

Yamashita, Tomoyuki, 1885-1946, defendant.

BEFORE THE
MILITARY COMMISSION
convened by the
United States Army Forces
Western Pacific

UNITED STATES OF AMERICA)

-vs-)

TOMOYUKI YAMASHITA)

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PUBLIC TRIAL

High Commissioner's Residence,
Manila, P. I.
5 December 1945

Met, pursuant to adjournment, at 0830 hours.

MEMBERS OF MILITARY COMMISSION:

MAJOR GENERAL RUSSEL B. REYNOLDS, Presiding Officer
and Law Member

MAJOR GENERAL LEO DONOVAN

MAJOR GENERAL JAMES A. LESTER

BRIGADIER GENERAL MORRIS C. HANDWERK

BRIGADIER GENERAL EGBERT F. BULLENE

APPEARANCES:

(Same as heretofore noted.)

REPORTED BY:

E. D. CONKLIN

L. H. WINTER

M. M. RACKLIN

P R O C E E D I N G S

GENERAL REYNOLDS: The Commission is in session.

MAJOR KERR: Sir, all members of the Commission are present, the Accused and Defense Counsel are present.

GENERAL REYNOLDS: The Commission will now hear the final arguments of Defense.

COLONEL FELDHAUS: If it please the Commission, the summation and argument by the Defense will be divided into four parts: The introductory part by myself will cover the Accused's background and the conditions with which he was confronted upon his arrival in the Philippines;

Captain Sandberg will cover that phase of the evidence before the court that deals with the commission of atrocities in the City of Manila;

Captain Reel will sum up the evidence regarding guerrilla activities, the situation in Batangas, and the charges of mistreatment and abuses of internees and prisoners of war;

Colonel Clarke will make the concluding argument for the Defense, treating specifically the various items of evidence that attempt to connect the Accused with the crime as charged.

The Defense has submitted evidence to the Commission that the Accused during his long army career has demanded strict discipline of his subordinates; that prior to the war with the United States he was associated with a group of Japanese officers identified as "moderates", who believe that the Japanese army should reduce to a size only large enough for the defense of the Japanese Empire, and that

such army should not be used as a tool of aggression. This group is opposed to the policies of the Extremists Group, of which Tojo was a member.

In 1929 the Accused assisted in the preparation of plans for the reduction of the army, and, as a Moderate, he was never associated with any group that opposed friendly relations with the United States and Great Britain.

The fact that the Accused was not in the good graces of Tojo is further pointed out by the fact that he was relieved of his command at Singapore in June 1942 and given a command in Manchuria, a relatively unimportant assignment, in view of the war that was being carried on with the United States; and the further fact that he was not accorded the privilege of visiting Tokyo enroute to his new command. According to the witness who testified in this regard, the privilege was not granted to the Accused as it was rumored in Tokyo that he could not see eye to eye with Tojo.

On 23 September 1944, General Yamashita was notified that he had been assigned to the Philippine Islands to take command of the 14th Army Group, as a successor to General Kuroda. The Accused assumed command of the 14th Army Group on 9 October 1944. Upon his arrival he found the following conditions existed:

The 14th Army Group was subordinate to the Supreme Southern Command, commanded by Count Terauchi, whose headquarters was in Manila. Liaison to the Philippine Government was entrusted to Count Terauchi and Ambassador Murata. The navy was under a separate and distinct command, subordinate

only to the naval command in Tokyo. Subordinate to Count Terauchi's command, but on a parallel with the 14th Army Group, were the 4th Air Army, the 3rd Transport Command, and the Southern Army Communications Unit.

Therefore, out of approximately 300,000 troops in Luzon, only 120,000 were under General Yamashita's command.

An acute shortage of food existed, and the Japanese army was exceedingly short in both motor transport and gasoline.

The Accused found that the general state of affairs in the 14th Army Group was very unsatisfactory. The Chief of Staff was ill, there were only three members of Kuroda's staff left in the headquarters, and the new members were not familiar with the conditions that existed in Luzon. The 14th Army Group was of insufficient strength to carry out the Accused's mission, inasmuch as it was, in his opinion, about five divisions short of what would be required. His troops were of poor caliber and not physically up to standard requirements. The morale of his men was poor.

In addition, a strong anti-Japanese feeling existed among the Filipino population. There was no unity of command. Supplies were inadequate, his staff was not competent, his troops inferior and, in addition, he was surrounded everywhere by a hostile population.

Preparations for defense were practically nonexistent. Nine days after Accused arrived in Manila, the American Army invaded Leyte. On December 7, the American Army landed on Ormoc Bay, and it became apparent to General Yamashita that the battle of Leyte was lost.

However, about that time the Chief of Staff for operations, from the Imperial General Headquarters in Tokyo, arrived at General Yamashita's headquarters and urged further action against our forces on Leyte; and the Accused, because of this, actually made plans to make a counter-landing on Carigara Bay. This counter-offensive was decided against by the Tokyo representative, when the Americans landed on Mindoro.

The Accused's next problem was the defense of Luzon. His first action in this regard was to increase the strength of his army and to unify the command. Reinforcements were requested from the Supreme Southern Command. Only one-third to one-half of the three divisions sent by the Supreme Southern Command survived the American attacks by air and submarines.

The headquarters of the Supreme Southern Command had moved to Saigon on 11 November, taking with it the headquarters of the 3rd Maritime Transport. At about the same time, the prisoner of war camps came under the full command of the 14th Army Group.

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

during landing operations only.

This limited command was based on a long-standing agreement between the Japanese army and navy in Tokyo. This tactical command involved the right to order naval troops to advance or to retreat, but did not include the command of such things as personnel, discipline, billeting or supply.

General Yamashita's plan for the defense of Luzon, for sound strategic reasons, called for the evacuation of Manila. In line with this plan, on 26 December the Accused moved his headquarters to Ipo and on 2 January to Baguio, where he remained until the middle of April.

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

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

Thank you, gentlemen. I shall now turn the argument over to Captain Sandberg.

CAPTAIN SANDBERG: No one will ever know 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.

At the outset one point should be clearly emphasized. There is no rule of international law that says a commander must abandon a city. If General Yamashita had wanted to defend Manila to the last he would have been perfectly within his rights under the accepted international law and under the accepted standards of military warfare.

History is full of commanders who fought last-ditch fights in besieged cities -- Stalingrad is only one of a long list of beleaguered cities which fought to the end.

But General Yamashita decided to abandon Manila, and he is very frank about the reasons. He puts his motivation solely on strategic and not humanitarian grounds. Manila, he says, is indefensible and any attempt to retain would have been strategically unsound. There were at least three good reasons for this conclusion.

First, it was impossible to keep open food sources for the population of one million persons;

Second, the buildings are highly inflammable and so a constant battle hazard for a defender;

Third, the land is flat and peculiarly unsuited to

Japanese strength, armor and battle methods. In addition, Manila was of no particular strategic importance to the army, although it may be noted that it was one of the chief harbors of the Orient and it was of vital importance to the navy.

The soundness of General Yamashita's strategic views is borne out by what happened. The Japanese forces caught here were crushed between the bay and the river, and with no natural defenses and no escape route, were demolished to the last man.

The next question is this: If Yamashita did not want to fight in Manila why did he not declare it an open city? And his answer to this is likewise the answer of a military man with no attempt to put a humanitarian gilding on the harshness of war. General Yamashita did not declare Manila an open city because if he had done so it would have been a fraud. The declaration of a city as an open city has the effect in international law of making the city immune from enemy bombardment. No city is properly an open city unless it has been cleared of all military fortifications and supplies.

So long as Manila was full of war supplies, which he did not have the time, fuel or transportation to remove, and as long as the navy was basing its main operations, activities which he never had authority to curtail, he had no right to label Manila "open", and so invoke immunity from bombardment by the American forces. If he had declared Manila an open city then, truly, he would have violated the laws of war, just as the Germans did in 1944 when they

declared Rome an open city, knowing that as a center of war supplies Rome had no right to immunity from bombardment. 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.

The steps he took to achieve the evacuation of the city were clear and certain. In the middle of November he ordered General Kobayashi of the Manila Defense Corps and Lieutenant General Shimono of the Commissariat to evacuate. Subsequently similar orders were given to the Shimbu Group on its activation and to the Fourth Air Army when it came under his command on January 1st.

As a result of all these orders the Herculean task of moving the army installations from the city was accomplished so expeditiously that by February the 3rd there were left in the city only 1500 to 1800 troops of the Noguchi Detachment concerned with the guarding of supplies left in the city.

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.

It may also be noted that at the same time the Japanese Army was withdrawing its troops it was encouraging the civilian population to leave the city to go to

the provinces where food was more plentiful. This point, clearly established, we think by the issues of the Manila Tribune in evidence and the testimony of several of the Prosecution rebuttal witnesses, disposes once and for all of the rumor or gossip that the Japanese Army in some manner imprisoned the civilian population within the city and would not let it leave.

Given all these moves, why did General Yamashita's plan fail? Why did the navy stay behind? We know that they were ordered to leave. Even before the navy came under his tactical control General Yamashita had instructed the Shimbu Army to inform the naval commander of his wishes. And when the navy came under Shimbu on January 6th, it came under the direct compulsion of the direct order to evacuate. During January, there was some withdrawal of naval troops, but on February 13th, General Yamashita learned for the first time that there had not been substantial compliance with his order -- that the bulk of the navy troops were still in the city. Very much concerned, General Yamashita sent an urgent order to Shimbu that the navy must withdraw immediately in accordance with previous orders. But the navy did not withdraw and the Battle of Manila ensued.

As to exactly why the navy stayed behind in Manila, we can only speculate. But Vice-Admiral Okoochi, the Supreme Naval Commander, advanced two reasons before this Commission. First, that transportation facilities made withdrawal impossible; second, that Admiral Iwabuchi deliberately delayed his withdrawal because he had not yet

completed the destruction of the harbors, docks and store of supplies in the city.

Since the transportation problem was no more difficult for the navy than for the army and the army was able to evacuate, we think that we may assume that the second reason is the really important one.

As Admiral Okoochi testified, he had issued an order in December for the destruction of harbor and dock facilities and naval supplies; on January 6th this order had not yet been completed. The order was one for a naval rather than a land operation, and, consequently, did not pass to General Yamashita's control; and it could not be revoked or superseded by General Yamashita.

We have a picture, therefore, of Admiral Iwabuchi on January 6th, 1945, faced with two conflicting orders -- an order from General Yamashita to withdraw and a previous order from Admiral Okoochi to remain until the work of destruction was completed. In the opinion of Admiral Okoochi, Iwabuchi stayed on to complete his naval mission, and the Battle of Manila ensued.

Now, there is little question but that the Manila atrocities were committed by these naval troops. If the evidence in the record of caps with anchors were not enough, the mere proportion of 1500 to 1800 army troops to 20,000 navy troops, and the disposition of the naval troops in the atrocity area along Manila Bay south of the river would certainly clinch the point. We submit that it is very doubtful indeed whether under any definition

of the term these navy troops were under General Yamashita's command.

It is true that they passed to his command on paper, but it is also true that the only important order he ever gave them -- the order to evacuate -- they failed to carry out. This is because the Tokyo agreement which steered a middle ground between the traditional and age-old rivalry of the two services, provided for a dual control in case of land operations. Admiral Iwabuchi's troops were serving two masters at the same time: General Yamashita for land operations, Admiral Okoochi for operations of naval importance; but when the conflict arose, they followed the navy.

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.

But most important of all is the practical problem. How can the man possibly be held accountable for the action of troops which had passed into his command only a 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?

The Prosecution contends that there was a plan in the Manila atrocities. We do not see any. We see only wild, unaccountable looting, murder and rape. If there be an explanation of the Manila story, we believe it

lies in this: Trapped in the doomed city, knowing that they had only a few days at best to live, the Japanese went berserk, unloosed their pent-up fears and passions in one last orgy of abandon. There are some phases of the Manila situation that point to anti-guerrilla activity, it is true, but there are many others which do not. Can the rapes committed in the Bayview Hotel be explained on this basis?

Does the Prosecution contend that General Yamashita ordered these rapes?

And if General Yamashita is not charged with ordering the Manila atrocities, what is the charge? Is he charged with having failed to punish the 20,000 Japanese left in the city after the battle?

Another question remains. How does the report of the liaison committee of the Japanese Army fit in with the testimony before this Commission?

In our opinion, the statement is an ambiguous one. In our opinion, this statement is subject to two possible interpretations, and according to one of these interpretations it is perfectly consistent with the testimony. According to another interpretation it is not.

The ambiguity in the liaison committee report lies in its use of the word "Manila." General Yamashita has testified that the word "Manila" when used in operational orders did not refer to the City of Manila at all, but referred to the whole Manila sector, the whole area south of Nichols Field, north of Lake Laguna, Antipolo and the mountains to the north, Wawa, Ipo and other areas

up to the Pampanga River.

Read in the light of this meaning, the report of the liaison committee makes sense. It is true that the Manila sector, as so defined, was one of the three points of main troop concentration. It is true also that Manila, as so defined, was defended to the utmost. That the liaison committee was using the term "Manila" in this broad sense is confirmed by the statement in subdivision E, which refers to the main defensive positions at Montalban, Ipo and Antipolo, the forward outposts at For McKinley, Nichols Airfield and Karokan Airfield -- all outside the city limits -- and mentions as being inside the city limits only one battalion, described by it as a "Suicide Battalion," but identified in this trial as the 1800 men of the Noguchi Detachment, left behind in the city to guard the withdrawal of war supplies.

If, however, the liaison report is using the term "Manila" in the narrow sense of the City of Manila, it does not make sense. For the fact is that Manila was not defended to the utmost. Our own intelligence reports confirm the fact of constant withdrawal of troops from the city before the American advance. General Yamashita testified on the stand that he had received no orders to defend Manila to the utmost. And one fact is clear and certain: If he did receive such an order, he very definitely ignored and disobeyed it.

In our opinion the liaison report does not have much probative value. It does not contain actual documents, merely the recollections of staff officers, and it states

on its face that it is not absolutely correct.

One point remains -- was there any Japanese plan to destroy the city? Was there an order such as has been referred to by the Prosecution for the destruction of the city? The best answer to this question, we feel, was given by Captain Sparnon, of ATIS, who stated that nowhere among all the hundreds of thousands of documents captured by the United States was such an order to be found.

The only order in the record is one of the Imperial Naval Defense Force to destroy the factories, warehouses and material. Apart from being a perfectly legitimate military order, it was undoubtedly issued pursuant to Admiral Okoochi's plan of December, 1944, for destruction of naval supply depot. It is an unmistakable conclusion that it was under this order that the buildings along the northern bank of the Pasig River in downtown Manila, where Colonel Hashimoto testified the naval supply depots were located, were demolished.

It can hardly be pure coincidence that the only large-scale destruction in Manila was at the points of heaviest fighting, namely, the north bank of the Pasig and South Manila along the bay, but this destruction is battle destruction.

Our own XIV Corps report describes in great detail how we brought the point-blank fire of 155 millimeter howitzers, took destroyers and tanks to bear on the large public buildings of Manila until the buildings collapsed and were demolished.

The battle of the southside of Manila was a house-

to-house, room-to-room battle, and it was a battle of Japanese small arms against American artillery mortar fire and flame throwers.

Our own XIV Corps also reports that the only Japanese demolitions outside of destruction during combat was of bridges, and this corroborates completely the testimony of General Yamashita that the only order he gave was for the destruction of bridges.

If the Japanese had wanted to destroy the city, why did they not do so in January, after the American landing of Lingayan?

Why did they not put to the torch the vast populous sections of Manila, Quiapo, Santa Cruz, Sampaloc, San Jaun, Santa Mesa -- all highly inflammable, yet left virtually untouched and unharmed.

Our conclusion must be that, if indeed General Yamashita did receive this mysterious order from Tokyo, that order which the mysterious voice on the sound track says that an American soldier found on the body of a Japanese soldier, but which no one else has seen since, he certainly failed miserably to carry it out.

General Yamashita arrived in Manila on October 9th and left on December 26th. In those two key dates lie the salient explanation of much that happened in the Philippines. General Yamashita had his headquarters in Manila only two months and seventeen days. We can understand just how short a time that was because it parallels almost exactly the time this trial has been proceeding. From the time of the arraignment on October

8th until today, General Yamashita's case has been pending before this Commission only about three weeks less than the entire time of his stay in the City of Manila in 1944. That is the date of Count Terauchi's removal from Manila.

Until November 17th, General Yamashita was not even the highest commander in the City of Manila. His immediate superior, Count Terauchi, was here. He was on the spot and he was in charge. And, most important of all, it was Count Terauchi and not General Yamashita who was handling affairs concerning the civilian population -- the relations with the civil government and the discouragement and suppression of anti-Japanese activities. The basic period, therefore, is from November 17th to December 26th, a matter of a mere five weeks, during which General Yamashita was in Manila and in charge of civilian affairs.

Can it be seriously contended that a commander, beset and harassed by the enemy, staggering under a successful enemy invasion to the south and expecting at any moment another invasion in the north, that such a commander could in the period of a handful of weeks gather in all the strings of administration?

Could he in this period of time get a true picture of what the military police, with its three years of background in Manila and its long tradition of close contact with Tokyo, was up to, what it was doing right and what wrong, what legally and what illegally? Wasn't he forced by the very nature of the time and place and circumstances to rely on the course of conduct of the established,

functioning, subordinate commands?

And yet the record shows that General Yamashita did do something, that he acted swiftly, decisively, drastically. Shortly after the departure of Count Terauchi in November he met with President Laurel for the first time. This was as it should be, because prior to the departure of Terauchi he was not concerned with civil matters.

At that time he spoke to President Laurel about his desire to promote friendly relations between the Filipino people and the Japanese troops. "Because of the difference between the Filipinos and the Japanese in religion, customs and speech," he said, "undoubtedly there would arise incidents."

He hoped to be able to keep such incidents to a minimum but, he said, would President Laurel please report to him without reticence anything that should come to his attention.

Some time later President Laurel took advantage of this invitation and told General Yamashita that there was one thing which tended to create discord with the civilian population, the methods of the military police.

This was just a very general conversation, but General Yamashita went back to his office and said to his chief of staff, "President Laurel has got something to say about the military police." Go and find out what is the matter."

General Muto went, and he was told that in President Laurel's opinion the military police were over-

zealous and were making arrests on the basis of false reports of informers.

Shortly after General Yamashita's first conversation with President Laurel he had called Colonel Nagahama in to caution him to proceed with greater care, and General Muto had spoken to him also about the complaints. In addition, General Muto instituted an investigation of the military police.

However, the Japanese Army does not have an inspector general's department comparable to that maintained in the United States. The only investigative agency in the Japanese Army is the military police itself -- and the very agency it was desired to investigate, as General Muto pointed out, would have been a very difficult and very long process indeed to get the real truth about what was going on inside the Kenpei Tai. When President Laurel complained again, this time about the arrests of a friend and relative, General Yamashita took firm and immediate action. He recommended the immediate removal of Colonel Nagahama.

To understand the motivations in this matter we have to go back to the original assumptions on which General Yamashita based his plan for defense of Luzon. He knew that he was fighting an uphill battle against American superiority in all arms. He knew that friendly relations with the civilian population and with the civil government were essential. He made this point emphatically to his subordinates generally on arrival, and to Colonel Nagahama in particular on several occasions thereafter.

