an end to repressing, violations of the laws or customs of war, it being understood that no such abstention shall constitute a defence for the actual perpetrators. 25

The citing of this Report in support of the contention that there was ample precedent for a command responsibility - negative criminality charge against Yamashita, is weakened by

two factors. Firstly, the Report was not unanimously supported by the Versailles delegates, nor was it ever ratified by the nations involved and hence its provisions thereby were never implemented. Secondly, the United States delegation of Robert Lansing and James Scott had serious objections to some of the Commission's recommendations, and, since the United States was the same nation that was preferring the charges against General Yamashita, these deserve attention.

The American delegates at Versailles were immovably opposed to any standard of liability resting on negative criminality. Punishment for those who either directly committed the crime, or who had the authority and abused it, so ordering the commission of an illegal act, was seen to be valid, since the individual concerned had committed a positive offence. In contrast, the punishment of a person who failed to prevent, stop or ensure that a repetition of offences against the law of war was no longer a possibility was, in the American viewpoint, a subjectively measured criterion and one that could easily be abused by the vindictive, seeking to redress the killing of their own soldiers and civilians at the hands of the enemy. Such a danger was obviously one to be avoided, if it was not to damage international credibility and relations in the future. A further fear of Lansing and Scott was that by punishing the superior the actual agent of commission would be exonerated from blame for the incident, and this they considered to be unsatisfactory from the standpoint of military order and discipline. To avoid the suspected war criminal being 'punished for the acts

of others without proof being given that he knew the commission of the acts in question, or that, knowing them, he could have prevented them,'²⁶ they suggested criteria to be adopted in determining command liability

'To establish responsibility in such cases it is elementary that the individual sought to be punished should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. They must exist in conjunction, and a standard of liability which does not include them all is to be rejected.'²⁷

Thus, Lansing and Scott held, that if such a type of liability was to be introduced, then adequate safeguards to the defendant's rights must be provided. Only knowledge with both power and authority was sufficient to convict, not only knowledge and supposed power as recommended by the Commission. Nevertheless, Lansing and Scott did not tackle the knotty problem of what constituted knowledge, and how it was to be ascertained and measured.

However, Lansing and Scott had other objections which prevented them from agreeing with the formation of an international tribunal to try such criminals. Firstly, the law that the tribunal would apply was thought to be uncertain given that the Commission had made liability dependent on infractions against both the law and customs of war and 'the laws of humanity'. The latter they felt varied with time, place and people and hence was not a constant that could be applied. In including the laws of humanity, they felt that the Commission was exceeding its mandate, which covered only infractions of the laws of war. This stance reflected the

American thinking with regard to law and morality, and the nature of a crime.²⁸ They believed that an act could not be a crime unless it was deemed to be so by the law, and the commission of such a crime could not be punished unless the penalty was also prescribed; hence the Latin maxims nullum crimen sine lege: nulla poena sine lege.

They particularly objected to heads of states being included as subject to trial before the Commission, because it was a violation of the principle of sovereignty and, in common with the other suspects, they would be being tried under ex post facto law, which was a violation of one's natural rights, as guaranteed under the United States Constitution. As stated before, an act could not be a crime without the law prescribing it as such and providing a penalty for its commission. Acts not so delineated at the time of their commission, no matter how reprehensible, were not crimes but offences against moral law, and could not therefore be dealt with judicially since judicial tribunals only dealt with and administered existing (criminal) law. The views of the American delegation are especially interesting given the round of war crimes trials after World War II, which were supported by the United States and which applied such law as is described above. The idealism of the Wilsonian period had clearly given way to a self-righteous moral tone in American politics.

Thus, the Commission on the Responsibility of the Authors of the War was more interesting from the standpoint of the precedent argument, for the objections of the American delegates to negative criminality. (That the Japanese had no

objections to the Report did not go unnoticed). But the third conclusion of the majority, which recommended special measures 'in a matter so unprecedented' to adequately deal with the authors of the war, and which held that it was desirable that penal sanctions should be provided for future outrages could have been utilised to support Yamashita's charge and trial as an exercise in the creation of positive law, which would readily have been approved (despite its legal standing) by the moral consciences of the Allies. This, quite unusually, remained relatively unexplored.

