'JUS GLADII' - THE RIGHT OF THE SWORD:

THE TRIAL OF GENERAL YAMASHITA TOMOYUKI.

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PART 2

JUSTICES OF THE IMTFE

CHAPTER 7

THE I.M.T.F.E. AND GERMAN TRIALS

There can be no doubt that the Yamashita Trial left an indelible mark on the trials of war criminals that were held subsequent to it. Not only did these later courts find the principle of command responsibility highly persuasive, but the Yamashita precedent also extended to other questions of law, notably the debate on prisoner of war status, and it exerted a procedural influence as well as illuminating the litigous path to the United States Supreme Court. These factors add an even greater significance to the trial of General Yamashita.

None of the defendants before the International Military Tribunal for the Far East (IMTFE), held in Tokyo between 1946 and 1948, was accused of personally committing a war crime stricto sensu. Those culprits who had personally participated in the perpetration of atrocities were tried by lesser tribunals; national courts of Britain, Australia, the United States and the Netherlands, and by courts held in Yokohama under the authority of the Supreme Commander for the Allied Powers (SCAP). In this context, even General Yamashita was a lesser criminal.

The defendants before the IMTFE had been summoned on a command responsibility-type basis to answer for the deeds of their country and its functionaries. Their responsibility was ultimate. Not only did they have to answer for Japan's policy of 'aggressive war' and other governmental decisions, but also for Homma's Bataan Death March; Yamashita's policies

in the Philippines, the widespread patterns of atrocities and the Rape of Manila; Baba's Sandakan Death March; the Burma-Siam Railway and the execution of the Doolittle Fliers. In other words, they were charged for command responsibility for the actions of, for example, General Yamashita in much the same way as Yamashita had himself been brought to trial for the actions of his subordinates.

Three of the fifty-five charges against the Accused are here relevant. Count 53 alleged that the charged accused had conspired to 'order, authorize, and permit' Japanese functionaries to 'frequently and habitually commit' breaches of the laws and customs of war. Count 54 (drawn from the Nuremberg Trial), charged all accused except Okawa and Shiratori with having ordered, authorised and permitted various Japanese theatre commanders, War Ministry officials, labour unit and camp officials to frequently and habitually commit infractions against the law of war against the armed forces, prisoners of war and civilian internees of the 'complaining powers'. Hence, the accused either conspired or actually ordered the infractions; the final aspect of the conspiracy charge claimed that they conspired to have the Japanese Government abstain from taking adequate steps to ensure the observance of the laws of war and to prevent breaches thereof.

Count 55 charged the same accused with having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent actions contrary to the law and customs of war.

As Minear points out, Count 55, new at Tokyo, was 'almost

an admission of the difficulty of convicting these defendants under Count 54.' [1]

The Prosecution contention regarding individual responsibility argued that

> one who has the ultimate power and duty to make a policy decision, either individually as the head of a main branch of the Japanese governmental structure or corporately as a member of a policy-making body, and who personally exercises his power, is responsible for that exercise of power. 2

This itself was a revolutionary proposition; in international law it had been held that States were liable for their actions, but that individual functionaries performing state duties were not. The Prosecution were thereby attempting to upset this practice, and to hold individuals responsible for the actions of the State of which they were a national (or for whom they acted).

> However, he is likewise equally responsible if he permits someone else to exercise that power. If a member of a policy-making body delegates his power to one or more of the other members of the body either expressly or impliedly, he is liable for the decision of those other members in the same way as if he had personally participated in the decision. 3

Having both the power and the responsibility by virtue of the law and the legislation enacted pursuant to it, the accused could not escape same by delegating his power to others who shared that power with him, the Prosecution argued. This was especially so when the accused acquiesced later in the decision made, or actively participated by taking steps to effectuate it.

> In fact, such conduct may be deemed ratification by him of the decision and be, therefore, tantamount to a personal exercise of the power. Unless the person delegating his power to other members of a policy-making

> body expressly repudiates the decisions made by them, he cannot escape the ultimate responsibility for that decision imposed upon him by law. 4

Clearly, the Prosecution position was that a superior was responsible for the decisions of a subordinate made under a power delegated by him, unless he took the appropriate actions according to his position to repudiate the decision. The failure to repudiate was viewed as acquiescence or condonance of that decision. This was a translation into civil terms of that principle of command responsibility applied militarily in the case of General Yamashita. General Yamashita was liable for the actions of subordinates committed under an authority delegated by him, * since he failed to take actions appropriate in the circumstances and commensurate with his power to repudiate the same; to show his disagreement rather than what could be construed as a condonance of the infractions against the law of war. At this level of argument, what General Yamashita should have done was to have taken disciplinary action against the perpetrators, disregarding the other obstacles. This was spelled out later in the Prosecution summation.

> Likewise, a commander of any army or a theater of operations has ultimate responsibility for the conduct of his troops. For purposes of administrative efficiency he may delegate his powers to his subordinate commanders. However, his ultimate responsibility remains. If the subordinate commander misuses these powers or fails to exercise them, the responsibility rests upon the person having ultimate responsibility, unless he has taken the necessary corrective measures. 5

The concept of ultimate responsibility, whether applied in a civil sense to a member of the government at a policy-

* Not an order; a chain of command is in essence a delegation of authority from top to bottom.

making level, or to the most senior theatre commander, did not preclude those functionaries at intermediate or subordinate levels from being held responsible to that degree. The essence of modern government practice, according to the Prosecution, was a situation in which the decisions made by the intermediate level functionaries, the specialists, were formally adopted and acquiesced in by those with the ultimate responsibility.

> A person with ultimate responsibility has multifarious duties covering a wide field and he must rely upon his subordinates...He relies upon them because he has implicit confidence in them or feels that they are experts in their particular field. 6

Hence, it was only reasonable that such intermediate level functionaries be held to account for their advice, and the only way envisaged by the Prosecution in which such persons could escape criminal liability was where they could prove that they had nothing to do with the specific act or policy involved, or that it was done in opposition to their counsel.

Command responsibility then, in the Prosecution viewpoint, could be applied in the military arena, as it was with Yamashita, or it could be invoked to support the notion of the accountability of the higher echelon government functionaries for the actions and policies of the State, (sometimes called individual responsibility). The accused before the IMTFE covered both the civil and military spectrums, and whilst many defendants were found guilty of either Count 54 or Count 55 in conjunction with other offences, the only person found guilty only of Count 55 was General Matsui Iwane, commanding officer in Central China during the so-called Rape of Nanking, and he was sentenced to death by hanging.

The Defence refused to accept the legitimacy of the doctrine of command or individual responsibility, and vainly attempted to convince the Tribunal of the validity of their argument. In objecting to the presentation of the Philippine phase of the Prosecution case, Mr. Cunningham, one of the American defence counsel argued that

> the full criminal responsibility for the acts complained of by the Philippine prosecutor have been adjudicated and established in a court organized under the Congress of the United States and Constitution of the United States in the prosecution of General Yamashita and General Homma.

To this, the President, Sir William Webb, replied,

> But we are not re-trying Yamashita or Homma. We are trying the accused whom the prosecution assert are responsible for what was done by Yamashita, Homma and the others. The conviction and the execution of Yamashita and Homma do not absolve the accused if they were guilty.
>
> The position is so elementary as to be incapable of argument, and I resent the waste of time involved in listening to you.

Cunningham realised his failure to communicate the point he was making and so he readdressed the President in the hope of clarifying his argument.

> Well, I should like to make my position clear, if I may, by stating that the responsibility for the violation of the rules of land warfare is a military responsibility and not a political responsibility under the Rules of Land Warfare itself.

Webb was moved to comment,

> But for the fact that you have contended it, I could not believe counsel would be capable of submitting it. 7

Needless to say, the point raised by Mr. Cunningham was left unanswered and deliberately disregarded, and the challenge to the Prosecution to answer the inherent accusation that the

'principle' of command or individual responsibility was no more than an ad hoc method of convicting enemy leaders was not taken up.

Mr. Blakeney was not any more successful in his refutation of the principle. He attempted to introduce into evidence the Charter of the United Nations as the latest and best considered document on the subject of international responsibility, in which no reference was made to the concept of individual criminal responsibility. The President of the Tribunal objected to the procedure employed by Mr. Blakeney in introducing the Charter as a documentary exhibit and he told him that,

> In the course of a few weeks the U.N. may adopt or reject - I cannot say what they are going to do - the law as laid down in the Nuremberg Judgment because of matters before them.

Blakeney's point not having been recognised, he again addressed the court;

> Of course none of us knows what principles nations may adopt in future, but my submission is that the failure to adopt it at San Francisco when the Charter of the UN was adopted shows that the nations then either did not recognise the existence of the principle or did not consider punishment for violation of it by criminal proceedings to be wholesome and thus worth perpetuating in the Charter; and this in the course of the most comprehensive attempt in history of preserving the general peace and at enforcing international obligations.[8]

This particularly effective way of illustrating the novelty of the principle of individual or command responsibility was rejected by the Tribunal which invoked an obscure ruling on the technique of presenting evidence to justify its position. However, the idea behind Blakeney's presentation was of considerable validity in the jurisdiction of international law;

the use of treaties and conventions as a method of showing the norms and trends accepted in international law at a particular time was a recognised legal technique.

In his summation for the Defence, Mr. Takayanagi agreed that the administration of 'stern justice' to the perpetrators of war crimes stricto sensu was 'clearly within the purview of the terms of the Instrument of Surrender to which the Japanese Government plighted its honor.' [9] Thus, persons alleged to have actually committed such crimes could properly be tried by a duly constituted court, and punished if guilt was proven.

> But we call the attention of the Tribunal (he said) to the fact that the American members of the Commission of Fifteen at the Versailles Conference altogether denied assent to the doctrine of 'negative criminality', i.e. responsibility for failure to prevent 'conventional' war crimes, and that negligence in preventing death is only non-capital manslaughter in England. [10]

Takayanagi then went on to argue that it was a 'facile assumption' on the part of the Prosecution to assume that the German and Japanese situations were the same, and hence that there were orders from above directing the commission of every offence against the law of war. But the orders from above could not be proven, he stressed, and this meant that the Prosecution case was based 'on assumption and on assumption only'. He drew from the conclusion of the Chief Prosecutor, who had advanced a similar argument to that put forward by the Prosecution in the Yamashita case. Because the atrocities occurred over a wide range of territory and a long period of time, even after protests had been registered by neutral states, 'we must assume' orders from above, and that the accused 'made them possible'.

Takayanagi then confronted the Tribunal with an assertive

half-question.

> ...it must surely be shown at what exact level the assumed command issued; an indiscriminate assumption of guilt at all levels or at all above a certain level would be essentially contrary to justice and would be revolting to the conscience of the world. 11

Even if all of the alleged atrocities and other infractions against the law of war were of a similar pattern, such an inference could not be justified, Takayanagi told the Tribunal, as crimes 'no less than masterpieces of art' may express cultural characteristics. Hence, it was imperative in a case of such a grave nature that the existence of commands from above and their point of origin be proven beyond reasonable doubt.

The Chief Prosecutor had also cited the case of Ex parte Quirin (German Saboteurs Case) heard before the United States Supreme Court in 1942, in support of his argument that the planning, preparation, initiation and execution of war in contravention of international law and treaties, involved individual responsibility. The case of Ex parte Quirin did not however decide on such an issue, Takayanagi pointed out. Instead, it was concerned with the question of whether Congress could adopt the system of common law as applied by military tribunals (as far as it was recognised and considered acceptable by the courts), rather than codifying offences against the law of war. The problem upon which the Court pondered was one involving the interpretation given to an Act of Congress, and as such, its verdict had no binding force or authority in other nations, Takayanagi stressed.

The Defence counsel then highlighted the distance between

the common-law practice of trying individuals for alleged conventional war crimes in military tribunals to the 'revolutionary doctrine' of the Prosecution in this case, where not only the State was to be held responsible but also the individuals acting for it. This action was contrary to the expressed state of international law, and at odds with the consensus of international jurists and writers. Takayanagi asked whether it could seriously be thought that senior statesmen had contemplated individual responsibility when they had signed the Kellogg-Briand Pact; if they waged war in contravention thereof, they could be tried on a responsibility basis for murder and other war crimes. The fact that the recently signed Charter of the United Nations not containing such a doctrine further reinforced the correctness of the Defence position, Takayanagi concluded.

International law, in general, did not sanction the notion of individual responsibility Takayanagi told the Tribunal, except in cases where an exception to the general rule of State liability was made. Such exceptions covered the actions of pirates and contrabandists as well as in cases where persons suspected of having committed offences against the law of war (conventional war crimes) were apprehended; these groups were held personally liable for their actions. In all other matters, the State retained liability. Proposals had been made on several occasions in the inter-war period to expand the classes of exception to the general rule, but nations had shown considerable reticence to adopt them.

Takayanagi completed his summation on behalf of the defendants by stating that whilst international law did not

commonly recognise individual or command responsibility,

> it may be 'high time' that the principle of individual responsibility in these exalted circles of government was introduced. But let it not be done in a manner which will inevitably cast suspicion and discredit on it, by making it appear as the unilateral opinion of a conqueror; that will set back its acceptance for centuries. 12

TAKAYANAGI BEFORE IMTFE

The Defence and Prosecution response to the doctrine of command responsibility was clearly defined and predictable

in the circumstances. The question that remains is to ascertain how the Tribunal reacted to it, (and to the arguments placed before it) as well as what criteria it developed or applied for the assessment of a criminal negligence of duty.

In this respect, the Tribunal does not itself provide much that is useful. Throughout the lengthy proceedings, pronouncements relating to the principle of command responsibility and discussions of the appropriate law, with the standards of guilt to be applied, did not occur. The answers of Sir William Webb in the instances outlined above can only be regarded as inadequate, and when coupled with his customary attitude of impatience and hostility with the Defence, they could easily have been interpreted as being incompatible with the idea of a fair trial for the accused.

The judgment handed down by the Tribunal (the majority decision) did discuss the principle of command responsibility, and it did set standards particularly in relation to the treatment of prisoners of war, but little effort was made to apply, or define the application of the criterion to the individual accused. The judgment began from the premise that,

> It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners if:
>
> (1) They fail to establish such a system.
> (2) If having established such a system, they fail to secure its continued and efficient working. 13

The Tribunal went on to point out that persons responsible did not discharge the legal duty merely by instit-

uting an appropriate system; it was also their duty to discover whether the system was working, and neglect could here also render them responsible. It was stressed that an Army Commander or a Minister of War

> must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he had issued on matters of the first importance.14

Having established a 'proper' system and provided for its continued efficient functioning, a person could not be held responsible for the commission of conventional war crimes unless:

> (1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or,
> (2) They are at fault in having failed to acquire such knowledge. 15

If a person had knowledge, or should have had it (except for his negligence or 'supineness') then his inaction could not be excused if he was required or permitted by his office to have acted in prevention of the crimes. Neither was it sufficient for him to show that he accepted the assurance of others more directly concerned with the control of prisoners,

> if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further enquiry as to whether those assurances were true or untrue. 16

The notoriety of the crimes, their prevalence and whether they were widespread in time and place, were expressly identified by the Tribunal as being factors to be considered in 'imputing knowledge'.

The responsibility of members of Cabinet was next discussed. A member of Cabinet, which was as a principal organ

of government, responsible for the care of prisoners of war, could not absolve himself from responsibility, if having 'knowledge', he failed to secure the taking of measures to prevent the commission of such crimes in the future, and he continued to serve in the Cabinet. It was irrelevant that the department of which he was in charge was not concerned with the treatment of prisoners of war, or that he might be a minister without portfolio. A cabinet minister could resign. His continuing membership of the Cabinet when he was aware of the perpetration of such crimes, and powerless to prevent future ill-treatment could only be construed as a condonance of that policy, and hence, he 'willingly assumes responsibility' for any future crimes.

Ministers of War and Navy could, like theatre commanders, secure by the issuance of orders, proper conduct from their subordinates. If crimes were committed against prisoners of war under their control, and they had knowledge or should have had knowledge of the possibility of the occurrence, then such ministers could be held responsible, the Tribunal stated.

> If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes. 17

Departmental functionaries could not be held responsible simply because of the failure to resign from office, but if their duties included the administration of prisoner of war protection, and if they had knowledge or should have had it, and did nothing effective to the extent of their powers, to prevent the occurrence of similar crimes in the future, then

they could be held responsible for any future crimes.

Dohihara and Itagaki were found guilty under Count 54; they were 'responsible' for the 'policy' of withholding food and medicine to the prisoners of war throughout all theatres of war.

The defendant Hata was found guilty under Count 55. He was the commander of Japanese expeditionary forces in China in 1938, and the period 1941-1944, and during this period the Tribunal held that atrocities were committed on a large scale by troops under his command and over a long period of time. The Tribunal was not clear however on Hata's state of knowledge, and reasoned thus;

> Either Hata knew of these things and took no steps to prevent their occurrence, or he was indifferent and made no provision for learning whether orders for the humane treatment of prisoners of war and civilians were obeyed. In either case he was in breach of his duty as charged under Count 55. 18

This suggests that the standard of proof offered by the Prosecution in relation to Hata was insufficient, and that the Tribunal did not strictly apply the standards it had itself defined for the assessment of guilt.

In the evidence introduced in support of Lieutenant-General Muto Akira, Yamashita's Chief of Staff, it was pointed out that the Imperial Guards division of which he had command prior to his Philippines posting, had a behaviour record that was most exemplary and showed that it was well disciplined.

> General Muto took every possible step to assist Yamashita in the prevention of improper incidents. The efforts taken in this direction are well illustrated by the decision on the part of the Japanese Army to quit the

> City of Manila, which decision was made when it became clearly impossible to make it an open city...However, the American forces,far superior in equipment, transport, and fire power, proceeded with amazing speed and cut the Japanese forces into small segments. The Japanese forces were thus almost completely isolated from each other, and the command organization of Yamashita was destroyed. Proper command became literally impossible.19

The alleged atrocities in the Philippines were committed without the knowledge or approval of either General Yamashita or Muto, by troops beyond the disciplinary command of the former, averred Muto's counsel. Muto was in no position to be able to suppress the incidents, but he did all that could have been done. Apart from the oral testimony and affidavits to this effect, extracts tendered from the Biennial Report of General Marshall showed 'conclusively' that Muto could not possibly have prevented the events in Manila. This was reinforced by extensive testimony as to the weakness of the communication facilities; this meant that only events of major significance were transmitted between units, and they barely got through. [20]

The judgment against Muto noted his service as a staff officer to General Matsui Iwane during the era of the so-called Rape of Nanking (1937-1938). The Tribunal was of the opinion that,

> We have no doubt that Muto knew, as Matsui knew, that these atrocities were being committed over a period of many weeks. His superior took no adequate steps to stop them. In our opinion Muto, in his subordinate position, could take no steps to stop them. Muto is not responsible for this dreadful affair. 21

It then went on to consider Muto's command over the 2nd Imperial Guards Division in Sumatra from April 1942 until October 1944, whereupon they found a pattern of 'widespread

atrocities' for which Muto was to 'share responsibility'. The Tribunal stated that internees and prisoners of war suffered starvation, torture, neglect and that civilians were massacred during the time of Muto's command.

Muto's position as Yamashita's Chief of Staff was quite different from his position under Matsui; he was now in a position to be able to influence policy. From this premise, the Tribunal went on to conclude its judgment against him, thus:

> During his tenure of office as such Chief-of-Staff a campaign of massacre, torture and other atrocities was waged by the Japanese troops on the civilian population, and prisoners of war and civilian internees were starved, tortured and murdered. Muto shares responsibility for these gross breaches of the Laws of War. We reject his defense that he knew nothing of these occurrences. It is wholly incredible. The Tribunal finds Muto guilty on Counts 54 and 55.

In the case of Muto it seems that the alleged misdemeanours of the Imperial Guards, in addition to the incidents in the Philippines, coupled with his position as a staff officer of Matsui, was sufficient for the court to find that he, himself had an influence over the conduct of his subordinates. This is despite the fact that he supposedly was not blamed for the Nanking incidents, and that the Defence presented evidence indicating that the Imperial Guards were well disciplined. Obviously the fact that General Yamashita had been convicted and hanged for his responsibility in the Philippines was most persuasive; the defence of his not having had knowledge was similarly rejected by the Military Tribunal that tried him. Nevertheless, there is no evidence to suggest that the Tribunal evaluated Muto's case in the light of the standards it had earlier laid down, its comments appear

instinctive rather than reasoned.

On the other hand, the Tribunal's statements regarding other defendants bore greater resemblance to a reasoned judgment based on a comparison of the evidence with the standards it established. In discussing Hirota for example, the Tribunal stated that the evidence connected him with the atrocities of Nanking due to his position as Foreign Minister. He received reports of atrocities immediately after the entry of the Japanese forces into Nanking, and according to the Defence evidence, credence was given to these and the matter taken up with the War Ministry. Hirota accepted assurances from the Ministry that any atrocities would be stopped. However, after the assurances had been given, reports of further atrocities continued to come in for another month.

> The Tribunal is of the opinion that Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence. 22

The Tribunal argued in a similar fashion with Kimura, who had been a Chief of Staff of the Kwantung Army and a Vice Minister of War, prior to his appointment as commander of the Burma Area Army in August 1944. He had come to that position fully cognizant of the extent of atrocities committed by Japanese forces in other theatres of combat, the Tribunal felt. From the time of Kimura's arrival atrocities 'continued on an undiminished scale', and he took no disciplinary measures.

In his defence it was argued that Kimura issued orders upon his arrival in Burma, urging his troops to conduct them-

selves properly and not to ill-treat prisoners of war. However, the Tribunal found that in view of the nature and the extent of ill-treatment against prisoners 'in many cases on a large scale within a few miles of his headquarters' Kimura was negligent in his duty to enforce the law of war.

> The duty of an army commander in such circumstances is not discharged by the mere issue of routine orders; if indeed such orders were issued. His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus, he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war. 23

The proximity of incidents to Kimura's headquarters and his employment history appear to have been important factors in the Tribunal's reasoning coupled with their doubt that any order as claimed had ever been issued by him to restrain the excesses of his troops.

General Matsui Iwane was held responsible for the Rape of Nanking, between December 1937 and February 1938 during which it was alleged that thousands of women were raped, 'upwards of 100,000 people were killed' and much property was stolen or burned. During this period General Matsui made a triumphal entry into the city, where he kept his headquarters for about a week.

> From his own observations and from the reports of his staff he must have been aware of what was happening.

Matsui admitted that he had been informed by the Kempei Tai and the Japanese consular officials of 'some degree of misbehaviour'.

> The Tribunal is satisfied that Matsui knew what was happening. He did nothing or nothing effective to abate these horrors. He did issue orders before the

> capture of the City enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as is now known, and as he must have known. 24

In his defence Matsui had pleaded ill-health, but the Tribunal pointed out that his illness had not prevented him from conducting his military operations or making his triumphal entry into the city.

> He was in command of the Army responsible for these happenings. He knew of them. He had the power, as he had the duty, to control his troops...He must be held criminally responsible for his failure to discharge this duty. 25

Matsui was found guilty solely of Count 55, and was sentenced to hang for his criminal negligence in the performance of his military duties as commander of the Japanese forces in Nanking.

This was the extent of the discussion of the principle of individual responsibility in the majority judgment; essentially it was confined to the question of responsibility for the treatment of prisoners of war, and at a fairly rudimentary level linking the defendants with the crimes and the standards for the assessment of guilt. The doctrine of individual responsibility did however, warrant the attention of those justices who filed dissenting opinions, and these will be examined next.

The French jurist, M. Bernard was outspoken in his criticism of the trial. He felt that the defendants had not had a fair trial, and he was especially critical of such judicial method that enabled a small clique of judges to control the proceedings and which did not demand a joint session to discuss orally the judgment.

In discussing individual responsibility, Bernard took the view that the individual could not properly shield himself from the consequences of his actions or deny responsibility therefore, by claiming collective (or national) responsibility. 'Assuming that there exists a collective responsibility', Bernard argued,

> obviously the latter can only be added to the individual responsibility, and cannot eliminate same. It is because they are inscribed in natural law and not in the constitutive acts of the Tribunal by the writers of the Charter, whose honor it is, however, to have recalled them, that these principles impose themselves upon the respect of the Tribunal.

Hence, it was his analysis that,

> in the light of these considerations will appear the justification of the rejection of the objections of the Defense based upon the principle '<u>nullum crimen sine lege</u>', upon the principle of the non-retroactivity of laws, or upon the nullity of the dispositions of the article of the Charter setting forth the principle of individual responsibility. 26

Continuing with his line of reasoning, Bernard recounted the propositions of the majority with regard to individual responsibility, and stated his disagreement with the 'principle' of high level individual responsibility as contained in that judgment. The wording, according to Bernard,

> leads one to believe that the majority sees...a crime of equal seriousness with all those qualified as conventional War Crimes in each of these cases, where the crimes in question have some distinct immediate author and thus directly responsible for the act, the culprit in question before us is declared responsible for the crime without any kind of reservation, on the same terms no doubt as would be affirmed in the case of the responsibility of the immediate author. The responsibility seems to be judged equally as serious in either case...The truth, however, is that the responsibility involved is of an entirely different nature from that of the immediate author, and that the seriousness of the anticipated sentence cannot be determined, unless the nature of this responsibility is specified. 27

To determine this, Bernard drew attention to the fact that a

person could only be held criminally liable for his own actions. Thus, guilt through omission could only exist where the commission of a crime directly occurs from that omission, the perpetrator being either the author of the omission, or another party.