He knew that an unfriendly civilian population would be an additional and very powerful military arm of the invading Americans. History proved him to be correct. Our own military analysts of the XIV Corps credit the anti-Japanese sentiment of the Filipinos as one of the four major reasons for our military success here. This elementary fact of military strategy General Yamashita knew. But what he did not know then was that he was going to fail -- that his few months of effort were not going to wipe out the years of ill-feeling which grew under his predecessors, General Homma and General Kuroda, and that the Filipino people were just waiting for the signal light of the American counter-invasion to turn in full fury against the Japanese.

He recommended the removal of Colonel Nagahama. He did not remove him because he had no power to do so. The papers had to follow the long, tortuous route to the Supreme Southern Command at Saigon, from Saigon to Tokyo, from Tokyo back to Saigon, and from Saigon back to the Philippines. He recommended the removal on December 1st, 1944, and the official approval did not come back until February 1st, 1945. It took eight weeks to remove Colonel Nagahama, although ordinarily such a removal could be completed in two weeks. Why it took so long for Saigon and Tokyo to consider an act in the case of the commander of the military police we can only speculate. But we do know one thing: It was during this eight weeks -- during the months of December and January -- during the time that Colonel Nagahama was on the way out, yet not out,

that the affairs of the military police took the turn that is the subject of consideration of this Commission.

It is one of the peculiarities of the Japanese Army system that a commander cannot remove on the spot a subordinate whose performance is unsatisfactory. He can only recommend it to higher authority. As officers of the United States Army we fail to understand this. But not only is this the case in the Japanese Army, but it is also true that removal of an officer from the command which he holds by direct order of the Emperor is a far more serious and drastic step than it is in our own army.

General Yanashita, by endorsing the removal of Colonel Nagahama to the Southern Supreme Command, had taken this step and had every reason to believe that within two weeks Colonel Nagahama would be out as chief of the military police.

The Defense has maintained from the very beginning that the key -- the explanation -- of much of the matter covered by the Bill of Particulars is contained in the history of the guerrilla movement in the Philippines. We have noted with appreciation that as the trial has progressed the importance of this phase of Philippine operations has loomed larger in the evidence.

As Americans we know only too well what we owe the Filipino guerrillas. They spied for us on Japanese military installations and troop movements. They harassed Japanese supply lines, damaged bridges, ambushed Japanese detachments and assassinated Japanese soldiers and officers.

What greater tribute can there be to the effectiveness of their operations than the statement on the stand of General Muto that he was not even safe driving in the neighborhood of his own headquarters at Fort McKinley. What illumination is cast on the whole subject by General Muto's testimony regarding the plot to blow up Fort McKinley?

About the middle of November, 1944, the military police uncovered a plot to blow up General Yamashita's headquarters at Fort McKinley. Dynamite had been placed in the basement of the officers' recreation room. Machine gun emplacements, hand grenades and short wave transmission sets were found at a place between Nielson Field and Fort McKinley and 100 stands of small arms were found in a bamboo grove near Pasig. This was in November, two months before the American landing at Lingayan. The story of this incident explains the letter of commendation to the military police of which there has been so much comment. But it also brings out forcibly and vividly the extent to which the guerrillas in and around Manila had gone in their warfare with the Japanese Army.

Knowing as we do the scope and extent of guerrilla activity in the Philippines and of its increasing tempo as the American landing at Lingayan approached, is it surprising that there were in December a thousand suspected guerrillas held by the Kempei Tai for trial?

Our own G-2 reports mention the figure of 300,000 as a possible membership figure for east central Luzon alone, suggesting that many of these carried on their

routine duties during the day, joining the patrols, ambush parties or other guerrilla units only at night.

One thing we must concede: That however much we admire these staunch and fearless fighters, they were, in Japanese eyes, criminals, and the Japanese had every right under international law to try and execute them as such. Any civilian who took up arms against the Japanese thereafter was, in the eyes of international law, guilty of war treason -- just as any Japanese in Tokyo who would now take up arms against the United States would be a war traitor and subject to the death sentence. That guerrillas could, as a matter of international law be tried and sentenced has been recognized by this Commission.

The Commission has heard detailed evidence on the Japanese method of trial of guerrillas from Richard Sakakida, formerly a technical sergeant in the U. S. Army and later an interpreter of the Judge Advocate of the 14th Army Group, and from Colonel Nishiharu, Judge Advocate General of that army.

This testimony is so confusing and conflicting that it is impossible to state with any degree of certainty just what the procedure was. The points on which these two witnesses agree are as follows:

First, there is an investigation by a military police investigating officer; then there is a consultation or conference by the judge advocate's department; then finally there is a form of trial, which has much less importance and formality than the hearing in the judge advocate's department. Colonel Nishiharu's testimony is

so full of inconsistencies, confusion and untruths that we find it impossible to analyze it intelligently.

His statement, for example, that a death sentence did not require the approval of the appointing authority is so obviously at variance with the fact that it defies intelligent discussion.

There is one point, however, that emerges clearly from the mass of testimony, and that is embodied in Prosecution's Exhibits 319, 320 and 321.

These three documents which are labeled "Verdict" are apparently the records of conviction of persons charged with membership in guerrilla organizations. The dates of these verdicts are in two cases 22 December, and in one case 13 December 1944. The documents are mimeographed and in each case refer to the basis of the decision as a statement given by the defendant and a statement of the army judicial policeman. In each case the accused is found to have been engaged in guerrilla warfare against the Japanese Army. In the case of the verdicts of 22 December, the sentence is signed by one officer as "Judge." In the case of the verdict of 13 December, the sentence is signed by three judges.

The evidence indicates that Japanese methods of trial and procedure are foreign to and repugnant to American standards of justice. Sergeant Sakakida testified, however, that the methods described by him were used not only in the case of civilians accused of guerrilla activities, but also in the case of Japanese soldiers accused of purely military offenses.

In neither case was there a right to counsel; in neither case were witnesses called. In both cases the decision of the court was based on the facts developed in the military police investigation held before trial. The only difference developed by the witness between the courts-martial trials of Japanese soldiers and the military tribunal trials of suspected guerrillas was this: That in the case of Japanese soldiers, the soldiers' company commander or personnel officer would be called in and consulted as to the severity of sentence.

Colonel Nishiharu did not testify on the question whether there was any difference in any procedure of trying accused guerrillas and Japanese soldiers. Testimony from Colonel Nishihara on this point was waived.

On analysis of the shifting and inclusive evidence it seems that the only difference which clearly appears between the method of trying suspected guerrillas after December 14th or 15th and prior to that date is that the number of judges signing the verdict was reduced from three to one. This appears from Prosecution's Exhibit 319, 320 and 321, in which three judges are shown as signing the verdict on 13 December and only one judge shown on 22 December.

That the procedure was quick, informal and summary both before and after the 14th or 15th of December can hardly be doubted. That Japanese conceptions of a fair trial differ materially from Anglo-Saxon conceptions likewise cannot be doubted. But that the methods of trial described by Sergeant Sakakida as being in use for

both Japanese soldiers and suspected guerrillas are substantially the methods of trial called for by Japanese military law and regulations is likewise not subject to doubt.

Colonel Nishiharu has testified that he had a conference with General Yamashita and a conference with General Muto on the 14th or the 15th of December relative to the method of trial of suspected guerrillas. Both General Yamashita and General Muto deny categorically that there was any such conference.

This Commission will have to decide whom it considers more worthy of belief on this score. We think that Colonel Nishiharu with his vagueness and uncertainty and his inability to remember the most elementary facts is not worthy of being believed. According to Colonel Nishiharu, General Yamashita said nothing at all to him at this meeting -- only nodded.

At a previous conference on the question of pardoning Japanese prisoners so that they might rejoin the army, General Yamashita, according to Colonel Nishiharu, did not even favor him with a nod, just listened. We cannot believe that the Commission, after listening to General Yamashita on the stand for 19 hours will accept this story. In contrast to Colonel Nishiharu's vagueness and evasions are the definite and forthright statements of both General Yamashita and General Muto on this point.

Let us, however, examine the one-sided conversation which Colonel Nishiharu says he had with General Yamashita, on 1 December, and he described it as follows:

"I told him that a large number of guerrillas were in custody, but to try them in court would be impossible due to lack of time, and therefore the officer of the military tribunal, after an investigation would cooperate with the military police in the handling of the prisoners."

On cross examination on December 3rd his description was approximately the same:

"It appears that the Kenpei Tai are sending a great many guerrillas to the military tribunal, but there is no time to judge them in a formal court. They should be investigated by the officers of the military tribunal, and then in liaison with the Kenpei Tai, those who should be released should be released, and those that were to be punished should be punished."

Assuming for the moment that Colonel Nishiharu did make this statement, in what respect was he proposing a change from the ordinary, orthodox and usual procedure of military tribunals?

Both Sergeant Sakakida and Colonel Nishiharu testified that both before and after the middle of December, the role of the military tribunal was simply to approve or disapprove the findings of the Kenpei Tai and not to take evidence or hear witnesses. Colonel Nishiharu may have thought he was proposing something new, but if all he said is what he claims he said, he was simply describing to General Yamashita the ordinary, orthodox usual procedure for military tribunals as prescribed by Japanese law and regulations.

One point might be added: Colonel Nishiharu made

much of the need for haste in view of the impending removal of General Yamashita's headquarters from Manila. Actually there was no such need at all. When the time came, General Yamashita transferred general court-martial jurisdiction to the Shimbu Army, thus giving to General Yokoyama full authority to dispose of pending cases of suspected guerrillas.

We have only one observation to add: Did Colonel Nishiharu honestly believe after 23 years of service in the army, and after three years of service as Judge Advocate in the Philippine Islands, that a death sentence of a military tribunal did not need the approval of the appointing authority?

We can hardly believe that he did.

In concluding the discussion of the military police situation in Manila, we think the salient points are these:

First, that guerrillas are, in the eyes of international law, subject to trial and execution if caught;

Second, that international law does not prescribe the manner or form of trial which must be given;

Third, that the suspected guerrillas held in Manila in December, 1944, were tried in accordance with the provisions of Japanese military law and regulations;

Fourth, that General Yamashita never ordered or authorized any deviation from the provisions of Japanese military law and regulations;

Fifth, that the fact that the method of trial prescribed by Japanese military law and regulations is a summary one and not in accord with Anglo-Saxon conceptions

of justice is immaterial, since international law does not prescribe any special method of trial, and in no event are Japanese methods of trial provided by Japanese law the fault or responsibility of the Accused in this case.

GENERAL REYNOLDS: There will be a recess for approximately ten minutes.

(Short recess.)

GENERAL REYNOLDS: The Commission is in session.
The Defense may proceed.

CAPTAIN REEL: May it please the Commission, to recapitulate for a moment the plan of this summation: the background, the character of the Accused and the situation he faced here in the Philippine Islands were brought to your attention by Colonel Feldhaus. We then began to consider the affirmative case put forth by the Prosecution. It is our opinion, sir, that that case, those 123 some-odd specifications break down into four major groups:

1. The Manila situation.
2. The military police situation.
3. The matters of atrocities in the provinces aside from Manila, which we believe have a close connection with the guerrilla situation, and
4. The charges relative to prisoner-of-war camps.

We have divided that up, as I believe is obvious now, so that Captain Sandberg discussed the military police situation and the Manila situation, and I am going to use the time allotted to me by the Commission to talk about the atrocities, the items of the Bills of Particulars that had to do with the atrocities in the provinces and the guerrilla situation and also the prisoner-of-war camps.

I want to start with this question of the prisoner-of-war camps. The charges in so far as prisoner-of-war camps are concerned fall into two main categories:

1. In the first place, there is a group of items having to do with the killing of prisoners of war.
2. On the other hand, there is another group of

evidence having to do with the mistreatment of prisoners of war with especial reference to lack of food and lack of medicines.

First of all I wish to talk about those items that had to do with the killings. That in turn breaks down into five categories: (1) the Palawan incident in which there is an allegation that 150 persons were killed; (2) the Santo Tomas incident involving four persons; (3) the Los Banos incident involving two persons; (4) a matter that does not have anything to do with prisoner-of-war camps as such but has to do with alleged executions of prisoners who were captured in the field, they being at Leyte, Cebu, and on Batan Island; and (5), and finally, the Olongapo situation having to do with the voyage of the ORYOKU MARU in which there was an allegation that prisoners were killed.

The other allegations I shall take up afterwards. Those have to do with mistreatment especially so far as food is concerned. First of all I wish to dispose of the Palawan incident.

In so far as the testimony before this Commission is concerned there is no evidence that General Yamashita had any connection with the Palawan incident. As a matter of fact, there were no connection, no chain of command, no tie-up at all between General Yamashita and the personnel at the airfield who allegedly committed these atrocities. This occurred at a time when the air force was not under General Yamashita's command.

The essence of this charge is that troops under his command committed certain acts. And we submit that

if it is not proved that troops were under his command, the charge must fall in so far as that item is concerned.

The testimony of the defense witnesses -- General Yamashita, General Muto and the others -- is clear on this point, but we do not need to look at the testimony of defense witnesses. The only witness that the Prosecution produced to show the chain of command in so far as Palawan is concerned was General Kou, whose statement they put in and, therefore, in so far as the statement is concerned the Prosecution made him their witness: Exhibit No. 238. The other witnesses and the moving picture all had to do with the occurrences at Palawan. But the only word in this testimony from the Prosecution side as to the chain of command, as to the control of troops in Palawan is found in their own Exhibit 238. And General Kou was clear and concise on that matter! I read:

"Q Were you in control of the prisoners who were kept at the airport at Puerto Princesa, Palawan?

"A I had no control over the airport at Puerto Princesa, Palawan. It came under the immediate command of the air force headquarters.

* * * * *

"Q Were you not in charge of prisoners of war in the Philippines?

"A Yes, I was. The regulations concerning that particular instance or similar instances were as follows: In general, I had control over all prisoners of war but those prisoners of war attached or sent to other units for work came automatically under the control and responsibility

of the particular unit commander."

And then specifically:

"Q What did you do if you wanted to get some prisoners back?

"A I remember that in the case of prisoners of war dispatched to work in airfields I had no control. In the case of airfields the chain of command was not under General Yamashita but under the 4th Air Army."

That is the only testimony of the Prosecution bearing on this entire subject of Palawan. And we submit that the allegation must of necessity fall.

Now let us take up the allegation that four men were executed at Santo Tomas: Grinnell, Duggleby, Johnson and Larson.

There is in the testimony, sir, no clear evidence as to exactly what did happen to these men. It appears that they were taken away from the prison compound, the internment camp, by the military police -- not by any orders of General Kou, General Yamashita or anybody else except the military police, and apparently they had that authority.

What happened to those men we do not know except that later on -- considerably later, after the liberation, a matter of a month and a half to two months later -- their bodies were found near the military police barracks in Manila. We can surmise from that that they were executed, but there is no evidence whatsoever as to whether or not in that period of time these men received any kind of trial. There was some evidence from various witnesses

to the effect that they were apparently charged with various types of guerrilla activity or connection with the American forces, but there is no evidence by anyone that they were not tried on this charge. They may have been tried. And the fact that General Yamashita did not have presented to him for signature death warrants of these men would not prove that they were not tried, because they left Santo Tomas at the end of December and if they were tried it must have been while the Shimbu Army had the court-martial jurisdiction.

So there is no evidence here to substantiate the allegation (and I quote) that these men were "executed without cause or trial".

The third allegation in so far as killing prisoners of war is concerned has to do with Los Banos prison camp. The allegation is and the testimony was that on the 20th and 28th of January 1945 at Los Banos two men, one named Held and one named Louis, were executed. There seemed to be some question as to whether or not they had attempted to escape and, as to one of them, whether he had been shot while attempting to escape, although it appeared that the final death blow was given later.

There is in this case no evidence whatsoever before this Commission that General Yamashita knew about this, condoned it, excused it, ordered it or had any connection with it whatsoever. His testimony was clear. He did not know of it until this case was started and he saw the Bills of Particulars.

Now there, I think we can assume that there probably

was no trial from the testimony of the witnesses, but it is not clear that while these two witnesses were out of sight there was not what might have been in the loose Japanese method, as pointed out by Captain Sandberg, not conforming to Anglo-Saxon ideas, a trial. And there again the mere fact that General Yamashita did not get a death warrant would not prove there was no trial, because that Los Banos prison camp was in the area covered by the Shimbu Army.

There was some testimony there by a witness named Hennesen, found on pages 1948 and 1949 of the record, who said that he saw a notice on the bulletin board to the effect that the camp commanding officer (and he quoted it and said that this was the precise language) "had orders from the Imperial Headquarters from Manila, 28 January 1945, to execute any prisoner who attempted to escape".

This notice was not signed by anyone from Manila. It was signed by the camp commanding officer. So it is pretty flimsy; hearsay at best. But it is interesting to note that the other witness, and a very impressive witness, if the Commission will recollect -- the lawyer de Witt -- stated that he saw the bulletin board; that he saw on that bulletin board the other two notices, that is, the protest and the answer to the protest, but that he never saw anything else.

Furthermore, we know that in January, January 28th, anytime in January, 1945, there was no headquarters of any sort in the City of Manila. And we know further now that the only "Imperial Headquarters" that ever was in Manila

was that of Count Terauchi and it had no connection with the Accused except that it was superior.

The fourth set of allegations having to do with the killing of prisoners is the one that I styled "captured prisoners", those who were not in prison camps: Leyte, Cebu, Batan Island.

First of all, let us consider Leyte.

The allegation on the Leyte situation was not proved by any oral evidence before this Commission. It was brought to the Commission's attention merely by one written statement.

I shall take that back. I am sorry. There was more than one written statement. There were a number of written statements. But there was one prisoner who was supposed to have been killed and there was no oral testimony before this Commission.

In those statements (and I think there were two or three) there is no evidence as to who committed the crime. They found this body, you will recollect, of the soldier in a mutilated and, of course, deceased condition. There was evidence that in the vicinity there were some Japanese troops, but there is no evidence as to who committed that crime; as to whether it was any Japanese troops; as to whether those Japanese troops were under General Yamashita, or anything else in that connection. And, certainly, this occurrence in Leyte at a time considerably after the invasion was in a situation where it is obvious that there was no further communication possible between that Island and the Commanding General of the 14th Army Group. And no

General of the 14th Army Group. And no connection is shown as to any knowledge, condonation, permission or anything else of that nature from General Yamashita.

Secondly, we have the Cebu incident. In Cebu the Commission will recollect that there were two American prisoners apparently captured and killed. One of them, I believe, was in civilian clothes at the time. It is not clear there that there was no trial. There may have been. One or two witnesses stated that in their opinion there was not, but it is clear that they were not present at all times. If there were a trial, the mere fact that General Yamashita did not have a death warrant presented to him would not be a point, because Cebu was under the 35th Army and even before General Yamashita ever got to the Philippine Islands the 35th Army had court-martial jurisdiction and right to approve a death sentence. But assuming that there was no trial (and it may well be that there was not), this appears on its face to be one of those incidents where soldiers took the law into their own hands and naturally there was no report made to the Commanding General.