From the premise that these are some values of a humanitarian nature that are recognised by all civilised nations,

it is arguable that the legal systems of all civilized communities protect those values, and it is therefore legitimate to abstract from the pertinent rules of municipal law, general principles of law,

according to Schwarzen^berger. 29

Such a rationalisation led to the attempt, particularly in the United Nations War Crimes Commission Law Reports on the Trial of War Criminals, to establish some plausible precedent for the charge of command responsibility through negative criminality in municipal law, presumably because of the inadequacy within international law. As O'Connell ³⁰ stresses though, a distinction should be recognised between principles properly a part of international law - common elements amongst diverse national laws on fundamental rules of justice (jus cogens) - and principles merely suited for incorporation into it. The adoption of aspects of municipal law here clearly falls into the second category. France, for example, in Article 4 of the French ordinance of 28th August

1944 'Concerning the Suppression of War Crimes' provides thus for command liability:-

'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 insofar as they have organised or tolerated the criminal acts of their subordinates.' 31

Similarly, the Law of 2nd August 1947, (Article 3), of the Grand Duchy of Luxemburg on the 'Suppression of War Crimes' reads,

'Without prejudice to the provisions of Articles 66 and 67 of the Code Penal, the following may be charged, according to circumstances, as co-authors or accomplices in the crimes and delicts set out in Article 1 of the present Law: superiors in rank who have tolerated the criminal acts of their subordinates, and those who, without being the superiors in rank of the principal authors, have aided these crimes or delicts.' 32

The Chinese Law, of 24th October 1946, Article IX, 'Governing the Trial of War Criminals' asserts 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.' 33

In the Netherlands an additional section was incorporated in July 1947 into 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.' 34

The colonial administration of the Dutch East Indies' Statute Book Decree No. 45 of 1946 contained in Article 9 a provision of similar substance with regard to the responsibilities of a superior for the war crimes committed by his

subordinates.

'He whose subordinate has committed a war crime shall be equally punishable for that war crime, if he has tolerated its commission by his subordinate whilst knowing, or at least must have reasonably supposed, that it was being or would be committed.' 35

Before going on to consider the application of these clauses of national law to international law, it should be pointed out that the weak link in using municipal law, at least these cases as cited, to justify the principle of command responsibility in international law is the dating. With the exception of the French ordinance, all of the other instances cited in the Law Reports post date the trial of General Yamashita. Thus, we have a situation where municipal law in general, as far as can be judged from the material in the Law Reports, did not support the principle of command responsibility (negative criminality) under national law (and therefore operative against members of its own armed forces) until after the hanging of Yamashita.

An alternative explanation is to view municipal law as offering a rationalisation for Yamashita's trial. It could be argued that municipal law acted as a form of precedent for the later command responsibility trials, but how valid is this contention given that Yamashita had already been tried and executed, and a precedent, set by his case in the application of the principle, had been established?

Nevertheless, there is a great similarity between the application of the command responsibility clauses of national law and the way the principle worked in international war crimes jurisdiction.

It is interesting to note that the United Nations War Crimes Commission Law Reports made no mention of the American standard of liability, which it could be assumed, would have had a substantial bearing on the case in question. Whilst not as clearly and concisely worded as the European clauses cited, the United States can be said to have supported the principle of command responsibility. Under General Order 100, (1863) Article XIII, it is directed that 'military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war.' Clearly, as Campbell elucidates, 'trial and punishment on conviction is required; if trial is not forthcoming it is a command delict itself triable under the 62nd Article of War.'³⁶ Hence, toleration of the commission of crimes of war on the part of commanders was abhorred, and rendered them directly liable for dereliction of duty or culpable negligence.

General Order 100, in Article LXXI, further delineates the liability of commanders for the actions of their troops. 'Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death.'³⁷ The perpetrator is therefore to be held liable for his action under this provision, but the commander who orders or encourages the perpetrator in his action, also becomes liable.

Elsewhere in the Rules of Land Warfare, 1914 and 1940, similar expressions of intent can be found.³⁸ However, these

generally are concerned with the ordering or authorisation of such actions, and so knowledge is assumed, rather than with that aspect of liability under which knowledge is disputed and the objectionable actions do not meet with punishment.

Picturing then, the American standard of liability in conjunction with the clauses of national European law, it becomes evident that knowledge is a key concept in the principle of command responsibility in municipal law.³⁹ This raises the question of how this principle was applied in international law, and whether knowledge retained its importance at that level.

It will be remembered that the national penal codes mentioned before, in general, regarded the commander as an accomplice of the primary actor in the crime. This attitude was of importance in shaping the way in which command responsibility as a principle, was applied to General Yamashita, Admiral Toyoda and the other Axis war criminals after World War II. For this purpose, it becomes necessary to define what is legally meant by the term 'accomplice'. Black's Legal Dictionary thus defines it,

A person who knowingly, voluntarily, and with common intent with the principal offender, unites in the commission of crime. One who is in some way concerned with or associated in the commission of crime. 40

Perhaps the clearest definition is that arrived at in the case State v Arnold, 84 Montana 348;

An accomplice is one who is guilty of complicity in the crime charged; either by being present, or aiding and abetting in it, or having advised and encouraged it, though absent from the place when it was committed,

though mere presence, acquiescence, or silence, in the absence of a duty to act, is not enough, no matter how reprehensible it may be, to constitute one an accomplice. 41.