> The responsibility for the results of this commission is only imputable to the author of the omission if the commission is the certain result of the latter. The relation of cause and effect may be easily ascertainable when the author of the omission and that of the commission are the same individual; it is no longer the case when they are different. The only possible manner of establishing this causal connection would consist in proving that the author of the omission could by an action of some kind prevent the commission and its direct harmful consequences. 28

A causal connection, therefore, Bernard felt should have been proven, to link the accused with the alleged crime, and in this context, the circumstances existing at the time of the perpetration of the crime were of importance.

Relating his prescription on individual responsibility to the case at hand - the responsibility for the welfare of prisoners of war - Bernard urged that persons be declared guilty of 'passive complicity' of violations of the law of war, only those who,

> able to prevent that violation from being committed, did not do so. No legal presumption could be invoked to establish that the defendant could have prevented such violation of such wholesale or particular violations of the laws of war, and the failings from their professional duty or from their moral obligations, could not be considered as an element of the crime of complicity by negligence, imprudence or omission unless the crimes committed were the direct result of this negligence, imprudence or omission, or could only have been committed because of this negligence, imprudence or omission. 29

Thus, to Bernard the guilty were those who were negligent, imprudent or who voluntarily disregarded their orders and

regulations so that a state conducive to the perpetration of offences against the law of war was allowed to develop. But there were aggravating circumstances in the crime of failing in one's duties to prisoners of war. The first of these postulated by Bernard envisaged circumstances where the defendant, having anticipated or had as his duty to anticipate (by virtue of his office) the consequences of his imprudence, negligence or non-observance of orders, committed it regardless. The second circumstances were those whereby violations of the law of war of the same nature as those caused by negligence etc. occurred. Using these criteria, Bernard went on to suggest a differential punishment scale for the guilty. Punishment by death was reserved for those defendants who were convicted of passive complicity in violations of the laws of war. Life imprisonment awaited those guilty of failing in their duties to prisoners of war, where there was at least one of the aggravating circumstances. A penalty of imprisonment for a limited duration awaited those who had rendered themselves guilty of failing in their duties toward prisoners of war (without aggravating circumstances).

In other words, M. Bernard was making a plea for a more judicial approach to the question of negative criminality and individual responsibility. What he desired was a clearer delineation of the connection between accused and the alleged crime resultant from his inaction, so that a more precise and analytical assessment of guilt or innocence could be made, thereby eliminating any susceptibility to a purely vindictive judgment.

Mr. Justice Röling of the Netherlands stated that whilst

there was 'solid ground' for dissent in the fact that the charges were almost unknown before the war, he had taken exception to the implications of MacArthur's power to reduce or otherwise alter (but not increase) sentences, and his comments were only given as far as they could have significance to this provision, or the question of guilt and punishment. Röling also decided not to discuss that 'fateful decision' in which the majority endorsed the judgment of the United States' Supreme Court in In re Yamashita on prisoner of war status.

There were several very significant dangers, Röling asserted, in the view that the Tribunal was bound by its Charter. As a judicial tribunal, its overriding concern should have been the administration of justice; yet, to mete out justice, it could not inquire whether the victors strayed from lawful conduct. The Tribunal could neither inquire whether it was applying the rules of justice, since on this aspect it was dictated to by the Supreme Commander of the Allied Powers (SCAP) - the victors controlled this too. And of course, there was the question of whether the crimes enumerated in the Charter were actually crimes under international law. Cynically, Röling noted that whilst the majority claimed that it was bound by the Charter they disregarded it where they saw fit.

Having so commented, Röling moved on to discuss the responsibility for ommission. The basic question, he said, was who are responsible in cases where conventional war crimes are committed, and who can be said to have violated, either by commission or omission, the laws and customs of war?

Where the commission of crimes are undertaken pursuant to orders, Röling pointed out, the perpetrator is still considered to have committed a crime but the orders may, under the Charter (article 6) be allowable in mitigation of punishment. The order giver is then responsible for the deeds done pursuant to his order.

> The problem which has to be faced here is the question whether there are some persons responsible for the fact that they did not prevent the commission of crimes. The responsibility for omission is a very restricted one, in domestic law recognized only in special cases where the legal duty was clearly indicated. The duty to act varies in different countries with the degree of liberal individualism. The modern trend in most countries is to emphasize the duty of the individual towards his fellow citizens of the community. However, there does not appear to be a similar trend in international law. 30

Röling drew attention to the provisions of the American Rules of Land Warfare (FM 27/10, 1940) which until 1944 carried article 347 as follows:

> The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they fall. 31

The underlined clause was felt to be unclear and it was replaced with article 345 which stipulated that the commander was culpable for actions pursuant to his orders.

Quoting from the British Laws and Usages of War on Land, Röling showed that until 1944 officials and commanders responsible for 'such' orders could be punished in connection with crimes committed on superior order. With the amendment of article 443 under which the defence of superior orders was removed (as a general justification) from the laws, any indication of responsibility through omission was similarly

removed. Thus, Röling concluded, there was apparent amongst the major Allies a reluctance to accept legal responsibility for omission.

Indeed, even in the Nuremberg judgment as it related to Doenitz's responsibility for the killing of survivors of torpedoed ships there was the same hesitation. Doenitz's orders were ambiguous and deserved the 'strongest censure'.

> Yet the Tribunal, without touching on the question whether Doenitz was criminally responsible for those killings through his failure to take sufficient steps to prevent them, stated: 'The sentence of Doenitz is not assessed on the ground of his breaches of the International Law of Submarine Warfare.' As to the killing of survivors, this is apparently only based on the fact 'that the evidence does not establish with the certainty required that Doenitz deliberately ordered the killing of ship-wrecked survivors.' 32

Turning his attention to Counts 54 and 55 of the Tokyo trial indictment, Röling postulated a definition for the word 'permit', urging that its meaning within the context of the individual responsibility debate be taken as the intentional granting of freedom to commit crimes. Such permission, Röling felt was akin to 'authorising' a violation of the laws of war, and was in itself a criminal infraction of the same body of law.

The next difficulty with Count 55, in Röling's view, was to determine the extent of criminal responsibility for the failure to prevent the commission of crimes. In an attempt to clarify the issue, Röling sought earlier decisions and opinions on the question. Hence, he cited the Commission on the Responsibility of the Authors of the War, which reported to the Versailles Peace Conference in 1919, to the effect that,

> 'To establish responsibility in such cases it is

> elementary that the individuals sought to be punished should have knowledge of the commission of the acts of a criminal nature, and that he should have possessed the power as well as the authority to prevent, put an end to, or repress them. Neither knowledge of commission nor ability to prevent is alone sufficient. The duty or obligation to act is essential. 33

Röling noted that it was at the insistence of the American members, Scott and Lansing, that the concepts of knowledge, and the power to intervene had been incorporated into the Commission's report; this was certainly ironical in view of the case before him.

The same question was raised in In re Yamashita. The Defence had argued that the charge against Yamashita did not allege that he had personally committed or had directed the commission of acts contrary to the law of war, and so there had been no violation of that law. The Supreme Court of the United States on appeal had ruled that the gist of the charge was an unlawful breach of duty as commander to control the operations of his troops by 'permitting' them to commit crimes against the law of war. The question then is whether the law of war imposes on a commander the duty to take appropriate measures as are within his power to prevent the occurrence of violations that are likely to attend the occupation of hostile territory by uncontrolled troops, and thus whether personal responsibility can be charged for failure when violations result. Rutledge and Murphy, in their dissents stressed the importance of knowledge; that the commander knowingly failed to take action, when he had both the power and duty to do so.

From his analysis of past deliberations on the topic, and particularly taking cognisance of the Yamashita case,

Röling advanced tests which he felt must be satisfied in order to establish the guilt of an accused:

> (1) The defendant must have known or should have known of the commission of the acts charged;
> (2) He must have had the power to prevent them;
> (3) He must have had the duty to prevent them.

He was quick to point out that the criteria of guilt he had laid out were not discrete, but instead

> are correlated, in that the duty may imply the duty to know. Ignorance is no excuse in case the person in charge could and should have known. On the other hand, 'power' means power in relation with legal duty. The three elements combined may lead to criminal responsibility. 34

Thus, not only knowledge but the lack of it resulting from criminal negligence was of importance. If the function and duties involved place the commander in a position where he had an obligation to know what was happening, a lack of knowledge in a situation where he could have been informed if he was normally alert would constitute no defence.

The power to prevent incurred criminal liability only where all possible preventative measures have not been taken; not all war crimes are preventable. In conclusion, Mr. Justice Röling commented that,

> One could argue that this duty exists, as soon as knowledge and power are apparent. International law may develop to this point. At this moment, however, one has to look for the specific obligation placed on government officials or military commanders, which makes them criminally liable for omissions. 35

The scope of the responsibility was extensive, Röling held, and the implications of the majority decision had extended the liability, especially with regard to the responsibility for prisoners of war, too far.

> It is advisable indeed to bear in mind that this is a new question, which carries a warning to be very careful not to apply rules which did not exist before. It will, moreover, be a wise policy not to extend this recently applied responsibility too far. 36

The dissenting opinion of Mr. Justice Pal of India was the longest and most detailed dissent. Pal agreed that there was evidence of Japanese forces having maltreated enemy civilians and prisoners of war, but the fundamental question as he saw it, was how far the defendants before the IMTFE could be held criminally responsible for such acts.

The major thrust of his dissent from the majority concerned the issue of state sovereignty; Pal held that there was no sufficient reason to assume that the rule of customary international law under which no state could claim jurisdiction over the acts of another state was suspended by the outbreak of war. Thus, it did not govern the relationship between the belligerent parties. This meant that one belligerent could not hold another state or its functionaries responsible for the latter's acts of state, since they were only within the legal competence of that latter state. In other words, no international or national tribunal such as the IMTFE could properly charge Japan or Japanese governmental and military functionaries to account for actions of that government or taken pursuant to its command. Therefore, irrespective of the separate issue of the justiciability of individuals under international law (also discussed at great length by Pal), and the question of whether those individuals charged committed any international crime, in working the constitution of the government of their nation, the IMTFE, in Pal's view, really lacked legal jurisdiction due to the

doctrine of state sovereignty. The other factors above served to reinforce this conclusion.

Continuing, Pal argued that there was 'absolutely no evidence' of the ordering, authorisation, or permission to commit war crimes or to mistreat prisoners of war and civilians. Neither did the evidence support the conclusion that it was the policy of the Japanese government to mistreat other nationals. Pal felt that the different attitude held by the Japanese to surrender and the number of prisoners in Japanese hands would explain that maltreatment that did occur, and as he said, those responsible had been tried in other tribunals. Whilst Tojo was responsible for the order requiring the employment of prisoners of war, Pal claimed that as it was an act of state, Tojo should not have borne criminal responsibility. [37]

Deliberate and reckless disregard of duty, as alleged in Count 55, did not constitute a crime even under the Charter governing the IMTFE.

> There is, indeed, some difficulty in reconciling Count 55 with the provisions of the charter. The charter lists as crime only 'violations of the laws or customs of war.' It does not list as crime 'disregard' of 'legal duty' to take adequate steps to secure the observance of and to prevent the breaches of the laws of war. If Count 55 be taken to mean that 'the deliberate and reckless disregard of legal duty' itself constitutes a crime, then the crime charged therein would be outside the provisions of the charter and as such, outside our jurisdiction. [38]

However, Pal went on, the Count could be taken as mentioning 'deliberate and reckless disregard of legal duty' only as evidentiary conduct upon which the charge - violation of the law of war - was based. Thus, the 'deliberate and reckless disregard' of duty was not in itself the violation of the

law of war, but instead was the conduct of the accused from which the act of violation was to be established. But in using evidence of a disregard of duty to support such a charge, the charge would not be established until the act of violation was proven to be the action of the accused, Pal urged. Evidence so introduced under Count 55, whilst it did not constitute a separate crime, could be used to support Count 54, but Pal believed that the evidence adduced before the Tribunal was insufficient to justify findings of guilt against any accused. [39]

The use of negative criminality and the principle of command or individual responsibility at the IMTFE was therefore, not the subject of unanimous agreement between the judges. In fact, a significant percentage of them were opposed to the reliance placed upon it in the state of the development of the law at that time, and in the manner in which it was utilised. A more judicial and discriminating approach to the use of the doctrine was necessary, if the principle was to have any value apart from mere vengeance.

Such an approach to the Yamashita precedent of command responsibility was however, being concurrently practised elsewhere; halfway around the globe in the trials held at Nuremberg. It is to these that I will now turn.

The trial of Erhard Milch before an American Military Tribunal in Nuremberg between 20 December 1946 and 17 April 1947 is a case in point. Field Marshal Milch was held responsible for a number of experiments performed by Luftwaffe physicians at Dachau, which resulted in death and permanent injury for many of the victims. Such experiments included

high altitude and low pressure experiments, and 'cooling or freezing' experiments.

The Prosecution argued that 'the facts of the Yamashita case are similar to those of the Milch case, and the opinion rendered by the Court is particularly in point in the matter of responsibility for senior officers.' [40] Articles 1 and 43 of the IVth Hague Convention, 1907; Article 19 of the 10th Hague Convention, 1907; and Article 26 of the Geneva Red Cross Convention of 1929 imposed upon a commander

> an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population,

the Prosecution pointed out, quoting the Yamashita case. [41] The chain of command situation in this case was somewhat simpler than that of Yamashita; it pointed to Milch having direct responsibility. Had Milch given the order for a termination of the experiments, they would have ceased; Milch had not issued any orders, however.

> The defendant had an affirmative duty to know what was going on, and an affirmative duty to act so as to stop the experiments. That he was ignorant of the true state of affairs is unbelievable in view of the letters and the testimony of those who were below him...By holding the office which he held, he had the duty to control the activities of those who were his subordinates, to insure that they conducted themselves as soldiers and not as murderers. He has failed woefully in the task. 42

The Tribunal in its judgment did not fully endorse the Prosecution argument. They acknowledged that the Yamashita case and judgment had been discussed during the deliberations of the Tribunal in camera, but no mention was made of it in the wording of the court's decision. The Tribunal's discussion of the Yamashita case led them to adopt the view that

its decision was not controlling in the case at bar.

In his concurring statement, Judge Phillips held that both Prosecution and Defence evidence and testimony was to the effect that Field Marshal Milch did not have knowledge of the high altitude or low pressure experiments conducted by the Luftwaffe physicians until after their completion.

> The evidence offered as to the knowledge or responsibility of the defendant Milch was not of such a nature as to show guilty knowledge on his part of said experiments. 43

With regard to the 'cooling and freezing' experiments,

> the Tribunal was mindful of the fact that the defendant gave the order and directed his subordinates to carry on such experiments, and that thereafter he failed and neglected to take such measures as were reasonably within his power to protect such subjects from inhumane treatment and deaths as a result of such experiments. Notwithstanding these facts, the Tribunal is of the opinion that the evidence fails to disclose beyond a reasonable doubt that the defendant had any knowledge that the experiments would be conducted in an unlawful manner and that permanent injury, inhumane treatment or deaths would result therefrom. 44

Hence, the Tribunal felt that Field Marshal Milch did not have knowledge that amounted to participation or responsibility, and it thus found him not guilty of the second charge. It is interesting to note that no duty to discover the alleged character of the experiments was mentioned by the Tribunal in this case, as had been in other cases, such as the so-called Doctors' Trial (trial of Karl Brandt and others). 45

The commentary in the Law Reports suggests that because Milch was not a doctor of 'ability and experience' and because his command encompassed vast responsibilities in a wide industrial field, many areas of which he had only superficial knowledge, including the medical experiments, he was excused

by the Tribunal on this aspect.

In the Pohl trial (trial of Oswald Pohl and others), one of the accused, Erwin Tschentscher, a battalion commander of a supply column, and a company commander on the Russian front in 1941, was judged to be not responsible for the murder of Jewish civilians and other non-combatants in Poland and the Ukraine, committed by members of his commands at that time. [46] The reasoning of the court marks a new departure in the development of the doctrine of individual or command responsibility. It was the decision of the Tribunal that Tschentscher had no 'actual knowledge' of the offences specified, and so the verdict of the Supreme Court in the Yamashita case had no relevance to the defendant. They stated that,

> Conceding the evidence of the Prosecution to be true as to the participation by them was not of sufficient magnitude or duration to constitute notice to the defendant, and thus give him an opportunity to control their actions. 47

With this decision, the articulation of a new concept to further refine the standards applicable to assess guilt had been made, although what level or quantity of actions in contravention of the law of war would have been considered sufficient to constitute 'notice' remained undefined.

The trial of Wilhelm List and others, held before an American Military Tribunal at Nuremberg between 8 July 1947 and 19 February 1948, makes a further contribution to a codification of the extent of the responsibility of a commanding general for the offences of his subordinates.

The attitude of the Tribunal as revealed by the judgment was such that commanders having executive authority over

occupied territory, (the person in whom resides the obligations laid down in Section III of IV Hague Convention 1907 - 'Military Authority Over Territory of the Hostile State'), should not be able to plead that the offences were committed within occupied territory under his authority, by persons taking orders from authorities other than himself. This was also applicable to any subordinate commanders to whom executive powers had been delegated.

It will be remembered that it was alleged that General Yamashita was military governor of the Philippines concurrently with his position as commanding general of the 14th Area Army, but with the divided and fragmented command structure under which the Japanese armed forces operated, Yamashita had no control over the Navy, which maintained an independent and parallel system. Such a decision, if applied to the Yamashita case may have exacerbated the potential for a miscarriage of justice.

The Tribunal also took the view that no commander should be permitted to plead ignorance of reports made specifically for his benefit. A commanding general would usually be held responsible for any events occurring during his temporary absence but which arose from 'a general prescribed policy formulated by him.' [48]

At other places in the judgment the Tribunal reasserted the first principle, arguing that the commanding general of occupied territory cannot escape his responsibility by pleading a want of authority over the perpetrators. The authority they felt, was inherent in his position. The foremost responsibility for the prevention and punishment of crime lies with

the commanding general and this he could not escape by pleading a want of authority. Hence, the commanding general could not hide behind a puppet government, or plead a different chain of command.

In this case, a corps commander who argued that the responsibility for the taking of reprisal measures rested with divisional commanders was told that he must be held responsible for the acts of his subordinate commanders in carrying out his orders and for acts which he knew or ought to have known about.

The commentary of the Law Reports in noting that the judgment made in the List trial was intended to be read in conjunction with the Yamashita case findings, asked to what extent the accused's knowledge of offences being committed by his troops must be proven in order to make him responsible for their acts.

In the List trial, the proof of knowledge was made easier because reprisal actions were often reported by lesser officials to various of the accused, but in the Yamashita case 'few, if any' reports of the atrocities were made to the accused. The widespread nature of the crimes, both spatially and temporally, in the Yamashita case, was obviously an important factor in convincing the Tribunal that Yamashita must have known or must have been assumed to have known of their occurrence, or that he was criminally negligent in his duty to discover the standard of behaviour of his units.

The judgment in the List case (Hostages Trial) also offers some indication of the extent to which a Chief of

Staff could be held responsible. The chief of staff could not be held responsible, the Tribunal ruled, for the outcome of his commander's orders which he approved from the point of view of form, and issued on the latter's behalf.

Of Foertsch, the first chief of staff charged, the Tribunal said that he had no authority in the field, and his attempts to procure the withdrawal of certain unlawful orders and the mitigation of others, coupled with the lack of direct evidence placing the blame on him, led them to conclude that there was no case against him.

> That he had knowledge of the doing of acts which we have herein held to be unlawful under International Law cannot be doubted. It is not enough to say that he must have been a guilty participant. It must be shown by some responsible act that he was...Many (acts) were carried out through regular channels over his voiced objection or passive resistance. The evidence fails to show the commission of any unlawful act which was the result of any action, affirmative or passive on the part of this defendant. His mere knowledge of the happening of unlawful acts does not meet the requirements of criminal law. He must be the one who orders, abets, or takes a consenting part in the crime. 49

The second defendant von Geitner, was chief of staff at a lower level of the military hierarchy than Foertsch, and his duties encompassed mainly operations, supplies, training and the organisation of troops. Von Geitner was shown to have signed orders issued by his commander for the shooting of reprisal prisoners and hostages. Applications for permission to take reprisals were made to the commanding general and referred to a legal officer who reported back to the commander. The commander then made a decision and delivered the text to von Geitner for transmission into an order. The order was despatched through regular command channels by von Geitner.

> No doubt existed that such an order was that of the military commander and that the defendant von Geitner lacked the authority to issue such an order on his own initiative. The accused claimed that the approval of the form of such orders was the full extent of his participation in the issuing and distributing of reprisal orders, 50

the Tribunal stated. Von Geitner was found not guilty since it had not been proven beyond a reasonable doubt that he had taken any consenting part in illegal acts reinforced by his obvious lack of authority and inability to prevent the commission of unlawful acts.

The High Command Trial is perhaps the most interesting of the trials held at Nuremberg, both for its participants as for the pronouncements on the law made by the Tribunal. In his summation before the court, the Chief Prosecutor, Telford Taylor, prominent for his more recent comments on the My Lai incident in Vietnam and the guilt of the officers in that chain of command, eloquently made a plea for the responsibility of the senior officers on trial.

> Somewhere, there is unmitigated responsibility for these atrocities. Is it to be borne by the troops? Is it to be borne primarily by the hundreds of subordinates who played a minor role in this pattern of crime? We think it is clear that that is not where the deepest responsibility lies. Men in the mass, particularly when organized and disciplined in armies, must be expected to yield to prestige, authority, the power of example, and soldiers are bound to be powerfully influenced by the examples set by their commanders. This is why...the only way in which the behavior of the German troops in the recent war can be made comprehensible as the behavior of human beings is by a full exposure of the criminal doctrines and orders which were pressed down on them from above by the defendants and others. Who could the German Army look to, other than von Leeb and the senior field marshals, to safeguard its standards of conduct and prevent their disintegration? If a decision is to be rendered here which may perhaps help to prevent the repetition of such events, it is important above all else that responsibility be fixed where it truly belongs. 51

This was rejected by the Tribunal. Despite the argument that because of the extent of the German murder programme in the areas of occupation, and the communications facilities available to the commanders, plus the fact of their having been in command, that they should necessarily have known, the Tribunal stated that,

> we can draw no general presumption as to their knowledge ...and must necessarily go to the evidence pertaining to the various defendants to make a determination of this question. 52

The reasons for this attitude are made clearer by an earlier passage of the Tribunal's judgment, which although lengthy, deserves to be quoted in full. The Tribunal began by noting that the responsibility of commanders of occupied territories was not unlimited.

> It is fixed according to the customs of war, international agreements, fundamental principles of humanity, and the authority of the commander which has been delegated to him by his own government...His criminal responsibility is personal. The act or neglect to act must be voluntary and criminal. The term 'voluntary' does not exclude pressures or compulsions even to the extent of superior orders. That the choice was a difficult one does not alter either its voluntary nature or its criminality. 53

The Tribunal then went on to highlight the fact that

> A high commander cannot keep completely informed of the details of military operations of subordinates and most assuredly not of every administrative measure. He has the right to assume that details entrusted to responsible subordinates will be legally executed. The President of the United States is Commander-in-Chief of its military forces. Criminal acts committed by those forces cannot in themselves be charged to him on the theory of subordination. The same is true of other high commanders in the chain of command. Criminality does not attach to every individual in this chain of command from that fact alone. There must be a personal dereliction. That can only occur where the act is directly traceable to him or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to

> a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of international law would go far beyond the basic principles of criminal law as known to civilized nations. 54

The Law Reports commentary offers the following suggestion;

> It appears...that, in suitable circumstances, the requirement of knowledge may be dispensed with. Speaking of the 'Maintenance of Discipline Order', the Tribunal said:
>
> 'Can these defendants escape liability because the criminal order originated from a higher level? They know it was directed to units subordinate to them. Reports coming in from time to time from these subordinate units showed the execution of these political functionaries. It is true in many cases they said they had no knowledge of these reports. They should have had such knowledge.'

Clearly, the commentary is confusing the concept of knowledge here; it was not 'dispensed with' so much as inferred from surrounding circumstances. In this particular instance, the fact that reports were made for the benefit of the commander (and they contained information on the illegalities) coupled with other factors enabled the finding that knowledge was inferred.

An inference of knowledge and an assumption of guilt and knowledge are different, the commentary later pointed out. References to the fact that an accused ought to have known of certain facts raised questions of substantive law. The second, the presumption; an accused must be presumed to have known was raised by the Prosecution in the case against von Leeb and his alleged responsibility under Counts I and II.

> Where the proof shows the systematic and widespread commission of crimes, the officers in the chain of command are criminally responsible for such crimes if they have failed to take appropriate measures to prevent such acts by subordinates. Here, the proof need show only the widespread commission of crimes by units sub-

> ordinated to the defendant. Proof of widespread crimes necessarily raises a presumption of failure to take appropriate measures to control subordinates. It is unnecessary to show that the defendant had knowledge of such crimes. (Footnote 3, p. 112).