Incidentally, I might point out that this incident occurred at the end of March -- March 26, 1945 -- on the Island of Cebu while the Commanding General was in Baguio preparing to leave for the mountains to the north. And it is clear that there was no communication between those areas at that time.

Finally on these allegations of captured prisoners being executed we come to the matter of Batan Island.

Batan Island, the Commission will recollect, was

a place where three men arrived in a rubber boat and were later executed. Apparently from the evidence the executions there were without trial, but there is no evidence that there was any information brought to General Yamashita's attention about this and, indeed, his testimony was a categorical denial that he knew anything about it.

This was the place where the Commission will recollect that a certain witness, I believe a restaurant keeper on Batan Island, testified that he was told by a second party that a third party had received a telegram purportedly sent by a fourth party, the fourth party being General Yamashita, the third party being General Tajima, and the second party being the one who told this story, and that that telegram said "Kill all American prisoners of war in the Philippine Islands"!

When the Japanese that was used by this supposed second party, this Captain or Lieutenant who told the witness, was translated here (the witness said he heard it in Japanese and that he understood Japanese and that he remembered precisely what was said) the official court interpreter stated that the words used were not idiomatic; that they mean "who talks American soldier", which might through some peculiar, unknown idiom to him mean "kill American soldiers". And he added "I have never heard a Japanese put the word 'General' or any other title before the name rather than after the name".

In other words, to put it mildly, considerable doubt was cast upon the credibility of that witness by the official interpretation of what he supposedly heard.

But add to that this situation, sir: there was no prisoner-of-war camp on Batan Island; there were three isolated men who arrived in a rubber boat; there would be no sense in sending a telegram like that to a place where there were no prisoners of war. And add to it further the obvious fact that all prisoners of war in the Philippine Islands were not killed. Thousands of them, as we shall show in a few moments, were turned over in advance of the time of the landing of the American forces.

We submit that it is an utterly fantastic and ridiculous story on the part of that witness and that General Yamashita's categorical denial of any such incident is the complete and whole truth!

Finally we come to the Olongapo incident, the ORYOKU MARU. That, the Commission will remember, is a ship which, upon orders from Tokyo relayed through the Supreme Southern Command, took prisoners of war to a place that was considered by them to be safer than the battleground here in the Philippine Islands: namely, Japan. And I bring it up in this connection because there was testimony that upon the arrival at Subic Bay some of the prisoners were shot and killed.

First of all, though, in so far as this voyage was concerned it is clear that General Yamashita and his chain of command had no connection with the Third Maritime Transport Command that operated this vessel and was responsible for its operation at this time. Here again we can turn to the testimony of defense witnesses which is clear on this point, but we do not have to because we can turn to

the testimony of the only prosecution witness who brought in any evidence on the connection between the voyage of the ship and General Yamashita: namely, General Kou. I refer to Prosecution Exhibit No. 238. And on this matter in his statement General Kou was clear.

On page 217 of the statement and on page 218 of the statement and on page 219 of the statement the Commission can find the precise and definite statement that there was no authority on the part of General Yamashita over the ORYOKU MARU during its voyage.

He testified here as a Commission witness and during the course of that testimony he was asked questions about this matter. And again as a Commission witness General Kou made the matter clear and certain. He said at page 3340:

"Q Now, who was responsible for furnishing food to the prisoners of war on the ship?

"A The captain of the ship.

"Q And who was responsible for the time when the prisoners would be fed?

"A That is determined by the Captain of the ship.

"Q And who was responsible for furnishing water to the prisoners of war on the ship?

"A That is also the captain of the ship.

"Q And if any marking is necessary on such a ship, whose responsibility would it be to see that it is there?

..."

Incidentally, sir, so far as we are aware, under International law it would be a violation of the laws of

war to mark such a ship as long as it carried munitions and other weapons. There are no necessity and no law which say that you must mark a prison ship.

The answer to the question "And if any marking is necessary on such a ship, whose responsibility would it be to see that it is there?" is:

"A That too is the responsibility of the captain of the ship.

"Q Now, when you testified as to responsibility for deliverance of the prisoners, did that have to do with anything more than guarding them?

"A I am not stating that I am responsible for the transportation of the prisoners of war. As far as the guard commander's duty is concerned, . . ."

And, incidentally, the guard commander was under General Kou.

" . . . he is responsible for giving any aid to the prisoners of war and to prevent their escape, and at the destination the guard commander is responsible for handing over the prisoners of war."

There was some question as to responsibility for loading that vessel. It appeared clearly in the evidence, sir, that the order came from above to ship that many prisoners of war and the order came to the Third Maritime Transport Command to furnish a vessel. The vessel was crowded but, as testified to by General Kou, it is clear that, although it was crowded, those prisoners were given the same accommodation as the Japanese soldiers got. Not good, to be sure; not proper; not comfortable; but in so

far as any violation of law is concerned, not in violation of International law.

General Kou said that he attempted to get more space but it was outside of his authority, and inasmuch as these prisoners were given the same space requirements as Japanese soldiers it is readily easy to see why the Third Maritime Transport Command would not furnish any more vessels, if indeed they had any. The testimony here was that there was a shortage of vessels.

What occurred at sea is completely beyond the scope of this Commission. And, incidentally, the charge here refers to "the Philippine Islands" and not to "the sea". And so that even if there were a chain of command running to the Third Transport Command, it would not be within the scope of this Commission's authority to decide that point.

When they got to Subic Bay the ship was bombed, there was some strafing and some men were shot. We do not justify in any way what occurred there, but I wish to point out, not by way of justification but by way of explanation, one thing that was not brought to the Commission's attention at the time. I bring it out now because I believe it has a bearing on this whole picture of this case, especially the atrocities in the provinces which I am going to take up next.

The Prosecution put in a number of statements on this matter. In fact, the entire case on this particular item was put in by statements; there were no witnesses before this Commission. And one of those statements

(incidentally, a statement that, if we had had it, we would not have put in) reads as follows. It is the statement of Lieutenant Colonel Jacobs. The part I am reading from is found on page 2860 of the transcript of record. He described the bomb hits on the ship by American planes and then he said:

"Pursuit ships strafed the decks of the vessel and killed hundreds of Japanese women and children."

I mention that for this reason:

It is not difficult to picture the reaction caused by abnormal war psychology on the part of soldiers to that sort of incident. We are going to run into that again and again in the guerrilla situation. It is no justification to those soldiers that after that incident they shot prisoners. None at all! It is not even a legal justification, because you cannot have reprisals against prisoners of war. That is clear. But inasmuch as 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".

I know there was testimony by General Yamashita on this subject of "control", and before I finish I am going to discuss that in more detail. But I bring this up now because it runs through the entire picture -- not only at Subic Bay, not only at Olongapo, but all through the Philippine Islands where you have guerrillas committing acts of violence against the Japanese troops.

Finally on this subject I merely want to repeat that

in so far as the OROYOKU MARU or the happenings at Subic Bay are concerned, there is no evidence on this matter that anything in connection with it was brought to General Yamashita's attention, that he knew about it, approved it, condoned it, permitted it, justified it or excused it in any way.

Now, so much for the killings.

The rest of the allegations as to prisoner of war camps had to do with treatment and, for the most part, the question of insufficient food. I think the Commission has heard a very great deal about the food situation, particularly in so far as the staple, rice, is concerned, and I don't think there is a useful purpose to be served in going into the matter at great length now.

General Yamashita, General Muto, General Kira, Lieutenant Colonel Ishikawa, all testified as to the seriousness of the food situation; it was one of the most serious problems that they faced. The newspapers, the Manila Tribune, put in as Exhibits by Defense, and the last rebuttal witnesses of the Prosecution, all bore out this truth: that the food situation was very serious. Indeed, one of the Prosecution witnesses from Santo Tomas, a woman who was a dietician, testified that even in normal times in the Philippine Islands nutrition is a very serious problem. There is no question about it: that after the American submarines got into action, and the American Air Force and the guerrillas, the shipments of rice into this area were seriously curtailed, and even the local rice which was obtainable could not be brought to the cities or to where it would be useful, because of air attacks, guerrilla attacks, lack of transportation facilities and, very important, lack of fuel. The tie-up between fuel and food I think was clearly shown by Colonel Ishikawa, whom the Commission will remember testified that after his inspection trip he went immediately

to General Muto and recommended that they get gasoline from the Air Force to bring rice into the City of Manila. They were unable to get that gasoline. They made numerous trips, and they finally got some after the Air Force came under General Yamashita's command, but it was a small quantity by that time and most of it never actually came into their physical possession.

Now, the testimony as to whether prisoners of war got equal rations with the Japanese soldiers took up a great deal of time in this case. We think the testimony on that is pretty clearly to the effect that they did. Not only the Defense witnesses were unanimous on this point, but the truth of the matter came out also through some of the Prosecution's witnesses.

But there is one thing I want to point out to the Commission: There were here, during this period, approximately 250,000 Japanese troops that had to be fed. At the peak there were only 10,000 internees and prisoners of war -- most of the time there were less, but at the peak there were only 10,000. The prisoners of war and the internees therefore constituted 1/26 of the whole number of persons that had to be fed by the Japanese Army. Now, even if they decided to starve the internees and prisoners of war and not give them one grain of rice, from the time the shortage became acute, it wouldn't have made any significant difference to the Japanese Army -- because that is a drop in the bucket. It doesn't amount to anything; it is 1/26 of a whole.

And actually, there was no difference in the rations

issued. There was some testimony that in certain places Japanese soldiers were able to go out and buy in the stores, the markets, but the issue was the same. And in other places the Japanese soldiers were not so fortunate.

Here again we turn not to our own witnesses, but to the Prosecution's witnesses. I won't take the time of the Commission to read General Kou's statement put in by the Prosecution on this subject, but simply remark that the matter on it can be found at page 229 and page 230 of the record. Incidentally, General Kou pointed out that although the ration was the same the Japanese soldiers, even those in the prison camps, had their own cooks, their own system of preparation; whereas, the prisoners of war had their system of preparation. But the rations, the issue, was the same.

The Witness Ohashi, the Commission will recall, was a civilian employee of the Japanese Army and ate with the Japanese guards at Santo Tomas, and he testified that the food that was issued to them was the same.

Then we had the Prosecution witnesses that came in here on rebuttal. There was Doctor Icasiano, a doctor who reported on the physical condition of the residents of Manila, showing that in the City of Manila at that time the food situation was so serious that people were dying on the streets. He said he thought the Japanese soldiers looked well fed, but he also admitted that he never had made any physical examinations of them, never had seen them with their clothes off, and so forth. The important fact that he brought out was the substance of our position,

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sir: that during December and January in the City of Manila there was a food shortage, and that nobody could get food; that the ration given to the internees at Santo Tomas was not less than the soldiers were getting, or the civilian population, or anyone else.

Now, what about this fact that soldiers could walk out into Manila and buy fruits and vegetables? No, they couldn't. Alejandro Acuna, another witness for the Prosecution, testified on examination that there were no fruits or vegetables of any sort available in Manila. Later he was brought in on redirect and said that, "Well, there was a little available." But the fact of the matter is pretty clear: If there was a little, it was a very little.

Finally we had the testimony of another Prosecution witness, to whom reference has already been made in this case: one Sakakida, technical sergeant in the United States Army, later civilian interpreter for the Japanese Army, and now master sergeant in the United States Army. He testified on unrelated matters to this issue, but at the close of his examination he was queried by a member of the Commission.

I am now reading from page 2300 of the record:

"Q While you served with the Japanese Army as an interpreter from October until the time of your liberation, did you receive ample food?

"A Not as much as I am fed by the American Army, sir.

"Q Did you lose weight during that time?

"A Yes, sir.

"Q Do you happen to know the value in calories of the food ration that you received while in the Manila area?

"A No, sir.

"Q What was the nature of your ration as to its balance? Did you have vegetables and fruits?

"A It consisted of rice, soup, meat, fish, and a little green vegetables, sir.

"Q Any fruits?

"A Very seldom, sir.

"Q Was the ration better or worse as you went to Baguio from Manila?

"A It became worse.

"Q It became worse?

"A Yes, sir."

Now, that was a soldier who was in the headquarters of General Yamashita during this period. He wasn't in any minor echelon; he was at a place where, if anywhere, we would expect the food situation to be at its best in the Japanese Army.

We submit that, on the basis of the Prosecution's witnesses, the food ration of the Japanese Army and the food ration of the civilian internees and prisoners of war was equally poor, equally low.

Defense witnesses made no claim that civilian internees and prisoners of war were well fed. They all frankly admitted they were not properly fed, but they all stated -- and I believe it is clearly proven -- that they were given the same ration as the Japanese Army, and that the best that could be done for them was

done.

One final word on this prisoner of war question. Let us come to General Yamashita and his affirmative action that he took for prisoners of war and for civilian internees. First of all, as I have just stated, he did everything he could to alleviate the food situation in the civilian internee and prisoner of war camps.

Secondly, I want to mention something that may appear in the evidence as minor, unimportant, small, but perhaps is indicative of something here. That is this: General Yamashita testified that during the entire time of his command in the Philippines he knew of only one prisoner of war who was captured, that is, one who was brought to his attention. The prisoner of war was captured near his headquarters. That is not unnatural, in view of a number of things: First, the poor communications, the lack of land communications between various parts of his command; and, secondly, the fact that he was on the run, he was retreating from the moment he started -- and when you retreat you aren't able to take prisoners. This particular prisoner of war, the only one brought to his attention, was given medical treatment and sent back to the American lines. Although a flyer, he was sent to the nearest outfit, which was the 32nd Division, and General Yamashita testified that he received a letter of thanks from the commanding general of the 32nd Division. That was Captain Shaw.

I say that is not important, it is a small matter, but I think it is indicative that the only prisoner of

war brought to General Yamashita's attention, who was captured, received that treatment.

Finally, and most important -- and this is very important -- we come to the question of the orders of General Yamashita for the freeing of prisoner of war and civilian internees. Far from ordering all American prisoners of war executed, or ordering any prisoners of war executed, General Yamashita's orders were to turn them over to the American forces at the earliest available time. Now, General Yamashita had an order from Tokyo -- this appears in the record on page 3543 -- he had instructions from Tokyo to the effect that the prisoners of war were to be released if the Americans approached. What were General Yamashita's further orders in carrying out that basic order? His instructions were that if the United States troops landed, long before any approach -- if they landed at all on Luzon, a roster of all the prisoners was to be made up and turned over to the protecting power, and that one month's supply of rations was to be prepared and was to be left with the prisoners. His order was that the list, the roster of prisoners, was to be forwarded to the United States Army through the protecting power. As General Muto testified, on page 3032 and page 3034 of the record, there was this slip-up: General Kou assumed that by "protecting power" was meant the protecting power of the United States -- Switzerland. He tried to find the representative, and there was none here. What was intended was the protecting power of Japan, who did have a representative here. But despite that slip-up,

the order was carried out, and when the Americans landed preparations were made to turn over the prisoners of war and the civilian internees.

In every one of the civilian internee and prisoner of war camps the prisoners were turned over without a hitch, with one slight exception -- and I say "slight," because in comparison with the whole number it was slight. At Santo Tomas there were 4,000 civilian internees. Thirty-seven hundred of them were immediately turned over to the American forces, set free before the American forces ever got there; that was the method. The commander at Santo Tomas disobeyed the order in one particular: He refused to let 300, who were living in the Education Building, go until he got a safe conduct for himself and his troops. This was a violation of General Yamashita's order, which made no such provision. It was not, so far as we are aware, a violation of any international law, because these prisoners were not taken from a place of safety and put into a place of danger at all, but it was a violation of General Yamashita's orders. General Yamashita's orders, had they been carried out to the letter, in Santo Tomas would have had 4,000, not 3,700, prisoners immediately released. As a matter of fact, the other prisoners were released after the safe conduct was granted.

There is one further element here. General Yamashita jumped the gun on the Tokyo order. He ordered the preparation for release of the prisoners upon the American landing, and not upon the American approach. As a result, as he testified, he was reprimanded by the Southern Army for

going too far in favor of the prisoners of war and the civilian internees.

We submit that on all of these prisoner of war matters that came to General Yamashita's knowledge or attention, he did everything that he could do for them. He did more than he was required to do, either by international law, by orders from his superiors, or from any other source of authority.

Now, sir, if I may, I wish to take my remaining time to discuss that part of the Prosecution's case which has to do with atrocities that occurred outside of the Manila area, which atrocities have already been taken up by Captain Sandberg. There are numerous items in the Bill of Particulars, and there has been much testimony about atrocities committed throughout the Islands, with particular emphasis on Batangas Province. It is impossible to consider these atrocities without considering at the same time the background of guerrilla activity that pervaded the Philippine Islands at the time that these atrocities took place. May I say that throughout this trial the Defense has made a point of bringing up the matter of guerrilla activity, not in justification of torture or in justification of execution of persons who were not guerrillas, but in explanation of the circumstances surrounding this entire bloody picture.

Now, the guerrilla situation, for purposes of our discussion, I believe divides itself into two parts: First of all, the factual situation and, secondly, the law applicable.

First of all as to the facts. We believe that it is now abundantly clear that the guerrillas were tremendously

active throughout the Islands, and particularly in the localities where the alleged atrocities occurred. We believe that it is clear that the activities of the guerrillas had been confined largely to espionage and intelligence missions prior to the Leyte landing, but that the Leyte landing was the signal for a flare-up and for the coordination of actual combat activities on the part of these guerrillas. These activities have been described by some of the witnesses, and they are fully covered in Defense Exhibit V, which is an extract from a G-2 document called "Guerrilla Resistance Movements in the Philippine Islands."

Now, it is interesting to know in this connection that the guerrillas not only harassed the Japanese, but that they also raided and terrorized civilians whom they suspected of Japanese sympathies or who did not cooperate with them in the manner in which they desired. We bring that to the Commission's attention at this time because we feel that in many of these cases where there is testimony simply that somebody came back to the scene and saw bodies and saw mutilation, that it cannot in all of those cases be assumed that the acts were those of Japanese troops.

Without taking the time to quote extensively from the testimony and documents, I just want to read one excerpt, a sample excerpt from Defense Exhibit V, the G-2 document. I quote -- this was about the guerrilla leader Merritt, one of the most active guerrillas:

"Merritt's relations with the civilian population under his control was reported to leave much to be desired. Reports indicated that the people were exploited by high

ranking Army officers and politicians, who made personal profits at the expense of the people. The people were held under control by terror tactics and anyone opposing the Army was eliminated."

Now, realization of the extent of the guerrilla activities in the areas covered by these atrocities makes it sometimes a little bit difficult to believe witnesses who, one after another, took the stand and testified that they knew of no such thing happening in their district; but it is true that a realization of the methods, perhaps the necessary methods of the guerrillas, does make those statements quite understandable. Occasionally the Commission was faced by the refreshing honesty of witnesses who testified as to guerrilla activities, and, in some cases, of their own connections therewith. I don't think it is necessary to belabor the point of the existence of guerrillas much further.