Presence is unnecessary. Knowledge and concealment are not sufficient to render one an accomplice, and neither is the false denying of knowledge about the commission of the crime in a similar way sufficient unless a duty to act is proven.

Clearly, the above conception of the nature of an accomplice seems to have been extracted in total from municipal criminal law and recast in international law as the fundamental rationale underpinning the principle of command responsibility. Within this framework then, the main question to which the Prosecution and Defence counsel in the Yamashita case addressed themselves, was the evaluation of whether, in that situation, Yamashita as commanding general, had a duty to act. Intricately involved in this problem was its concomitant, that of knowledge.

In ascertaining the guilt or innocence of the accused on the principle of command responsibility, the military tribunal was given great leeway and discretionary powers since the law in this field was at best, embryonic. It had access, in common with all courts of law, to two categories of material that would help to establish criminality or innocence. The first of these, being substantive law, is in this situation, composed of sources actually delimiting the extent to which the commander may be held responsible for the criminal actions of his subordinates. In other words, such material is directed towards answering the question, 'What level of omission is necessary to hold a commander vicariously liable

for offences committed by subordinates, and not ordered by him?', as Solf points out.⁴²

Second, is the evidential aspect, involving also the problem of procedure, and applied towards answering the question, 'By what standards should criminal charges against a commander be adjudicated?'

The Defence reaction to the Yamashita case was based primarily on the assumption that the case was one of Res Nova, (a question not previously decided) and their strategy in answer to the charge was moulded substantially by this attitude. Whilst it was a case justiciable under a new legal principle, the Defence failed to appreciate the inherent possibilities contained within the charge as framed or formulated by the Prosecution. In addition to the lack of time available for the preparation of the case, this was the most significant weakness the Defence faced.

To summarise then, a commander in 1945 could be held accountable for the illegal actions of his troops on two grounds.

- (1) The participation in the commission of acts contrary to the laws of warfare, or the issuance of orders on the part of the commander directing the commission of the acts, would have automatically made him directly liable. Actual knowledge was presumed. This was positive criminality.
- (2) In a situation where the commander negligently failed to acquire knowledge, and it was his duty to possess the same (in order to control the troops

in his command), he could now be legally arraigned. It was on this ground that Yamashita was indicted; command responsibility through negative criminality.

Where the crime was ordered by the commander, and he became directly liable, knowledge is an essential element but it was not an issue. By the same token, 'should have known' does not render a commander liable for the commission of a war crime perpetrated by a subordinate unless dereliction of duty is involved. That duty to know and duty to act is of supreme importance.

How, in this situation, can the duty to act and the commander's knowledge be evaluated? Those were questions to which the Tribunal trying Yamashita should have addressed itself.

To a certain extent, the 'Reasonable Man' Test may be applied. It should be remembered in this connection though, that the reasonable man test is not the same for all military personnel; the higher the rank, the more difficulty is encountered in pleading lack of knowledge of the commission of the illegal acts. This rests on the logic that the more elevated the position in the military hierarchy, the greater and more detailed the information that is made available to the commander, and is demanded in turn, by his position. As well as routine information, a general can be expected to have far more experience-generated information available to him than, say a corporal, and hence the reasonable man test takes cognizance of rank, authority and status, and the relationship to the case in point. 43

Campbell defines 'authority' in this context as the officer's rank, his position in the national military hierarchy, and the scope of his duties as set out by national military law and custom, and the dictates of humanity. ⁴⁴ These then, are both the determinants of the extent to which knowledge can be inferred and as indicators of that extent. The relationship between knowledge and authority is that knowledge is either directly and actually gained (actual knowledge) or can be imputed to the indicted commanders on the basis of their scope of authority and the information available to them. Hence, the commander either had actual knowledge or he 'should have known'. Given this, what the Tribunals sought to do was to look at the structure of authority to determine the intent of the commander. If the general had the authority to prevent the acts charged, (authority here being equivalent to both the power and the duty to act, by virtue of the above definition) and he did not do so, then the commander became liable for criminal negligence.

According to this theory, criminal negligence is incurred where the commander has no knowledge, but there is both the duty to know, and the means available to him to acquire the information required by his position, all other factors being equal (i.e., information not being purposely withheld by officers at the lower extremities of the command pipeline).