The Tribunal nevertheless disregarded this pronouncement as an absolute ruling; such factors as mentioned were considered along with evidence of the efforts made by the accused to discover and prevent the occurrence of crime, the chain of command and other material presented in evidence.

In this case, the Prosecution argued also that according to the Hague Convention, military commanders of occupied territory were per se responsible for the crimes committed within the area of their command, especially against the civilian population, irrespective of the area of their occupation, the orders, regulations and the laws of their superiors limiting their authority, and regardless of the fact that the crimes committed were due to the action of the state or superior authorities, which the commander did not initiate or participate in. Military commanders, the Tribunal emphasised, were subject to both their military superiors and the State as to their jurisdiction and functions, since they were functionaries of both, and could be removed at their will.

> In this connection the Yamashita case has been cited. While not a decision binding upon the Tribunal, it is entitled to great respect because of the high court which rendered it. It is not, however, entirely applicable to the facts in this case for the reason that the authority of Yamashita in the field of his operations did not appear to have been restricted by either his military superiors or the State, and the crimes committed were by troops under his command, whereas in the case of the occupational commanders in these proceedings, the crimes charged were mainly committed at the instance of higher military and Reich authorities. 55

The Tribunal went on, that a State could limit the exercise of sovereign powers by a military commander, but some responsibilities of a military commander under international law could not be so set aside by State action. He could not argue, for example, that he was not responsible for inhumane acts against the civilian population committed by the State when he has executive powers and hence represents both the military and the State in an occupied area. The situation was parallel to the one governing prisoners of war, the Tribunal stated, where under international law, armies capturing prisoners (enemy soldiers) were bound by the fixed responsibilities of the law as to their treatment.

A lengthy consideration of the responsibility of the Chief of Staff and the staff officers was included in the judgment of the Tribunal. Having had the finding of the List case brought to its attention in respect of the responsibilities of the Chief of Staff, the Tribunal noted that such finding was one of fact and only a legal determination insofar as it related to that particular case.

> We adopt as sound law the finding therein made, but we do not give that finding the scope that is urged by defense counsel in this case to the effect that all criminal acts within a command are the sole responsibility of the commanding general, and that his Chief-of-Staff is absolved from all criminal responsibility merely by reason of the fact that his commanding general may be charged with responsibility therefore. 56

No facts from the List case were pertinent to the German High Command Trial, the Tribunal emphasised, the application was solely one of law.

Commenting that the claims of commanders and chiefs of staff on trial, as to the functions of the chief of staff and

the staff officers were not consistent, the Tribunal went on to elaborate on the role each fulfilled in the army hierarchy, as it had analysed them.

The duties and functions of the staff officer in the German army was not vastly different from that in any other modern army, the Tribunal felt. Principally, the role of the staff officer was the translation of ideas, policies and general directives into properly prepared orders, with which subordinate units would be governed. This was an indispensable role in order to create an efficient military organisation. However,

> If the basic idea is criminal under International Law, the staff officer who puts that idea into the form of a military order, either himself or through subordinates under him, or takes personal action to see that it is properly distributed to these units where it becomes effective, commits a criminal act under International Law. 57

Staff officers, the Tribunal concluded, were not delegated command authority except within very small fields.

As to the role of the chief of staff, the Tribunal stated that it was his responsibility to relieve the commanding general of the tedium of routine matters, so that he was confident that his wishes and policies, plus the procedures for the implementation of the policies, would be carried out. It was also the duty of the chief of staff to keep the commander informed of the activities taking place within his command. The sphere of influence and personal activities of the chief of staff were dependent upon the position and the responsibilities of the commander, the Tribunal said.

> Since a chief of staff does not have command authority in the chain of command, an order over his own signature does not have authority for subordinates in the chain of command. As shown by the record,...however, he signs orders for and by order of his commanding officer... While the commanding officer may not and frequently does not see these orders, in the normal process of command, he is informed of them, and they are presumed to represent his will unless repudiated by him. A failure to properly exercise command authority is not the responsibility of a chief of staff. 58

As the commentary in the Law Reports later states, it is apparent that the duty to inform the commander incumbent upon the chief of staff, was a duty under German military law rather than international law. If the duty was one under the jurisdiction of international law, it would have been possible to indict chiefs of staff for crimes of omission; the chief of staff could be held responsible for his failure to fulfil his own duty as a staff officer, to inform his commander, rather than on a command responsibility basis. This conclusion is reinforced by the next words of the Tribunal:

> In the absence of participation in criminal orders or their execution within a command, a chief of staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call these matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitely upon his commander. 59

The Tribunal evidently felt that the main opportunity for a chief of staff to commit war crimes occurred in his capacity as the transmitter of the orders of his commander, and it is this assumption which shaped the form of the legal determination it made.

There can be no doubt that the Yamashita precedent was received gladly, utilised and developed further by the Tokyo trial and at Nuremberg. In fact, the principle articulated

in the Yamashita case was probably the most influential doctrine applied in the post-war trials of war criminals, but the Yamashita case was persuasive also in the procedural arena. The criticisms levelled at the Regulations Governing the Trial of War Criminals under which Yamashita's trial was held, were raised again with the same conviction at the IMTFE. Accounts of the infractions by the Tribunal of the minimum guarantees for a fair trial, are numerous, and no attempt will be made to recount them here,[60] except to point out that the action of General MacArthur in making the IMTFE an Allied authority (rather than a United States' court as Yamashita's had been) so that appeals could not be made to the United States Supreme Court, added fuel to that debate.[61]

FOOTNOTES

1 Minear, Richard. H., Victor's Justice: The Tokyo War Crimes Trial, Princeton, New Jersey, 1971, p. 67.

2 IMTFE Proceedings, Prosecution Summation, p. 40,544.

3 Ibid.

4 Ibid., pp. 40,544-5. Emphasis added.

5 IMTFE Proceedings, Prosecution Summary, pp. 40,545-6.

6 Ibid., p. 40,548.

7 IMTFE Proceedings, p. 12,347.

8 IMTFE Proceedings, p. 17,673.

9 IMTFE Proceedings, p. 42,202.

10 Ibid.

11 IMTFE Proceedings, p. 42,203.

12 IMTFE Proceedings, p. 42,220.

13 IMTFE Proceedings, Judgment (majority), p. 48,144.

14 Ibid.

15 Ibid., p. 48,445.

16 Ibid., p. 48,445.

17 Ibid., p. 48,446.

18 Ibid., p. 49,784.

19 IMTFE Proceedings, pp. 32,936-7.

20 Affidavit of Kumegawa Yoshiharu, Snr. Staff Officer in charge of Tactical Affairs Section (succeeding Colonel Kobayashi), pp. 33,069-76.
'...Communication facilities of the Japanese Army in the Philippine campaign were beyond all comparison inferior to those of United States Army. Therefore, express delivery of communications was found, prior to the opening of the operations, to be difficult owing to the lowered level of ability of the operators, and the intricacy of ciphers as well as to the fact that there existed only one wireless available in the principal direction. After the operations were opened, the difficulties increased so extremely that only important commands or reports could barely be communicated and any detailed information was not reported at all.'
Kumegawa went on to note the continual breakdown of

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wirelesses and the transmission lines from bombing, and because they had been soaked in the sea(?) Wireless in this context did not mean the transmission of the human voice; rather messages were encoded and transmitted by Morse code.

21 IMTFE Judgment, p. 49,320.

22 Ibid., p. 49,791. A similar reasoning applied to Shigemitsu, who was charged as a Foreign Minister - ... 'circumstances, as he knew them, made him suspicious that the treatment of the prisoners was not as it should have been. Thereupon he took no adequate steps to have the matter investigated, although he, as a member of the government, bore overhead responsibility for the welfare of the prisoners. He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of responsibility which he suspected was not being discharged.' (p. 49,831).

23 Ibid., p. 49,809.

24 IMTFE Judgment, p. 49,816.

25 Ibid.

26 Dissenting Opinion of Justice Bernard (France), 23 pages long, dated 12 November 1948, pp. 10-11.

27 Bernard, op.cit., p. 14.

28 Bernard, op.cit., p. 15.

29 Bernard, op.cit., pp. 16-17.

30 Opinion of Mr. Justice Roling (Netherlands), 60 pages, dated 12 November 1948, p. 54.

31 Röling, op.cit., p. 55. Emphasis added.

32 Röling, op.cit., pp. 55-56.

33 Röling, op.cit., p. 57. Emphasis added.

34 Röling, op.cit., pp. 59-60.

35 Röling, op.cit., p. 60.

36 Ibid.

37 The legal meaning of 'act of state' is as follows:

'The legal meaning of the statement that an act is an act of state is that this act is to be imputed to the state, not to the individual who has performed the act. If an act performed by an individual - and all acts of state

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are performed by individuals - must be imputed to the state, the latter is responsible for this act...If an act is to be imputed to the state and not to be imputed to the individual who has performed it, the individual, according to general international law is not to be made responsible for this act by another state without the consent of the state whose act is concerned. As far as the relationship of the state to its own agents or subjects is concerned, national law comes into consideration. And in national law the same principle prevails, an individual is not responsible for his act if it is an act of state, i.e., if the act is not imputable to the individual but only to the state...The collective responsibility of a state for its own acts excludes, according to general international law, the individual responsibility of the person who, as a member of the government...has performed the act. This is a consequence of the immunity of one state from the jurisdiction of another state.' - Prof. Hans Kelsen, quoted in Pal, op.cit., p. 75.

38 Dissentient Judgment of Justice Pal, printed edition, Sanyal & Co., Calcutta, 1953, p. 600.

39 Of the Yamashita decision, Pal is not explicit at this point but there is an implied criticism of the principle of command or individual responsibility as it was applied in the case. He says:
'while considering the cases of atrocities in the Philippines we cannot attach much importance to what happened there subsequent to October 9, 1944. That was a period when it became impossible for the Japanese commanders to control the troops effectively. All lines of communications became destroyed or disorganized and the victorious American army was effectively blocking all lines of communication. Their failure to control the troops during this period cannot be ascribed to any disregard of duty, not to speak of any wilful disregard of such duty.' (p. 629).
It was 'absurd' to suggest that the conduct of the soldiers at that stage of the war in any way reflected the established policy of the Japanese government, which operated far away from the theatre and which was hampered by a lack of efficient communication facilities. Hence, Pal concluded that 'the evidence would not entitle us to infer that members of the government in any way ordered, authorized or permitted the commission of these offences.' (p. 629).

40 UNWCC - Law Reports on Trials of War Criminals, London: HMSO, 1948-9. Vol. 7, Trial of Milch, p. 62.

41 Ibid.

42 Ibid.

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43 Ibid.

44 UNWCC - Law Reports, op.cit., vol. 7, p. 63.

45 Tried Nuremberg by American Military Tribunal, 21 Nov. 1946 to 20 Aug. 1947.

46 Tried Nuremberg by American Military Tribunal, 10 Mar. 1947 to 3 Nov. 1947.

47 UNWCC - Law Reports, op.cit., vol. 7, pp. 63-4.

48 Op.cit., vol. 8, pp. 88-9.

49 UNWCC - Law Reports, op.cit., vol. 8, p. 76.

50 Ibid., p. 43.

51 UNWCC - Law Reports, op.cit., vol. 11, p. 374. Quoted in Campbell, op.cit., p. 146.

52 UNWCC - Law Reports, op.cit., vol. 12, p. 79.

53 UNWCC - Law Reports, op.cit., vol. 12, p. 75.

54 UNWCC - Law Reports, ibid., pp. 75-6. Emphasis added.

55 UNWCC - Law Reports, op.cit., vol. 12, p. 76.

56 Op.cit., vol. 12, p. 80.

57 UNWCC - Law Reports, op.cit., vol. 12, p. 80.

58 Op.cit., vol. 12, p. 81.

59 Op.cit., vol. 12, p. 81.

60 See for example, Appleman, op.cit., the accounts of Reel and the other Defence counsel, and the debate that has been generated since the My Lai Massacre and Vietnam War.

61 See Facts on File V (1945) 395J, Dec. 5th 1945 - appeals were made from several defendants IMTFE to U.S. Supreme Court, as there were appeals from trials at Nuremberg.

CHAPTER 8

PATTERNS OF PRECEDENT : THE TOYODA TRIAL

The trial of Admiral Toyoda Soemu, held in Tokyo in late 1948-1949, bore the stamp of the Yamashita precedent - the doctrine of command responsibility through negative criminality. In addition to the similarity in legal principle applied, Toyoda's trial makes an interesting comparison to that of General Yamashita as both men were charged with the responsibility for the same events in the Philippines, those for which General Yamashita Tomoyuki paid with his life in February 1946.

Whilst the Yamashita precedent shaped the charge upon which Admiral Toyoda was indicted, its impact on the case cannot be fully evaluated without an understanding of the political environment in which the trial was held, since trials are never conducted in a socio-political vacuum. This environment was substantially different, with the passage of time, from that in which Yamashita's trial was held.

By the time of Toyoda's arraignment in October 1948, United States' policy on the Occupation of Japan had re-oriented itself away from the demand for reparations and economic emasculation, and towards the encouragement of a self-supporting and economically viable economy for Japan. This was seen as an essential factor in securing Japan's co-operation with the United States in the furtherance of the latter's post-war goals in Asia, and in the establishment of harmony and the freedom from aggression in the region. Economic instability was by inference seen as being the root

cause of Japanese aggression.

Coupled with this trend towards a more lenient attitude towards Japan was the school of thought which argued that the war crimes trials were having an adverse effect on American-Japanese relations, and since they were failing in their purpose, should be terminated. George Kennan, the Director of the Policy and Planning Staff in the Department of State went so far as to say that the trials of war criminals were 'profoundly misconceived from the start' and that

> There is really no law on which such judicial procedure can be founded...This is not to say that the victor does not have the right to punish individual leaders of the defeated nation. But the punishment should take place as an act of war, not of justice, and it should not be surrounded with the hocus-pocus of a judicial procedure which belies its true nature. 1

Punishment, to have its exemplary effect, must be swift and incisive, Kennan argued, and the duration of the trials and their removal in time from the occurrence of the crimes denied the trials this effect. Kennan also held the view that people holding strictly legal qualifications were inappropriate for trials that were in essence political, and this factor also rendered their effect impotent since it was absurd that American lawyers should be defending the practices of past Japanese governments, suggesting to the Japanese a division of opinion amongst the Americans.

Also significant was the fact that peace with Japan had yet to be signed. Due to the adverse effect of the trials upon the Japanese, and to the customary practice of international law to cease the punishment of war criminals on or before such time as peace was signed, there was pressure for the early cessation of the prosecutions. Agreement between the

members of the Far Eastern Commission on a suitable date for the conclusion of Allied trials of Japanese war criminals was difficult to achieve, but the United States decided to act unilaterally and complete such trials by 30 September, 1949. The trial of Toyoda, along with that of Lieutenant-General Tamura Hiroshi (tried also on command responsibility charges) were the final trials of significant war criminals, both having been Class 'A' suspects.

These political considerations and the passage of time helped to shape the Toyoda trial in a direction away from the barbarity and naïvety of the Yamashita precedent. The passage of time saw the development of the principle of command responsibility by later tribunals which seized upon the precedent offered by the trial of Yamashita; criteria for the assessment of guilt and standards of conduct for commanders had been established, thereby cutting down both the tribunals' freedom to innovate on the law and its concomitant, the danger of a miscarriage of justice. With Japanese sensitivity too, to the question of war crimes and war guilt there was less room for riding roughshod, legally speaking, as had been done in Yamashita's case, since irreparable damage in political terms could have easily been caused.

Because of these features, which reveal that the principle of command responsibility was applied in the Toyoda trial rather differently from that of Yamashita, because of the impact of the Yamashita trial on this trial and because of differences in conduct between the two tribunals, it has seemed to be the path of wisdom to compare the two trials.

The tribunal assembled to try Admiral Toyoda Soemu was

convened under the authority of General MacArthur as the Supreme Commander of the Allied Powers, and it was composed not only of members from the different branches of service, but it also had Allied participation. The President of the Tribunal was Brigadier John W. O'Brien, D.S.O., a member of the Australian Army serving in the British Commonwealth Occupation Force (BCOF) in Japan. He was assisted in his task by Colonel Edward McCarthy (United States Army); Colonel Arthur Jones, jr. (United States Air Force); Colonel Ronald Pearce (Infantry, United States Army); Lieutenant-Colonel Leo Schlegel (United States Air Force), and Major William Sorrell, also of the Air Force. Lieutenant-Colonel James Hamilton, of the Judge Advocate General's corps of the United States Army, was appointed to act as law member.

The Prosecution team was headed by Mr. Francis O'Neill, with Mr. Jesse Deitch, Mr. Joseph Walton and Mr. Kurt Steiner assisting. These men, in line with the practice in Tokyo, were civilians in the employ of the legal section of SCAP headquarters.

Mr. Ben Bruce Blakeney and Mr. George Furness, both defence counsel in the IMTFE were defence 'advisory counsel' with Mr. Tadashi Hanai and Mr. Tatsuki Shimanouchi as Toyoda's Japanese defence counsel. [2]

The Tribunal was governed by the Regulations Governing the Trial of War Criminals (AG000.5 as amended on 27 October 1945), basically the same rulings that had been drawn up for the trial of General Yamashita and which had been utilised in the proceedings held at Yokohama.

When viewed in comparison, however, with the trial of

General Yamashita and those of the senior officers conducted by Australia, the framing of the charge against Admiral Toyoda appears to be somewhat unusual. It was alleged in the charge that Admiral Toyoda had violated the laws and customs of war, specifically that

> (he) wilfully and unlawfully did disregard and fail to discharge his duties as said officer by ordering, directing, inciting, causing, permitting, ratifying and failing to prevent Japanese Naval personnel of units and organizations under his command, control and supervision to abuse, mistreat, torture, rape, kill, and commit other atrocities and offences against innumerable persons of the United States, its Allies, Dependencies and other non-combatant civilians. (Specification 1).

Other specifications covered robbery; pillage; the destruction of property; the unlawful use of hospitals and churches as fortifications thereby causing the maiming, death and wounding of innumerable persons; the unlawful internment, mis-treatment, abuse, starvation, torture and killing of American and Allied prisoners of war, and contributing to the death of others; and of 'wilfully and unlawfully' conspiring to enter into a 'common plan with other known and unknown persons' to abuse, mistreat, torture, kill and commit 'other offenses against innumerable persons', as well as conspiring to conceal same.

Sweeping and catch-all are perhaps the best adjectives to describe the charge and specifications against Admiral Toyoda. Clearly, if the more serious charges were not proven to the satisfaction of the Tribunal, the Prosecuting authorities were not going to risk a second (and perhaps more lenient) trial, so that their reasoning must have been that amongst the above, they could surely convict him of something. Vagueness was certainly the most noticeable feature of the

so-called 'specifications'. Toyoda was therefore faced with the task of defending himself on capital charges in a situation where the breadth of the alleged criminality was daunting - the definition of the word 'permit' has already been discussed elsewhere - and in which the details of his supposed criminality, the places and victims, had been omitted. Coupled with the procedural regulations, Toyoda's predicament was at least parallel to that faced by General Yamashita: those hallmarks of a fair trial in the Anglo-American tradition were again conspicuous by their absence.

After the receipt into the record of the charge and specifications, the President of the Tribunal informed Admiral Toyoda that the Tribunal was then ready to hear his plea and any special motions he might want to submit.

Mr. Blakeney and Mr. Furness, unlike the defence attorneys in Yamashita's case, rose before the Tribunal and articulated two motions in opposition to the continuance of the trial.

The Defence objected to the composition of the Tribunal and its competency to accord the Accused a fair trial by one's peers, the essence of the military tribunal and court-martial system of military law. All of the adjudicators assembled pursuant to MacArthur's order were inferior in rank to Admiral Toyoda, and whilst the Tribunal contained members of other branches of service in addition to the army, no ranking naval officer had been included. What the Defence attorneys feared, justifiably, was a repetition of the Yamashita trial, in which it was patently obvious that the members of the Tribunal, all inferior in rank to the Accused, and also 'deskgenerals', were not familiar with the respon-

sibilities of the rank and command of the Accused during combat conditions. This had proved utterly detrimental to General Yamashita in his trial, and Blakeney and Furness feared, could have the same effect with Toyoda.

As this motion was failed by the Tribunal, the Defence then argued for a dismissal of the charge and specifications on the following grounds:

1. That the charge and the specifications herein state no offense justiciable under any law, international or otherwise;
2. That the charge and specifications herein state no offense justiciable by this Tribunal;
3. That the charge and specifications herein charge as criminal acts which were not such at the time of their commission, thereby creating crimes ex post facto and retroactively;
4. That the rules of procedure established for the Tribunal do not secure to the defendant the minimum requirements of a fair and impartial trial;
5. That the allegations of Specifications 1, 2 and 3, that the defendant 'failed to prevent' the commission of acts alleged to have been unlawful, state no offense justiciable under any law, international or otherwise.

The Defence further urged that the specifications detailing criminal liability incurred through the alleged use of non-military objects and places (churches etc.) as fortifications and the conspiracy to conceal the commission of such crimes stated no offence justiciable under any system of law. Crimes alleged to have been perpetrated against nationals of states other than the United States and for which Toyoda was being held responsible, were claimed not to be justiciable in the current action.

The Defence emphasised to the Tribunal the fact that until the end of hostilities in 1945, the state of international law had not sanctioned the trial of defeated enemy

leaders, either military or civilian, for alleged 'war crimes' committed during the course of those hostilities. In order to secure the punishment of German suspected war criminals after World War I, the Allied Powers had inserted a special provision in the Treaty of Versailles, and such persons as were tried were tried not by Allied or international courts, but by German courts. Hence, the trial of defeated enemy leaders by international courts of the victor nations, or national tribunals, were entirely unprecedented, the Defence averred.

International law was explicit in its attitudes on the breaches of the law of war; all perpetrators of such infractions and those directly responsible commanders were to be tried by military commissions composed of members of the wronged nation. The Tribunal convened to try Admiral Toyoda, the Defence pointed out, purported to be international in composition, but even given this, the alleged offences were said to have been perpetrated throughout the Pacific, and hence, were directed against many peoples who were not involved in the prosecution of the case. This, too, was a departure from past practice.

Continuing, the Defence then delivered a broadsided attack against the argument that there was ample precedent for such a trial, commenting that

> If it be answered that we now have precedents for this type of proceeding, to wit, the Yamashita and Homma tribunals of the United States, the Nuremberg and Tokyo International Military Tribunals, which have competence to try members of the government or High Command of the defeated nations for violations of the laws of war committed not by them, not by their immediate subordinates, but by their subordinates at the extreme end of (the) chain of command, some of them by troops in the field, must be obvious to all that the verdicts of

> those tribunals imposing such responsibility, and in some cases declaring criminal acts which at the time of their commission were not criminal, and also declaring criminal non-action even of men who had neither power or authority to act, those verdicts are certainly the merest, plainest ex post facto decision. 3

The Tokyo and Nuremberg judgments, whilst admitting the consternation with which the ex post facto imposition of criminal responsibility was viewed in the 'civilised' world, nevertheless proceeded on an artificial assumption: that the principle that there should be no punishment without a pre-existing law (nullum crimen sine lege) was merely a guide in the administration of justice, rather than being a binding limitation on sovereignty (i.e., law) and hence, that it need not be applied. Surely Tribunals such as those, the Defence quizzed, should apply justice if they are going to apply anything at all? The so-called law

> to be applied in the trial of such offenses as those alleged here is sometimes spoken of as natural law, universal law, but upon investigation it always proves to be that which we consider to be just. 4

Disregarding the problematic area of the parochialism of justice, the Defence merely reasserted the contradiction between stating that the principle of Nullum crimen sine lege was one of justice and then saying it therefore need not be applied. This, in combination with the procedural regulations meant that the defendant was afforded a trial that lacked the 'very bare minimum standards' required of a fair trial, it was argued.

To support this contention, the Defence drew a comparison between the type of tribunal assembled to try Admiral Toyoda, and that had previously tried Yamashita and Homma, and the court-martial of the American Army. The rules of the court-

martial, the Defence held, were exercised in order to achieve justice rather than to expedite the hearing. Hearsay evidence could not be used to convict an accused. An accused in a court-martial could exercise his right not to testify on his own behalf, without an inference of guilt being made against him; it was merely the exercising of a fundamental right. An accused in a court-martial did not have to testify on 'any subject whatever', which may have led him into self-incrimination.

> These are the outstanding points in which the rules of procedure under which it is proposed to try this defendant differ from those recognized throughout our world as being just and fair, 5

the Defence counsel concluded.

The Prosecution counter to the Defence argument was predictable; the Yamashita case had decided the very issue raised in the fifth count of the motion to dismiss. The commission had held that a commander who fails to prevent the commission of atrocities by troops within his command was responsible therefore, the Prosecution pointed out.

The motion for a dismissal of the charge and specifications was denied.

On Admiral Toyoda's behalf, his Defence Counsel then argued that the specifications were worded far too generally for an affirmative defence to be made; they asked that details of when, where and the manner in which Toyoda ordered, permitted etc. the alleged atrocities, and the names, ranks and offices of the persons alleged to have been ordered and permitted to commit the atrocities.