Now, secondly, we come to the other question: the question of law on the subject of guerrillas, which has already been touched upon to some extent by Captain Sandberg. This may be a difficult concept for us, as American soldiers, to appreciate. To us it is true that guerrillas were heroes who risked their lives and the lives of their loved ones to help us liberate the Philippine Islands. I, for one, certainly hope that the American people will some day realize the tremendous debt that they owe to the Philippine people, and in particular to the active guerrillas for the heroic work they did in helping us to win this war. Not only throughout this trial, sir, but throughout the entire preparation, throughout interviews with the Accused and the members of

his staff and staff officers, the Defense counsel have had an unparalleled opportunity to see the tremendous effect that the guerrilla resistance movement had on the morale, on the communications, on the fighting ability of the Japanese soldiers.

But in considering this case, this trial of General Yamashita, who is charged with being a war criminal -- considering this case we must put ourselves in the position of the Japanese forces. To us the guerrillas were patriots and heroes, and rightly so; but to the Japanese forces they were war criminals, and rightly so. They were the most dangerous form of war criminal: treacherous, ruthless, and effective.

Perhaps we can understand this better if we remember that after V-E Day, when our armed forces began the occupation of Germany, there were rumors that a Nazi organization called the "Werewolves" was in existence with the avowed purpose of striking at night and from hidden places, to ambush isolated groups of American occupation soldiers. Now, were we ready to regard those "Werewolves" as German patriots, as heroes willing to risk all for what they considered their homeland? Or were we ready to regard them as vermin that would have to be stamped out? Would we consider them honorable combatants entitled to the privileges of prisoners of war, or would we turn to our rules of land warfare, the Hague regulations, and take the correct position that they would be subject to execution and that we would have the right to use stern methods to exterminate them? I don't think there can be much question about this.

Defense Exhibit I, which was an extract from M-1

Operations Report of the XIVth Corps, United States Army, contained General Wainright's surrender terms as promulgated by Brigadier General Christie. This was a complete surrender of the Philippine Islands to the Japanese. The language as used by General Christie, quoting General Wainright's telegram, was:

"THE FORMAL SURRENDER OF ALL AMERICAN AND PHILIPPINE ARMY TROOPS IN THE PHILIPPINES. YOU WILL THEREFORE BE GUIDED ACCORDINGLY, AND WILL, REPEAT, WILL SURRENDER ALL TROOPS UNDER YOUR COMMAND TO THE PROPER JAPANESE OFFICER."

There follows in this document a complete description of every step that was to be taken to turn over all men, all arms, to cease all resistance, ending up with the very last one:

"IT IS ABSOLUTELY PROHIBITED THAT ARMS, AMMUNITIONS AND OTHER EQUIPMENT, MILITARY ESTABLISHMENT OR FOOD CACHES BE DESTROYED OR DISPERSED."

Even that was to be turned over. It was a complete surrender, as complete as possible; and legally, after that complete surrender, every man, woman and child who took up arms against the Japanese or distributed money or other aid to those who did take up arms, or gave shelter or gave aid and comfort for those who took up arms against the Japanese -- every such person, after a complete surrender of that type, is a war criminal. If captured, they are not entitled to any of the rights of a prisoner of war.

To be sure, there would have to be proof that the person captured was a guerrilla, was aiding the guerrillas, and our understanding is that you cannot say that such a

fact is proved unless there has been something that we call or choose to call in our parlance a "trial." But what kind of a trial must it be? The guerrilla suspect is not entitled, as a prisoner of war would be entitled, to the same kind of a trial that a Japanese soldier would get.

Now, the Prosecution has alleged that in all of these cases there was execution without trial. Maybe so, but what do they mean by "trial"? In practically all of these cases there was at least a semblance of what they call an investigation. Very often, this seemed to go no further than the action of a Filipino informer, sometimes with a mask on, pointing out guerrillas from a line of suspects, but in some cases it may have gone considerably further, and the evidence is not in all of the cases clear on that point. In some cases the evidence doesn't even show that there was any kind of an investigation.

But we are pointing this out to the Commission: that this is not only our position, as to the lack of necessity for a full trial, but it is the Prosecution's position that suspected war criminals are not entitled to the kind of a trial that a capturing Army gives its own troops. They have made that abundantly clear throughout this case. In the very beginning we raised the question, and claimed that because General Yamashita was a prisoner of war, that this trial would have to follow at least the rules laid down by the Manual for Courts-Martial, but the Prosecution took the position that General Yamashita, as an accused war criminal, was not entitled to the rights of a prisoner of war and that all of those known rules need not apply.

In the case of guerrillas, there is a much stronger situation, because the guerrilla never was a war prisoner and is not given the rights of a war prisoner, and it is the Prosecution's position that certainly he is not entitled to the kind of a trial that a prisoner of war would get. In so far as General Yamashita is concerned, as I said, it is our position that he is a prisoner of war; we are not, as I wish to point out, arguing the subject, because before this Commission it has been settled. But we want to point out that if the Prosecution is right, then it cannot be claimed that guerrillas are entitled to the specific type of trial a prisoner of war would get, and we submit that in any cases in which there is not clear proof that there was no trial or impartial investigation there is insufficient evidence on which to base a finding.

Now, this is not in justification of punitive expeditions that included the execution of small children or other persons who were not guerrillas, but there has been no testimony that General Yamashita ever ordered or permitted or condoned or justified or excused in any way these atrocities. All of the testimony, as a matter of fact, has been to the contrary. It is merely that we feel, as lawyers, that we have a duty to point out to the Commission the legal principles involved in the entire question of treatment of guerrillas.

Now let us see just what General Yamashita's attitude was on this whole matter. Let us put ourselves in his position. Coming to these Islands on the 9th of October, just before an imminent American landing, he finds

confusion, deterioration, and the danger of active guerrilla preparations for actual combat. He is faced with a dilemma. As a military commander he must take all steps to put down armed forces who threaten him, whether from the front or from the rear. If he doesn't do this, he is guilty of a dereliction of duty. On the other hand, he must do his best to gain the friendship and the aid of other civilians, other than guerrillas, because they are equally important in the defense of these Islands.

We submit that General Yamashita did precisely what he should have done under those circumstances. He issued an order in which he directed action against armed guerrillas, was careful to say "armed," and at the same time he informed his chiefs-of-staff -- I am now referring to page 3551 of the record -- "to think the matter over," that is, having to do with relationships with the Filipinos, and "to handle the Filipinos carefully, to cooperate with them and to get as much cooperation as possible from the Filipino people." He was forced to trust his subordinate officers to carry out those two orders to suppress armed guerrillas and to cooperate with and win the friendship of civilians who were not guerrillas. There is no question but that he did not receive any information to the effect that one of these two orders was not in effect carried out.

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. But in the second place, we submit that General Yamashita did not know and that he could not have known, and that it is entirely unreasonable to expect that he did know about any of these atrocities.

First of all, practically all of the atrocities took place at times and in areas that made communication of such matters practically impossible. Land communication was cut off early in the game, and Japanese wireless communication at its best was apparently somewhat worse than ours at its worst. It was reserved only for matters of operational importance. General Yamashita testified that he tried and failed to augment his inefficient communication system by the use of airplanes, that he tried to send sufficient staff officers and others to outlying units, but that the situation was such that they were cut off; that after the American landings on Leyte, Mindoro and Luzon, land communications were completely disrupted.

In the second place, not only was he physically unable to know of these things, but it is ridiculous to suppose that he would be told about them. His orders were clear: to attack armed guerrillas and to befriend and win the cooperation of other civilians. 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. Captain Sparnon of ATIS testified that if any such orders were captured they would

have had such intelligence value that he would have seen them, and that he knows he has never seen any such order. The Prosecution's report put into evidence on the last day, from the liaison committee in Tokyo, contains a clear, negative answer to their request for the production of any such orders. There were none. When these atrocities occurred, they were committed in violation of General Yamashita's orders, and it is quite natural that those who violate a superior's orders are not going to inform him about that, either before or after the fact that they intend to do so or have done so.

It is not unknown, sir, that in many armies there may be some subordinate officers who break the law. Let us take, for example, in perhaps some army a subordinate officer who actually organizes groups of enlisted men and others to high-jack supplies and sell them in the black market in war-torn areas. Do these officers inform their superiors in advance of what they are going to do? Do they tell them afterwards that they have done it? There have been some diaries put into evidence in this case which support the Prosecution's testimony to the effect that certain subordinate officers ordered punitive expeditions, which resulted in the slaughter of innocent civilians. Now, is it reasonable to suppose that those subordinate officers informed their battalion commanders that their battalion commanders informed their regimental commanders, that their regimental commanders informed their divisional commander, that the divisional commander -- suppose he was in Batangas -- informed General Yokoyama, that General Yokoyama informed General Yamashita, and that perhaps

General Yamashita informed Count Terauchi, and that Count Terauchi informed the Imperial General Headquarters, and that the Imperial General Headquarters informed the Emperor -- either before or after the commission of any such crime?

We believe that the Prosecution, in its summation, will undoubtedly review for us these bloody, horrible atrocities. No human being could hear those stories without a feeling of revulsion and a perfectly normal desire for revenge. But we know that this is a court of justice, and not a court of vengeance. We don't say that those atrocities did not occur; we do take the position that some of them have not been proved by evidence of any probative value. We do say that some of the witnesses have been less than completely frank about guerrilla activities and about the numbers of victims involved in these matters. These are perfectly normal mistakes for witnesses to make, witnesses who have been subjected to the psychological and physical strain at the time of the occurrences about which they testify.

But I think it is interesting to note, in connection with the testimony as to numbers of persons involved, which seems to be a basic part of the Prosecution's case because they say that because of the number there must have been knowledge -- in that connection it is in point, we think, to quote from a paragraph from the extracts of the M-1 Operations Report, XIVth Corps, U. S. Army, which has been put into evidence before the Commission. I will read just one paragraph from this report:

"Guerrilla sources of information proved to be invaluable as to the location of enemy, but, in general, numbers

were grossly exaggerated. Guerrilla bands, among which there were several women, would report a group of 300 to 400 enemy in a barrio. Upon investigation, it was found that two or three Japs were in the village. In the Batangas campaign civilians reported a group of 1,000 to 1,500 Japanese soldiers moving to the East along the North Shore of Lake Taal. Later, when the group was considered annihilated by the 1st Cavalry Division, the counted enemy dead were 106. In many cases the enemy was reported in certain barrios by one or more civilians who desired only to have the prestige of being escorted home by a military guard. In the final states of the Central Plains and Batangas campaigns, civilians reported enemy concentrations in district barrios and villages for the sole purpose of enticing troops to their villages where they could sell them local produce. Despite all this chicanery, the information, when properly evaluated, was of value."

No, we don't say that these atrocities did not occur. We tried throughout this trial to show that General Yamashita had no connection with them. To place them in their proper value, may we remind the Commission that the witnesses that the Prosecution has presented are not only to be regarded as the victims of individual cruelty, but that what this Commission has been shown has been the victims of war in all of its ugly horror. There is not a nation in the world that has taken part in this war on either side that cannot produce a tale of death and torture of innocent, noncombatant civilians, including helpless women and babies, who suffered because of what someone on the other side decided was military necessity.

Our answer to the torture of noncombatants, whether they were victims of Sheridan's destruction of Atlanta, the shelling of French cities and villages in this war, or even the bombing of Hiroshima and Nagasaki, is that there was destruction by reason of military necessity.

Now, what answer can be given to the noncombatant victims in the Province of Batangas? Perhaps some subordinate commander thought there was military necessity for such action. If so, not only do we feel that he was wrong, but General Yamashita feels that the subordinate commander was wrong.

But does this charge mean merely that someone was guilty of a mistake in judgment on the question of military necessity? If so, who made the mistake? Certainly not General Yamashita, on military matters! Not in all these weeks of testimony has there been one word indicating that he made such a decision, and I submit that to attribute so ridiculous a move to a man of his military sagacity is fantastic. General Yamashita's orders were clear; they were based on sound military strategy, namely, to suppress armed guerrillas and to attempt to win the friendship and cooperation of other civilians. If the perpetrators of these acts were not guided by any thought of 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.

We return finally to this basic question that I mentioned

before, of control, control of troops, which is the essence of the charge against General Yamashita and which is basic to the discussion not only of these atrocities, the prisoner of war camp question and the accusations relative to the City of Manila, and so forth. In this matter we can do no better than to call your attention to one or two short portions of General Yamashita's own statements on cross examination. If you will remember, he gave a rather long answer to the opportunity that was offered him by the Prosecution to explain how he could fail to know about these matters. He pointed out that he was constantly under attack by large American forces, under pressure day and night. He said, "Under these circumstances I had to plan, study and carry out plans of how to combat superior American forces, and it took all of my time and effort.

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

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

"Reorganization of the military force takes quite awhile, and these various troops, which were not under my command, such as the Air Force and the Third Maritime Command,

were gradually entering the command one at a time, and it created a very complicated situation. The source of command and coordination within a command is or lies in trusting your subordinate commanders. Under the circumstances I was forced to confront the superior U. S. forces with subordinates whom I did not know and with whose character and ability I was unfamiliar.

"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."

He then spoke about his difficulties with communications, his attempt to better his land communications, and he pointed out that they were completely disrupted after the landings. "And under conditions like this," said he, "with both the communication equipment and personnel of low efficiency and old type, we managed to maintain some liaison, but it was gradually cut off, and I found myself completely out of touch with the situation. I believe that under the foregoing conditions I did the best possible job I could have done. However, due to the above circumstances, my plans and my strength were not sufficient to the situation, and if these things happened they were absolutely unavoidable."

Now, I point that out because shortly thereafter General Yamashita was asked this question, on page 3660:

"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."

That answer is, of course, a legal and factual conclusion which only this Commission can decide, but also it must be taken in the context of his previous answers, particularly the long answer which preceded it.

Now, actually there is no question about this. General Yamashita did not have full control over all of his troops at all times. While these atrocities were being committed, he did not actually control the actual perpetrators in a strictly factual sense. Yet on paper, as a commander, he can give no other answer. I suppose that there have been rapes, and that there has been mistreatment of prisoners of war by all armies -- isolated cases, at least. And I don't suppose that any commander would say that he controlled a man while he was in the act of committing rape or mishandling a prisoner of war, but if you asked any of those commanders whether they controlled their troops they would certainly say they did.

Another matter: Suppose that it were a state of fact, sir, that approximately 20 percent of all of the supplies shipped into a certain area by service troops were pilfered or stolen, in many cases by the troops themselves. Certainly the commanding officer of that particular services of supply would not say that he did not have control of his troops, and

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yet actually he would not have real control of the perpetrators at the time they committed the theft. And furthermore, he would not be held criminally responsible as a thief, and he would not even be held responsible financially for the loss.

General Yamashita's problem was not easy. Harassed by American troops, by our Air Force, by the guerrillas, even by conflicting and unreasonable demands of his superiors, he was on the run from the moment he got here. Of course he didn't have time to inspect prisoners; of course all he could do about the guerrilla situation was to give orders to suppress armed combatant guerrillas 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 supinely succumb to a mob's desire for revenge, then we must find General Yamashita not guilty of these charges!

GENERAL REYNOLDS: There will be a recess for approximately ten minutes.

(Short recess.)

GENERAL REYNOLDS: The Commission is in session.
The Defense may proceed.

COLONEL CLARKE: The Prosecution, in the presentation of its case, has called over 250 witnesses to the stand and has introduced into evidence many ex parte affidavits in support of the allegation of the charge. The testimony thus adduced was directed almost exclusively to the proof of the atrocities alleged in the Bills of Particulars. A minute fraction thereof attempted to impute to General Yamashita the knowledge of the commission of the atrocities and, in a few instances, the ordering of the commission of the atrocities.

One witness, whose testimony would tend to charge General Yamashita with having ordered the massacre of civilians and the destruction of the City of Manila, is Lapus, a collaborator during the Japanese occupation. This witness testified that he had contacted General Ricarte in March 1942, and that he had devoted part of his time in aiding General Ricarte in performing his mission of preparing the groundwork for Philippine independence. He continued working with General Ricarte until the month of June 1942, at which time he was arrested by the military police and charged with having committed the crimes of espionage and sabotage. He was tried and sentenced to death but was informed that he could save his life if he would agree to corroborate to the end with General Ricarte. Despite the fact that Lapus had been assisting General Ricarte for three months prior to his arrest, he would ask this Commission to believe that he inquired as to the kind of cooperation

which would be required because, in his own words, "If it was against my conscience I preferred to be executed."

Thus, to save his life, Lapus became the confidential secretary to General Ricarte and was the one and only person in the Philippines who enjoyed the confidence of General Ricarte.

It was to this man, and this man only, that General Ricarte confided that General Yamashita had issued a general order to all commanders of the military posts in the Philippine Islands to wipe out the whole Philippines, if possible, and that General Yamashita had stated that he had orders to destroy Manila.

General Ricarte kept Lapus informed of the various meetings he had with General Yamashita at which times, he, Ricarte, had pleaded with General Yamashita to rescind his order to massacre the Filipinos, but to no avail.

The Commission will recall the inconsistencies in the testimony of Lapus and his attempts to explain those inconsistencies. The Commission will remember Lapus' eulogy of General Ricarte, in his direct examination and in the cross examination and his statements that he had never experienced any lies from that man for the long years that he had relations with him, and that he had heard General Nagasaki say to General Ricarte, "You are not a human being; you are a god," and that General Ricarte was a man of ideals and a puritan and did not care about materialistics.

Later on cross examination, Lapus testified that although he was the confidant of General Ricarte, the

General held mental reservations as to the witness's loyalty. When asked to explain why General Ricarte entertained such mental reservations, Lapus attempted to extricate himself from that untenable position by reversing the import of his prior statements as to General Ricarte's character by testifying that, "The Japanese are tricky; they never tell the truth; they always have something in your back. That is the way General Ricarte thought."

A reversal of his testimony came easy to the man who would rather be executed than betray his conscience.

Lapus was emphatic on direct examination and on cross examination in denying that he had been promised any reward if he would testify in this case, or that he had contacted the CIC and offered to testify for a consideration, or that he had asked anyone for any consideration for himself or his family in return for his testimony in this case. He testified that he volunteered as a witness in this case to serve justice and to help my country and to be redressed of all these crimes committed by this man.

The Defense introduced into evidence the CIC file relating to Narcisco Lapus. This file contained letters written by Lapus to the Chief of the CIC offering to tell his story in return for the release from confinement of his son, his houseboy and himself, the return to the son of all his property now under the control of the CIC or the monetary equivalent thereof and other benefits to himself and the members of his family.

In view of the unexplained inconsistencies in his testimony and his deliberate statement under oath that he

had made no request for any reward for his testimony, contradicted by letters written and signed by him, now a part of the official records of the CIC, no credence can be given to any of the testimony presented by Lopus before this Commission.

Lopus was followed by Galang, another collaborator who testified that he was a constant visitor to the home of General Ricarte and that on one occasion when he was at the Ricarte home, General Yamashita, by himself, unaccompanied by an aide or other officer, called at the Ricarte home. General Ricarte and General Yamashita, with Ricarte's thirteen-year-old grandson as the interpreter, engaged in a conversation which he, Galang, heard and the grandson interpreted the conversation. Galang testified that in this conversation General Ricarte said to General Yamashita, "I would like to take this occasion to ask you again to revoke the order to kill all of the Filipinos and to destroy all of the city," and that General Yamashita answered, "An order is an order; it is my order. It should not be broken or disobeyed."