To recapitulate the main points, the United States Army Subject Schedule which succinctly sets out the liability of the commander can be utilised here. It states that,

The legal responsibility for the commission of war crimes frequently can be placed on the military commander as well as his subordinates who may have actually committed the crime. Since a commander is responsible for the actions of those he commands, he can be held as a guilty party if his troops commit crimes pursuant to his command, or if he knew the acts were going to be committed even though he did not order them. The commander is also responsible if he should have known, through reports or by other means, that those under his command are about to commit or have committed war crimes, and he fails to take reasonable steps to prevent such crimes or to punish those guilty of a violation. As a minimum, such a commander is guilty of dereliction of duty. 45

In substance, this is the principle of command responsibility that should have been applied in the case of General Yamashita. Being a new principle, many of the above distinctions and criteria were not fully articulated and only emerged in the later trials of Axis war criminals. With the Yamashita trial, the political implications and the punitive considerations appeared to be paramount, and questions of legality a relatively minor point.

But it was apparent that, despite the opportunity given to the Tribunal to develop responsible criteria for the evaluation of guilt under this new principle of command responsibility through negative criminality, political and punitive considerations remained uppermost in their collective mentality, and questions of law and legality were relegated to a fairly minor issue.

In conclusion then, the United States claimed sufficient legal basis for the judicial trial of General Yamashita Tomoyuki on charges of command responsibility through negative criminality. As can be seen from the foregoing discussion, these legal bases were cloudy at best; the certainty claimed by the United States did not exist and she was forced to

operate in an area of international law with little precedent for guidance. Indeed, many international lawyers date the emergence of recognisable standards of conduct in the international arena from 1945 onwards, and there can be no doubt that international law and especially the war crimes jurisdiction was in a state of ferment, turmoil and development. Yet, despite this, the United States behaved as if it was working in an area of law where lex lata prevailed. Little serious attention was paid to the problems of international law, particularly as they bore on the Yamashita case. Instead, it was political considerations that held paramount importance, that dictated the indecent haste of the trial, the necessity for legally inexperienced military commissioners and the lax procedural regulations employed in order to secure an easy conviction, with law being given the back seat treatment.

There can be no shade of doubt that the justice of Yamashita's trial was that of Jus Gladii - the right of the sword.

FOOTNOTES

- 1 Schwarzenberger, International Law, (Stevens, 1968), 3 vols., vol. 2, p. 448.
- 2 Whilst at the time of their signature the Hague Conventions bound only the signator nations, it is arguable that by World War II all nations were bound by the provisions contained therein to the extent that they were declaratory of international law and irrespective of the mutual participation (or de Martens clause).
- 3 Jurisdiction over war crimes is usually held to cease with the establishment of peace - equated with the signing of the treaty of peace - so that a fresh beginning is made. In the case of Japan, peace was not officially established until the Treaty of San Francisco (a multi-lateral peace treaty between Japan and the Allies) in 1952. The last war crimes trials did not conclude until 1951.
- 4 Interpreting reprisal as the basis of war crimes jurisdiction explains the reason why, (until it was rectified with the 1949 Geneva Convention on Prisoners of War), suspected war criminals such as Yamashita were refused prisoner of war status. Immunities, rights and protections offered by the 1929 Geneva Prisoners of War Convention were held to be only applicable to those captured enemy belligerents who had themselves abided by the rules; hence, by virtue of the fact that a suspected war criminal was suspected of having broken such rules and was awaiting trial the privileges granted by the Convention were withdrawn. Only where the rights of such soldiers were established by treaty, might there be any exception to this policy. It becomes rather arbitrary to decide who should have the benefits of POW status, and who should not. To withhold the protections it offers, especially with regard to the convening of trials, is to make an automatic assumption of guilt, and not to accord that prisoner the right to be considered innocent until his guilt was proven. The conclusion can therefore be made that there was an assumption made that trials would demonstrate the criminality of the prisoner.
- 5 Appleman, Military Tribunals and International Crimes, (Indianapolis, 1954), p. 9, footnote 1.
- 6 Tsai, Judicial Administration of the Laws of War, Unpub. LLD Thesis, Yale, 1957.
- 7 Schwarzenberger, op.cit., vol. 2, p. 520.
- 8 Schwarzenberger, op.cit., vol. 2, p. 520
- 9 Potter, A Soldier Must Hang (Müller, 1963), Conversation with author, as reproduced in Appendix, p. 200.