A Bill of Particulars, containing some 85 articles was tendered by the Prosecution. Particulars 1 - 36 involved offences throughout the Pacific, but Particulars 37 - 85 dealt with atrocities in Manila and the Philippines. Many of this latter group covered the same offences for which General Yamashita had been tried and found responsible in 1945-1946. Such discussion as pertains to the evidence will largely be confined to this group of Particulars, for this is where the comparison of the two trials, that of Yamashita and Toyoda, is most interesting.

For the Prosecution, Mr. Deitch delivered the opening statement, which outlined the strategy to be employed in the case against Admiral Toyoda. He began his address before the Tribunal with a brief summary of the salient points of Admiral Toyoda's recent military history. Admiral Toyoda, Mr. Deitch said, had been appointed Commander-in-Chief of the Japanese Combined Fleet on 3 May 1944, and he served in that capacity until the naval reorganisation of 29 May 1945. This command included three grand fleets, many minor fleets and a number of base forces. During the period 1 May - 29 May 1945, Toyoda concurrently commanded the Combined Naval Forces as Commander-in-Chief, as well as the Naval Escort Command. From 29 May 1945 until the surrender Admiral Toyoda was Chief of the Naval General Staff. Toyoda, therefore, 'was' the Japanese Navy,

> the personification of what was to be expected as the ultimate best in a Japanese Navy man, 6

as Mr. Deitch put it.

Toyoda Soemu was being tried for atrocities that occurred

during the period of his tenure of office, as outlined above, and the basis of the trial was Command Responsibility, the Tribunal was told. A second feature of the trial was the conspiracy aspect; conspiracy between Admiral Toyoda and other top echelon Naval officers and German government officials. Mr. Deitch continued,

> We are reaching to the very top when we try Toyoda on the basis of Command Responsibility, because that is where the command lies. The Prosecution will show that the atrocities were not only committed by ordinary seamen but were committed by vice-admirals immediately subordinate to Toyoda. As such the Prosecution expects to prove that the atrocities were so widespread among the immediate subordinates of Toyoda that Toyoda must have known that these things occurred. By the very amount of atrocities that were ordered by vice-admirals and rear admirals immediately beneath him, the Prosecution expects to show that Toyoda must have ordered that such course of action be carried out, or if not Toyoda must have known that these acts were occurring, or he condoned these acts or permitted them to happen. 7

The statement above indicated that the Prosecution had no positive and direct linkage between Admiral Toyoda and the crimes; they were hoping to make an inference of knowledge on Toyoda's part through the evidence of circumstance. The thrust of the case then would argue that Toyoda should have known of the occurrences, and that his failure to do so constituted a culpable negligence of his duties of criminal proportions.

The Prosecution next claimed that Admiral Toyoda received diplomatic protests from Allied governments when their ships had been sunk and the survivors strafed by machine gun, and so he was 'on notice' that such things were occurring. Admiral Toyoda also held daily staff meetings where discussions were held on 'these matters', and so again he had notice and it

was his duty as commander to see that such incidents did not continue. It was alleged that Toyoda overheard subordinates talking about the execution of prisoners, to which he was said to comment, "if you are going to interrogate these prisoners, you cannot execute them." [8] This was interpreted by the Prosecution to mean that Toyoda countenanced the killings, he approved them, and 'he might order them'.

> The facts in this case will show a pattern of killing throughout Toyoda's command, it is sufficient to show that there were no isolated killings, that it was the rule and policy to kill prisoners of war, and that the rule and policy was made at the highest level in the Japanese Navy and understood from Toyoda on down to the ordinary seaman. The prosecution will contend that it was the duty of Toyoda to prevent such incidents, that Toyoda because of his positions as commander had but to order that these war atrocities cease and they would have ceased. Had he done such a thing, tens of thousands of Americans and others would have lived. [9]

In concluding his opening statement, Mr. Deitch told the Tribunal that the Prosecution case would depend 'almost entirely' on Japanese affidavits and testimony, in contradistinction to the trials of Japanese Army personnel which were reliant upon the testimony and affidavits of Allied witnesses.

Much of the evidence tendered by the Prosecution consisted of portions of other war crimes trials, those of subordinates within his command convicted on a command responsibility basis for the misdoings of their own subordinates. Many of the accused in these trials were sentenced to hang. Charges included systematic terrorisation, illegal employment of prisoners of war, exposing prisoners of war to danger, torture, mistreatment, killing of prisoners of war and civilians, the mutilation of dead bodies, and preventing the

honourable burial of prisoners of war.

The Prosecution alleged that the offences above had been committed during the period of Toyoda's command, and that the convictions supported the contention that there was a pattern of atrocities and command responsibility involved. The fact that earlier trials had been conducted and convictions resulted also established both the precedent and expounded the law applicable to Toyoda's trial.

The trial record of Lieutenant-Commander Sawada Eito for example, must have been of considerable utility to the prosecution in this aim. Sawada was tried in a provisional court-martial at Macassar by the Dutch and was found guilty of the charges, 'causing his subordinates to maltreat prisoners of war employed on labor' and 'putting prisoners of war to work in an unlawful manner.' Sawada had entered a plea of not guilty, his defence being, in effect:

> I failed, but I was extremely busy, and I did what I possibly could, however, had I had knowledge of maltreatments and excessive work these things would not have occurred. 10

The court in its final comments prior to the announcement of the verdict, stated that the question it was being asked to pass judgment upon was whether inability (i.e., pressure of work) to exercise strict control exonerated the accused. The court made a brief review of the circumstances in which Sawada exercised his command, noting that he had the power to request headquarters to replace subordinates with whom he was dissatisfied, since they were appointed by him or in consultation with him. Also considered was Sawada's failure to check upon whether the lieutenants below him exercised

the control he demanded of them and his reliance on their initiative to make reports to him. Sawada's statement that he felt himself responsible since he had been placed in a position of supervision and, due to pressure of duties, he had been remiss, was also recalled by the court. However,

> having considered that the Court-Martial, on the grounds of generally accepted Rules of Law, governing international law and consequently law of war, takes the position that a Chief (whether civilian or military), even if he did not order or condone a certain act, and even if he had no knowledge of the act, is yet to be held responsible for crimes committed by those under his jurisdiction (command), on the grounds that he is under an obligation to prevent commission of those crimes, in as much as prevention is one of his duties as Chief (Commanding Officer), particularly if he had reason to expect the commission of such crimes, 11

the court had little real choice but to find Sawada guilty of the crimes alleged.

The summary by the court of the law by which it was bound was a particularly explicit and precise statement of the doctrine of command responsibility for which the Prosecution must have been exceptionally grateful.

To support the Philippine phase of the Prosecution case, extensive use was made of extracts from the testimony given in the Yamashita case; portions of the statements of some sixty witnesses formed the bulk of the evidence tendered by the Prosecution in its case against Admiral Toyoda. Augmenting this was the affidatory evidence of Admiral Okawachi Denshichi, the Commander in Chief of the Southwestern Area Fleet and the 3rd Southern Expeditionary Fleet.

The influence of the case of General Yamashita on the trial of Admiral Toyoda was not confined only to the evidence from the former trial that was brought to bear on the convic-

tion of the latter, or the principle on which the charge against Toyoda was based. Toyoda, with regard to the Philippine phase of the case, was being charged with responsibility for the same atrocities as those for which Yamashita was charged, and executed several years earlier. Hence, the Prosecution in attempting to convict Toyoda, adopted as its argument that which had unsuccessfully been advanced by the Defence in the case of General Yamashita.

Thus, here the Prosecution was arguing that the responsibility for the Manila atrocities lay with Admiral Toyoda because Rear-Admiral Iwabuchi had been engaged in a naval mission over which the Army had no control when he was defending the naval installations in the city. He had been so ordered by Vice-Admiral Okawachi, his superior, who was subordinate to Admiral Toyoda. Only the Navy, in the person of Vice-Admiral Okawachi had the power to discipline Iwabuchi and to order him to abandon the defence of the naval facilities in Manila. Hence, argued the Prosecution, only the Naval chief, Admiral Toyoda could be held responsible.

On the other hand,the Defence adopted the reasoning of the Prosecution in the Yamashita case. They held that the Iwabuchi unit had been transferred to the command of the army under Yokoyama for the purpcses of land combat, but did not recognise the division between administrative (disciplinary) and tactical command that existed in the Japanese armed forces. Iwabuchi was engaged in land combat in Manila; if he refused to obey Army commands to withdraw, why was he not removed or disciplined by the Army they asked. No army gives commanders the authority to command without giving them also

the power to enforce their commands. Iwabuchi did not receive Army orders to withdraw; he was fighting to defend Manila at the behest of the Army, and hence General Yamashita was ultimately responsible.

One is led to wonder had the Prosecution argument been successful in convicting Admiral Toyoda whether that would have cast doubt on the validity of the convictions of General Yamashita, Lieutenant-General Muto, and Lieutenant-General Yokoyama. Or was the Tribunal under some limitation in its reasoning; did it have any real alternative but to find Admiral Toyoda not guilty and to reinforce the Yamashita decision?

Irrespective of this issue, the major weakness of the Prosecution case was the conviction and subsequent execution of General Yamashita and the subordinates in his chain of command. If Yamashita and the Army chain of command had been so declared as responsible for the Philippine atrocities, then surely Toyoda could not be held responsible too? [12] Unless, of course, the 'principle' of command responsibility was not a principle of law but an ad hoc means of eliminating enemy commanders and leaders.

Vice-Admiral Okawachi, in his affidavit, declared that as supreme naval authority in the Philippines, it had been his decision to remove his headquarters from Manila to Baguio, to facilitate closer liason with General Yamashita, and to transfer the tactical command of the 31st Special Naval Base Force under Rear-Admiral Iwabuchi to the Army. Admiral Toyoda had been informed of these actions by report. The

rapid increase in aerial bombing coupled with inadequate transportation facilities had caused Okawachi to abandon his plan to remove all naval troops from Manila to Bayombong, and thus to transfer the tactical command of the remaining troops to the Army for the purposes of land combat, where he felt the troops could be better utilised.

However, at the time of the transfer, 5 January 1945, Admiral Okawachi issued Iwabuchi with naval operational orders; the destruction of all piers, dry docks and naval facilities in the City of Manila, and the scuttling of ships in the harbour.

The question then was, did Iwabuchi's unit remain in the City of Manila to complete its naval mission, and thereby commit the atrocities, or did it remain in Manila at the request of the Army? Was the 31st Special Naval Base Force Unit engaged in naval operations or did its activities constitute land operations at the time when the atrocities were committed?

In the Yamashita case, the Tribunal had decided that, irrespective of the nature of the activities of Iwabuchi's unit, they had been undertaken on land, hence - land operations, and this placed them within the command responsibility of the Army chain of command, with Yamashita at the apex. But it was the Prosecution contention in the Toyoda trial that Okawachi's operational orders took precedence over any Army orders, and that the only explanation for Iwabuchi's failure to withdraw from the City despite repeated Army attempts to secure this, was his persistence in performing his naval mission. This meant that the correct chain of command to bear

responsibility for the Manila atrocities was Iwabuchi → Okawachi → Toyoda and not Iwabuchi → Yokoyama → Yamashita. The conviction of Admiral Toyoda in this phase of the case was therefore dependent on the same question as that which bedevilled the Tribunal that tried General Yamashita.

Okawachi understood that the orders which he gave Iwabuchi were complied with shortly after he left Manila. No orders were issued by him regarding the land defence of Manila, and so, given that Iwabuchi's unit possessed only a few small boats and no ships or vessels, Okawachi considered that Iwabuchi's naval mission had been completed. His continued presence in the City was due to the wishes of the Army, Okawachi felt, as the unit's only remaining function was land fighting. Okawachi was of the opinion that

> There was no meaning to defending Manila on land from the viewpoint of a big-scale operations because as far as the sea operations was concerned the Japanese Navy was reduced to where they had no strength left. 13

On this point both he and General Yamashita concurred.

Okawachi had no tactical control over the Iwabuchi unit after the transfer of command, and hence had no authority to order his withdrawal from the city. He did retain control of all matters involving personnel; this meant that Okawachi had the power to effect a change of command in the 31st Naval Base Force had the need arisen. Neither General Yamashita nor his subordinates complained to him, Okawachi told the court, of any naval orders binding on Iwabuchi, or that he be either compelled to obey Army orders or removed from command. Okawachi went on, under cross-examination, that he had not, during combat, heard of any suggestion that Iwabuchi had

failed to carry out or had violated any Army order with which he had been issued. He had not been approached to institute disciplinary proceedings against Iwabuchi, a power which was considered administrative and so was retained by Okawachi.

Okawachi believed that the failure of Iwabuchi to withdraw from Manila was not due to his disobeying Army orders, but 'he was following the orders of the Army and that due to various circumstances he was unable to withdraw,' withdrawal being very difficult to achieve in the combat situation at that time. [14]

In mid-February 1945, Admiral Okawachi surmised that the combat in Manila was severe. Despatching his Chief of Staff to Yamashita's headquarters with the recommendation that Iwabuchi's Manila Naval Defence Force be withdrawn, he found that such an order had already been issued by that headquarters. Seeing no indication of Iwabuchi's imminent withdrawal within the next several days, Okawachi, despite his lack of authority, sent Iwabuchi a telegram advising him to withdraw from Manila immediately

instead of being so stubborn. 15

A phrase like this could easily be interpreted so as to indicate Okawachi's knowledge of Iwabuchi's failure to accede to the Army commands.

However, Okawachi maintained under re-direct examination that he had no knowledge of the Army having made three attempts between January 6th and February 1945 to get Iwabuchi to withdraw, and he reiterated his belief that circumstances prevented the withdrawal. It was not because of a

previous naval operational command to destroy the piers and naval facilities, Okawachi held, that Iwabuchi refused to withdraw.

Whilst communication facilities were poor, General Yamashita did receive wireless telegrams from Iwabuchi as to the combat situation, and informational copies of same were received by Okawachi. Okawachi stressed that he had no knowledge of the alleged Manila atrocities, but when asked who was responsible replied that

> In my opinion it would be the Commanding Officer of the 31st Naval Base Force. As tactical commander, General Yamashita was indirectly responsible. 16

This was not what Okawachi had told the court that had tried General Yamashita.

The Prosecution then called Colonel Asano Kenichiro, Chief of Staff in the Shimbu Shudan to give evidence. He told the Tribunal that at Shimbu headquarters in Wawa just east of Manila, he was informed on the 14 January 1945 by Rear-Admiral Iwabuchi that his troops were to be placed under the command of Lieutenant-General Yokoyama for the purposes of land combat. This was to be effective from 16 January 1945.

Upon assuming tactical command over Iwabuchi for the purposes of land combat, Yokoyama approached Iwabuchi and suggested that he abandon the defence of the naval installations in Manila, and withdraw to the defence line east of the city. Iwabuchi, according to Asano, refused. The reason for the refusal Asano believed, was that the Navy had decided to defend its installations in Manila and for this purpose kept Iwabuchi and his troops in the City of Manila after the

17th or 18th of January.

On the 5 February 1945, after the approach of the American troops, Iwabuchi was ordered to withdraw to the defence line in the eastern foothills, and to assist this, Yokoyama dispatched an escape unit to attack the rear of the American forces. Despite the fact that Iwabuchi could have withdrawn, he refused to do so, moving himself as far as Fort McKinley. On the 8th February, seeing that Iwabuchi had not obeyed the earlier command, Yokoyama got Asano to send a second telegram, again ordering his withdrawal, but this caused Iwabuchi only to return to the city centre. His retreat was still possible at this time. The only explanation for his refusal to withdraw, Asano said, was that he felt it was his duty to defend the naval facilities in the city. He was not in Manila pursuant to any Army plan;

> Yokoyama received definite orders from Yamashita. The orders were to the effect that we were to occupy the mountains East of Manila and draw as many troops there as possible so as to ease the operations of the Area Army in Baguio. 17

The City of Manila was to be abandoned under the battle order assigned to Yokoyama, and it was envisaged that the Iwabuchi naval unit would withdraw to the foothills east of Manila and join the Shimbu Shudan, already there. The defence of naval installations was not anticipated in the Army battle order, since that was both contrary to the abandonment of the city strategy devised by the Army, and a Navy function.

Yokoyama did not have the authority to order Iwabuchi to abandon his defence of the naval facilities in Manila, given that it was a naval duty, Asano stated. Only Vice-Admiral

Okawachi had that power. Neither did Lieutenant-General Yokoyama have the authority to discipline Iwabuchi or to remove him from command; that power too, resided with Okawachi. Asano continued,

> The Navy was responsible for the 31st Naval Base Force being in Manila. The Army battle order did not call for the defense of Manila. We had suggested and ordered these troops out of Manila, and furthermore we were not responsible for the discipline of these troops: that was up to the Navy. 18

Under the cross-examination of Mr. Blakeney, the problem of the duality in the Japanese command system arose and received the same type of contempt by the Defence in this case as the Prosecution had given it in the case of General Yamashita. Asano told the Tribunal that Iwabuchi was only the subordinate of Yokoyama in respect of certain matters - tactical command over land combat only. Hence, the Manila situation was viewed in the following way by Asano and Yokoyama:

> The Army had already given up the Manila defense unit and had gone into the hills. The Manila defense unit was renamed the Kobayashi Heidan. In contrast to this action of the Army, the Navy newly organized a Manila defense unit to defend Manila and this was an independent mission of the Navy. Yokoyama had received orders from Yamashita relieving him of the duty of defending Manila. This was on the second of January. Under such circumstances mentioned above the defense of Manila was an independent mission of the Navy and we believed it was beyond our authority 19

to order Iwabuchi to withdraw from the City at the time when he suggested Iwabuchi do so.

The Manila Naval Defence Unit, Asano said, was composed of the 31st Naval Base Force as its core, with air force personnel, and men from the munitions section and the harbour department. Yokoyama had no authority to order this group to

abandon its defence of the naval facilities as long as it remained a strictly naval operation, but by the 5th February, with the approach of the Americans, the combat situation changed and land combat became involved. Since Iwabuchi's unit had to face an American advance from the land and not the sea, land combat was implicated and Yokoyama had the authority to order his withdrawal to the eastern foothills where their strength could more effectively be deployed and in keeping with General Yamashita's strategy. Iwabuchi refused to obey these orders.

Mr. Blakeney asked,

> Mr. Witness, I put it to you that the only conceivable reason that no action was taken against Iwabuchi or his removal requested for his gross disobedience of orders was that he never had such orders and therefore he could not disobey them?

Asano replied,

> That is not so. You will have to take into consideration the battle situation of that time. The battle situation was so severe that such thing could not be taken up at that time. Yokoyama did not have the authority to punish navy personnel. 20

Mr. Blakeney then questioned the witness further as to the disciplinary powers of the Army over the Navy, and then asked whether that lack of authority was the reason why Asano believed that the Army was not responsible for the Manila atrocities. Receiving an affirmative reply, Blakeney then said,

> Then I take it that you are willing to assert before this Tribunal that the American Military Commission which tried General Yamashita and found him guilty upon the charge of responsibility for the conduct of those naval troops was completely wrong, are you? 21

The objection by the Prosecution was sustained.

The final evidence in support of the Prosecution's Philippine case against Admiral Toyoda was the presentation of a lengthy extract from the testimony at General Yamashita's earlier tribunal of Lieutenant-General Muto Akira, Yamashita's Chief-of-Staff.

This evidence recounted the tactical reasons which motivated Yamashita's decision to abandon the City of Manila and to fight from defensive positions in the hills, and detailed the orders and instructions transmitted to Lieutenant-General Yokoyama relative to this and the transfer of command.

In adducing such evidence, it was the Prosecution desire to illustrate its theory that the 31st Special Naval Base Force remained in Manila for the purpose of fulfilling their duties under the naval operational order issued by Vice-Admiral Okawachi immediately prior to the transfer of command. The presence of this unit in the city was not required by the Army plan for the defence of Luzon; indeed it was contrary to the basic principles upon which General Yamashita had predicated his strategy. Despite repeated attempts by the Army to have Iwabuchi withdraw, and the despatch of a diversionary unit to facilitate the evacuation, the 31st Special Naval Base Force remained in the city. Although there had been an agreement between the Army and Navy with regard to the transfer of powers of tactical command over Iwabuchi's unit for the purposes of land combat, it was the Prosecution contention that the unit, due to the pre-eminence of their naval operational order, never came under the tactical command of the Army, and hence never received any orders relating to land combat from that service. Thus, it was the naval chain of

command that should be held responsible for the conduct of Iwabuchi's unit; it was in Manila as part of a naval plan to defend the city, and was not there at the behest of the Army. Admiral Toyoda, at the apex of the naval chain of command was therefore implicated.

The Philippine atrocities constituted only one portion of the case against Admiral Toyoda. The Prosecution argued that the atrocities in the Philippines and throughout the Pacific occurred before and during the command of Admiral Toyoda and were so widespread that Toyoda must have known of them. The quantity, their geographical dispersion and the duration of time over which they were committed constituted sufficient notice to the accused.

The Defence quite naturally did not agree. In their motion to dismiss the charge against Admiral Toyoda at the conclusion of the Prosecution case, they took up arguments against the form of the charge and the proof required to support it, which the Defence had argued on behalf of General Yamashita. Mr. Furness argued,

> No evidence showing knowledge of such atrocities has been offered in court. The power to control, the power to prevent and the power to gain knowledge are dependent not upon formal chain of command, but also upon circumstances - circumstances of distance, confusion of war and the effect of our destruction of the means of power and the means of gaining knowledge. The power of command cannot be proved by the mere submission of charts showing chain of command. 22

Mr. Furness went on to point out that the Commander in Chief of the Combined Fleet did not have any command over the commanders in chief of the area fleets in respect of administrative matters in occupied territories. Most of the atroc-

ities alleged against base forces concerned such administration, he said, and so Toyoda could not be held responsible.

The evidence before the Tribunal had highlighted the limited and divided command that existed in the Japanese Navy, Mr. Furness told the Tribunal. The Naval Ministry had charge of prisoners of war and administrative matters; others had charge of operational matters, technical matters and command over land operations. The power of command of the Commander in Chief of the Combined Fleet was nowhere made clear, but the role of the Chief of the Naval General Staff was even less clear, Mr. Furness said, especially since Admiral Toyoda had crossed out his name where it appeared on the charts in this capacity and was not questioned about his action.

Mr. Furness continued,

> that the naval units actually operated under the orders of the military command and received orders from it appears in other evidence now before this Tribunal... This did not shift the command of the Southwest Area Fleet (under Vice-Admiral Okawachi) to the command of the Army. By that time the commander of the Southwest Area Fleet had no vessels under his command, his headquarters were in Baguio, far in the interior of Luzon, deep in the mountains, not on the sea coast; and all evidence of atrocities committed by Naval troops of bases within the formal chain of command under that fleet were committed in land fighting after the troops of those bases had been placed under the command of the Army for land fighting. 23

In other words, the appropriate chain of command to bear responsibility for the events in Manila from Rear-Admiral Iwabuchi was directed through Lieutenant-General Yokoyama to General Yamashita Tomoyuki. It was therefore irrelevant whether Iwabuchi was engaged in the defence of naval installations in Manila; the mere fact that his defence was made on land rather than on sea, to the Defence meant that it was a

so-called land operation and one for which the Army should be held responsible. Such an interpretation was reinforced by the fact that no complaint as to Iwabuchi's uncooperative attitude and gross insubordination was made to Okawachi so that the Navy could take disciplinary action.

Mr. Furness concluded his address by asserting that,

> The so-called Bill of Particulars set forth merely a list of atrocities. All these might be proved but unless they are connected up with orders, directions, incitement, permission, ratification or failure to prevent by this particular defendant, they prove nothing whatever against him. 24

Mr. Blakeney then spoke to the motion, arguing firstly as to the adequacy of the specifications and that the conspiracy charge was an offence unknown to the law, and had not been proven against Admiral Toyoda, even at prima facie level. He moved on to speak of Particulars 37 to 85, dealing with the charges relating to the Philippines.

Blakeney told the Tribunal that, for the purposes of his argument, the fact that the alleged events did occur could be taken as established, and that it would be assumed that the participation and responsibility of naval troops for a share of those acts had been proven. Thus, he said,

> the question here is, has any such responsibility of this defendant been shown as to justify the imposition upon him of a vicarious responsibility for those acts, which he is not shown to have ordered or permitted, to have approved or acquiesced in, or even to have had knowledge? 25

Tackling the question of knowledge first, Mr. Blakeney drew the attention of the Tribunal to the fact that the bulk of the evidence introduced by the Prosecution had been admitted by the Tribunal on the understanding that proof would be

offered to connect Admiral Toyoda with the atrocites. This connection, alleged Mr. Blakeney, the Prosecution had not proven.

> So far as concerns the Philippine case, the evidence cannot be said to rise higher than this: that widespread atrocities were committed in the Philippines by Japanese troops, including troops of the Navy; while at the extreme far end of the chain of naval command, remote in space and almost infinitely so in time, as Commander in Chief of the Combined Forces of the Navy, charged with the impossible task of directing that Navy's dying efforts to salvage something from the war was this defendant. 26

Pausing, Mr. Blakeney continued,

> Needless to say, there is not a scintilla of evidence tending to show that he himself or any member of his staff ordered or directed the commission of atrocities, or approved the commission of them after the fact, there is not a scintilla of evidence that the defendant or any of his staff ever had knowledge of the fact that such atrocities had been committed. 27

Indeed, Mr. Blakeney said, the Prosecution's evidence tended to support this conclusion. Communications difficulties, even within Luzon itself had been attested to, and Vice-Admiral Okawachi, some one hundred and fifty miles removed from Manila, testified that he had no knowledge of the commission of atrocities there.