Thus did collaborator Galang corroborate the testimony of collaborator Lopus. Galang further testified that although he had been arrested in February 1945, and had talked to a member of the CIC, he had not mentioned this conversation between General Ricarte and General Yamashita; in fact, he had not mentioned this conversation to anyone until he related the story from the witness stand.

The Commission will recall the testimony of the thirteen-year-old grandson of General Ricarte, who, clearly

and without equivocation, testified that he had not interpreted the conversation alleged to have taken place between his grandfather and General Yamashita in the presence of Galang. The grandson also testified, that in his opinion, if his grandfather had known that an order to massacre Filipino civilians had been issued by General Yamashita, General Ricarte would have ceased immediately his labors in the interest of the Japanese Government. To anyone who knows the history of the life of General Ricarte, the opinion of the grandson is well-founded.

The testimony of Galang and the inference to be drawn therefrom, namely, that General Ricarte, a man who believed in the independence of the Philippines and who had the courage of his convictions to the extent that he lived in exile for thirty years, would continue to work in the interests of a power which had ordered the destruction of all that he had believed in, is absurd and in view of the frank testimony of the grandson of General Ricarte in denial thereof, it is not worthy of belief.

The Prosecution introduced into evidence an ex parte statement wherein the affiant, among other things, said that he had seen a number of Red Cross packages, some of which had been opened and the contents appropriated, stored in a room in General Yamashita's headquarters in a building in the City of Manila.

Even though the affiant may have seen Red Cross packages stored in a room as he described, he was mistaken in his assumption that they were stored in a room in General Yamashita's headquarters.

Defense witnesses and prosecution witnesses have testified that the headquarters of General Yamashita, from the day he arrived in the Philippines, from the 9th of October 1944, from the day that he assumed command of the 14th Army Group until the 26th of December, 1944, the day he moved his headquarters to Ipo, that at no time during that period of time did General Yamashita have his headquarters in any office in the City of Manila.

A witness who testified concerning the execution of three American prisoners of war on Batan Island, attempted to establish the fact that General Yamashita had ordered all prisoners of war on Batan Island to be executed. This testimony was predicated upon a statement made to him by a Japanese officer, a frequent visitor at the home of the sister of the witness, who, according to the witness, made the statement not only in the Japanese language, but also in the Tagalog language, without identifying the source of information. Testimony of this character can have no value in imputing to General Yamashita, not only knowledge of the illegal execution of prisoners of war, but, in fact, the ordering of the execution.

An ex parte affidavit of Corporal Harold W. Memmler, formerly a prisoner of war, interned in the prisoner of war camp at Cabanatuan, was introduced into evidence by the Prosecution; the attention of the Commission being called to a sentence in the affidavit reading:

"Also General Yamashita, Philippine Japanese Commander, visited the camp twice, saw the conditions there and did nothing to improve the situation."

The Defense introduced into evidence, as an exhibit, a message from Washington signed SERVJAG to CINCAFPAC, which contained the following information:

"Steps undertaken to obtain an additional statement from Memmler. No other information in this office that Yamashita visited Cabanatuan. Believe possibility of error in Memmler's statement."

This message coming from an official source, indicates that Corporal Memmler was mistaken in his identification of the officer whom he identified as General Yamashita, a visitor to Cabanatuan.

In view of the circumstances and the testimony discrediting the testimony of the collaborators Lapus and Galang, the apparent mistake in the testimony of the affiant, who thought that the Red Cross packages he saw in a room in a building in the City of Manila were stored in the headquarters of General Yamashita, the character of the testimony imputing that General Yamashita gave an order, via radio, to execute prisoners of war on Batan Island, and the message from SERVJAG, Washington, stating that there was no other evidence in that office that Yamashita visited Cabanatuan and the belief, therefore, of the possibility of error in Corporal Memmler's statement, there is no credible testimony in the entire record of trial which in any manner supports any contention that General Yamashita had ordered or had actual knowledge of the commission of any of the atrocities set forth in the Bills of Particulars. Without knowledge of the commission or the contemplated commission of the offenses, General Yamashita

could not have permitted the commission of the atrocities. Before there could be permission, there would have to be knowledge of the acts or act to be permitted.

We do not deny the commission of atrocities by Japanese troops, but the fact that atrocities were committed does not charge General Yamashita with knowledge of the commission thereof, nor can knowledge be inferred therefrom under the conditions which existed during the period in which the atrocities were committed.

What were those conditions? Briefly, this is the picture.

General Yamashita, unfamiliar with the Philippine situation, assumed command of the 14th Area Army on the 9th of October, 1944. He did not know the members of his staff and he was not familiar with the character and the ability of his staff officers. Before he had an opportunity to make any estimate of the situation, within nine days after he assumed command of the 14th Area Army, the American forces landed on Leyte. From the 18th of October, 1944, until the surrender of General Yamashita in September 1945, this command was engaged in combat.

The original plan for the defense of the Philippines contemplated that troops of General Yamashita in Leyte would cooperate with the air force and the navy in the event of an attack on Leyte. However, the manner in which the American troops landed on Leyte, demanded an immediate abandonment of the original Leyte defense plan, and the substitution of a new plan.

As a result of the change in plan, General Yamashita,

on the 21st or 22nd of October, 1944, was ordered to send immediate reinforcements to the Leyte area. The execution of this order, with the attendant confusion and added duties and responsibilities placed upon General Yamashita and his staff, demanded a concentrated effort of all concerned to the exclusion of all other duties. The first troops to be transported to Leyte were equipped, embarked and sailed from Manila on the 28th of October; 50,000 troops were shipped between October 28 and December 3.

American troops landed on Ormoc on 7 December, and to add to the confusion at General Yamashita's headquarters, a staff officer from the Imperial General Staff arrived and demanded that additional troops be equipped and shipped to the battle area.

5,000 troops were assembled and preparations were made for a counter-landing, but before the troops could be transported from Manila, the American troops landed on Mindoro, nullifying the plan and the preparations for the execution thereof which had been accomplished by General Yamashita's headquarters.

General Yamashita was faced with the defense of Luzon proper. He decided upon a delaying action plan of defense, necessitating concentration of his troops in the mountainous areas. His attempt to put this plan into execution was complicated by the destruction of his supply lines, his lines of communication, his motor equipment and his supply dumps by American aviation and by guerrilla bands.

Under adverse combat conditions, with the myriad of problems which had to be solved in fighting a losing battle,

neither General Yamashita or the members of his staff could or would have time for any duties other than that of an operational nature and could not, and did not know of the commission of the acts set forth in the Bills of Particulars by troops whose imminent and inevitable death turned them into battle-crazed savages. Nor is General Yamashita or the members of his staff chargeable with any dereliction of duty in not learning of these occurrences.

The evidence adduced by the Prosecution, therefore, 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.

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

The United States does not recognize a criminal responsibility predicated upon the status of the individual as a Commanding General of troops, but does recognize the criminal liability attached to a Commanding General for the

improper exercise of that command. The United States has defined the criminal liability of offending individuals against the Laws of War in War Department Publication, "The Rules of Land Warfare," FM 27-10, Section 345.1, wherein criminal liability is defined and limited to individuals and organizations who violate the accepted laws and customs of war.

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

In addition to the failure of proof of the criminal responsibility of General Yamashita for the alleged offense, the witnesses for the Defense have testified that no orders directing or authorizing the commission of the alleged acts were issued by General Yamashita nor by his headquarters; that no reports of any of the acts were received by General Yamashita or his headquarters; that under the circumstances General Yamashita and the members of his staff were absorbed in the duties incident to combat to the exclusion of other duties normally performed by an army headquarters, and that the proper functioning of General Yamashita and his staff officers was complicated by enemy action, disabling and destruction of supply lines, lines of communication and motor equipment, the lack of gas and oil for the operation of the vehicles, which were not damaged, and the consequent impossibility to keep

advised of the status of the administrative functioning of his command.

General Yamashita elected to take the stand, be sworn as a witness, and subject himself to direct examination and cross examination in the interest of truth and justice. Throughout hours of questioning, General Yamashita told this Commission the true facts as they existed during the period of time covering his command of the 14th Area Army in the Philippine Islands.

The intensive cross examination of General Yamashita failed to develop any inconsistencies in his testimony. However, an apparent inconsistency was developed in his testimony relating to the delegation of courts-martial jurisdiction to the Shimbu Army and the authority of the Commanding General of the Shimbu Army, as well as the authority of the Commanding General of the 35th Army to confirm sentences of death imposed by a courts-martial or a military tribunal.

In view of prior testimony to the effect that there were no courts-martial trials of prisoners of war in the Philippines during his period here, that a death sentence adjudged by a military tribunal would have to be approved by the Accused, that a sentence of death adjudged on a charge of being a guerrilla would have to be approved by the Accused, when the question of the approval of death sentences by the Accused was first introduced into the testimony of the Accused, the following questions were asked on page 3589 of the record:

"Q Did you have a Staff Judge Advocate?

"A There was no Judge Advocate in the staff. However, there was a Judge Advocate officer within the Judge Advocate Department.

"Q The Judge Advocate Department belonged to what unit?

"A It was part of the 14th Area Army Headquarters.

"Q Was Colonel Nishiharu the head of that department?

"A Yes.

"Q Were all death sentences in the 14th Area Army approved by you?

"A It requires my decision.

"Q Were any prisoners of war in the Philippines sentenced to death by courts-martial?

"A During the time I was here, there was none."

And continuing the questions from that time on, the answers of General Yamashita were made in the approval of death sentences in the Philippines.

The Commission will note that the first four questions related to the 14th Area Army and that the next question related to the Philippines. The Accused, having been questioned concerning the 14th Army Judge Advocate, and approval of death sentences in the 14th Army, assumed and had the right to assume that the questions following the first four questions which related to the 14th Area Army, related to his command of the 14th Army Group, and the answers given by the Accused to the questions were consistent with that assumption.

Consequently, that which appears to be a discrepancy in the answers of the Accused is not, in fact, a discrepancy,

but the result of the mistaken assumption on the part of the Accused that the questions referred to his courts-martial jurisdiction of the 14th Area Army.

The testimony of Colonel Nishiharu to the effect that he had informed General Yamashita that it would be necessary to change the method of trying suspected guerrillas and that General Yamashita gave his approval of the suggestion by a nod of the head, was denied by the Accused and this denial was corroborated by General Muto, to whom Colonel Nishiharu believes he talked about the same opinion.

It will be noted that throughout the entire testimony of Colonel Nishiharu he was vague in his remembrances of those facts attempted to be elicited by questions, as well as the military justice procedure in the Japanese army. I believe that the lack of memory as to most every event which happened, except his remembrance of the one opinion he gave to General Yamashita relating to a change in the courts-martial system, is best accounted for in the answer given by General Muto to the question: If during December 1944, Colonel Nishiharu was a trusted or responsible member of your staff, to which his answer being, "At that time his head was a little clearer and he had a better memory ."

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

We respectfully request that this Commission, after an analysis of the evidence adduced by the Prosecution and the Defense and after weighing this evidence in the scales of American justice, will exemplify the concepts and the standards of American justice, the keystone of American democracy, by returning a finding of not guilty of the charge.

GENERAL REYNOLDS: The Commission will recess until 1:30 this afternoon.

(Whereupon, at 1130 hours, a recess was taken until 1330 hours, 5 December 1945.)

AFTERNOON SESSION

(The trial was resumed, pursuant to recess, at 1330 hours.)

GENERAL REYNOLDS: The Commission is in session. You may proceed.

MAJOR KERR: Sir, all members of the Commission are present; the Accused and Defense Counsel are present. We will proceed.

ARGUMENT ON BEHALF OF THE PROSECUTION

MAJOR KERR: If the Commission please, we shall open our closing argument or discussion with reference to the charge upon the basis of which this proceeding has been held.

The charge is that the Accused, a "General (of the Imperial Japanese Army, between 9 October 1944 and 2 September 1945, at Manila and at other places in the Philippine Islands, while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he, (the Accused), . . . thereby violated the laws of war".

I intend, sir, to point out the extent of our proof of the basic requirements of this charge and to show that the Prosecution has established the truth of the charge

as stated.

In the first place, the evidence of course is that the Accused was a General of the Imperial Japanese Army. The dates, 9 October 1944 to 2 September 1945, are established in the record as being the period of time during which the Accused was the commander of the 14th Area Army, its subordinate units and its attached units in all of the Philippine Islands. There is no question as to that. Furthermore, there is no question as to the proof that the Accused during that period of time did command armed forces of Japan then at war with the United States of America and its allies.

We contend, sir, that the evidence also shows clearly, conclusively that during that period of time the Accused did unlawfully disregard and fail to discharge his duty as such commander to control the operations of the members of his command and that he permitted members of his command to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines.

We contend further that his dereliction of duty in that regard clearly is a violation of the laws of war.

The principal contentions as between the Defense and the Prosecution have been as to whether or not the Accused did fail to perform a duty which he owed as commander of armed forces in the Philippines, and, secondly, whether or not if he did fail to perform that duty, if he were derelict in the performance of that duty, such constitutes a violation of the laws of war.

Analyzing the closing argument of Defense Counsel I would say that those are the two issues at this time before the Commission. There is no question as to the atrocities having been committed. Defense Counsel has acknowledged that. The Commission has seen and has heard hundreds of witnesses, themselves victims of the wrongful acts of members of the Japanese armed forces in the Philippines. We repeat: There is no question, there can be no question as to the commission of the atrocities. There is no question as to where the atrocities were committed. From Davao City in the south on Mindinao Island to north in Batan Island beyond the northern limits of Luzon, from practically one end of the Philippines to the other, these atrocities were committed in the Philippine Islands. The people who were the victims of those atrocities were well identified and most of them, of course, were citizens of a dependency: the Commonwealth of the Philippines. There is no question as to those points in the charge having been adequately covered by the proof.

On the point of whether or not the Accused unlawfully disregarded and failed to discharge a duty to control his troops:

First, does the proof, does the evidence establish that it was the duty of the Accused to control his troops in the Philippine Islands?

The Accused himself on the witness stand acknowledged freely that he was familiar with international law applicable in this field. He stated that he had studied it and given it great care and was familiar with it. He

freely acknowledged, or, I should rather say, he "did" acknowledge, that an officer in his position owed a duty to control his troops. I refer now to page 3647 of the record which is a part of the testimony of the Accused:

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

"A It is the same.

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

"A It is a recognized duty."

The Accused then has acknowledged that he was under a duty to control his troops so that they would not commit wrongful acts.

The question then arose as to the responsibility so far as punishment goes of the commander of such troops under Japanese law. We have the, I presume, very carefully-considered (in any event, written) statement of the Accused on that subject which was presented to the Commission and read by the interpreter. And that appears on page 3674 of the record. Therein the Accused states that, If the commanding officer ordered, permitted or condoned the crime which was committed by his troops or his subordinate, then that commanding officer would be subject to criminal punishment under the military law of Japan; if in spite of all that the commanding officer did or could have done he took all possible means to prevent the crime committed by his troops or his subordinate, and yet that crime was committed

thereby, then the commanding officer, despite all of the efforts which he made, bears administrative responsibility to his superiors.

I repeat, sir: There is no question as to the crimes having been committed; there is no question as to the Accused having been in command of the troops who committed the atrocities.

The question then arises, Was the Accused responsible for the acts of those troops which he commanded, the acts which resulted in these atrocious crimes?

The crimes having been committed, the atrocities having been established, of course the next question is, Who is responsible?

We contend that clearly under the laws of war, under international law, the commanding officer who was in command of those troops, who was in the theater, who owed the admitted duty to control those troops so that they would not commit those acts, is responsible.

In passing let me point this out: So far as the laws of war are concerned there is no distinction between criminal responsibility and administrative responsibility. If an act constitutes a violation of the laws of war the death penalty may be assessed irrespective of whether or not under the military laws of the nation involved or in civil law there would or would not be a criminal responsibility. I believe that is clear. It is so stated in our own basic Field Manual on the laws of war. I quote now from page 357 of Field Manual 27-10, Rules of Land Warfare. It reads as follows:

"All war crimes are subject to the death penalty although a lesser penalty may be imposed."

Therefore we contend that if the Commission finds that a violation of the laws of war was committed by the Accused, irrespective of whether or not under the laws of Japan or the military regulations of Japan the punishment would be criminal or merely administrative, the Commission, if it sees fit to do so, may assess the death penalty or such lesser penalty within the provisions of the regulations prescribed by the convening authority as it may deem to be proper under the circumstances.

With respect to the duty of the Accused the Commission will recall that the testimony showed that Marshal Terauchi left the Philippines on 17 November 1944 and, according to the testimony, at that time the Accused took over the responsibility and the duty of handling the civil affairs in the Philippines. That is the statement of the witness General Muto on pages 3073 and 3074 of the record.

In other words, as we interpret that statement, the Accused became to all intents and purposes after the 17th of November 1944 the military governor of the Philippine Islands. He was the highest military commander in this area. It was his duty, in addition to the duty as a military commander, to protect the civilian population. There became added to his duty as a military commander the further duties of a military governor.

With respect to the atrocities or the wrongful acts which the evidence has established as having been committed in the Philippines during the period of the Accused's

command, I see no need at this time reviewing the unpleasant details of those terrible tragedies which were visited upon the civilian population of the Philippines. The Commission will recall, probably all too vividly for its own peace of mind, the nature of those atrocities. I do desire to point out, however, that in many, many instances those acts were under the leadership of officers -- commissioned officers! Defense Counsel has referred to these atrocities as having been committed by "battle-crazed men under the stress and strain of battle". That is not the evidence! That is not the evidence! The atrocities which were established before this Commission are atrocities, wrongful acts committed by military units or men then acting as a part of military units under the command of noncommissioned officers or of officers. We have not presented to this Commission instances merely where soldiers, members of military forces on their own time, on leave, on furlough, three-hour passes or the equivalent thereof, committed excesses or violations of law. The atrocities before this Commission were committed by armed soldiers of the Imperial Japanese forces embarked upon military missions. Obviously, clearly so! They were led; they were commanded; they were acting as military units in a military operation.

That is quite a far cry from sudden breaking of bounds of restraint by individuals on their own initiative, on their own time. We submit, sir, that the evidence shows that these atrocities were carefully planned, carefully supervised; they were commanded.

Take the German Club massacre, for instance (the Commission will recall that clearly), where hundreds of civilians, men, women and children, took refuge under the substantial structure then in use by the German Club in the City of Manila. They were surrounded by armed Japanese who piled furniture and other materials around the foundations of the building, then set it afire.

The Commission will recall that a spokesman for those civilian refugees, the manager of the German Club, went forward; went outside to find the officer who was in charge of the Japanese and talked to him and pled with him to let these people, who were noncombatants, go free. The Commission will recall the testimony, uncontroverted, not denied in any particular, entirely credible, that the Japanese then in charge of those men denied the request and forced that spokesman to go back under the Club. Whereupon those who remained there were burned to death; those who sought safety outside were bayoneted, pursued, killed or wounded.

Time and time again in these atrocities there were that same command, that same supervision, that same obvious plan. These were not wild, drunken orgies by individual soldiers on their own! Not at all!

I submit that we have no instance where the evidence indicates that such was the case. Counsel has referred to the number of civilians who lost their lives in these atrocities in the Philippines and in that connection made reference to guerrilla reports which he stated were unreliable

as to totals given. What possible connection that discussion of guerrilla reports has with the number of persons our evidence shows were massacred, killed in the Philippine Islands during the period of the Accused's command, I do not see at all.