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- 10 Friedman: The Law of War - A Documentary History, (Random House, 1972) 2 vols., vol. 1, p. 775.
- 11 See Schwarzenberger, *op.cit.*, vol. 2, pp.462-6.
- 12 See O'Connell, International Law, 2nd ed., (Stevens, 1970), vol. 1, pp. 198-200.
- 13 Tsai, Judicial Administration of the Laws of War, *op.cit.*, I/10.
- 14 Black's Legal Dictionary, 4th revised edition, (West Publishing Co., Minnesota, 1968), p. 1480.
- 15 Tsai, *op.cit.*, IV/23.
- 16 To satisfy the principle then, criminal law which seeks to strengthen the penalties accruing in response to the commission of certain acts, should not be enforced before the public have had an opportunity to become aware of its existence. Here actual knowledge does not have to be proven, it is sufficient that the public have an opportunity to know, and this is generally satisfied by the publication of the proposed act or amendment in the government gazette. This is read in conjunction with the principle that ignorance of the law is no defence.
- 17 Akehurst, A Modern Introduction to International Law, (Allen and Unwin, London, 1970), p. 334.
- 18 Woetzel, The Nuremberg Trials in International Law, (Stevens, London, 1960), pp. 64-66 and pp. 108-15.
- 19 Tsai, *op.cit.*, IV/23.
- 20 Kuhn, 'International Law and National Legislation in the Trial of War Criminals: The Yamashita Case', American Journal of International Law, 44, pp. 559-62, (July 1950).
- 21 Redford, The Trial of General Yamashita, unpub. MA Thesis, 1975, pp. 135-6.
- 22 Colby, 'War Crimes', 23 Michigan Law Review, (March/April, 1925), p. 511.
- 23 i.e., American commanders liable for trial under regulations of Articles of War.
- 24 Emphasis added. American Journal of International Law, vol. 45, (1920), p. 117.
- 25 American Journal of International Law, vol. 45, (1920), p. 143.
- 26 *Ibid.*
- 27 American Journal of International Law, vol. 45, (1920), p. 143. Italics added.

FOOTNOTES

- 28 The American viewpoint on law and morality had reversed itself by the conclusion of World War II, as will be seen later. Law and morality became equivalent, rather than two separate concepts, as here. More, only acts delineated as crimes by the statutes were punishable in a court of law. Infringements of the moral law (not defined) were not justiciable. Law or crime and morality are not here interchangeable names for the same phenomenon or concept. This has an important bearing on the type of legislation which the American government was prepared to support. This will be clarified at a later stage.

The American stance on infringements against the 'laws of humanity' also changed as a concomitant of this reversal. Major war crimes World War II, especially IMTFE at Tokyo were characterised by the arraignments of defendants on charges of 'crimes against peace' and 'crimes against humanity' as well as conventional war crimes.

Law applied by such tribunals and criticised as being ex post facto was defended on the grounds that International Law was an innovatory form of law given that there was no world legislature and that as it progressed on an ad hoc basis, it had to take such steps to further the cause of justice in cases where it was condoned by world opinion.

- 29 Schwarzenberger, op.cit. vol. 2, p. 23.
- 30 O'Connell, op.cit., vol. 1, pp. 10-13.
- 31 UNWCCLR, vol. 3, p. 94 & vol. 15, p. 67. My emphasis.
- 32 UNWCCLR, vol. 15, p. 68. My emphasis.
- 33 UNWCCLR, vol. 15, p. 68. My emphasis.
- 34 Ibid.
- 35 Ibid.
- 36 Campbell, pp. 80-1. Military Command Liability for Grave Breaches of National and International Law: Absolute or Limited? PhD. Thesis, 1974.
- 37 Quoted in Campbell, p. 81. Emphasis supplied.
- 38 For discussion of these see Campbell, pp. 81-5.
- 39 Fr. 'organ./tolerated', L/berg. 'tolerated', Neth. 'deliberately permitted/knowingly tolerated', as standards for the assessment of accomplices.
- 40 Black's Legal Dictionary, op.cit. p. 33.

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- 41 State v Arnold 84 Mont. 348, as quoted in Black's Legal Dictionary, p. 33.
- 42 Solf, Waldemar A., 'A Response to Telford Taylor's "Nuremberg and Vietnam: An American Tragedy"' in Falk, Richard A. (ed.) The Vietnam War and International Law, 4 vols. Princeton, New Jersey, 1976, vol. 4, pp. 421-446.
- 43 See Campbell, op.cit. pp. 61-100.
- 44 Campbell, op.cit. p. 156.
- 45 A.S.S. Department of Army Pamphlet 27-1, p. 10 . Quoted in Campbell, pp. 100-1.