> In such circumstances, it is submitted, it is legally impossible to impute to the defendant any knowledge of these facts simply by reason of the presumption arising from his post. 28

Even conceding Admiral Toyoda's knowledge of the atrocities, Mr. Blakeney argued that he would still have been free of the responsibility for them since he occupied a post which gave him neither the power to control the troops, nor any responsibility for their acts. This was because the troops involved in the commission of atrocities had been removed from

under his command and hence from the chain of command with Toyoda at its apex.

The naval forces in Manila had been transferred to the command of General Yamashita, as Commanding General of the Japanese Army in the Philippines, Mr. Blakeney said, drawing on quotations from the trial proceedings to support his point. The problem of responsibility then, hinged on the question of whether the naval troops in Manila were, when the atrocities were committed, engaged in land warfare. Begging the indulgence of the Tribunal for discussing an issue that was so obvious (the battle for Manila obviously being fought on land), Mr. Blakeney claimed that red herrings had been laid by Colonel Asano's testimony, to cloud the issue. Blakeney then attempted to discredit Asano's independence as a witness by alleging self interest as his superior, Lieutenant-General Yokoyama was at that time on trial for his responsibility in the Philippine atrocities. It was for this reason that Asano contradicted Yokoyama's testimony at Yamashita's trial and held that the naval troops were on a naval mission in Manila, Blakeney urged. Admiral Okawachi's testimony showed that the only naval mission was the destruction of the piers and harbour facilities and that this had been completed shortly after his departure from Manila. The only remaining function of the naval forces after this time was land fighting, Blakeney said, since they had no vessels.

An interrogation of Admiral Toyoda, introduced by the Prosecution, in which Toyoda instructed the Southwest Area Fleet headquarters of the importance of Manila to the Navy and said 'therefore it should be defended to the very end,'

even if construed as orders to that headquarters, was superceded by the later change of command to the Army, which was made without orders relative to the defence of Manila. This was supported by the fact that during Okawachi's period of command he never received orders for the defence of the city. Mr. Blakeney continued,

> The absurdity of the prosecution's whole position on this matter - the desperate attempt to split hairs and to prove, by some agreements between Army and Navy forces on the existence of some secret plan, that the troops which committed the rape of Manila were under the command of Admiral Toyoda, is shown by the fact that there is not a word of testimony in the record concerning any operations except land operations. The atrocities were committed on land, by men usually described by the witnesses as 'marines', which have been defined by the Tribunal as sailors equipped for land operations. 29

Thus, the upward chain of command was Iwabuchi → Yokoyama → Yamashita and not Iwabuchi → Okawachi → Toyoda as it had originally been prior to the transfer of command. Logically, if one chain of command was responsible, then clearly the other was not.

Mr. Blakeney then launched into a discussion of the Yamashita case to underpin his argument; the sentence and judgment of that tribunal affirmatively proved that the responsibility for the Philippine atrocites did not lie with Admiral Toyoda. It was not the intention of the Defence, Mr. Blakeney claimed, to suggest that the United States had acted unconscionably, or had been guilty of a breach of good faith in trying Toyoda, or again that his trial justified the charge that the purpose of war crimes trials was one of vengeance. Rather the issue involved was one of res judicata; responsibility for the crimes had already been judicially determined by the Yamashita decision.

Over the objections of the Prosecution, Mr. Blakeney quoted excerpts from the judgment of the military commission in the Yamashita case, in which the commission noted that the offences for which Yamashita was being tried occurred throughout the Philippines during the period of his command, and that some of the crimes at least, had been ordered by officers subordinate to the Accused, as was revealed by the captured orders. He went on to read,

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility... where murder and rape and vicious, revengeful actions are widespread offenses,...such a commander may be held responsible, even criminally liable, for the lawless acts of his troops. 30

The commission concluded, Blakeney told the Tribunal, that the offences outlined in the Bill of Particulars submitted by the Prosecution against General Yamashita had been committed by members of his command because he failed to exercise effective control of his troops. Accordingly, General Yamashita had been convicted and hanged.

The Tribunal interruped Mr. Blakeney at this point to draw his attention to the fact that both General Yamashita and Admiral Toyoda having been presented with twenty or thirty identical particulars did not necessarily have probative value as to the grounds on which Yamashita was convicted. The Law Member, Lieutenant-Colonel Hamilton stated that,

> the record in this case merely indicates that General Yamashita was convicted of certain offenses which occurred in the Philippines. There is nothing in the record of this case that the offenses of which he was convicted are the same offenses for which the accused is now on trial; that is, matters as to the area, points of time, or troops involved. 31

Mr. Blakeney, permitted to continue, then drew the attention of the Tribunal to the failure of any prosecuting nation to indict Vice-Admiral Okawachi or any of his subordinate naval commanders for their responsibility in the Philippine atrocities. The very theory on which the Prosecution based its case against Admiral Toyoda, the criminal responsibility of a superior commander for the actions of his subordinates, was, in itself, Blakeney urged, the whole defence to their charges.

> If General Yamashita's guilt was that he 'failed to provide effective control' of his troops, only those in the same chain of command can bear that responsibility; unless Admiral Toyoda was in the chain of command, either as a subordinate or as a superior of General Yamashita, the responsibility running up through that chain of command could not reach him. If it is desired to trace the responsibility higher than General Yamashita, it should be traced to his superior - who, parenthetically, was Chief of the Army General Staff, General Umezu, and who likewise was charged with responsibility for these identical atrocities and was acquitted of the charge by the International Military Tribunal for the Far East. 32

If the troops in Manila had been under naval command in any 'ultimate sense', General Yamashita, General Umezu, Lieutenant-General Muto and Lieutenant-General Yokoyama could not have been tried unless they had been in the Naval chain of command. This none of them were, Blakeney averred.

> So far as concerns the Philippines phase of the case, we submit to the Tribunal that the question for its decision is whether law or even simple, every-day fair dealing can countenance the effort being made here to impose upon this defendant responsibility for acts for which other men have already paid with their lives - and paid on the theory that this defendant was not responsible. 33

Whilst the Prosecution would advise the Tribunal that the judgments of other tribunals are of no concern to it, Mr. Blakeney said, the Tribunal could not ignore 'the basic

concept underlying all law, that of doing justice.'

The Prosecution evidence failed to connect Admiral Toyoda with the atrocities which they alleged were his responsibility, Mr. Blakeney told the Tribunal. The Defence did not doubt that the atrocities had been committed, or that those responsible ought to be punished, but what it did question was whether the defendant, Admiral Toyoda, was the author of those acts? There was no proof of a pattern in their commission; the acts were sporadic in nature, scattered in location and were carried out on the initiative of the perpetrators or lower echelon commanders. No proof of orders from any headquarters had been offered.

The evidence failed, Mr. Blakeney concluded, to prove that Admiral Toyoda had the power to control the troops which committed the atrocities.

> The Prosecution has failed in the second and cognate point of showing responsibility - that responsibility and duty which follows the power to command. It is idle to say that a man who has not the power to command troops must have the duty of controlling them and must accept the responsibility for failure to control them. 34

Mr. Blakeney then rested his motion, closing with a quotation from the Supreme Court of the United States in Yamashita's case:

> An officer cannot be held guilty for failure to prevent a murder unless it appears that he had the power to prevent it. 35

The Prosecution, to support its case as to the law involved, launched into an extensive series of quotations taken from the Homma and Yamashita cases, the IMTFE and other lesser tribunals which made statements on command responsibility which had application to the case against Toyoda.

From the case of Lieutenant-Colonel Morimoto Isanu, tried before a United States military tribunal, Mr. Deitch read:

> It is further established (FM 101-5) * that 'the commander...is responsible...for all that this unit does or fails to do. He cannot shift this responsibility to his staff or to subordinate commanders.' 36

Similarly, from the case United States v Naval Captain Toyama Minoru,

> The fact that Vice-Admiral Ohsugi was found guilty of command responsibility for the same offenses as those charged in this case (Toyama) does not relieve the accused Toyama from his responsibility. There is evidence in this case that the accused Toyama could have taken steps to prevent the perpetration of the crimes charged which automatically fixes his responsibility. 37

Clearly, the Prosecution was attempting to rebutt the Defence assertions as to Admiral Toyoda's want of power and consequent escape of responsibility; Toyoda they hoped to suggest, was in a position to influence the conduct of the troops involved, and the previous convictions of other lesser commanders did not alter the question of his trial. As had been decided in the Yamashita case, and reiterated in Homma's, a commander had

> 'an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.' It remains to test the accused's conduct as Imperial Japanese Military Commander by that prescribed norm. 38

The standards laid down in the IMTFE for the assessment of personal liability were quoted at length as a further example of the norms applicable to the doctrine of command responsibility as recognised until that time. 39 The Prosecution

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* U.S. Staff Officers Field Manual.

arguing that the Tribunal knew the facts of Toyoda's case, chose not to discuss them, contenting itself with a statement of the law. The application of the law, the extracts from the tribunals noted above, were not explicitly linked by the Prosecution to the case at hand, and hence lost some impact.

Referring to Toyoda's supposed admonition of subordinates re the killing of prisoners of war after interrogation, the Prosecution held that

> a good officer anticipates commands or anticipates what he believes is the policy or attitude of his commander. The commander necessarily very often will not put his ideas or commands in writing. Very often the bare details are given. A good officer enlarges upon these bare details and attempts to do that which he believes the commander has in mind. Thusly, if a subordinate feels the policy is to kill prisoners of war, he will follow this policy and see that prisoners of war are killed. 40

Hence, a commander had a critical responsibility; by his policies, attitudes and actions he could cause deaths or save lives. This could not be lightly dismissed; a crime of omission was often far greater than one of commission, Mr. Deitch concluded.

In its surrebuttal to the Prosecution pursuant to its motion to dismiss the charge against Admiral Toyoda, the Defence emphasised the vital point that

> command must be proved. It must be proved that he had command, that under the circumstances and under the powers inherent in his title he had such command. It must be proved that he had knowledge or that he had the duty to gain knowledge and the power to gain knowledge. Power is co-existent with duty; power and ability to perform that duty. Without the ability to perform a man cannot have power. 41

The Yamashita and Homma cases were cases of field generals, who were near their troops; no matter whether one agreed with

the decision, Mr. Furness said, that was the basis on which the convictions were based. Admiral Toyoda occupied an entirely different position,

> far higher in the realm of command, far distant from the scene of atrocities, and his command responsibility, his power to command, his power to prevent, his power to gain knowledge, and his duty to gain knowledge must be proved. When we speak of knowingly and negligently we must prove both things and we submit the prosecutor in this case has not produced proof. 42

The Tribunal, after an executive session in camera, chose to reject the motion of the Defence to dismiss the charges against Admiral Toyoda, and elected to hear the arguments of counsel on behalf of Admiral Toyoda.

The Opening Statement of the Defence was characterised by brevity and simplicity. Mr. Blakeney restated the Defence thesis: that the Prosecution had attempted to hold Admiral Toyoda responsible for the actions contrary to the laws of war committed by persons subordinate to him in the naval chain of command because he had held a diversity of top echelon posts within the Japanese Navy during the war, he was ipso facto responsible. The Defence would counter with proof that some of the alleged crimes had not occurred, that Admiral Toyoda in no circumstances had actual knowledge (or the duty to acquire it) of the intention to commit or the actual occurrence of a crime, and that in some cases the perpetrators had been removed from the chain of command with him at the apex. Following this was a short explanation of the method of presentation to be followed by the Defence in its case.

In the first phase of their case, the Defence introduced evidence which defined the command powers of the Commander in Chief of the Combined Fleet. This was intended to rebuff any

notions that Admiral Toyoda could, in this position control base force troops, such as Iwabuchi's unit, which were under the command of fleets subordinate to, and composing part of the Combined Fleet. Defence Exhibit F was a memo dated 24 November 1944, from the Vice-Minister of the Navy to the Chiefs of the Administrative Offices of the ministry, entitled 'The Administrative Competence of the Combined Fleet'. Therein the matters of military administration to be under the competence of the Commander-in-Chief of the Combined Fleet were outlined:

(1) Matters connected with operations and disposition of ships and units.
(2) Matters connected with the maneuvers and technical and basic training and mission of the Combined Fleet as a whole.
(3) Matters connected with supplies necessary for operations.
(4) Matters connected with such important phases of technical administration as concern the operations of ships.
(5) Matters connected with such ceremonials and daily and weekly routines as require uniformity throughout the Combined Fleet. 43

The affidavit of Admiral Yoshida Zengo, an ex-Chief-of-Staff of the Combined Fleet, expanded on the nature of the command exercised by the Commander-in-Chief of the Combined Fleet over the constituent fleets, and is exceptionally interesting when the pronouncements of the Defence on the command system in the Japanese armed forces are recalled. In his affidavit, Defence exhibit I(i), Yoshida says

> that the Commander-in-Chief of the Combined Fleet was to have tactical command (tōsotsu) of the Combined Fleet and was to control such business of the fleet as concerned his duty above-mentioned. 'To have tactical command (tōsotsu) of the Combined Fleet' meant to command the Combined Fleet as a whole in the field of tactics and operations, and 'to control such business of the fleet as concerned his duty' meant to take control over

> matters of business that directly accompanied the tactical command of the Combined Fleet. 44

The commanders of the fleets composing the Combined Fleet, were subject to the command (shiki) of the Commander-in-Chief but only for operational matters affecting the fleet as a whole. Tactical matters within their own fleets did not concern the Commander-in-Chief, and likewise, he had no power of command over military administration (discipline, personnel matters etc.) in such fleets. Hence, the Defence through this affidavit, was suggesting, as the Prosecution had done in this case, and as the Defence counsel had earlier done in General Yamashita's case, that there was a duality of command in the Japanese armed forces, such that there was an operational command and command over military administration, and that they did not necessarily coincide or fuse together in each command situation.

The affidavit of Rear-Admiral Takada Toshitane (Defence exhibit L), as that of a senior staff officer of the Combined Fleet engaged in liason work with the staff officers of the Supreme Southern Command of Field Marshal Count Terauchi, offers a valuable insight into this command dichotomy.

> The Commander-in-Chief of a General Army had almost the complete right of command over his subordinates...and he enjoyed wide power to control matters relating to personnel affairs, maintenance of discipline, pay-masters' affairs and medical affairs, and not only the operational command. 45

Admiral Takada then went on to contrast this with the military administrative powers of the Commander-in-Chief of the Combined Fleet, as had been listed in the 1924 Vice Naval Ministers' notification to divisional chiefs. With regard to

discipline,

> In the case of a criminal belonging to a subordinate fleet, he was to be tried by the commission (gumpō kaigi) of that fleet, and as to his punishment the commander-in-chief of that fleet had supreme jurisdiction. The Commander-in-Chief of the Combined Fleet was in the same position as other commanders-in-chief of fleets as the punishing authority only of those in units directly belonging to the Combined Fleet.* He had neither authority to review verdicts given by the military commissions of the fleets, nor any authority to order the execution of the penalty; therefore, no report of the military commissions of the fleets and no announcement of the penalties imposed was sent to the Combined Fleet. 46

The powers of command exercised by Admiral Toyoda as Commander-in-Chief of the Combined Fleet were therefore, according to the Defence, very limited; he had absolutely no control over the discipline of the troops of the constituent fleets, and his operational command was restricted to tactical matters for the fleet as a whole. Consequently, although Admiral Toyoda (with Admiral Takada) had held a conference in Manila in October 1944 (including an interview with Field Marshal Terauchi), it was beyond Toyoda's competence to discuss the defence of the City, as this was purely a matter for resolution regionally between Vice-Admiral Okawachi of the Southwest Area Fleet and General Yamashita of the 14th Area Army. Admiral Toyoda could not be held responsible either for the resultant atrocities, since he had no power of command whatever over Iwabuchi's troops, even when the chain of command carried his name at the head.

To support their contention, the Defence went on to draw from the Yamashita case; the Prosecution argument that the naval troops of Iwabuchi were under Yamashita's tactical

* Analogous position to gun chokū heidan in Army - not constituent fleets.

command, and that whilst Yamashita did not have the power to discipline them, he could have restrained them through arrest. It was General Yamashita's responsibility and not Vice-Admiral Okawachi's because the troops were engaged in land combat and not naval operations associated with the defence of the port or the repulsion of an American marine attack. As tactical commander, General Yamashita was responsible for what Iwabuchi's troops did. [47]

The affidavit and testimony of Vice-Admiral Arima Kaoru, the Chief-of-Staff with the Southwest Area Fleet headquarters, the 13th Air Fleet, and the 3rd Southern Expeditionary Fleet, further reinforced this thesis. In December 1944, he said that Muto, Yamashita's Chief-of-Staff, showed him the plans for the defence of Luzon. After having seen this, Arima drew up a plan for the withdrawal of all except 4000 naval troops from Manila; they were to retire to Bayombong in the northern mountains of Luzon where they could be self-sufficient in food and could fight delaying actions in line with Army strategy. The troops remaining in Manila would similarly withdraw to the eastern hills for the same purpose once the military installations of the city had been destroyed. [48]

Upon receiving information that the enemy intended to land at Lingayen, Vice-Admiral Okawachi immediately relocated his headquarters at Baguio and informed Yamashita, Yokoyama and the subordinate naval commands that from midnight on 6 January 1945, command over Iwabuchi's unit for the purposes of land combat transferred to the Army, specifically Yokoyama's Shimbu Shudan. The Navy Ministry, Naval General Staff and Combined Fleet were similarly informed.

The Vice Chief-of-Staff of Okawachi's headquarters, Rear-Admiral Shimamoto Kyūgorō and some other staff officers were left in Manila, according to Arima, to take charge of the destruction of the naval facilities there, and to oversee the withdrawal of the troops to Bayombong. They drafted a plan for the accomplishment of those duties, which was effectuated by the 31st Special Naval Base Force during January. Reports of progress made were radioed to Okawachi's headquarters. The staff officers were ordered to withdraw to Baguio at the end of January, when it was believed that the ordered duties had almost been completed. Since land communication between Manila and Baguio had already ceased, Shimamoto and the other staff officers withdrew to Baguio via Bayombong and the mountain passes. The only remaining function of the Iwabuchi unit, with the completion of its naval duties, was the land combat.

According to Arima, from the informational reports submitted to Okawachi's headquarters, it was possible to deduce the combat situation in Manila,

> and according to our deductions around 7 or 8 February it was believed that unless they withdrew from Manila by the 13th or 14th it would be impossible to make a withdrawal for they would be surrounded completely by the enemy. 49

At Okawachi's command, Arima met with Lieutenant-General Muto of Yamashita's headquarters to propose that a withdrawal order be issued, to which Muto replied that there was no cause for worry as Iwabuchi had withdrawn to Fort McKinley and apparently was acting according to the plan. After Iwabuchi's return to the city centre, Muto informed Okawachi that he had taken steps to have the Shimbu Shudan issue an order for

withdrawal, but that Iwabuchi had told Lieutenant-General Yokoyama that he would like to fight to the end, since it had become impossible to withdraw.

Arima stressed that withdrawal from a state of near siege by troops of inferior training as composed Iwabuchi's unit would have been very difficult, especially as the invading troops of the enemy were their best units. Nevertheless, it was Arima's view that Iwabuchi remained in Manila because he received no orders for a withdrawal; this interpretation was reinforced by the citation for valour the unit received from the Shimbu Shudan after Iwabuchi's death, Arima said.

Lieutenant-Commander Kayashima Koichi, staff officer of the 31st Special Naval Base Force assisting in operational matters, told the Tribunal that

> since the naval units were assigned to the defense of Nicholl's Field, and also the sea coast in that vicinity, naval forces had already constructed defense installations in preparation for the enemy's landing assault.
> In the City of Manila, itself, fortifications for the street fighting were not constructed prior to 6 January 1945. 50

After this date, installations were constructed by the orders of the Shimbu Shudan, and were inspected by Lieutenant-General Yokoyama on January 20th. The only orders Yokoyama issued relative to the construction of such installations was that they be hastened and perfected, and the naval troops were to remain in their assigned area to defend the City of Manila and Sakura Barracks (Fort McKinley) sectors.

When it became apparent that the 31st Special Naval Base Force would become encircled and annihilated in Manila, Kayashima was despatched to Wawa to Shimbu headquarters whilst

Iwabuchi, anticipating withdrawal orders, on 9th February moved his headquarters to Fort McKinley. [51] Reporting to Yokoyama the battle situation in the City, Kayashima was instructed to convey to Iwabuchi an order that Manila be defended at all costs until a counter-attack could be launched to secure the release of the 31st Special Naval Base Force troops. [52] The counter-attack was unsuccessful as the units involved were nearly destroyed, so that Iwabuchi's forces were unable to strike out from within. Orders were received on 15th and 17th February from Yokoyama urging the withdrawal of Iwabuchi's headquarters to Fort McKinley and subsequently the evacuation of the unit from the City, but these could not be complied with as the enemy had encircled the City, effectively preventing withdrawal, Kayashima said.

The destruction of the naval facilities, as required by Okawachi's order, was commenced immediately upon its receipt, Kayoshima informed the Tribunal, and was completed by 1st February. After this date, the scuttling of unusable vessels continued, and vessels still serviceable for the purposes of combat were transferred to the naval unit at Corregidor (at the mouth of Manila harbour) on 7th February. Since all vessels were disposed of by 7th February, it was impossible for Iwabuchi to conduct sea operations, according to Kayashima.

Interestingly, it was revealed by Kayashima that after Iwabuchi's death (or suicide) on 26 February 1945, it was Vice-Admiral Okawachi who ordered the reorganisation of the Manila Naval Defence Force under Naval Captain Furuse Takesue. A later command instructing the withdrawal of the naval unit and its reconcentration at Ciniloan before advancing to

Infanta, originated with the Shimbu Shudan. The division between operational (tactical) and administrative (personnel, discipline) functions was evident here.

The problem of the division of command was an issue that went to the gravamen of the charge against Admiral Toyoda. Two basic questions presented themselves. Were the naval troops who committed the atrocities in Manila for which Toyoda was being held responsible, within the actual command umbrella exercised by him, and, secondly, were they there pursuant to a naval plan for the defence of the city? In seeking to evaluate Toyoda's involvement as a commander in the commission of the atrocities, the Defence case strategy concentrated on his lack of power to intervene in the affairs of subordinate fleets (and their base forces) and in demonstrating that Toyoda similarly had no legal duty to intervene. One is left to wonder why the concept of knowledge and its concomitant - communication - received such scant attention, especially when such knowledge could be imputed.

Indeed, the testimony of Commander Kusumi Tadao, the communications officer of the Southwestern Area Fleet was the only significant evidence given at Toyoda's trial upon the state of Japanese communications in Luzon at the end of the war. It is worth noting that no evidence of comparable authoritativeness was presented at the trial of Yamashita, so that Kusumi's testimony offers the greatest possible insight into the problems associated with the exercise of command in the Japanese armed forces at that time, available from Japanese sources. The picture he painted was one of considerable technical backwardness - no voice transmission radios were in

use, Morse code was the medium of communication - and personal ineptitude caused by the peculiarities of the Japanese language, greatly exacerbated by the steady and repeated American air attacks. [53] One feels that the appropriate question was not 'why did the commanders not know what was going on in Manila?' rather, 'how did the commanders know anything about the Manila situation?' Kusumi's testimony presumably was some of the most persuasive evidence offered on behalf of Admiral Toyoda, from the viewpoint of the Tribunal, which must have felt that the defence to the Prosecution argument lay therein. Nowhere in the Yamashita case, though, did such information appear.

Speaking in his own defence, Admiral Toyoda in his affidavit EA, pointed out that his alleged responsibility for the Philippine atrocities rested on two grounds; that naval troops in many cases perpetrated the atrocities, and secondly, a purported admission by himself that he ordered the defence of Manila to the last, and was thus responsible for the naval troops' presence in the City.

Toyoda went on to categorically deny any knowledge of the commission of atrocities in the Philippines, drawing attention to the state of the communications facilities which rendered it exceedingly difficult for even the local commanders to remain informed. He stated,

> Looking at these matters as a military man, I feel considerable surprise at the suggestion that any higher Naval commands bear responsibility for the atrocities, even if they were committed by Naval troops, after those troops had been transferred to the command of the Army, on the ground of retention of administrative authority by the Navy. I think that such a view is contrary to commonsense, and it seems to me that my opinion is borne out by the fact that evidently no one has ever thought

> of charging Admiral Doi, who was the holder of administrative authority in Mindanao, or Admiral Okawachi, who was the highest commander in the Philippines, with responsibility for the crimes committed by troops formerly under their command. 54

It was obvious that since the case against Admiral Toyoda was one of the last cases to be tried by the United States, those commanders would remain untried.