The testimony is explicit as to the atrocities. The Prosecution has gone to great pains to establish the names, the identities of the victims. The testimony as to the number of people who lost their lives or who were wounded has been the testimony of eyewitnesses. We did not place before the Commission exhibits such as this, which is Exhibit No. 315, for nothing. This is a photostat copy of the official records of the Municipality of Tanauan, Batangas, bearing the names (hundreds of them!) of persons who were established to have been killed in that area. That particular exhibit is supported by the oral testimony of witnesses to the effect that those people were killed in that area and that they were killed by acts of Japanese.

I submit there is no basis for any question as to the number of persons who were affected by the atrocities, evidence on which we have presented to the Commission.

For instance, the exhibit and the testimony with respect to Batangas go down even to one last figure: 25,709 civilians in Batangas Province, according to the record on page 2519. We submit that that is extraordinarily explicit for a case of this nature.

The atrocities having been established, the command of the Accused over the forces involved having been estab-

lished, let us examine into the defense or the excuse offered by the Accused.

The Accused asserts that he had no knowledge of these acts. He states that if he had had knowledge or any reason to foresee these acts he would have taken affirmative steps to prevent them.

In explanation of his claim that he had no knowledge he asserts that his communications were faulty. Let us examine the record on that issue.

General Muto on page 3059 of the record stated that General Yokoyama, who commanded the Shimbu Shudan, responsible for the Manila area during the battle for Manila, reported to him when the American forces reached the Pasig River on the 3rd of February. General Muto further testified that the report came through from General Yokoyama on the 4th of February that the Americans had arrived in the vicinity of Nichols Field and that it appeared as if the Navy forces would be surrounded.

General Muto also testified on page 3063 that the last report he received concerning the fighting in Manila was at the end of February -- the end of February!

It is interesting to note the comments or testimony of General Yokoyama, who, after all, is in the best position to know what were the communications, since he was in the middle. The chain of communications or avenue of communications from the Accused on into Manila passed through General Yokoyama except in so far as they had communications directly with the Naval radio in Manila. I am now quoting from the testimony of General Yokoyama

on page 2674. This relates to the communications between General Yokoyama and his subordinate, Admiral Iwabuchi, whose forces were a part of the Shimbu Shudan under the overall command of General Yokoyama.

"Q Between February 23rd -- after that time did you keep in contact with Iwabuchi at all times?

"A There were times when I had liaison and there were times when I did not have liaison with him.

"Q Were you able to get all of your important orders to him during that period?

"A 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.

"Q Did you have communication with Yamashita from December, 1944, until the end of hostilities? Did you have communication with Yamashita from December 1, 1944, until the surrender?

"A To be specific, until the early or middle part of April I can say that there was no interruption in communications between us. From then on communications deteriorated until about the middle of June and they were completely severed. Since then I have had no communication.

"Q Between February 3rd and February 20th, 1945, did you send reports to Yamashita?

"A I sent them every day, as much as I could.

"Q Did you receive reports from Iwabuchi during

that period?

"(Answer) I received them up until the 10th of February, and from then to the 20th occasionally.

"Q How did Iwabuchi receive his orders?

"A Are these orders from myself that you refer to?

"Q From yourself or from Yamashita.

"A All orders from General Yamashita for Iwabuchi came to me and I transmitted them direct to Iwabuchi."

We submit, sir, that that establishes there was adequate communication during the period of the battle for Manila between Yamashita, on the one hand, and Yokoyama and, on the other hand, between Yokoyama and Iwabuchi. We believe that that conclusively spikes any contention on the part of the Accused that he did not have communications which he could have used for the purpose of obtaining the requisite information of what was going on in or in the vicinity of Manila.

With respect to communications I should like to point out that there is nothing in the record to the effect that the Accused did not have communications throughout with Batangas Province. The Accused testified, General Muto testified with respect to the intelligence operatives or representatives, the intelligence personnel, who were established throughout the Philippines and in response to direct questioning acknowledged that such personnel were placed in Batangas Province. The Accused acknowledged that reports from Batangas concerning guerrilla activity were received from time to time. And I repeat: The

record does not show that the Accused did not have communication with Batangas Province or that Yokoyama, the subordinate commander under Yamashita, did not have such communications. Therefore there is nothing in the record to show that the Accused could not have been fully informed as to what was going on in Batangas. True, he acknowledged that he made no request for information; he did not request reports. He says "I received no reports". Is that satisfaction of the duty to control his troops? Does that constitute an adequate effort or any effort at all to control, to supervise his troops, to protect the civilian population?

We contend it clearly was not an adequate or even any effort at all. He has not shown as a matter of defense that he could not have obtained the information as to what was going on in Batangas if he had desired to do so. Irrespective of any question of his actual knowledge, if we accept his position that he did not know, there still remains this stubborn fact: that he did not make an adequate effort to find out; else he would have known. And he has not shown that he could not find out so far as Batangas is concerned, nor so far as Manila is concerned.

He contended that he did not have communications. We believe that an examination of the record will show that the testimony of competent witnesses such as General Yokoyama, General Muto, is conclusive on that issue. They did have communications. Perhaps the Accused did not endeavor to use those communications for the purpose of acquainting himself with the developments and the activities of the battlefield in Manila. Perhaps not! It was his

duty to do so. It was his duty to know what was being done by his troops under his orders, under his commands.

Now the matter of press of duties:

Whenever the Accused was asked upon the witness stand, "Did you endeavor to find out what was going on? Did you endeavor to find out what your troops were doing?" the answer invariably was "No. I received no reports. I asked for no reports".

"Why not?"

"I was too busy. I had many things to do. I was being pressed by the enemy."

That, sir, is no answer. The performance of the responsibility of the commanding officer toward the civilian populations is as much, as heavy a responsibility as the combating of the enemy. And if he chooses to ignore one and devote all of his attention to the other he does so at his own risk, because he is deliberately choosing then to disregard a substantial part of his duty as a commanding officer.

Furthermore, let us examine into this matter of being "too busy" to perform the duties of the commanding officer.

The Accused acknowledged that he made seven or eight trips into Manila, some of which confessedly were for social purposes or at least involved considerable time in social activity or political activity. Apparently in those connections he had weighed between the responsibility to protect the civilian populations of the Philippines, to control his troops, and his mission in the political field. He saw fit to slight the one and devote his attention to

the other. Again he assumed the risk in doing so.

Why, sir! the Accused acknowledged that he did not even take the trouble to step the few steps from his headquarters buildings in Fort McKinley over to the prisoner-of-war camp where some 450 American prisoners of war were incarcerated to supervise the activities of his subordinate officers. He didn't even take that trouble! He had time to come down into Malacanan for a social visit; he had time to drink with Ricarte and others in his own headquarters building, but he did not have the time because of press of duties to step those few steps or to ride in his car over there to the barracks where our prisoners of war were being starved or improperly treated, according to the evidence; or even time or interest enough to note that those barracks in which our men were kept were not marked as protection against bombs by our own forces -- certainly a humanitarian measure which anyone who had any interest in the welfare of the enemy captives would have taken.

Again as to notice or knowledge, many of these atrocities were committed very, very close to the headquarters at that time of the Accused. The tortures by the military police in the Cortebitarte garrison here in Manila over a period of time were not committed in faraway Cebu. According to the evidence, they were the normal, the customary, the general practice right here in the City of Manila. He has testified that the garrison was not far from Fort McKinley. The Accused testified he did not inquire as to the methods being pursued by the military police. He made no effort to find out what they were

doing. He did not visit even Fort Santiago, which of course he knew was the headquarters of the military police here and the place of incarceration of the guerrillas. He was "too busy" for that!

Our answer to that, sir, is not that he was "too busy" but that he was too disinterested. He did not care. At least he did not care enough to take the time and trouble of looking into those matters.

With respect to the testimony concerning whether or not the Accused visited Cabanatuan, very well! we shall agree that the Accused did not visit Cabanatuan, if the Defense so desires. Where are we now? The Accused never visited any of the prisoner-of-war or civilian internee camps according to his own testimony, including, as I said before, Fort McKinley where his own headquarters building was. Very well! We are willing to let the record stand on that. He did not take the trouble to visit any of those camps.

That alone is a bit startling, but when we couple it with the confession of the Accused that he did not require reports concerning those camps other than the normal reports which were made from time to time, despite the fact that he had been informed that the food situation was bad, he made no inquiry and took no special pains to find out whether that condition improved or became worse, even though he himself (he says by virtue of necessity) had required the reduction of the ration.

We contend, sir, that when Yamashita found it necessary to reduce the ration of the civilian internee camps

and the prisoner-of-war camps, then he certainly was on notice that the condition in those camps thereafter would be extremely bad and it was his duty to look into that and see if there were not something that could be done to alleviate those conditions.

The Defense offers as the supreme example of solicitude for the welfare of the prisoners of war and the civilian internees the order which the Accused issued for the release of these unfortunate captives upon the approach of our own troops. Certainly! The Accused was beaten and he knew it. He was a beaten man. He has acknowledged in the testimony that he foresaw defeat before that time. And that, we believe, was simply an effort to make up for past derelictions on his part and the part of his command. Merely an effort to improve the record! "Too late!" And of course it was a natural act for a man to foresee his doom. We venture to say that no such humanitarian act would have been committed by this officer unless he had known that that was the last phase of the campaign in the Philippines.

While we are on the subject of prisoners of war let us discuss the Palawan incident.

The Accused acknowledged that he knew that prisoners of war were working on Palawan Island. The evidence is clear, of course, that the prisoners of war generally were under the Accused. He as commanding general in this theater was responsible for the care, custody and well-being of those prisoners of war. He knew that those prisoners of war were on Palawan Island. He also acknowledged

that he knew that they were being worked on airfields or an airfield installation.

In response to questions he stated that, in his opinion, airfield work was entirely legal, that is to say, in accordance with international law, so long as the airfield was not under attack -- an interpretation of the Geneva Convention which we believe to be wholly unwarranted. It was a military installation and, according to the Geneva Convention, the prisoners of war shall not be required to work on a military installation. It was an installation to be used against their own nation, against their own forces. It was illegal, a violation of the Geneva Convention for those men to be worked on that airfield at all. The Accused has acknowledged that they were being so worked and that he knew it.

If, with the Accused's knowledge and apparently consent and approval, those men were being worked in that illegal manner and as a result of that illegal act they lost their lives through murder, we contend that the Accused is responsible. He was responsible for the custody, the well-being of those men. It is immaterial that under the Japanese procedure or regulations those men may have been turned over to another organization outside his immediate command for that type of work. It was his duty to see to it that the men under his control, the men for whom he was responsible, were not turned over for illegal work. And when he found out that that had been done after his arrival here he owed those men and he owed humanity a duty to do everything he could to get them back and get them

out of that illegal work. There is no evidence that he ever even made that effort.

Therefore we contend that he is responsible in the Palawan case irrespective of whether or not he immediately commanded the forces which were working those men on the airfield at the time.

Furthermore, the evidence shows that there were army forces on that island. There is a reference in one of the affidavits to the "army troops" guarding the prisoners of war at that time. We acknowledge that the evidence on that point is obscure and is not clear as to whether or not the troops who were guarding those unfortunate prisoners of war at Puerto Princesa, Palawan were under the direct command of Yamashita. But we say that, irrespective of that point, this man had the duty of seeing to it that the requirements of international law, of the Geneva Convention with which Japan had agreed to comply, were complied with in his jurisdiction with respect to men for whom he was responsible. Having failed to meet that responsibility, to perform that duty, we say he is responsible for the consequences.

The Accused testified several times in several ways to the effect that he was anxious that the prisoners of war be properly treated. I call the Commission's attention to this statement by General Muto as a witness for the Defense which appears on page 3024 of the record, and I quote:

"After my arrival General Yamashita had never issued any special orders on these subjects" (the treatment of pri-

and conduct of prisoner-of-war camps)".

The food situation:

The Commission will recall the testimony of the men who were in the camps, who were civilian internees at Los Banos, at Santo Tomas; will recall the affidavits on that subject with respect to Cabanatuan. The evidence in the record is that according to the observation and the personal knowledge of internees the Japanese garrison at each of those camps actually was getting better food and more food than the internees were getting. The Commission will recall the testimony of the man who worked in the kitchen.

With respect to Old Bilibid Prison the Commission will recall the testimony of the men to the effect that they were forced to eat garbage scraps while in the kitchen where the Japanese guard was being fed ample food was served the guards and personnel of the Japanese forces.

Furthermore, the testimony is replete with references to efforts made both by the internees themselves through their own organization, their own funds, to bring food in which was available from the outside and which they had been able to buy until orders later forbade it or restricted it; food which they knew to be available. The testimony is replete with references to efforts made by people on the outside to bring food in. And for some inexplicable reason the Japanese authorities either from time to time absolutely forbade such food to be brought in or so restricted it that it became impractical to get it in.

All this time, of course, the Japanese forces, whatever may have been their issue of rations from the commissary in the garrison, were free to get food from the outside.

The Commission will recall that on cross examination it was brought out from one witness, a guard or employee in Santo Tomas, that the Japanese personnel there had pigs and other food in addition to the issue of the Japanese forces which was not available to the civilian internees. And he finally frankly acknowledged that the internees were worse off so far as food was concerned than the Japanese guards.

So that whatever the situation may have been outside with respect to food -- starvation among the people -- irrespective of whatever the problem may have been of distribution of food to the Japanese Army, the fact remains that food was available to these civilian internees if the Japanese had permitted it to come in. They didn't see fit to do that. They are responsible for the results.

We submit, sir, that the evidence concerning the murder of George Louis and Patrick Held, Los Banos, was clear and that it has not been controverted by evidence produced by the Defense. We believe the record shows very clearly that those men were murdered; that is to say, that there was no justification in law or in humanity for the killing of those two men.

In the case of George Louis it will be recalled that he was on the way back to the camp enclosure when he was shot and the evidence is that there was no trial between the time that he was originally wounded and apprehended and the time of coup de grace or when he was executed. Eye-witness accounts show that he was simply summarily disposed of -- no court-martial, no trial. And the same way with Patrick Held. And we see no basis upon which the Commission could reach any conclusion other than that those two men were summarily disposed of by the Japanese forces, clearly in contravention of the prisoner-of-war agreement. They had no trial.

There is no evidence, of course, that the Accused ordered those executions. However, the executions were carried out by men under his command. And we contend that the very method by which those executions were accomplished; the callous disregard, complete disregard of the prescribed procedure, shows that those men were acting under approval. Otherwise they would have never dared to be so arbitrary.

The Defense has painted Yamashita as a man of iron discipline; a man who controlled his troops, exacted the

last measure of military discipline of the men under him. They say that that was his reputation in Japan before he came to the Philippines, that that was his general reputation among military men.

Very well! If we accept that, it makes it all the more unlikely that his subordinates would have violated, as obviously they did in these many, many ways -- flagrantly violated -- not only the regulations of the Japanese army but the regulations and the principles of mankind, unless they had felt and had known that their conduct was approved and permitted by the Accused. If he had a reputation as such a disciplinarian and if those acts had been contrary to his desires, to his orders, certainly those men (many of them high generals) never would have dared to proceed on that basis.

With respect to guerrillas, that is an interesting position the Defense takes. Apparently their contention is that the Japanese were goaded into committing atrocities or wrongful acts by guerrilla activity. Surely they did not mean to assert that these executions, these massacres in Batangas, for instance, or in Manila, wherein many thousands of women and children were butchered, constituted or were intended as the execution of guerrillas.

If that be their position, it is palpably a false one because a baby in arms is not a "guerrilla." And the testimony uncontradicted showed that these people were unarmed. They had no trial. Their hands were tied behind them or they were otherwise fettered and they were butchered --

again by military men acting as military units, squads, platoons, led by officers, noncommissioned and commissioned. These massacres were not in the heat of battle. The Americans were not anywhere around at the time.

Therefore I believe the Defense will have to acknowledge that those executions were not executions of guerrillas or, if they were, that there certainly was no trial.

Reference was made to a possible investigation by the "evil eye" or the "magic eye", the hooded man who pointed out certain people to be executed. That is not "investigation"! That certainly is no trial! And I was astonished that Counsel would even refer to it as a possible "trial". It bears no semblance of a trial. A trial in every nation of the world offers the person accused the opportunity to know what is the charge and the opportunity to defend himself, to answer it. And these poor people certainly had neither!

All right. They were not guerrillas, or at least they were not treated as guerrillas. They were not given a trial. They were certainly not armed. The only remaining possibility is that they were massacred, and we say they were.

The defense to that or the explanation of that simply is that the Japanese troops in that area got out of hand; they were goaded by guerrilla activity and they were desperate and they resorted to unauthorized, unlicensed activities. More than 25,000 people over a period of more than a month or practically six weeks were massacred in that methodical, obviously-planned way and, as

the evidence indicates very strongly, under the orders of the highest military commander in that area: General Fujisige. The Accused's position is that he did not know, he did not realize, he did not approve, he did not order! Let us look at the record on that.

Prosecution's Exhibit No. 4, which is an ATIS translation of a captured document, which includes an order issued by the Shobu Group (and this order later was identified by the Accused himself as having been issued by him on 11 October 1944), is a Philippines operation plan summary or summary of Philippines operations guide. It goes into some detail as to the plan for the defense of Luzon and the Philippines. It includes this paragraph:

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

The Accused testified that this order was discussed at a staff conference at which there were present all the chiefs of staff of subordinate units and the commanding officers of a number of units, the headquarters of which were located close to his own headquarters, at which time obviously there was an oral discussion of this general plan. We do not know what was that oral discussion. We do not know the extent to which this paragraph concerning the suppression of guerillas was expanded upon, added to or explained. We do know that it was discussed at this staff

conference.

We also know from the testimony of General Muto, as appears on page 3086 of the record, that about the middle of November (this is almost a month or more than a month after this order of 11 October was issued) Yamashita gave orders for the control of guerrillas as a result of the Leyte campaign. Of course the Leyte campaign had not started when this other order was issued on 11 October. Therefore if additional orders were given, of course they had to be sometime about the date given by Muto. In other words, he says, about the middle of November as a result of the Leyte campaign, Yamashita gave orders for the control of guerrillas. He said that it was necessary to break up the bands of armed guerrillas and he gave orders to that effect.

Yamashita himself had this comment to make: "As the Americans approached the people in those areas gradually became more hostile I knew of this from the time I first arrived here because of the activities of the armed bandits or guerrillas." And on page 3578 Yamashita stated that he knew of guerrilla activity in Batangas. He said that he left the method of suppressing those guerrillas to the local commanders. And, finally, despite all of his previous build-up as to the terrific problem of the guerrillas, he said that the guerrillas were only a "minor matter"!

That was the order, the action taken by General Yamashita with respect to guerrillas. "Suppress them"! "Mop them up"! And action was taken apparently under that

order.

The Commission will recall the testimony of Colonel Fujisige, the Commanding Officer under Yokoyama in the Batangas area. He identified, acknowledged the written record that we had of a conference which he had held with subordinate commanders in which record there appeared this instruction: "Kill American troops cruelly. Do not kill them with one stroke. Shoot guerrillas. Kill all who oppose the Emperor, even women and children".