Admiral Toyoda then went on to recapitulate on the circumstances surrounding his visit to Manila in October 1944, emphasising that he did not issue orders relative to the defence of Manila, and that he was not in a position to dispense operational orders of this type. Regarding his purported statement that he ordered the defence of Manila to the last, Admiral Toyoda argued that the translation of the question 'at any time just before or during the battle of Manila did you issue any orders...?' failed to convey the concept of a specific time in the term 'Manila sen'. 55 Furthermore, any operational orders issued by the Commander-in-Chief of the Combined Fleet were simply designed to suggest the essential elements to be followed by the subordinate commanders, but did not discuss concrete details of operations. The defence of Manila to the last was meaningless to the Navy within the context of the battle, Toyoda said, because the frequent enemy bombings and the embroiling of Luzon in combat meant that Manila was strategically not viable. Hence, the final defence of Manila had not been ordered by himself.

Admiral Toyoda restated the actions of Okawachi and the Iwabuchi unit, as had previously been brought out in evidence, commenting that some of the atrocities committed in Manila appeared to have been committed under operational orders,

whilst some others (rape, pillage) had no operational goal and were offences against military discipline, and others still again defied classification on the available evidence. 'It was a peculiarity of the legal structure of the Japanese military organization,' Toyoda said,

> to have operational activity come under the responsibility of the tactical chain of command and matters of military discipline and morale under the responsibility of the military administrative chain of command. 56

When military units were subject only to one chain of command, commanders had no necessity to distinguish between matters of military administration and operational concerns, as both powers co-resided in the one person.

> But the case was most complex with the Iwabuchi Unit, which was, in matters of land operations, under the command of an Army commander, and in matters of administration and of sea-operations (which were practically non-existent), was subject to a Naval commander. It may not be difficult theoretically to trace back those plural chains of command to the final seat or seats of responsibility of the illegal incidents that took place...But handling each concrete incident and defining the proper seat of its responsibility is not so simple. 57

Whilst the above was true at the theoretical level, Admiral Toyoda continued on to say that

> It may, however, be definitely stated that in a zone of combat where the forces are in action or ready for imminent action, such a thing as a double chain of command, one commander taking charge of operational matters and the other of administrative matters including the military discipline and morale of the fighting forces, is utterly inconceivable from both the theoretical and the practical point of view. I have never come across any instance of this in my knowledge of the history of any nation or of the world. It is a matter of course that the forces in such situation should be commanded under the unified control of a single commander for the impending necessity of operational action, all matters of military discipline and morale, whether related or unrelated to operational action, being placed in the hands of the operational commander. 58

A similar viewpoint had been expounded in the Yamashita trial, Toyoda concluded, in the testimony of Lieutenant-General Muto Akira, Yamashita's Chief-of-Staff.

The maintenance of military discipline and morale in the Iwabuchi unit by Vice-Admiral Okawachi was impossible, Admiral Toyoda said, an impermissible from the theoretical standpoint. Qualifying his comments, Toyoda went on that Okawachi should not hold himself completely aloof from the affairs of the 31st Special Naval Base Force, but that his supervision should not be of such an extent as to interfere with or hamper the Army's operational command, as this would have been impermissible and illegal.

Referring to the captured order of a battation of the Manila Naval Defence Unit (the Okada unit), Admiral Toyoda explained that the origin of the order, could not, as the Prosecution was wont to claim, be traced back to the South-western Area Fleet. The order was a memo of an order orally issued by the commander of the Okada unit to the men within it and it hardly bore a resemblance to the normal form of a military order. The time of its issuance, Toyoda continued, was clearly within the period when the battalion was commanded by the Army, and its contents were those relative to land operations.

Having completed his analysis of the Manila question, Admiral Toyoda moved on to outline his views concerning the extent of responsibility for illegal action, prefacing his comments by stating that he was offering same, not in an effort to sway the Tribunal but only as an explanation of the factors that shaped his approach to the problem based on his

active naval service experience. 'As I view it,' he said,

> the responsibility for any illegal incident occurring in one of a series of organizations forming part of a chain of command system should rest most heavily on the person who was the prime mover in the incident in question, becoming lighter the farther one goes to those standing in successively more distant relationship to the matter. Thus, if an illegal action be committed pursuant to an order, the heaviest responsibility should fall on the person who issued the order, with the responsibilities of the recipicients of the order and of commanders superior to him who issued the order, becomingly successively lighter as the distance by which they are removed from him increases. 59

In cases where the illegal activities were not committed following official orders from a superior, Admiral Toyoda took the view that

> the responsibility should similarly rest most heavily on him who committed the act, becoming successively lighter with the distance separating superior commanders from him. Parenthetically, I understand that in ordinary criminal law, the responsibility of a superior commander for acts of his subordinates in excess of authority or arbitrary acts is, in the absence of special provision, disposed of in general as a question of administrative responsibility in accordance with the situation; but since the theory of these trials is not clear to me, I would perhaps better not discuss that point. 60

The question then, asked Admiral Toyoda was what was (or should be) the measure of the responsibility of commanders? At a theoretical level, he went on, it was not difficult to trace the responsibility of commanders for the supervision and control of their subordinates to the highest echelons, but in the practical arena, some limit had to be observed otherwise no top commander in any army would be immune from such prosecutions. Toyoda told the Tribunal that he could not accept the doctrine that a superior commander was <u>ipso facto</u> criminally responsible for the illegal acts of his subordinates merely because of his position; the commander must be 'guilty of fault'. What Toyoda envisaged was the definition and

delineation of a standard of conduct for commanders; when commanders were accused on command responsibility charges, their behaviour could then be compared to an objective standard, and those who took action appropriate to the circumstances (i.e., took reasonable precautions to prevent the occurrence of crimes and to keep himself informed) would pass, and those who did not take such action, would fail the test and presumably suffer criminal punishment for their neglect. To this end, in exhibit EF, he outlined the responsibilities of a fleet commander in the case of the occurrence of unlawful acts in regard to prisoners of war. [61]

Of himself he said,

> Only God can be without fault; I cannot swear that I succeeded perfectly in controlling and supervising my subordinates, and if any fault of mine exist I willingly accept my share of the responsibility. Naturally, it is the concern of the Tribunal trying me to judge whether such a fault constitutes a crime, and not my concern. If, however, I am to be found guilty to any extent of having ordered acts of illegality or of having, with knowledge of the situation, made no effort to prevent them or wilfully neglected my duty of supervision, I shall regard my sixty years as having been completely wasted, and shall have nothing further to live for. [62]

In its final argument before the Tribunal in support of the charge against Admiral Toyoda, the Prosecution stressed that the atrocities that had been revealed in the evidence presented during the trial were not the isolated acts of individuals suffering from war induced psychological problems, but instead were the acts of high ranking subordinates within Toyoda's command. Such crimes were widespread in nature and location, and occurred both before and during Admiral Toyoda's period of command as Commander-in-Chief of the Combined Fleet.

The duty of a commander to control the actions of his

subordinates had been dealt with in 'numerous' international law cases, both in war crimes jurisdiction and in international claims cases, according to the Prosecution, and hence they declined to elaborate further. Continuing, the Prosecution stated that,

> The accused has been charged with neglect of duty. This is significant for it means that the prosecution need not prove that the accused ordered the commission of any of the incidents which resulted from his neglect of duty, and it means that the prosecution need not specifically prove that the accused knew of the impending commission of any incident before it occurred. This is an important consideration because the defense has sought to confuse the Tribunal into believing that it is necessary to prove, either directly or circumstantially, that the accused had actual or constructive knowledge of the commission of an incident. 63

Hence, the Prosecution summation rested on an argument that Toyoda neglected his duty to control his subordinates, and prisoners of war.

Criminal responsibility for the neglect of duty arising from command responsibility was not new, the Prosecution contended; it had previously been applied in the case of the United States v General Yamashita Tomoyuki (reviewed by the Supreme Court in 327 US 1); the case of the United States v General Homma Masaharu; United States v Colonel Fujishige Masatoshi; * United States v Kono Takeshi; United States v Captain Toyama Minoro et al; in the case against Vice-Admiral Ohsugi and in other cases held under the regulations of Britain, Canada and Australia. 64 These cases supported the Prosecution argument, claimed the Prosecutor, that the neglect of duty or neglect of command responsibility with which Toyoda was charged was in essence merely the application of the ordinary rules of criminal negligence to the special duty

* Commander in Batangas Province.

imposed by the law and customs of war on commanding generals of belligerent armies.

Having established the legality of the charge against Admiral Toyoda, the Prosecutor next considered the evidence adduced on behalf of Admiral Toyoda before restating the Prosecution's thesis of the case. The responsibility for the 20,000 naval troops being within the City of Manila, argued the Prosecutor, was that of the Japanese Navy. Vice-Admiral Okawachi wanted the City defended pursuant to the plan of 20 December 1944, whereas it was the desire and strategy of General Yamashita to require the withdrawal of all troops from Manila and for the City to be put beyond the zone of combat. Hence, the troops of Iwabuchi's 31st Special Naval Base Force were in Manila under the orders of Vice-Admiral Okawachi to destroy the naval installations there; the fact that the destruction of such facilities was not completed, and that Admiral Toyoda allegedly ordered the defence of Manila to the last, offered the explanation of why Naval troops remained in the City of Manila after the Army troops had withdrawn to fight delaying actions in the mountains. Such an interpretation was reinforced by Asano's testimony at the trial of Lieutenant-General Yokoyama, that Iwabuchi did not come under Yokoyama's command unless and until he withdrew to the Fort McKinley- San Juan del Monte line. Lieutenant-General Yokoyama could not command Iwabuchi whilst he was engaged in naval operations; when it became apparent that the unit was involved in land operations against the Americans in Manila, Yokoyama ordered Iwabuchi's withdrawal several times. Previous to this time, Yokoyama had urged his evacuation despite his

lack of authority over Iwabuchi. General Yamashita's authority added to the weight of Lieutenant-General Yokoyama's order, in the Prosecution viewpoint. Okawachi admitted his powers of military administration over the Iwabuchi unit; this meant that the power of punishment, removal or demotion was retained by the Navy chain of command.

Why then, asked the Prosecutor, did Vice-Admiral Okawachi not exercise these powers if Iwabuchi was acting contrary to his naval orders, assuming that the Navy did require his withdrawal? Vice-Admiral Okawachi did nothing because Rear-Admiral Iwabuchi, although disobeying Army orders for withdrawal, was in fact acting pursuant to Okawachi's orders. The proof for this assertion, argued the Prosecutor, lay in the fact that upon Iwabuchi's death, he was replaced by Naval Captain Furuse without Army approval or consultation, and in the testimony of Vice-Admiral Okawachi relative to his retention of certain powers of command. The testimony of Yamashita, Muto, Yokoyama, Asano, and Furuse also supported the point, the Prosecutor said. This led to the conclusion that the Navy never relinquished control of the naval troops of the 31st Special Naval Base Force; the appropriate chain of command to bear responsibility for the atrocities in Manila, therefore, was that which culminated in Admiral Toyoda Soemu, Commander-in-Chief of the Combined Fleet. The Prosecution consequently urged his conviction.

A preview of the Defence argument or strategy in its summation was delivered by Mr. Blakeney when the Prosecutor attempted to read into the record and have the Tribunal take judicial notice of part of the defence summation of the Yam-

amashita case (pages 3913-3918 of that record) to support the Prosecution argument against Admiral Toyoda. Mr. Blakeney objected, arguing that the extract submitted could have no probative value to Toyoda's case as

> It was entirely rejected by the Tribunal which hanged (Yamashita) for responsibility for the very atrocities which counsel are here saying he had no responsibility for. 65

This was, of course, the most serious weakness of the Prosecution argument; not only had General Yamashita been hanged on command responsibility charges arising out of the commission of atrocities in the Philippines, but so had his Chief-of-Staff, Muto, Lieutenant-General Yokoyama, the commander of the Shimbu Shudan, and Colonel Fujishige Masatoshi, the commander in Batangas province, also met their deaths as the result of judicial determinations of their responsibility for the crimes of their subordinates. Yet Vice-Admiral Okawachi had never been charged. The difficulties encountered in sustaining the Prosecution argument were intensified somewhat by the fact that the prosecuting authority in the most influential case, that of Yamashita, and in Toyoda's case, were identical, thereby leaving little room for acceptable legal manoeuvreing on the part of the Prosecution.

This embarrassing flaw in the Prosecution strategy was not one which the Defence was likely to minimise or ignore; mercy was not the keynote of their summation.

The Defence began their summation before the Tribunal by agreeing with the Prosecution that the duty of a commander to control the troops under his command supervision was well established in law. To this end, they cited In Re Yamashita,

and several international arbitration cases; the Jeannaud 1880, (3 Moore, International Arbitrations, 1898, page 3000) and the Case of Zafiro 1910, (5 Hackworth, Digest of International Law 1943, p. 707). This principle, stressed the Defence, had been accepted and applied in the Japanese military forces.

However, the Prosecution had to prove, firstly, that the Accused, Admiral Toyoda Soemu, had a duty as Commander-in-Chief of the Combined Fleet and as Chief of the Naval General Staff, to control the operations of members of his command, and persons subject to his control and supervision. Secondly, the Prosecution had to prove that Admiral Toyoda unlawfully disregarded and failed to discharge this duty, and that as a result, he thereby permitted those persons whom he had a duty to control, to commit the said offences. In other words, the Prosecution was charged with the responsibility for proving that Admiral Toyoda's duties in the positions above included the duty to control, and that his failure to exercise such control, directly resulted in the commission of the charged atrocities. In brief, the Defence argued that the crimes committed be directly linked to Toyoda through his own criminal inaction, the negligence and the connection to be proven beyond reasonable doubt rather than left to the realms of inference. The question then, the Defence claimed, was whether the Prosecution had sustained its burden of proof; had the guilt of Admiral Toyoda been established beyond reasonable doubt?

Leaving this question in abeyance temporarily, the Defence moved on to comment that a difficulty with the case

was the ex post facto nature of the charge; it was impossible to say what the provisions of international law being applied in war crimes trials were, they said.

> It passes then, for 'international law', but the thoughtful person who allows himself to consider the subject is likely to find himself entertaining growing doubts whether we are not moving to the condition, today, of the Roman citizen in those bad days of the Empire when Caligula used to decree his laws and post them on a high column, that none might know beforehand with what offence he might come to be charged. 66

Hence, this had allowed the leeway for the Prosecution to take the view that there was no requirement on their part to prove the connection between the crimes outlined in the Bill of Particulars, and the actions of Admiral Toyoda. The attitude of the Prosecution on this matter merely confirmed the worst suspicions of the vindictiveness of the war crimes trials, the Defence said. As for the 'principle' of command responsibility,

> this appears to be a principle that just as a commander is responsible for acts of his troops - a self-evident proposition - each superior commander as we ascend the hierarchy is responsible for the acts of troops of all his subordinate commanders until, reaching the summit, we hold the highest commander responsible - ipso facto - merely by virtue of his office - for any illegal act committed anywhere throughout the confines of the service. 67

The Prosecution had failed to prove, the Defence continued, that Admiral Toyoda neglected his duty in a criminal manner by issuing orders in contravention of international law, or that he gave approval for the commission of acts similarly contrary to the law and which his duty forbade. Neither had it been proven that Admiral Toyoda had been criminally negligent in the exercise of his duties by having knowledge of the commission of atrocities and doing nothing to prevent

further occurrences or to punish the perpetrators, or that he was at fault in failing to acquire knowledge. Therefore, the Defence concluded, the Prosecution argument could be boiled down to Admiral Toyoda having neglected his duty by being in those positions at that time; that his position rendered him ipso facto criminally responsible for the illegal actions of subordinates which he was not shown to have ordered, condoned or permitted and of which he had no knowledge. This 'doctrine' of command responsibility would be translated into law by a verdict of guilty against Admiral Toyoda, the Defence warned the Tribunal.

The Yamashita and Homma trials offered no precedent for the Toyoda case, the Defence continued. Yamashita Tomoyuki and Homma Masaharu were not superior commanders occupying supervisory positions removed from combat and troops at the top of chains of command; instead, they were field commanders in situations where atrocities were committed by troops under their direct, personal command. They were not convicted and sentenced to death

> on any theory of 'command responsibility' in the sense of the prosecution here, under which the proecution 'need not prove' orders or knowledge, but were on the contrary convicted on the basis of the atrocities being so numerous and widespread among the units within their restricted areas of command and in such close proximity to their persons that they must have given orders for or had personal knowledge of the commission of those acts and, having the power of command, not prevented the commission of them.

Pausing, the Defence continued with emphasis that,

> Even in those cases, where the commanders were on the ground, literally surrounded by the atrocities...there was sufficient doubt of whether the law imposed responsibility upon them, that 2 eminent judges of the Supreme Court found themselves unable to approve their convictions... 68

Hence, there was no principle of command responsibility in cases where knowledge or orders had not been proven. On the other hand, General Tojo Hideki, the wartime prime minister of Japan tried before the IMTFE, had knowledge of the commission of atrocities upon which he did not act, and he was also responsible for the issuing of an illegal order. Both of the criteria having been fulfilled, Tojo was convicted on command responsibility charges and was sentenced to hang.

The Prosecution had conducted the case against Admiral Toyoda on Western assumptions of the structure and functioning of the armed forces and their command systems, the Defence alleged. For example, it was the Prosecution's understanding that the Minister for the Navy was superior in all naval forces to the Chief of the Naval General Staff, but in the Japanese case each had quite distinct and separate functions. The division of command, and the fragmentation of power and authority were peculiarly Japanese. Hence, it was impossible to judicially try one nation's military system by the assumptions of another, the Defence emphasised.

Whilst this argument had been behind much of what the Defence in the Yamashita case as well as in the Toyoda trial, had said, this was the first time that it had been explicitly stated in either proceedings. This is quite surprising considering the critical importance of this issue to the fates of two Japanese military personnel.

The Defence then went on to assert that the naval forces in the Philippines were placed (at varying dates) under the ultimate command of General Yamashita, and that they engaged in land combat under Army direction and command. The naval

troops of Rear-Admiral Iwabuchi Sanji, the 31st Special Naval Base Force or the Manila Naval Defence Force, were engaged in operations on land - land operations - when they committed offences and these occurred after the transfer of operational command to the Army on 6 January 1945. Admiral Toyoda had no powers of command over those troops for affairs of military administration - discipline, promotion, demotion, personnel matters - nor for operational concerns, which were then the responsibility of the Army. The defence that the naval troops were engaged in sea (or naval) operations at the time of the commission of the atrocities in Manila, and that the responsible chain of command was that of the Navy, had been successively rejected by the tribunals that tried General Yamashita and Lieutenant-General Muto, as well as by that which condemned Lieutenant-General Yokoyama to death.

> On the question of Army or Navy command over the Naval troops in the Philippines, the prosecutor has favored the Tribunal with his 'impression' that the defense evidence was designed to 'establish a smoke-screen on the point and mislead the Tribunal' (R 4488). Is that, Your Honors, what we have done? It may be so that we have laid this smoke-screen and have attempted to deceive this Tribunal, but if we have, we have laid the very smoke-screen which the United States Government has long since laid, we have attempted to deceive this Tribunal just as the United States of America tried to deceive - and succeeded in deceiving - the tribunals which at its behest tried and hanged Generals Yamashita and Muto. 69

Three other tribunals entertained charges alleging responsibility for the same offences, the Defence said, against three different men, and these accused paid with their lives for their responsibility in them. If Lieutenant-General Muto 'shared responsibility' for the atrocities, as the IMTFE proclaimed, he must have shared it with someone with whom he stood in some relationship of military command.

As General Yamashita's Chief-of-Staff, it was reasonable to assume that it was with him that Muto shared his responsibility. Yamashita, Muto and Yokoyama had been eliminated; command responsibility was no more than an ad hoc 'legal' cloak in which Navy leaders could similarly be removed. This was the philosophy of the Prosecution, according to the Defence, and was substantiated by their utilisation of the thrice rejected Yamashita defence as an argument of prosecution.

Admiral Toyoda did not know of the atrocities, concluded the Defence. No reports were submitted to him, and none were required since the details of operations of subordinate fleets and their base forces were beyond his command scope. Even had reports normally been required, there was considerable difficulty encountered in transmitting them with the loss of various military points and the destruction of adequate shipping, coupled with the problems in changing code books (it was not safe to send them by air). The inferiority and inefficiency of communication equipment further exacerbated the situation. Thus, even had Toyoda the duty to know, the means of acquiring such knowledge were very meagre indeed.

It was not the Japanese naval system that was on trial, the Defence stressed. The trial was for the purpose of ascertaining the guilt or innocence of one Accused, Admiral Toyoda Soemu, and the evidence presented by the Prosecution before the Tribunal, and reviewed in summation, had not implicated him in the commission of the crimes in any way. Hence, in the interests of justice, the acquittal of Admiral Toyoda of the charges as drawn was the only course of action.

With this plea, the Defence concluded their comments before the Tribunal and completed their duties on behalf of their client. The fate of Admiral Toyoda now lay with the Tribunal.

In an unusual departure from the Yamashita precedent, the Tribunal bowed to the experience and expertise of the Legal Member, who delivered that portion of the judgment which dealt with the law; the doctrine of command responsibility and the standards to be observed in its application. This prefaced the Tribunal's findings on the evidence. Lieutenant-Colonel Hamilton noted that the atrocities perpetrated by Japanese Navy personnel had occurred throughout the Pacific over an extended period of time, but he went on to emphasise that

> this (was) a trial to ascertain truth, truth uncircumscribed by over-narrow legalities, retribution or personal feelings. 70

The trial was of an accused who had held the most important service offices in one of the most powerful navies seen in history, and so the trial was one in which it was necessary to propound the doctrine of command responsibility at the highest levels.

> It (was) <u>not</u> a trial devoid of new or retroactive principles for we have here the unusual case of a high national commander, separated from actual events by thousands of miles of water, linked only to the locale of those events by precarious lines of communication. These lines were so precarious that it is almost incredible that any degree of co-ordinated war effort could have been achieved. 71

Admiral Toyoda was not on trial for having led the Japanese into an illegal and aggressive war; the evidence in fact revealed that he had been strongly opposed to it, the Law Member said. Rather, Toyoda was the supreme naval

commander, a man who fought battles against great odds with much determination and with the realisation that the fate of his nation lay on his shoulders, and who, when the hopelessness of the struggle was seen, fought to preserve his people as an entity whilst seeking ways within his power, to end the destruction of war.

The qualities of character attested to by the Defence witnesses of Admiral Toyoda had obviously been reinforced by Toyoda's battle conduct and his attitude of cooperation with the Tribunal, so that they had formed an impressive opinion of his nature.

Toyoda's efforts to achieve maximum effect with his seriously depleted forces whilst seeking ways to end the war, coupled with the changing fortunes of battle, made a vivid backdrop to the events which concerned the Tribunal, Hamilton said, and the latter could not be understood or evaluated in divorce from the former. Outlining the 'shocking and extensive savagery' practised by naval troops throughout the Pacific, for which Admiral Toyoda was being held responsible Lieutenant-Colonel Hamilton went on to comment that

> In its initial stages, this case appeared to be but a simple one involving only direct command responsibility. When the enquiry reached into the highest strata of the Japanese Navy, it became all-too-clear that here was something that had little parallel to the systems of command familiar to Occidentals and that the application of such principles of command to the case was impracticable. A study had then to be made of what are, to Western mentalities, amazingly complex and, at times, almost unbelievable principles of technical administration, authority and direction of a war effort. This Japanese propensity for divided authority and control, for piecemeal responsibility and decision has added tremendously to the task of this Tribunal in ascertaining the hidden truth. 72

It was little wonder then that the trial had continued for some 300 sittings, had required the detailed and exhaustive examination of 121 witnesses and of 650 affidavits and other exhibits, and had consumed over 8,000 pages of proceedings and testimony.

Turning to discuss the legal aspects of the case, Hamilton made what was a customary justification of the ex post facto nature of the command responsibility charges, arguing that if a high commander who orders, permits or condones the commission of an atrocity were allowed to escape punishment because of a lack of machinery with which to judge him, then for the sake of fairness and consistency all perpetrators should be similarly allowed to escape also. This was naturally regarded as an undesirable course of action. Civilization was a growing, evolving thing, according to Hamilton, and in the past rape, looting and pillage, now crimes against the law of war, were regarded as legitimate tactics of warfare. Was civilization wrong to have declared these acts illegal? he asked. In this context, it was important not to punish offences because they were committed by a defeated adversary, but to serve notice upon all nations and individuals that in the future such actions will be justiciable. It was Hamilton's view that the sentences handed down by the IMTFE, at Nuremberg, and elsewhere exercised a strong deterrent effect.

> Potential leaders of nations may discount the action taken by the tribunals condemning persons for plotting aggressive war but who can believe they will disregard the punishment of perpetrators of atrocities?

The fact that there will always be crimes committed by men

in the heat and passion of battle which no law can ever prevent, and that there will always be crimes that remain unpunished offered no justification for the view that war crimes jurisdiction, especially that which is ex post facto, should not be exercised, in Hamilton's view.

He continued,

> It is not within the province of the Tribunal to comment on the action of the United States Supreme Court taken in the cases of General Yamashita and Lieutenant-General Homma. Suffice it to say, its decision is the precedent, as certainly is not the dissenting opinion in the Homma case. * Their lives were not forfeited because their forces had been vanquished on the field of battle but because they did not attempt to prevent, even to the extent of issuing orders, the actions of their subordinates, of which actions the commanders must have had knowledge. 73

The precedent offered by the Yamashita and Homma cases, as well as that of other tribunals had been 'carefully studied and followed' by the Tribunal in its findings on command responsibility, the court heard. Lieutenant-Colonel Hamilton on behalf of the Tribinal stated that after considerable deliberation, the Tribunal had adopted the view that the essential elements of command responsibility were,

> (1) That offenses, commonly recognized as atrocities, were committed by troops of his command;
> (2) The ordering of such atrocities. 74

As has been pointed out elsewhere, this type of command responsibility, in which the commander plays an active and positive role through the issuing of an order directing or which resulted in the commission of an atrocity, had been long recognised in international law. What the Tribunal was

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* Dissenting opinion in this case was made on similar grounds to that of In re Yamashita, but was applied to a factual situation in which Homma had closer links with the atrocities committed within his command.

propounding, was therefore, nothing new.

In the absence of proof beyond a reasonable doubt of the issuance of such an order, then the fundamental and essential elements of command responsibility were, as before, that the crimes actually have been committed, and that they were perpetrated by troops of the commanding general's command. The accused commander must be proven to have had notice of the commission of the offences. * This could be either actual notice, such as cases where an accused sees the commission of an atrocity, or is informed of it subsequently, or he may have constructive notice. Constructive notice, explained Lieutenant-Colonel Hamilton, was an inference of knowledge made where there was

> the commission of such a great number of offenses within his command that a reasonable man could come to no other conclusion than that the accused must have known of the offenses or of the evidence of an understood and acknowledged routine for their commission. 75

Quite obviously the above criterion would have had little meaning unless the accused commander was proven to have had actual authority over the offenders, so that he had the power to issue orders to them instructing them not to commit acts contrary to the law of war, as well as the power to punish those ignoring his wishes.

The failure of Toyoda to take measures appropriate to the circumstances and within his power to control the behaviour of the troops placed under his command, and to prevent the occurrence of acts which it was the function of the law of war to prevent, along with the failure to punish offenders

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* My emphasis.

composed the other essential criteria, Hamilton said.

Summarising the position of the Tribunal, Lieutenant-Colonel Hamilton asserted;

> In the simplest language it may be said that the Tribunal believes the principle of command responsibility to be that, if this Accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished. 76

The theory surrounding the charge of the dereliction of duty by a commander was simple, Hamilton felt, but that its proper consideration involved many factors and hence its application was quite the opposite. In the case of Admiral Toyoda, Hamilton said, that

> His duty as a commander included his duty to control his troops, to take necessary steps to prevent commission by them of atrocities, and to punish offenders. His guilt cannot be determined by whether he had operational command, administrative command, or both. If he knew, or should have known, by the use of reasonable diligence, of the commission by his troops of atrocities and if he did not do everything within his power and capacity under the existing circumstances to prevent their occurrences and punish the offenders, he was derelict in his duties. Only the degree of his guilt would remain. 77

These comments completed that section of the judgment delivered by the Law Member, and the discussion turned then to the evidence adduced in support of the charges against Admiral Toyoda.

The Tribunal did not dispute the fact that the atrocities in the Philippines as laid out in the Bill of Particulars, had occurred, or that they had occurred in sufficient quantity to

constitute a case. The only point at issue, they argued, was whether the Accused, Admiral Toyoda, bore the responsibility as commander for their occurrence.

Continuing, the Tribunal stated that it was convinced, as had been the commissions that tried General Yamashita and Lieutenants-General Muto and Yokoyama, that the naval personnel of Rear-Admiral Iwabuchi Sanji's Manila Naval Defence Force were both legally and actually commanded by the Japanese Army at the times and under the conditions specified by the Army-Navy Agreement of Imperial General Headquarters and elaborated upon by two Daikaishi. [78]

> The naval command channel, from Iwabuchi through the Commander-in-Chief of the Third Fleet, the Commander-in-Chief of the Southwest Area Fleet to the Combined Fleet is not evident and the Tribunal cannot but conclude that it did not, in fact, exist. The much disputed definition of operational and administrative authority is not a point of issue here. [79]

The Tribunal then stated that the Commander-in-Chief of the Combined Fleet exercised only strictly operational and tactical control over the subordinate fleets. In the performance of his duties in such position, Admiral Toyoda was limited by the nature of the intricate naval organisation, to the planning of battle strategy in its broadest sense. Hence, Admiral Toyoda had no association with or responsibility for the methods employed by the fleet commanders in achieving combat goals.

Whilst the occurrence of many of the atrocities in the Philippines had been proven, nowhere was it shown, the Tribunal remarked, that Admiral Toyoda issued any order, acquiesced, condoned, had knowledge or the means of gaining

knowledge. Thus, the connection between Toyoda and the crimes had not been established.

> It is difficult for reasonable men to conceive that a man of the defendant's background, intelligence and knowledge of his own people would not know of the commission, or the possible commission of some of these reprehensible acts. However, the acts, so the evidence indicates, were committed in isolated areas, remote in distance and communication and, for obvious reasons, under conditions of secrecy with little discussion by the participants beyond those immediately concerned. 80

The Tribunal then turned to discuss other aspects of the charges against Admiral Toyoda; the air attacks on hospital ships. Here the Tribunal was critical of the type, quality and consistency of the evidence adduced by the Prosecution as well as the failure to show that the attacks were perpetrated by any echelon of command under the Accused. The Prosecution therefore failed to show that Admiral Toyoda ordered, condoned or approved the incidents either individually or as policy, the Tribunal said, and instead there had been evidence introduced which suggested that the official naval attitude was opposed to such tactics. In passing, the Tribunal drew the attention of the court to the ten attacks by the Allies on Japanese hospital ships; the Japanese had not alleged that they were made as a part of Allied policy and yet the Prosecution, in charging Toyoda on three counts, was suggesting that they occurred pursuant to Japanese policy.

> Summed up, there is no evidence which, in the opinion of the Tribunal, incriminates this defendant, and, indeed, the Tribunal restrains itself from commenting at length here on the paucity and questionable quality of the evidence in this matter and the presentation in the case of such material. 81

Regarding submarine atrocities, during the period in question, Toyoda was commanding the Yokosuka Naval District

and then a Supreme War Councillor, a purely honorary position. Toyoda, in these positions, had no direct connection with the Navy Ministry, the Naval General Staff or the Combined Fleet. It was 'difficult' to find beyond reasonable doubt, the Tribunal held, that Admiral Toyoda was 'on notice' as the Prosecution argued, or that he had reason or duty to be aware of the occurrence of the atrocities. No substantial proof was offered that the Naval General Staff or the Combined Fleet ever adopted or promulgated a policy of directing the killing of survivors of sunken ships, the Tribunal stated, dismissing this phase of the case as not proving Toyoda's guilt beyond a reasonable doubt.

The atrocities at Ofuna Naval Interrogation Camp (within Japan), which occurred during the period of Toyoda's command over Yokosuka Naval District, next attracted the attention of the Tribunal. After having found that Toyoda did not 'order' any of the alleged acts, the Tribunal stated

> This leaves the verb 'permitted' to be examined in relation to the defendant. To have permitted any atrocity, Toyoda must be shown either to have had knowledge, or, failing to have had knowledge, to have had at hand the means for gaining knowledge, and the opportunity or reason. 82

This is interestingly one of the few definitions of sections of the doctrine of command responsibility; 'permit' here has been given a more circumscribed meaning within the context of the principle than that which it was earlier accorded. Using its own criterion for 'permit', the Tribunal concluded that although the atrocities had been proven, Admiral Toyoda did not know of their occurrence, and that the existence of machinery for the filing of reports with him had not been

shown. This was in part probably due to his onerous duties in commanding 600,000 personnel over an extensive area in 190 separate units, as well as the insignificant size of Ofuna camp and the restricted opportunities to acquire knowledge within the scope of his duties. However, by the fact of its existence within his command, he was charged with the responsibility for the efficient and proper management of Ofuna, and the Tribunal recognised this function. But, it continued, it had also to take into consideration Toyoda's legal means of discharging that responsibility, the difficulties and ramifications. When he had the authority and the knowledge, the Tribunal averred, Toyoda throughout his career upheld the discharge of his responsibility.

> His measure of guilt therefore becomes his measure of ability, considering all factors, to discharge his responsibility. The Tribunal therefore recognizes a measure of moral guilt in his failure to take objective steps to correct the Ofuna sins. But in the view of the Tribunal, it is a small and remote guilt indeed; and the Tribunal, in justice, does not find the Specification proved beyond reasonable doubt. 83

On the conspiracy count, the Tribunal found no evidence in the professional or personal activity of Admiral Toyoda that justified the conclusion of guilt on this specification.

Having completed its judgment, the Tribunal asked whether Admiral Toyoda had any comments to make before the verdict was announced. Toyoda expressed his gratitude to the Tribunal for its magnanimity and fairness, and their patience in permitting the Defence to present their case. No stone had been left undone, Toyoda said.

> Even if it can be assumed that the numerous crimes for which I was charged in this trial were not my legal responsibility, the fact that these crimes were committed

> by members of the Japanese Navy of which I was a part and by those who were under my command causes me to feel a deep sense of regret and self-reflection. Had my ability and character been more superior and stronger it might well have been that some or all of these crimes could have been prevented or stopped; and for this failure I feel a deep sense of repentance and a strong sense of guilt of moral responsibility. In this regard I take this occasion as a member and on behalf of the former Japanese Navy to express and offer my deepest apology to the Allied Powers. 84

Toyoda then said that he was no longer young and fit for service, but in continuing his life, he had to find some means through which he could atone for what in the eyes of God was his guilt. In concluding his statement, Toyoda paid tribute to the diligence and cooperation of the court reporters and interpreters, whose task was both difficult and arduous, and who had contributed significantly to the smooth progress and accuracy of the proceedings.

The President of the Tribunal arose upon the completion of Toyoda's comments, and announced that the Tribunal in closed session upon secret written ballot found Admiral Toyoda not guilty of all specifications and the charge. The Tribunal was adjourned.

Whilst the Toyoda trial bore the imprint of the Yamashita precedent, it was distinguished from the earlier trial in the attitude and approach manifested by the Tribunal toward the war crimes jurisdiction as a whole, but particularly towards the procedure employed in such trials and especially as it related to the guilt of the accused. The Tribunal that tried Admiral Toyoda, with its law member, produced a proceedings that was balanced and judicial in approach, in con-

trast to that which tried Yamashita, preoccupied as it was with expeditious procedure rather than with law, justice, and the safeguards against improper influences normally accorded an accused. The most plausible explanation for this difference is one that argues for a combination of the factors of time and the active presence of a legally experienced law member.

Through the liberal introduction of extracts of testimony from the Yamashita trial as evidence in the Toyoda case, and in the arguments presented by Defence and Prosecution extrapolated _in toto_ from those advanced (reciprocally) by counsel and prosecution in the earlier trial, the _Yamashita case_ had a strong influence on the trial of Admiral Toyoda.

Nevertheless, despite this similarity, the proceedings of the Toyoda trial differ markedly from that of the _Yamashita case_. Although normally prohibited forms of evidence were permissible under the _Regulations_ and were admitted, care was taken in its use, and it was generally of a higher calibre than material which was offered as 'proof' at the Yamashita trial. Affidavitory evidence too, was mainly drawn from Japanese sources, unlike the trials of Japanese Army personnel, which were usually reliant on Allied testimony. The accused, Admiral Toyoda, was recognised as being innocent until proven guilty; the burden of proof rested on the Prosecution. This was quite unlike the _Yamashita case_.

With the legal experience of the Tribunal that tried Toyoda, there was a stress on law (as opposed to a stress on expeditious procedure) and hence, there was considerable

legal debate, and debate on the principle of command responsibility. The basic question confronting the Toyoda Tribunal was essentially the same as that discussed in the Yamashita trial: the nature of command relationships and powers in the Japanese armed forces in the light of the confusion over whether Iwabuchi's unit was engaged in naval or land operations at the time of their commission of the Manila atrocities. The Tribunal trying Toyoda stated that there could be no imputation of knowledge merely because of the position of an accused; command must be proved and the linkages made. It did not, however, progress any further in resolving the basic question above since it adopted the stance that the Toyoda case was one of res judicata; that responsibility had previously been judicially determined by the Yamashita decision. Its upholding of the judgment is particularly interesting given the latter tribunal's obvious disagreement with many aspects of the Yamashita case and its verdict, and its acknowledgement of its many shortcomings.

The most distinctive feature that arises from a comparison of the Yamashita and Toyoda trials is the difference in the attitude and approach of the Tribunals to the cases, starkly revealing the fact that, under the Regulations Governing the Trial of War Criminals, commissions were vested with discretionary powers over procedure, and hence the pattern of procedural conduct pursued by the tribunal that tried Yamashita was not necessarily a foregone conclusion or a precedent for replication in subsequent trials. In seeing the Yamashita trial through the perspective of the Toyoda case, therefore, the deficiencies in the theory and practice

of that former case are thrown into higher relief.

There can be no doubt though, that Toyoda's trial was fairer and more judicial than the one which judged Yamashita. Whilst there was no credible testimony to implicate Yamashita in the atrocities for which he was being held responsible, he was convicted nevertheless, but a lack of the same type of evidence in the later case led to Admiral Toyoda's acquittal although the basic issue - whether Iwabuchi's troops were engaged in a naval or land operation when they committed the Manila atrocities - remained unsatisfactorally resolved.

FOOTNOTES

1 Foreign Relations of the U.S., 1948, vol. VI, p. 718, Explanatory Notes of Top Secret Conversation between MacArthur, Under Secretary of Army, Draper, and George Kennan on March 21st, 1948.

2 Blakeney has reputation for his outspoken criticism of what he felt were the injustices of prosecution of war crimes. Also translated and edited Togo Shigenori's book, The Cause of Japan.

George Furness was an education and information officer during hostilities and had been drawn into the IMTFE when the colonel selecting the defence staff had said he wanted a Harvard law graduate on the 'team'. Walt Sheldon in The Honourable Conquerors: The Occupation of Japan 1945-1952, (Macmillan, New York, 1965) commented that,

Although Furness had never spent much time at criminal law, he was an accomplished amateur actor and looked rather like a motion-picture fan's concept of a brilliant courtroom attorney - balding but handsome, pipe-smoking, a British flair to his clothes and a bearing, the accent that seemed as much a product of Oxford as it was of Harvard. (p. 158).

Furness had also been an observer at the trial of Lt.-General Homma Masaharu in Manila, 1945.

3 Proceedings, p. 14.

4 Proceedings, p. 15. Emphasis added.

5 Ibid.

6 Proceedings, p. 31.

7 Proceedings, p. 31. Emphasis added.

8 Proceedings, p. 31.

9 Proceedings, p. 32. Emphasis added.

10 Proceedings, p. 96, exhibit 32, extracts of trial of Sawada Eito.

11 Ibid.

12 This would explain why Okawachi and his subordinate commanders in the Philippines had not been indicted.

FOOTNOTES

13 Proceedings, cross-examination of Okawachi, p. 267.

14 Proceedings, p. 282.

15 Proceedings, exhibit 168, p. 261.

16 Proceedings, exhibit 167, p. 260.

17 Proceedings, p. 287.

18 Proceedings, pp. 288-9.

19 Proceedings, p. 295.

20 Proceedings, pp. 307-8.

21 Proceedings, p. 316.

22 Proceedings, p. 1079.

23 Proceedings, p. 1083.

24 Proceedings, p. 1083.

25 Proceedings, p. 1116.

26 Proceedings, p. 1116.

27 Proceedings, p. 1116.

28 Proceedings, pp. 1116-7.

29 Proceedings, p. 1119.

30 Trial of General Yamashita, Proceedings, p. 4061.

31 Proceedings, p. 1124.

32 Proceedings, p. 1129.

33 Proceedings, p. 1130.

34 Proceedings, p. 1131.

35 Proceedings, p. 1131.

36 Quoted, Proceedings, p. 1160.

FOOTNOTES

37 Quoted, Proceedings, p. 1160.

38 Quoted, Proceedings, p. 1161.

39 These are discussed in chapter on IMTFE and Nuremberg, quoted Record -Toyoda, Proceedings, pp. 1163-5.

40 Proceedings, p. 1166.

41 Proceedings, p. 1174.

42 Proceedings, p. 1174.

43 Read into evidence, Proceedings, p. 1195.

44 Affidavit, p. 1, in evidence, Proceedings, p. 1200.

45 Exhibit L, p. 3, read into evidence, Proceedings, p.1241.

46 Ibid.

47 Quoted, Proceedings, p. 1385.

48 As far as the Navy was concerned, Manila had little strategic value by February 1945, Arima stated. By mid-December, the enemy had landed on Mindoro and Manila had become subject to more frequent bombing, so that the Southwestern Area Fleet had transferred its remaining vessels to Indo-China, but did not attempt to fortify the city to protect the remaining supplies as the soil was not suitable for this purpose. The defence of Manila until the end had no tactical significance for (what remained of) the Navy, claimed Arima.

49 Defence exhibit O, p. 4, Proceedings, p. 1470.

50 Proceedings, p. 1507.

51 In an interesting testimonial on the divided and fragmented command system prevailing in the Japanese armed forces, Lieutenant-Commander Kayashima Koichi, staff officer of the 31st Special Naval Base Unit who assisted the senior staff officer (Captain Itagaki Takashi) with operational matters, stated that the Army Manila Defence Forces, renamed the Kobayashi Heidan, left Manila and withdrew to the defensive positions in the eastern hills. The Noguchi Butai which it left behind was, at the request of Rear-Admiral Iwabuchi, made subject to his 'limited command' - Kusho - command for land operations only. Iwabuchi had no powers of military administration (discipline) over the Noguchi Butai; such powers resided in Lieutenant-Colonel Hashimoto Yutake, a staff officer of the Kobayashi Heidan who remained in Manila. (Proceedings, pp. 1502-3).

FOOTNOTES

52 Staff officers Ishikawa and Kobayashi, of the 14th Area Army headquarters and assigned to the Shimbu Shudan for operational matters, designed the counter-attack to release Iwabuchi's troops as follows:

> from the northern area, the Kawashima Army Corps would dispatch two battalions to attack the rear enemy encircling Manila; and from the east, the Kobayashi Army Corps would dispatch two battalions to attack the enemy encircling Manila from the rear; and from the South a certain amount of forces were dispatched...to attack the enemy from the rear. These attacks were to be made during the night of the 16th, and simultaneously the naval units within the City of Manila would commence their counter-attack to break the encirclement of the enemy. (Proceedings, p. 1510). See Appendix.

53 Kusumi told the Tribunal that,

> when the battle situation was favourable, we had comparitively adequate communication facilities. However, with the deterioration of the situation, there occurred a shortage of communication facilities and, in inverse proportion, the number of communications increased. Therefore, all communications were necessarily limited to the important operational matters. The deterioration was most marked after we moved from Manila to Baguio. (Proceedings, p. 2233).

The effective range of the radio communication from Baguio, Kusumi estimated, was no more than several hundred miles' radius, limited by the weakness of the wireless transmitters and by time. Compounding this problem, was a lack of radio receivers and the difficulty of locating them in safe positions. The necessary coding required, and the peculiarities of the Japanese language often meant

> if there were any portion of that message which the receiver could not understand, the receiver had to repeatedly check back. Therefore, in the case of long messages, quite frequently it took half a day to a day to understand the whole message completely. (Proceedings, p. 2236).

Often messages had also to be repeated over and over to assure their arrival at the correct destination, Kusumi added.

> I worked hard to see that he (Okawachi) would feel that communication could be maintained between Manila and Baguio. However, the actual condition was not as rosy as he thought. It was very poor. (Proceedings, p. 2247).

FOOTNOTES

54 Defence exhibit EA, read into evidence, Proceedings, p. 4058; pp. 34-35 of affidavit.

55 Ibid., p. 36 of affidavit.

56 Ibid., p. 41 of affidavit.

57 Ibid.

58 Ibid., p. 41 of affidavit.

59 Ibid., p. 77 of affidavit.

60 Ibid., p. 77 of affidavit.

61 See Appendix.

62 Ibid., p. 76 of affidavit.

63 Proceedings, p. 4437.

64 US v HONDA Miroji, Vol. 1, Staff Judge Advocate, 18 June 1946, 8th Army.
US v YAJIMA Shichisaburo (Major) Vol. 2, Staff Judge Advocate, December 1947, 8th Army (Case Docket 66).
US v FUJISHIGE Masatoshi (Colonel) Vol. 1, Staff Judge Advicate, 2 April 1946.
US v KONO Takeshi, Vol. 1, Staff Judge Advocate, 14 June 1946, 8th Army.
US v TOYAMA Minoro (Captain) Vol. 3, Staff Judge Advocate, 3 May 1947.
US v TOHEI Takeshi (Major) Vol. 1, Staff Judge Advocate, 23 March 1946.
References given as they appear in Proceedings.

65 Proceedings, p. 4202.

66 Proceedings, p. 4637.

67 Proceedings, p. 4638.

68 Proceedings, pp. 4640-1.

69 Proceedings, p. 4704.

70 Proceedings, p. 5000.

71 Proceedings, p. 5000.

72 Proceedings, p. 5002.

73 Proceedings, p. 5005.

74 Proceedings, p. 5005.

FOOTNOTES

75 Proceedings, p. 5006.

76 Proceedings, p. 5006.

77 Proceedings, p. 5006.

78 Naval General Staff Directives, No. 38, 3 Jan. 1942, No. 189, 13 Jan. 1943.
No. 38 was the result of the headquarters agreement: for the defence of the Philippines the Navy would be responsible for all sea areas, its own shore installations and its air bases, and the Army would be responsible for all other areas and installations.
No. 189 directed that the Navy assume defence responsibility for specified areas, not including the Philippines. The order further directed that for defensive operations the commanders-in-chief of the Southern Army, the Combined Fleet, the 14th Area Army and the Southwest Area Fleet would conclude agreements for the purpose. Such agreements were concluded by summer 1944 and the principle established among the commanders that naval land forces would be under Army command when engaged in land combat. (See Proceedings, p. 5011).

79 Proceedings, p. 5012.

80 Proceedings, p. 5013.

81 Proceedings, p. 5015.

82 Proceedings, p. 5018.

83 Proceedings, p. 5019.

84 Proceedings, pp. 5020-1.

CHAPTER 9

PATTERNS OF PRECEDENT : THE AUSTRALIAN TRIALS

The Yamashita case established a principle whereby a military commander could be judicially tried for offences committed in contravention of the law of war. The Yamashita case was not only unprecedented in this respect, but, perhaps even more notably, because it invoked a new principle of law - command responsibility through negative criminality - which meant that commanders could be held vicariously liable for the criminal actions of their subordinate leaders and troops without proof of their personal complicity or the issuance of orders. Clearly, such a principle of law was of considerable utility in the prosecution of enemy war criminals, and hence the Yamashita case was viewed as the paradigm for later trials. The shadow it cast extended beyond those trials of Japanese war criminals tried by the United States in the wake of the Yamashita trial; it enveloped trials held at Nuremberg, the IMTFE, the trials at Yokohama and trials held throughout the Pacific by all Allied prosecuting agencies.

In this context it is interesting and useful to see how the Yamashita precedent was conceptualised and applied both by these prosecuting agencies and the courts inaugurated to exercise the war crimes jurisdiction. The Australian trials offer valuable insight within this framework, significant also since Australia, next to the United States, was responsible for prosecuting more Japanese war criminals than the other prosecuting nations. The decision to include material on

the Australian reaction to the principle of command responsibility represented by the Yamashita decision, and its practice in the trials of the senior Japanese officers was reinforced by the availability of access to original governmental source material underpinning the prosecutions and trial proceedings.

What distinguished the Australian trials from those conducted elsewhere was the peculiarly Australian approach to the practice of the principle of command responsibility. Australian authorities and military courts accepted the principle as expounded in the Yamashita judgment as lex lata, yet the criteria for the assessment of guilt were far from being established, and this led to an inconsistency of verdicts reflective of such a paradox. In addition, the conduct of Australian prosecutions bore evidence of the influence of certain individuals, notably Sir William Webb, the President of the IMTFE, who apparently advised on policy even after accepting this appointment. Stress was placed on the necessity for suitably qualified prosecutors 'fully cognisant' with the laws of war and their recent development, but no such concern was expressed for the experience of defence counsel. The Australian reliance, and indeed, emphasis on documentary evidence and the mutually reinforcing nature of the trials with the other factors, set them apart from the American trials and permit of closer examination through the policy documents and the opinions of the trial Judge Advocates such as has not been possible with the other trials.

That framework of foreign policy approach which dictated the necessity for the trial of alleged Japanese war criminals

was, for Australia, quite different from that of her ally, the United States. In the terminology of Camilleri, it was the 'psychology of threat perception' which governed the Australian response to the external world. [1] Whilst this force was one that had been a shaping factor of Australian foreign policy since Federation, it reached new heights of emotionalism in the period following in the shadow of World War II. Freedom from fear, particularly the fear of aggression, or the problem of security, was to be the primary problem of the post-war world, at least in Oceania, as Evatt had forecast. [2]

Professor Macmahon Ball summarised the psychological shock with which Australia was confronted in World War II. He noted that in terms of material damage and human deprivation, Australia suffered lightly in comparison to many other nations,

> Yet the way a people feel and think about a war does not depend on these comparisons, but on the comparison with their own past. The Japanese drive south made Australians, for the first time in their history, think of war not as an expedition in which their soldiers might fight and die ten thousand miles away but as something that immediately threatened the invasion and occupation of their own country. The bombers over Darwin, the submarines in Sydney Harbour had a psychological effect out of all proportion to the damage and suffering they produced. [3]

Exacerbating this shock was the realisation that Britain could no longer be depended on to guarantee Australian security; the capture of Singapore by the 'Tiger of Malaya', General Yamashita, had painfully highlighted this.