We had this interesting situation in that connection:

General Fujisige acknowledged that six of the seven paragraphs of that note taken by someone at the conference were exactly correct, but this particular paragraph relating to "Kill American troops cruelly" he disavowed. Everything in that paper was put down by the recorder absolutely exactly except that one paragraph, which happened to be the one that was embarrassing to the witness. However, he testified that in the middle of November he received orders from Yokoyama to "mop up" the guerrillas in his area. He testified further that a little later, either in November or early December a staff officer from Yokoyama's headquarters came around and told him that the "mopping up" of the guerrillas in his area was behind schedule and that he would have to see to it that it proceeded with greater rapidity. And, finally, on the 1st of January 1945 he received word from the Shimbu Group, Yokoyama's command, that even women and children were carrying weapons and they must be on guard against that.

These orders from Yamashita to "mop up", "suppress"

the guerrillas obviously resulted in the Batangas area in the mass killings which followed sometime later. Of course these orders do not say "massacre all civilians!" But Yamashita knew the hostility of the residents of the Philippines, according to his own testimony. He knew the guerrilla activity. He knew that his troops were being harassed. He gave them an order which naturally under the circumstances would result in excesses, in massacres, in devastation, unless the order were properly supervised. He unleashed the fury of his men upon the helpless population and, apparently, according to the record, made no subsequent effort to see what was happening or to take steps to see to it that the obvious results would not occur -- not a direct order, but contributing necessarily, naturally and directly to the ultimate result.

We maintain, sir, that if the Accused saw fit to issue a general order to suppress guerrillas under circumstances as they then existed, according to his own testimony, he owed a definite, absolute duty furthermore to see to it that that did not open wide the gates of hatred of his men leading them to wreak vengeance upon the civilian population. Obviously he did not do that. That is a part of his responsibility.

Again with respect to guerrillas, the contention is that they were always given a trial according to military law and according to the dictates of international law.

The Commission will recall the testimony of Sakakida which appears on pages 2253 and 2302 of the record. He stated that 2,000 Philippine civilians were tried in one

week in December in Manila -- one week in Manila! -- and that he saw five American women, including Mabel Jurika and Mary B. Stagg, beheaded in North Cemetery. The Accused asserted that the only method authorized for the execution of guerrillas was shooting. Beheading and bayoneting were not approved, were not authorized and would be contrary to regulations. Therefore the testimony is that the regulations of the Japanese army were being violated in Manila.

Sakakida testified as to the procedure followed in those so-called "courts-martial". He testified that the Judge Advocate's office was only two houses removed from the office of the Accused at Fort McKinley and that conferences frequently were held at the Judge Advocate's office at Fort McKinley concerning the disposition to be made of accused guerrillas.

Exhibits 319, 320 and 321 were introduced and identified by Sakakida. Those are records of courts-martial trials. Each trial was held in December of 1944.

The real significance of those exhibits has not as yet perhaps been perceived. Exhibit 321 is a record of a court-martial proceeding held on 13 December 1944. It is signed by three officers. It has three signatures and is under the name of Shobu Unit Court-Martial -- in other words, 14th Area Army. The date is 13 December 1944.

Exhibit 320 relates to a court-martial proceeding on 22 December 1944 -- 22 December! And it was again a Shobu Unit court-martial, with only one signature.

Exhibit 319 likewise is on the same date, 22 December 1944, Shobu Unit court-martial, with one signature.

The testimony of Colonel Nishiharu concerning his conference with Yamashita whereby there was decided upon a summary method of court-martial trial for guerrillas then in custody in Manila took place between the 13th of December and the 22nd of December, according to his testimony. His testimony is substantiated by these records. On the 13th of December they were having regular court-martial proceedings with three officers; the record was signed by three officers. On the 22nd only one officer was signing. And the testimony of Sakakida and the testimony of Nishiharu both are to the effect that under the normal court-martial procedure of the Japanese army three officers functioned at the so-called "trial", and Nishiharu testified that under this summary procedure only one officer was to perform the functions normally performed by three.

Those exhibits, sir, do substantiate the testimony of Colonel Nishiharu as to the conference with Yamashita, which the Accused saw fit to disavow, to deny.

Incidentally, an interesting sidelight on those exhibits is this:

It will be noted that the first name on Exhibit 319 is the Accused Henry Guy Lindobloom. He is charged with having given guerrillas 150 gallons of coconut alcohol. The death sentence was adjudged to that accused. Yamashita testified the other day that giving food to guerrillas was not a capital offense punishable by death. He later changed that testimony somewhat, saying that under some circumstances it might be so punishable. Here is one case where they did punish a man apparently because he gave 150

gallons of coconut alcohol to guerrilla forces.

Whatever the procedures of the courts-martial under Yamashita may have been, whatever the procedures of the courts-martial conducted by the subordinate units, Shobu Group and the 35th Army, both of which he said had court-martial jurisdiction that he issued himself, he acknowledged that he made no effort to determine what those courts-martial were doing. So far as he knows, they may have proceeded entirely in violation of all regulations, international or otherwise. He doesn't know.

He stated that no American prisoner of war was tried by court-martial. But he cannot possibly know one way or the other because he said he received no reports from them; he said he requested no reports; he made no effort to determine what they were. So therefore his testimony concerning the trial or lack of trial of American PW's is simply discredited because he wouldn't know. Nobody told him and he didn't take the trouble to ask anyone as to what were the facts.

The same way with respect to trials by military tribunals of civilian internees. He does not know who was tried; he did not inquire; he did not get reports.

With respect to Colonel Nishiharu's testimony the Defense Counsel saw fit to refer to it as "confusing". It was not "confusing" in particular to Prosecution, and if the Commission will re-read the record of that testimony I believe it will find that it does make sense.

Colonel Nishiharu was told by a Major that a large number of guerrillas were on hand in Manila; too large a

number to be tried by the normal court-martial procedure prior to the removal of the 14th Army headquarters to Baguio. He was further told by that Major that if nothing were done about it by the Judge Advocate all of those men would be executed by the military police. He felt that they deserved a better fate, that they should be given some semblance of a trial, which he knew the military police would not give them. Therefore he devised a summary procedure whereby instead of three officers sitting in a normal court-martial "passing upon the case", if you call it that, two officers would handle all of the thousand-or-some guerrillas involved and one officer would serve as the investigating or judicial officer representing the Judge Advocate.

He took that to Yamashita and, to his disappointment, Yamashita showed very little interest in the matter. He merely nodded! He merely nodded!

We can explain that lack of interest on the part of the Accused and we say it is in character according to all of the evidence in this case. Yamashita didn't care one way or the other! That is all there is to it. "Sure! Handle them any way you see fit! Go ahead!"

Colonel Nishiharu did the best he could. He had to go on to Baguio. He even went to the trouble later of trying to get reports as to who was executed, and he said that the reports showed that 600 of those guerrillas or accused guerrillas actually were executed.

GENERAL REYNOLDS: The Commission will recess for approximately ten minutes and then the Prosecution will continue.

(Short recess)

GENERAL REYNOLDS: The Commission is in session.

MAJOR KERR: Sir, before the recess I was discussing the so-called courts-martial of guerrillas. In leaving that subject, I would like to point out that on page 3878 of the record we have the testimony of the Accused himself to the effect that he was responsible or, as he stated, "It was my responsibility" for enforcing the regulations governing courts-martial in all of his subordinate units.

Therefore, all of the testimony of the Defense with respect to the establishment of courts-martial jurisdiction in the Shimbu group, under General Yokoyama, and the fact that the 35th Army Command had courts-martial jurisdiction, is beside the point. If courts-martial were not being conducted according to the requirements of Japanese military law and, more specifically, in compliance with the requirements of international law, it was Yamashita's responsibility -- and he admitted as much.

True, a suspected guerrilla is not afforded any particular type of trial by international law. However, it must be a trial; and the bare minimum of a trial, so regarded in any civilized nation, would be knowledge of the charges, an opportunity to defend, and a judicial determination of guilt or innocence on the basis of the evidence.

We submit that the procedure followed in these summary cases, as testified to by Colonel Nishiharu, and more particularly by the witness Fermin Miyasaki, certainly did not follow any such procedure. It was the testimony of the Accused that death sentences could not be executed or carried out except through court-martial and with his approval, or

the approval of at least one of two other officers: the commanding general of the 35th Army, the commanding general of the Shimbun group. And yet we have the testimony of Miyasaki, who was connected with the Military Police, a civilian interpreter at the Cortabitarte garrison in Manila, as set forth on page 2154 of the record, to the effect that the Military Police executed large numbers of people without trial, without any court-martial.

I refer precisely to his testimony on page 2154:

"Q Well now, in your capacity as interpreter, did you have occasion to know that the Military Police was charged with the duty of executing the sentences of the court-martial?

"A Only those people who were to be given prison sentence were sent to the court-martial. Those who were released, being found innocent, or those who are going to be executed, were never sent to the court-martial.

"Q Well now, after a court-martial reached a verdict for an execution, who executed that sentence?

"A I think the court-martial did.

"Q The Military Police did not execute that sentence?

"A Those prisoners who are going to be executed were never sent to the court-martial."

In other words, if the Military Police saw fit to decide a person was going to be killed, a death sentence assessed, that person didn't go to a court-martial; he was executed by the Military Police.

General Yamashita denied that he had ever given the Military Police authority to carry out death sentences, or

authority to try and assess death sentences; and yet, according to this competent testimony of the interpreter at the Cortabitarte garrison headquarters here in Manila, that was the practice of the Military Police. If Yamashita didn't know it, it was his fault! He didn't choose to know it! He didn't inquire, he didn't require any reports, he didn't ask what they were doing, he did not investigate! There is no testimony even that he had any staff member look into that matter. He didn't care! He was too busy, and yet, presumably, thousands of innocent people were summarily executed without trial, simply because of the lassitude and the lack of interest on the part of the commanding general.

There is no question that the Military Police were directly under the command of Yamashita; he acknowledged that. The testimony is all to that effect. He certainly owed a duty to find out, to know what the Military Police were doing. If they proceeded improperly, contrary to his wishes, it was simply because he didn't check on them, he didn't supervise.

Now, continuing with some of the chain of evidence leading from this general order, or these several orders by Yamashita to suppress or mop up guerrillas, down to the actual massacres that we know took place all over the Philippines, I remind the Commission of Exhibit No. 6 which, again, is a translation of a captured Japanese document. These are instructions by General Yamashita as commanding general of the 14th Area Army, otherwise known as the Shobu Army group. These are extracts, and

I quote:

"The enemy's casualties have reached 60,000 as a result of the daring action of the Army Group (Shudan)."

And this, incidentally, is dated 15 February.

"The operation is progressing as planned. The opportunity to crush the American onslaught is closer at hand."

He states, as of 15 February, that "The operation is progressing as planned." Obviously, that is the Luzon operation, as of 15 February.

"Orders:

"Raise the morale higher. Develop fighting spirit as such to have one man kill 100 enemy soldiers.

"The Army expects to induce and annihilate the enemy on the plains of Central Luzon and in Manila. The operation is proceeding satisfactorily.

"Whether the enemy's strength and plans will be destroyed in our great counter-offensive depends on the future daring actions of all officers and men. The front line troops and personnel, who are responsible for supply transportation in the rear, will develop a fighting spirit and a determination to kill 100 of the enemy for one of our men."

And the Commission will recall that in the Fujishige Conference he stressed exactly the same point: "Each one of your men will kill 100 Americans to his own life"; the same identical idea. We contend that there is reasonable ground for determining the same idea that Fujishige expressed -- "Kill Americans cruelly; kill even women and children who oppose the Emperor", as they appeared in his

instructions on that date -- that that came also from above, came from the same source, came from Yamashita.

In another exhibit in evidence, Exhibit 386, is an extract of a notebook diary covering a period in February, and this extract is a portion of diary entries made by a man who had just arrived in Manila. The entry for 7 February 1945:

"150 guerrillas were disposed of tonight. I personally stabbed and killed 10."

They weren't shot, as Yamashita said the regulations required; they were stabbed! You can imagine how!

"8 February 1945. Guarded over 1,164 guerrillas which were newly brought in today.

"9 February 1945. Burned 1,000 guerrillas to death tonight."

They certainly weren't executed by shooting!

"10 February 1945. Guarded approximately 1,000 guerrillas.

"13 February 1945. Enemy tanks are lurking in the vicinity of Banzai Bridge. Our attack preparation has been completed. Am now on guard duty at guerrilla internment camp. While I was on duty, approximately 10 guerrillas tried to escape. They were stabbed to death. At 1600 all guerrillas were burned to death."

In the same exhibit, this translation of a captured Japanese order is set forth. This is a Kobayashi group order, Kobayashi Heidan, dated 13 February. The Commission will recall that the Kobayashi group was part of the Manila defense force directly under Yamashita. Then,

according to the diagram which is in evidence as a Defense exhibit, showing the situation as of 1 January 1945, the Kobayashi Heidan is a part of the Shimbu Shudan, or General Yokoyama's force. It is not a naval force, but an army force. According to the evidence, it was based and was operating in Manila.

This is an order of that Kobayashi group:

"1. The Americans who have penetrated into Manila have about 1,000 artillery troops, and there are several thousand Filipino guerrillas. Even women and children have become guerrillas.

> "2. All people on the battlefield with the exception of Japanese military personnel, Japanese civilians, and Special Construction Units (GANAPS in the Filipino language) will be put to death. Houses" -- and the order breaks off at that point.

That, sir, is not an order for naval troops by Admiral Okoochi, or Iwabuchi; that is an order by the commander of the Kobayashi group, Lieutenant General Kobayashi, or Major General Kobayashi, who commanded Army units in Manila under Yokoyama who, in turn, was under Yamashita.

Now, the evidence shows frequently that Army personnel, Army officers or Army enlisted men, as distinguished from Navy personnel, were participating in the atrocities in Manila. Apparently they were doing their best to carry out the order of this military unit, this Army unit:
"Kill all Filipino civilians."

I refer now to extracts from Exhibit 388, again part

of this significant chain of orders which followed that one general order by General Yamashita to kill all guerrillas, to mop them up or to suppress them. Extract from diary notebook dated July, 1944, to 22 May 1945, captured in Luzon on 23 May 1945:

"February 1945. Every day is spent in hunting guerrillas and natives. I have already killed well over 100. The naivete I possessed at the time of leaving the homeland has long since disappeared. Now I am a hardened killer and my sword is always stained with blood. Although it is for my country's sake, it is sheer brutality. May God forgive me! May my mother forgive me!"

In the same exhibit, an extract of a diary belonging to a member of the 116th Fishing Battalion, dated December, 1943, to 17 April 1945 -- the Commission will recall that the evidence is that some of the so-called "Fishing" battalions were under the control and command of the 14th Area Army:

"10 February 1945. By order of the Army, we began punitive operations against the Filipino terrorists and killed 500 of them."

And let us remember that the Accused said he knew of only 44 cases where the death penalty had been approved by him for guerrillas. There are none for prisoners of war, none for civilian internees; only 44 cases. And he further said, in response to repeated questioning, that the most, the greatest number in any one of those cases, was three. Therefore, we may liberally say a total of 150 maximum, and here we have evidence by the perpetrator

that they killed at least 500.

"12 February 1945. We left for Calamba by automobile with the mission of carrying on punitive operations against the inhabitants of the town. We killed 800 men and returned at midnight.

"13 February 1945: For security reasons, all inhabitants of the town (presumably Anilao) were killed and all their possessions were confiscated."

All inhabitants of the town were killed; all the possessions were confiscated! Is that an activity against guerrillas? Is that after trial? Is that the unauthorized, disapproved activity of drunken battle-crazed men? Not at all! It was a military expedition by order of the Army, and we maintain in all earnestness that this sheds light on the intent, the purpose, and gives an explanation of these otherwise inexplicable massacres down in Batangas and elsewhere in the Philippines. They were expeditions, organized, deliberate, planned, and most mercilessly and cruelly carried out.

"Until yesterday we lived in the hills or in fishing barrios and we had only salt to go with our rice. But today we are in Paradise. There is nothing that we cannot obtain. Although there were a tremendous number of watches, rings, suits, shoes and dresses, we couldn't take them back with us, and so we had to burn them with great regret. Everyone has 3,000 or more pesos in cash. We had all we wanted of good things to eat.

"17 February 1945. Because ninety percent of the Filipino people do not feel pro-Japanese but on the

contrary are anti-Japanese, Army headquarters issued orders on the 10th to punish them. In various sectors we have killed several thousands (including young and old, men and women, and Chinese, in addition to Filipinos). Their houses have been burned and valuables have been confiscated."

Then on 17 March 1945:

"Caught and killed four natives (three children and their mother)."

In the same exhibit, an extract from a notebook belonging to a member of the 64th Infantry Regiment, dated 19 December, presumably 1944, to 27 March:

"Taking advantage of darkness, we went out to kill the natives. It was hard for me to kill them, because they seem to be good people. Frightful cries of the children were horrible. I myself stabbed and killed several persons."

In the same exhibit, an extract from a notebook kept by Machine Gun Company of West of the Lake Sector Unit, containing operations orders and intelligence reports dated 13 February to 23 March 1945:

"Instructions. 1600, 17 March.

"1. Leaving tonight at 1930.

"2. We shall march to Mahina.

"3. There will be many natives along our route from now on. All natives, both men and women, will be killed."

The Defense saw fit to refer to the victims of the Japanese and the Filipinos as the victims of war. Victims of war!

Is this warfare?

We have another explanation for it. We say they are the victims of Yamashita! They are the victims of the type of warfare that was conducted by Yamashita; by the troops under him.

Certainly they are not the victims of the type of warfare that the Laws of War, international laws, recognize. That is plain.

This also is of interest: Sakakida testified that he was in the headquarters of Yamashita at Baguio after the headquarters had been moved from Manila. He said that in February of 1945, that it was common talk in Yamashita's headquarters, among the officers and the men there, that the military police were denying or refusing permits to the people in Baguio who had come there from their homes in the lowlands, with the idea that Baguio would not be bombed, but who after the headquarters had been established there, to their knowledge, and who desired to get out because they foresaw the bombing of the headquarters by the American planes, permits to those people to leave the city were denied by the military police until finally such permits were made available and were being issued, and according to this common talk, they were being issued to the people to go down the one route which would take them by or in the vicinity of Rosario, where they were to be murdered by

army troops.

They were to be massacred -- shall we say suppressed -- in that locality. That was his testimony. That is on page 2271 of the record.

On pages 2655 to 2661 of the record appears the proof, testimony concerning the killings at Rosario. In that atrocity men, women and children were murdered as they were proceeding down that route. Thus, that substantiates that general rumor in Yamashita's own headquarters. That is coming very, very close, sir, to the Accused himself.

However, I suppose that if he is not interested or was not interested in the welfare of the Filipino people in the performance of his duty to protect them, to the extent of inquiring from time to time as to what his troops were doing in various areas where he knew guerrilla activities were great, where he had ordered guerrillas suppressed, if he was not interested sufficiently as to the civilian population, the American prisoners of war and internees, and the conduct of those who were directly in custody of them; if he was not sufficiently interested in the military police, to inquire from time to time to determine what they were doing and the methods of torture and what not that they were using, we might assume he was no more interested to what might happen to those civilians or even in knowing what might be generally known among his own headquarters.

Incidentally, Sakakida testified to the execution of the two American prisoners of war in Manila. His testimony was that they were held in Manila. He saw them; he

talked to them. He left Manila and went to Baguio before they were executed, but he was told by one of the guards later in Baguio that they had been executed. That is in contradiction to the Accused's statement that no American prisoners of war had been executed.

There again he would not know what happened to those prisoners of war unless he took steps to see to it that he was kept informed; perhaps he didn't know.

With respect to Manila, we do not contend, we never have contended that it was any crime or any unlawful act for the Japanese forces to defend Manila, if they saw fit to do so. They were free to do that if that was their plan.

However, we do deny their right in connection with defending Manila or in connection with fighting in Manila to massacre civilians, deface state property without military justification, or to commit other substantial wrongs in violation of the Laws of War. We deny the privilege of doing that. The whole question of Manila involves really two points.

First, were the troops in Manila, which were navy troops, under the command of Yamashita. He acknowledges they were under his tactical command. He contends that he had no control over them, was not required to control them because they were merely under his tactical command.

However, General Muto acknowledged that the officer in command of troops of the other branch under him did have the authority and did have the duty of restraining those men under his command against the commission of

wrongful acts. He said he could have them arrested. He had that authority. He could not punish them. He could not order their court-martial, but 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.

Much has been said about the naval mission of these troops. They were under the command of Yamashita, or his subordinates, only for land operations in land combat. That is all they were doing so far as the commission of these atrocities was concerned. They were not then defending the port; they were not then firing at vessels at sea. They were not then engaged in any naval operations on land or at sea; they were engaged, as one of the witnesses very clearly brought out, in repelling or attempting to repel the advance of the Americans, the advance of the American forces; from the east, north and south.

It was a land operation in every particular and there was no element of naval operation in it. Therefore, they were clearly under the tactical command of Yamashita at that time and he, as their tactical commander, was responsible for what they did.

And what did they do?

The record is replete with that, and there again those were not the acts of irresponsible individuals, acting at a whim or will in a drunken orgy; not at all. There again they were acting under officers -- sometimes in concert with army men -- army officers. Obviously, it was a deliberate planned enterprise. It may be they were then assisting the military police in the zonification of areas of the city and

in the suppression of guerrillas by burning the houses and killing everyone around there. Of course, by killing everyone in the vicinity they would also kill any guerrillas that might be there and that might have been their method of suppression.

Whatever it was, those troops were acting under military command and acting in a military enterprise, and in most cases they certainly weren't acting in the heat of battle.

The other point is with respect to the defense of Manila. We are interested in that question of the defense of Manila only in so far as it relates to the credibility of the Accused, as his own witness, and in so far as it shows that they were deliberately engaged in military operations in Manila.

I believe the Commission recognizes the utterly fantastic nature of the assertion by the Defense that there was no intent or plan to defend Manila. We believe that the correct, obviously sound analysis of that situation, and of that operation is that which is contained in Prosecution's Exhibit No. 404, which is, "A Report by XIV Corps," on the subject of the defense of Manila.

I shall read from page 1.

"The main purpose of the enemy in defending Manila was threefold:

"First, to effect maximum attrition of American fighting power by utilizing the advantages of natural

and man-made defenses within the city;

"Secondly, to delay the occupation and utilization of the Port of Manila as long as possible;

"Thirdly, to cripple the city as a base for future military operations and as a center for civilian production and governmental control."

Then it goes on and states further:

"This third objective was covered in Manila naval defense force order number 43, dated 3 February 1945, which reads in part as follows:

"The south, central and north forces must destroy the factories, warehouses and other installations and material being used by naval and army forces, in so far as the combat and preparations of naval forces in Manila and of army forces in their vicinity will not be hindered thereby."

And interpolating, I would like to point out this is not a naval order of the Imperial Japanese Navy. It was referred to in one of the exhibits of the Defense as such. This is an order of Iwabuchi, as commander of the Manila naval defense forces, and Iwabuchi was commander of the combined army and navy forces in Manila. This was not an order of the Imperial Japanese Navy.

"2. The demolition of such installations within the city limits will be carried out secretly for the time being so that such action will not disturb the tranquility of the civil population nor be used by the enemy for counter-propaganda. Neither large scale demolition nor burning by incendiaries will be committed.

"3. A special order will be issued concerning the demolition of the water system and the electrical installations."

All of which, incidentally, ties in with the orders from the Southern Army, the Southern Command, to the effect that Manila will be defended to the utmost, that if they have to give the city up they will destroy it as a base for enemy operations, and that the port and dock facilities will be destroyed.

The Commission will recall that as Exhibit No. 405, and this is part of the order:

"The 14th 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."

This order, by the Manila Defense Command, is directly in accordance with that directive.

Furthermore, there is ample evidence, in fact, there is visual evidence wherever you go in the City of Manila, that extensive preparations were made to defend the city, which belies the assertion by the Accused that early in December or in December, it had been decided that Manila would not be defended; it would be

evacuated.

However, I wanted to call particular attention of the Commission to the testimony of General Yokoyama on this subject. The Commission will recall that the Accused testified that he gave orders to Yokoyama, when he first appointed him as commanding general of the Shinbu Group, that Manila would not be defended; that it would be evacuated. Let's see what General Yokoyama had to say about that.

On page 2680 of the record there appears the following:

"Q What were General Yanashita's orders with respect to the defense of Manila?

"A Do you refer to the general locality of Manila?

"Q No; to the City of Manila as distinct from the whole sector; the city itself.

"A I received no orders with particular respect to the City of Manila.

"Q What orders did you receive with respect to the outlying sections?

"A The orders which I received were to establish a line on east of the city and contact as many American troops as possible for as long as possible and inflict as many casualties as possible.

"Q Were there any orders you received relative to the evacuation of the City of Manila?

"A There were orders to evacuate the city. I believe that was the 12th or 13th of February.

"Q Were there any orders before that to evacuate the city?

"A There were none before that."

That is indirect opposition to the testimony of the Accused. General Yokoyama ought to know what he was talking about. He was the general in command of Manila. Orders to evacuate were given, he said, to him on the 12th or 13th of February and the battle then was at its height. The Americans had reached the city on the 3rd of February.

Apparently, then, according to that testimony, the battle had failed so far as the Japanese were concerned and they wanted out. Of course, they would evacuate then. It doesn't tie in at all with the Defense's position that they intended to evacuate Manila, all in all, from the very time the Shinbu Group was first organized.

In any event, whether they decided to evacuate or not, the fact remains that there was an army operation in the City of Manila. The troops, naval and army, engaged in that army operation, and they were under the command of General Yamashita. Those troops, without question, committed the most heinous offenses, the most terrible atrocities -- almost unbelievable -- and yet they were acts of men under orders of officers and non-commissioned officers -- they were carried out methodically according to the testimony. They were carried out, obviously, with a general plan and a fixed purpose. They were not in any sense of the word the result of a sudden complete lack of control by officers, of battle hysteria or drunkenness -- not at all.

They were performed by and committed by sober men with full uniform -- in full uniform -- in mili-

tary units under the command of their officers.

We contend that, obviously, they were acting under orders, pursuant to carefully and previously prepared plans.

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 for him to know. We believe very earnestly that the Defense has failed to show that it was physically impossible for Yamashita to know.

Yokoyama's headquarters were then only ten miles away. Yokoyama's testimony is that he was in communication with Iwabuchi, in communication with the Manila Defense Force in February.

The testimony further shows that Yamashita's headquarters were in communication with Yokoyama. 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.

There is no question that the laws of war were violated by those acts; there is no question as to the illegality under any standard of humanity that any civilized nation might recognize or apply, that they were illegal; no question whatever about that.

The Defense certainly does not question that.

One point remaining is whether or not the failure of the Accused to prevent these atrocities, these illegal acts on the part of his troops, constitutes a violation of the laws of war. We are prepared to show and believe conclusively that it does.

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

We are not dealing here with isolated instances of peccadillos committed by individual soldiers on their own time, far from the restraining influence or commands of the higher officers. Under the circumstances which existed here, the whole length of the Philippines was blanketed with one horrible atrocity after another over a period of seven months; tens of thousands of innocent men, women and children were massacred under the most horrible, heartrending conditions, or subjected to the most inhumane tortures and indignities. It is amazing that the human mind and the human body could stand up as long as many of them did under such treatment. Where you have this widespread pattern of atrocities over such a period of time, necessarily notorious,

committed by organized officer-led military units, there must have been a failure on the part of the ultimate commander of those troops to perform his duty to control those troops so they would not commit such acts.

I refer now to the Hague Convention, known as the Fourth Convention, being the regulations respecting the laws and customs of war on land. Section I, Chapter I, Article 1, reads as follows:

"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;

"2. To have a fixed distinctive emblem recognizable at a distance;

"3. To carry arms openly; and

"4. To conduct their operations in accordance with the laws and customs of war.

"In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination 'army.'"

This article, sir, is intended as, and has the effect of defining lawful belligerents. And under that article Yamashita has this choice: To say, "Yes, I did command an army; these men under me were lawful belligerents, and, therefore, the person commanding them, myself, was responsible for his subordinates."

Responsible for what?

Responsible under international law for the proper conduct of its military operations; responsible to see to it that its members did conduct their operations in accordance with the laws and customs of war. That is one choice.

The other choice is to say, "No, I did not command an army; I commanded armed bandits," as he would call them, "outlawed brigands."

He has not chosen this second course; he has said, "Yes, I commanded an army," therefore, he has told this Commission that he was a person in command of an army and responsible for the acts of his subordinates. That does not mean merely subordinate officers, that means everyone in the army, to see to it that they conducted their operations in accordance with the laws and customs of war.

That alone is enough, as we see it, to establish the dereliction of duty on the part of Yamashita as a violation of the laws of war.

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. However, there are many provisions in these international conventions, in the customs and laws of warfare, which have not as yet come before or had occasion to be passed upon by military tribunals or by any tribunals, and this may be one.

We say this is the time for this tribunal to apply it. However, it is not necessary for us to rely merely upon that express provision of the Hague Convention.

As I have had occasion to say before, the Hague Convention, as well as other international conventions relative to the laws of war, very largely is merely a confirmation of the common laws of war which previously had been built up as general and common understanding of the nations of the world -- at least, the civilized nations -- following which they were codified in writing, into what we called "Conventions." We contend that under the standards of conduct of all armies, which the Accused himself acknowledged applied to professional soldiers of all civilized nations -- under those standards of conduct, in all armies, the commanding officer does bear responsibility for the conduct of those under him. That is a requisite element of command. If it were not the case, it would be impossible to conduct effective or, at least, civilized warfare.

Furthermore, the criminal laws, the customs, the laws generally of civilized nations, are construed to apply in the international field as a part of the laws of war as well, wherever they bear any relation at all. For instance, murder is a violation of the laws of war; not because there is an international convention on the subject, but because all civilized nations forbid murder. The same with rape.

Furthermore, under laws generally, any man who, having the control of the operation of a dangerous instrumentality, fails to exercise that degree of care which under the circumstances should be exercised to protect third persons, is responsible for the consequences of his

dereliction of duty. We say, apply that in this case! Apply that in the field of military law. It is applied by international tribunals or claims commissions with respect to claims for pecuniary damages by individuals or governments against individuals of another government, or against other governments, arising out of illegal acts. There are many cases where, under international law, a government of one nation -- or let us say a nation has been held financially responsible because of the wrongful acts of its agents or representatives, military or otherwise, with consequent injuries to the nationals of other countries. There is nothing to prevent the application of that same principle in the law of war on a criminal basis; absolutely nothing.

When we speak of criminal and civil liability, we are speaking of statutory law or of common law on a municipal basis, and not necessarily in the field of the laws of war. As I said awhile ago, if in military law an officer may have criminal responsibility in some cases and administrative responsibility in another, in either case, he having been guilty of a wrongful act in the field of international law, the laws of war, the difference in punishment is not recognized except as to the degree of sentence. If the judging authority sees fit to assess death as the penalty for that wrongful act, it may do so; or, if it believes that under the circumstances a lesser sentence is justified, it may fine or imprison rather than assess death. But the type of punishment is immaterial to the type of penalty, so far as the laws of war are concerned.

There are many cases in the courts where pecuniary damages have been awarded against a government because of wrongful acts of its soldiers or commanding officers, with consequent injury to the nationals of other countries. That is in the field of civil liability.

Now let us look to the field of criminal responsibility. The Defense would say that it is all very well to talk about civil liability or to cite cases involving civil claims, but that criminal liability and criminal punishment are quite another matter. We will meet them on that ground. I am sure the Defense would not deny the principle of criminal negligence. We believe that this is a clear case, in the international field, of criminal negligence.

The general rule with respect to criminal negligence is stated as follows:

Furthermore, where an injury results from a dangerous instrumentality, the law may impose upon the wrongdoer a criminal liability. This was so at common law and has generally been enacted into statutes.

Quoting Thompson on Negligence, 2d Edition, Volume I, Section 10:

"The general conception of the courts, and the only one that is reconcilable with reason, is that the failure to do an act required or the doing of the act required is negligence as a mere matter of law; otherwise called 'negligence per se'."

Wharton's Criminal Evidence, Volume I, Section 88, states the rule on Criminal Negligence as follows:

"That a person knows what he does is also sometimes called a presumption of law. If the term 'presumption of law' is taken to mean something that the law declares to be universally true until rebutted, then it is not a presumption of law that all persons know what they are about, for there are many persons of whom the law declares just the contrary. But that a person who is cognoscenti should set up ignorance of fact as ground of exculpation or of defense would be against the policy of the law, and hence, where there is no fraud or imposition, the law treats him as if he were cognizant of what he did. He is not supposed to have known the facts of which it appears he was ignorant; but if his ignorance is negligent or culpable then his ignorance is no defense."

"If his ignorance is negligent or culpable, then his ignorance is no defense" -- that is a principle applied in criminal law. There are many variations of that, and a similar principle has been applied in the field of international law.

For instance, Borchard, Diplomatic Protection, page 217, states that:

". . . . The failure of a government to use due diligence to prevent a private injury is a well recognized ground of international responsibility."

Now, if it is proper and permissible under international law and the laws of war to apply to an entire government, an entire nation, civil responsibility in the form of damages for wrongful actions, violations of laws of war by the agents or the representatives of that nation,

is there any reason under the sun why a responsibility, criminal or civil, under the laws of war, might not properly be applied under the proper circumstances in the proper case to an individual? The Defense cries that Yamashita was too far away from the scene of battle, too far removed from the actual perpetrators, justly to be charged and punished for the crimes of those under him. Yet, his very government, his entire nation may legally be held responsible -- even farther removed from the perpetrators and from the scene of the crime. We say that it is in accordance with all of the established principles of responsibility in the field of international relations that the commanding officer as an individual be held responsible.

Now, Defense has made out that the Accused took every possible step that he could have taken to prevent these violations of the laws of war by those under him. That is the customary defense in a manslaughter charge. In a manslaughter charge, which, of course, is a criminal charge in courts of law, the basis of the charge may be some failure to act or some negligent act, a negligent, not wilful act; not a deliberate, intentional act -- that could be some degree of murder. Where there has been a failure to do something which should have been done and which would 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.

I have in mind the case of the burning of the circus tent, I believe in Connecticut, a few years ago. 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. True, they had taken steps; they had men posted as fire guards. But 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.

We say the same thing of Yamashita. He knew there was guerrilla activity in the Philippine Islands. He says it was most intense, the hostility of the people was extraordinary, and that he learned those things as soon as he came to the Philippines. He knew that his men were being pressed by the guerrillas, he knew the people were unfriendly, and that such would naturally, necessarily react upon the reciprocal feelings of the Japanese troops

under him. He was issuing orders for the suppression of guerrillas -- civilians, of course. Under those circumstances he owed the affirmative duty of taking definite steps to see to it that his troops did not commit these atrocities. 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!

We won't say that he failed to foresee them. We think he did foresee them and didn't care. We claim there is ample testimony in the record to support that conclusion. But irrespective of that, and irrespective of the affirmative proof in this record to the effect that he himself ordered these executions, these massacres -- irrespective of that, the ultimate fact remains that he came into the Philippines under circumstances such that he should have and could have foreseen what later did happen, and he did not take the steps necessary to prevent it. That alone is sufficient to mark him as guilty of a dereliction of duty under international law, the laws of war; dereliction of duty which constitutes a violation of the laws of war.

I would like to quote from Moore's International Law Digest, Volume VI, page 919, which is a recognized authority in the field of international law:

"We do not, at the present day, often hear when a town is carried by assault that the garrison is put to sword in cold blood, on the plea that they have no right to quarter. Such things are no longer approved or countenanced by civilized nations. But we sometimes hear of

a captured town being sacked, and the houses of the inhabitants being plundered, on the plea that it was impossible for the General to restrain his soldiery in the confusion and excitement of storming the place; and under that softer name of plunder it has sometimes been attempted to veil all crimes which man in his worst excesses can commit; horrors so atrocious that their very atrocity preserves them from our full execration, because it makes it impossible to describe them. It is true that soldiers sometimes commit excesses which their officers cannot prevent; but in general, a commanding officer is responsible for the acts of those under his orders. Unless he can control his soldiers, he is unfit to command them."

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 guerrillas and the hostile attitude of the people.

He failed in his mission in the Philippines; not merely to hold the Philippines for the Japanese, but he failed in his mission here to protect the Philippine people who were in his custody. It was an affirmative failure, because he failed to take the action which

would have protected him, which would have preserved him against the fate which befell him.

Now, in conclusion, sir, the Prosecution believes without question that it has established the atrocities, the crimes, the murder, the rape, the destruction without military excuse or necessity of private and public property, the devastation of large parts of the Philippines; we have established that.

We have established that these acts were committed wrongfully by men under the command of the Accused.

We have established that he failed to take steps which could have been taken to prevent those acts. We believe that the testimony shows an affirmative failure to act, that is to say, a failure on the part of the Accused to do those things which he, as an Army commander under the circumstances, with the experience he confessedly had, knew would have to be taken to prevent these foreseeable acts. He failed to take that action.

We say he is responsible under the laws of war. If he is responsible, if it is his fault, his failure to perform his duty that resulted in all of these murders, horrors, that we have spent some four weeks presenting to the Commission, then we say that no penalty less than death could be justified.

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!

We therefore respectfully recommend that if the

Accused is found guilty as charged, the sentence be death; and, in view of the aggravated nature of the crimes, in view of the measure of the crimes, we recommend that the sentence in the case of death be carried out by hanging.

CAPTAIN REEL: Sir, may I make one remark that will aid the Commission in the study of the record, on the basis of the reference to the testimony of General Yokoyama? Quite inadvertently, I am sure, the Prosecution neglected to point out that the part that they read was later, on cross examination, corrected by General Yokoyama, who admitted that he had made a mistake in that particular testimony.

GENERAL REYNOLDS: This will conclude the taking of testimony and arguments in this case.

The Commission will announce its findings at two o'clock in the afternoon, Friday next.

The Commission is now in recess.

(Whereupon, at 1620 hours, 5 December 1945, the trial was adjourned until 1400 hours, 7 December 1945.)