Consequently, Australian policy was predicated on an acute awareness of her vulnerability; on an often highly

exaggerated sense of insecurity. This was a significant reason, but not the only one, for the different reaction of Australia and the United States to the war-time experience they received at the hands of the Japanese.

Coupled with this factor, was the size of the nation. Numerically, Australia not being large meant that individuals could attest to the brutality and inhumanity of the Japanese with reference to their immediate circle of friends; many people had lost friends and relations in the Asian theatre of war, and many others had returned home in an emaciated state. Viewed in this context then, as Menzies says,

> it is simple to understand that the instinctive reaction of Australia...is 'Keep them Down! Don't let them re-arm! Don't trust them!' It is true that history proves that such reactions are ephemeral and sometimes dangerous. But we are not living in a world of historians; we are living in a world of men and women, of widowed wives and bereaved mothers; a world tenaciously attached to a justice which precedes mercy, though it may be tempered by it. 4

The Australian Government therefore, was forced to approach the problem of Japan and its concomitant, the problem of Japanese suspected war criminals, in the light of the war-time experience of Japanese brutality and the threat caused to Australia, especially given the climate of public opinion which was essentially hostile to Japan.

These circumstances caused Australia to adopt definite views as to how Japan (through the Allied occupation) should best be handled. Democratisation and demilitarisation, with the goal of rendering Japan incapable of threatening her Pacific neighbours, were the major tenets of the Australian position. In order to assure Australian security, as a

complement to her Japan policy Dr. Evatt, the Foreign Minister, made a quest to develop a Pacific defensive alliance; this was a strategy of forward defence or containment through alliance, which evolved from an acceptance of the thesis of imminent threat.

The trial of alleged war criminals was necessary because Australian policies with regard to Japan were intended to stress the virtues of democracy, and to demonstrate that warmongering and aggression did not pay. (This was in turn related to the supposed ideological basis on which the war was fought; the forces of goodness triumphed over the forces of evil and immorality). The forum of the trial, itself a major feature (and pride) of the democratic system was thought to have the suitable powers of persuasion, whilst at the same time vindicating the Allies' righteousness of conduct and their generosity in granting to the vanquished criminals the right of defence. *

Secondly, Australia had participated in the United Nations War Crimes Commission since its inception (in 1943) and thereby subscribed to the theory that the war crimes of the enemy should be punishable. In view of her need for British and American approval and support, it was most unlikely that Australia would choose not to prosecute.

Finally, given the Australian experience in the war, and the public hatred of the Japanese which had been incited, and which showed no signs of abatement, the Government would have had to answer to the public had it chosen not to conduct the

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* Whilst their guilt was not established, they were considered to be surrendered enemy personnel or suspected war criminals. Official documents generally stressed this but general Army correspondence often did not.

trials. But, as Roosevelt is attributed as saying, 'All our thinking about foreign policy is conditioned by the fact that millions of American boys died fighting.' Effectively this meant that the Australian Government had little choice but to prosecute suspected Japanese for alleged war crimes, and to declare that immunity from prosecution was reserved for no one. Initial Australian policy, therefore, was to require the prosecution of all suspected Japanese war criminals, Emperor Hirohito being included within the ambit of this dictum.

The jurisdiction of the Australian Military Courts established to try suspected Japanese war criminals was based on the Commonwealth of Australia War Crimes Act, 1945, which became operational upon receiving the Royal Assent on 11th October of that year. There is considerable similarity between this Act and the regulations promulgated by the British Royal Warrant (14 June 1945) to govern trials of suspects in their hands, although the former is distinguished by its having been enacted by Act of Parliament.

Pursuant to section 14 of the Act, which empowered the Governor-General to prescribe rules for the exercise of the Act's provisions, the Regulations for the Trial of War Criminals were promulgated on 25 October 1945 (Statutory Rules, 1945, No. 164) and amended on 20 February 1946 (Statutory Rules, 1946, No. 30).

The definition of what constituted 'war crime' within the context of the Act was set out in Paragraph 3, which stated that 'unless the contrary intention appear(ed)', a war crime meant,

(a) a violation of the laws and usages of war; or
(b) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, One thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations (being Statutory Rules 1941, No. 35 as amended by Statutory Rules 1941, Nos. 74 and 114, and Statutory Rules 1942, No. 273) committed in any place whatsoever, whether within or beyond Australia, during any war. *

The instrument of appointment of the Board of Inquiry referred to was that document which provided for the investigation of war crimes committed by the enemy, and contains within it an enumeration of some thirty-five acts which for the purposes of the inquiry were included in the definition of a war crime. [5]

A perusal of the items listed [6] will reveal the broad scope of the crimes considered to be war crimes by the Australian authorites. The first section, for example, in words identical to the language used in the Charter of the Nuremberg Tribunal, (Article 6 (a)) lists crimes against peace, so that crimes against peace are placed within the scope of the term 'war crime' in the Australian parlance, as defined by the Act. However, crimes against humanity as articulated by Article 6 (c) of the Nuremberg Charter are not included within the definition of a war crime except where crimes against humanity are simultaneously also violations of the laws and customs of war.

The dichotomy as it appears in the Act is to some extent false; the crimes listed in points two to thirty-five of the instrument of appointment are violations of the laws and customs of war, according to the Law Reports of the Trials of

* Section 3 further says 'any war' means any war in which His Majesty has been engaged since September 2nd, 1939.

War Criminals, and so come under both parts of the definition. [7]

Interestingly, the listing of war crimes which appears in the instrument of appointment is drawn substantially from that contained within the 1919 Commission into the Responsibilities of the Authors of the War, a part of the Paris Peace Conference. This is not to suggest that the two lists are identical, though. Item 14 of the Australian list adds to section 13 of the Paris list the words 'and wholesale looting' to that of pillage. Item 30 of the Australian list clearly envisaged that its object would be the Japanese when it included the following examples to section 29 of the Paris list dealing with offences in the treatment of prisoners of war:

> (a) transportation of prisoners of war under improper conditions;
> (b) public exhibition or ridicule of prisoners of war; and
> (c) failure to provide prisoners of war or internees with proper medical care, food, or quarters.

Cannibalism and mutilation of the dead were also new items to be added to the Australian list (numbers thirty-four and thirty-five).

Questions as to the ex post facto nature of the Nuremberg Charter aside, the question still remains that if cannibalism and the mutilation of the dead were new charges (i.e. they had not been previously defined as such in the recognised treaties and sources of international law) then could it reasonably be expected that the Japanese against whom the Act was primarily directed, should have recognised that they were committing a crime? Here it is important to make the

distinction that whilst the Japanese may have realised that cannibalism per se or the mutilation of the dead were morally wrong, were they aware that such actions would now render them criminally liable under the law governing Australian trials?

Irrespective of the doubts expressed above, the definition of a war crime as practised by the Australian courts was both wider than that employed by the British, and at the same time rather novel and unusual in including items of domestic legislation within its scope.

Having stated in the preamble the necessity for making provision for the trial and punishment of violations of the law and usages of war committed by the enemy, in Section 7 the Act states the persons over whom the military courts (convened under the Act) had jurisdiction. Courts were given the power to try all persons charged with war crimes against persons who had at some time been a resident of Australia, irrespective of where the crimes had been perpetrated, and subject to the discretion of the Governor-General; the courts were thereby free to sit at any place whatsoever to hear cases brought before them. This power was extended by Section 12, which gave the military courts the power to try suspected war criminals for crimes against British subjects or citizens of a third power allied with His Majesty in the war, in a similar manner to that envisaged above.

The powers granted to the courts by these sections however, do not include the granting of jurisdictory power over nationals of neutral states (or the enemy nationals) such as in crimes committed against a civilian population, since the

definition given by the statute for a war crime specifically only refers to crimes committed against Australian residents (of citizens) and British and Allied nationals.

Section 5 (1) enabled the Governor-General to both convene military courts for the purpose of trying persons charged with war crimes, and to appoint officers to constitute the courts. These powers could be delegated by the Governor-General to other officers under Section 6.

The military courts established under the list were, Regulation 8 of the accompanying rules stipulated, to be composed of not less than two officers in addition to the President. Where the Accused was a naval or air force member, the Convening Authority was instructed to provide, if possible, a court member from the appropriate service. Where the Accused was an officer of his branch of service, it was desired that the members of the court appointed by the Convening Authority be equal to him or superior in rank. Whilst every effort was made to provide as many officers suitable in this situation for such trials, the Regulation recognised that this may not always be practicable, and so absolved the Convening Authority from a strict obligation to adhere to the clause.

With the addition of Regulation 8A in the 1946 amendment, officers could be drawn from any of the branches of service of the United Kingdom military, or from the sources of the Allies.

Regulation 10 stipulates that counsel may appear before the court on behalf of the prosecutor and the accused as if the court was a general court-martial. Augmenting the persons

accepted as being qualified to act as counsel before a court-martial, the regulation provided that persons qualified to appear before the courts of the accused's nation and those people approved by the Convening Officer shall be deemed as properly qualified to conduct the defence.

In contrast to American trials of war criminals, the role of the Judge Advocate, appointed to individual courts under Regulation 5, involved reviewing the evidence presented before the court and in advising court members on aspects of substantive and procedural law. Impartiality was required. Judge Advocates similarly had no voting powers within the court. Although it was the court members who made the decision on the guilt or innocence of the accused, and on the sentence to be awarded, there was no necessity for them to accept the Advocate's advice, although in practice it seems that his advice carried considerable influence. The summations of cases by the Judge Advocate therefore offers some insight into the way in which the courts utilised the law binding them, and particularly, how principles or concepts such as the Yamashita precedent on command responsibility were viewed and adopted.

Possibly the most contentious aspect of the War Crimes Act and its Regulations was Section 9, which dealt with the evidence to be admissible in the military courts trying war crimes. It provided that,

> (1) At any hearing before a military court the court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge notwithstanding that the state-

> ment or document would not be admissible in evidence before a field general court-martial.

In other words, documentary and affidavit evidence was made freely admissible as long as it appeared authentic, (no guarantee having to be given), and had probative value in the eyes of the court. Remembering that the cases which potentially could be brought before Australian military courts included a significant proportion of capital cases, this section assumes a critical significance. It was in such cases where the accused was on trial for his life, that the infraction of the right of the accused to see and cross-examine the evidence brought against him was so acute; it was possible for the courts to convict on evidence that the accused could not seriously challenge or refute. This situation, of course, is rendered even more unsavoury when it is recalled that Japanese defended Japanese in a military court system with which they were unfamiliar, which was being conducted not in their native tongue but only being relayed in translation to them, and in which our adversary system of law placed them up against Kings Counsel and other equally experienced prosecutors. The potential for a miscarriage of justice was even more real here than in the Yamashita case. [8]

Section 9 (2) is even more pernicious. It stated that

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

Regulation 12 expands upon the Act, stipulating that

> In any such case all or any members of any such unit or group may be charged and tried jointly in respect of any such war crime and no application by any of them to be tried separately shall be allowed by the Court.

This section and its supporting regulation had the effect of transposing the burden of proof from the Crown to the accused; instead of being considered innocent until proven guilty, the accused was guilty until he could prove his innocence to the satisfaction of the court. In addition, it is easy to foresee a situation where, in order to stress his own innocence, one accused gave evidence incriminating another co-defendant. This would hardly be conducive to that impartial and fair administration of justice upon which British/Australian law prided itself. Thus, one of the principal tenets of British justice had quietly been dispensed with for the purposes of trying Japanese war criminals (or suspected war criminals). Furthermore, a substantial body of jurists and legal writers have attested to the quality of British justice permissible under this provision; the conspiracy principle in British/Australian law, according to them, and upon which this section rests, is of very little legal strength.

George Dickinson, the legal adviser to the Japanese defence team at Manus in 1950-51, quite outspoken in his criticism of the War Crimes Act and Regulations, made these comments on the evidentiary section:

> Proof of a combination (was) necessary before such evidence (could) be given in Australian courts, and the patent unfairness of Section 9 (2) was overcome by the Defence at Manus adopting the expedient of seeking separate trials on the ground that co-accused were unwilling to give evidence for the applicant for a separate trial. 9

No right of appeal within the usual meaning of the same, could be held to have existed under the War Crimes Act and Regulations; there were no appeals in the Yamashita-type sense to the High Court of Australia challenging the validity of the law or the proceedings. The accused was granted the liberty of filing within fourteen days of the termination of the proceedings against him, a petition to the confirming officer (all findings of guilt and sentences had to be confirmed by superior authority). This right, granted by virtue of Regulation 17, only assumed validity if the accused signified his intention of submitting a petition to the confirming officer within forty-eight hours of the conclusion of the court proceedings. Any petition so submitted, which was directed against the finding was required to be referred to the Judge Advocate General (or his deputy) in Army Headquarters, Melbourne for his advice and report.

These sections were augmented by Regulations 9, dictating that

> The accused shall not be entitled to object to the President or any member of the Court or the Judge Advocate or to offer any plea in bar or any special plea to the jurisdiction of the Court.

In layman's language, what this meant was that the accused was unable to question the composition of the court in relation to its members impartiality; the regulation did not prevent an officer with previous investigatory experience in the same subject area as that for which the court was assembled from being appointed to that particular court. The most obvious case in point here, was the appointment of Sir William Webb, who had made three reports on Japanese atrocities for

the Australian Government (on the basis of his investigations as a Commissioner on the Board of Inquiry), as the President of the International Military Tribunal for the Far East.

A plea in bar is any plea which seeks to bar the action of the plaintiff, to defeat it absolutely or entirely. In this context a plea in bar could have, for example, challenged the validity of the trial legally or procedurally, (such as in the appeals made to superior courts in the Yamashita case). However, all such pleas were denied to the accused. Most importantly, this meant that the accused was not entitled to enter a plea against the court hearing the case on the grounds that he had previously been tried (and convicted or acquitted) on the same facts. This led to Japanese suspected war criminals standing trial more than once, thereby wasting time and money.

One example of the follies that could occur under this regulation was the case of General Yamawaki Masastake, tried on a charge of murder, at Manus in November 1950. Yamawaki had convened a military court (gunritsu kaigi) for the trial of two alleged Australian spies; the verdict it handed down was one of guilty and they were sentenced to death. The finding was forwarded to the War Ministry in Tokyo, which confirmed the sentence whereupon Yamawaki ordered the execution of the men. Yamawaki and the members of the Japanese court (including the prosecutor) were charged with murder. However, the Australian military court acquitted Yamawaki and the other co-defendants on the grounds that the prosecution had failed to disclose any offence known to the laws of war or to the War Crimes Act. Had a plea in bar been permissible,

the action could have been dismissed before being brought to court, preventing a waste of resources, of some significance given the shortage of manpower, finance and administrative machinery that characterised the Australian approach to the prosecution of war criminals.

Whilst the above was only an inconvenience as far as the accused was concerned, the interpretation given to the regulation by the courts (at least at Manus) was more serious. According to Dickinson, the courts gave the regulation a wide construction by interpreting 'shall not be entitled' as 'shall not be entitled as of right' [10] The difference is a real one. To quote Black's Legal Dictionary,

> The term 'right' in a civil society, is defined to mean that which a man is entitled to have, or to do, or to receive from others within the limits prescribed by law. [11]

The correct construction, therefore, would be to argue that whilst individuals under normal societal conditions would be able to exercise the right to enter such pleas and objections as outlined in the regulation, the regulation proscribed this right for the legal actions held pursuant to the act. In other words, the only people who were affected by the temporary loss of right were those brought before military courts convened under the War Crimes Act to answer charges of war crimes. To accept the alternate, that the accused was not entitled as of right to the exercise of the aforementioned functions, is to intimate that under no circumstances did he possess that power; that the right did not exist. This was simply not the case. Since the rights in question were secondary rights, rights of a judicial nature

designed to protect the primary rights of the individual (in this case the right to an impartial trial), the potential for a miscarriage of justice could arguably be said to have been heightened by such an interpretation.

To summarise, the situation that confronted a Japanese accused before an Australian military court was one in which a novel definition of the notion of a war crime was utilised and which may have been ex post facto in nature. He was denied the right to object to the composition or jurisdiction of the court assembled to try him; nor could he challenge the validity of the law or proceedings employed against him. He could not enter a plea in bar on the grounds of a past trial on the same facts, or object to the evidence introduced against him even though documentary and affidavit evidence prevented his right of cross-examination, and thereby compromised his right of defence. The major fault of the Act and Regulations governing his trial was, of course, the fact that normal rights of liturgy were dropped, and that the accused was forced to rely on the scruples and mercy of the individual courts and court members for the dispensation of a fair justice. This gave the courts much room to manoeuvre, and greater scope for a miscarriage of justice to occur. Those Japanese brought to answer for alleged war crimes, and tried before Australian military courts were, like their contemporary, General Yamashita, exposed to the worst aspects of British justice and the adversarial system of law, and consequently, it is little wonder if they failed to be suitably impressed by its merits, contrary to the wishes of the Allies. Indeed, some Japanese were even shrewd enough to perceive the

realities behind the judicial veneer.[12]

Although one is tempted to conclude that the architects of the War Crimes Act had little faith in the law, an alternative thesis, more plausible in the light of subsequent experience, is that the Act was a reflection of the strength of the cases against the Japanese. In all probability, the standards of proof normally required in law would have been too demanding for the war crimes cases to have been proven beyond reasonable doubt. Such a judgment is reinforced by the type of suspects held within Australian custody.[13]

The strongest evidence to support this contention is a letter entitled, 'Trials of War Criminals: Confirmation of Death Sentences', dated 8 January 1946, and addressed to Mr. Forde, the Minister of the Army.

> Apparently, Mr. Sinclair ((Sec. Dept. of Army) the letter says) thinks we owe the same duty to the Japanese guilty of war crimes as we do to our own soldiers guilty of breaches of military discipline. I respectfully suggest that is a wholly erroneous view. It is certainly contrary to international law, which merely requires a fair trial for enemies charged with breaches of the rules of warfare.

The respondent then goes on to point out that those who violate the laws of warfare are in a position the same as that of pirates and brigands (i.e., unprivileged belligerents) and that courts have always had the jurisdiction to try the same irrespective of the time and location where the offences were committed. The writer cites a military reference to substantiate his view, and then continues,

> One of my purposes in visiting England last year was to satisfy the British Government that the rules of evidence did not apply to the trials of war criminals and that even the onus of proof was shifted to them in certain circumstances. Unless I could show this,

> our prospects of convicting many Japanese offenders would have been very remote. However, I succeeded in convincing the Lord Chancellor and others...that international law was such that our military courts could be and should be instructed that the rules of evidence did not apply and that the onus of proof shifted to the Defence where the Accused was shown to have been a member of a unit which committed an atrocity or breach of the rules of warfare. These two principles were subsequently put into the English Instructions to Military Courts and were expressly embodied in our War Crimes Act.

The writer then dismisses any accusation that the normal safeguards adopted to ensure that members of society are not sentenced to death under military law without full and just cause, had been 'swept aside' in the case of the Japanese. He claims that the law being applied by Australian military courts is international law and that it does not prescribe such precautions.

> Surely it is sufficient if we carry out international law to the full extent without endeavouring to improve it for the benefit of enemies like the Japanese. 14

The writer of that letter was Sir William Flood Webb. Clearly, Webb played a decisive role in the whole question of Japanese war crimes. He was appointed to head the Board of Inquiry investigating Japanese atrocities in New Guinea and South East Asia, and he produced three reports (the so-called 'Webb Report') for the government on the basis of those investigations. In his capacity as an expert on both law and Japanese wartime criminality, Webb was called upon to advise the Australian Army prosecuting authorities and governmental ministers on practical and policy aspects of the prosecution of suspected Japanese war criminals.

I would not want to suggest, however, that the Government was unanimous in its initial adoption of Webb's advice; some

members expressed reservations about the implications of the policy and procedure on the principles of British justice. The Minister for Post-war Reconstruction, for example, raised a detailed query for the attention of the Attorney-General regarding the constitutional validity of Section 5 of the War Crimes Act (the powers of the Governor-General) vide Sections 71 and 72 of the Commonweath of Australia Constitution. The Minister was particularly concerned over the inconsistency of the evidentiary provisions of the Act (Section 9) with the law of evidence in force in the States of the Commonwealth, as well as the effects of the inability to enter a plea in bar. He cited one case where a Japanese found not guilty of murder in one court was tried several days later by another court, which found him guilty and sentenced him to death. He also asked what qualifications the Presidents and members of the various courts had, and whether enquiries had been made to ascertain their experience before appointment. The Minister's final point was a suggestion that all executions could profit from being stayed pending a full inquiry. [15] The Minute Paper produced by the Army Adjutant-General for the guidance of the Attorney-General in formulating his reply to the Minister for Post-war Reconstruction basically recapitulated the approach recommended by Sir William Webb, and urged that no action be taken upon the questions raised therein. [16] This recommendation, along with the Department of the Army's inability to provide copies of trial proceedings or information on the accused Japanese or the facts upon which the charges were based, to the Department of Information effectively precluded any informed discussion

from occurring relative to the law and justice being administered, and hence, any substantial challenges from being made. [17]

In common with the Yamashita case then, 'it would', as Dickinson bitterly remarked,

> appear that Australian War Crimes Courts were established with the apparent intention of depriving an accused person of the safeguards recognised by reasonable men and eminent lawyers as the basis of a fair trial in the Western World. [18]

This was in line, however, with the concern of Australian officialdom for the appearance rather than the reality of justice; here, without access to informed sources, it appeared that justice was being done. That the Japanese were getting what they deserved. (Quite obviously, justice was popularly equated with punishment, guilt being presumed). Locked into the conceptual outlook was that characteristic Australian ethnocentrism, which served to reinforce the dichotomy between appearance and reality. The Japanese, inferior in morality, behaviour and development were being treated very generously in being given the opportunity to make a defence, so the argument ran, but no one questioned the morality of those who granted a judicial hearing on one hand and then took most of it away again with the other hand, through the operation of the War Crimes Act and Regulations. [19]

The Australian Government was bound to respond to social pressure for the punishment of Japanese war criminals; it was partly responsible for inciting such attitudes to stimulate the war effort, and later its response occurred within the limits set by public opinion. Social pressure upon the Government, coupled with considerations of inter-

national power politics led the Australian Government to exert political pressure towards the achievement of judgments politically acceptable. This was most noticeable in Evatt's pronouncements on Japanese guilt and in connection with Webb's appointment to the IMTFE. [20]

Evatt, in his statement of 10 September 1945, upon the Webb Report, stated that if those Japanese responsible for the commission of atrocities were allowed to escape punishment, it would be the 'grossest defeat of justice' and 'a travesty of principles' for which the Allies had fought the war. He went on,

> I emphasise most of all that the war crimes committed by Japanese forces in the field, while utterly wicked on the part of the actual perpetrators, are also part of a system of terrorism in which all Japanese troops and commanders participated. It is our duty to see that those who organised the system are punished... Those at the top are, in our view, at least equally guilty with the actual perpetrators on the spot. [21]

This left little room for doubt as to the direction in which the Australian Government desired the trials held under its auspices, should go. The burden for the administration of justice therefore, was carried by the officers and lawyers involved in the trials; on their shoulders rested the implementation of the War Crimes Act and Regulations, and they had the power and the ability to prevent miscarriages of justice from occurring as a result of the disregard for evidentiary and procedural safeguards enshrined in the Act.

The question then becomes one of ascertaining how the Act affected the prosecution of the suspected Japanese war criminals; how it worked in practice. The shift in locus also involves an investigation and evaluation of the law employed;

whether the command responsibility precedent set by the Yamashita trial was adopted, how it was utilised by the Australian courts, and what results it elicited are considered.

During the period 1945-1947, the Australian Army through its war crimes units, conducted trials at Darwin, Rabaul, Morotai and in cooperation with the British South East Asia command at Singapore, and in conjunction with the Occupation authorities in Japan. Australian policy with regard to the prosecution of war criminals during this period exempted no one, and labouring under language and identification problems, those responsible for the apprehension of the Japanese, adopted the expedient of arresting suspects en masse. This led to a situation where there were, for example, 151 prisoners held by Australia with the name Chin, 144 with the name of Ko, and not surprisingly 14 with the name of Yamashita. [22] A significant percentage of these had been interned due to physical or name similarity with suspects, and yet all had to be thoroughly and properly interrogated by Australian Military Force authorities, before it could be decided whether to release or whether to indict them. [23] This was a procedure that was slow and painstaking, as well as being expensive both in cash and man-power terms, but Australian Army Headquarters counselled fastidiousness and excellence in view of the desire that 'no stone be left unturned in bringing all Japanese war criminals to justice,' and as was appropriate for the role as a major power which Australia was hoping to create for herself. [24]

A corollary of the policy to leave no stone unturned meant that the authorities spent a considerable time in

investigating and preparing cases against people that at best could be described as trivial. Australian policy makers failed to appreciate the immensity of the task they had assigned the country, particularly given the man-power and financial limitations with which Australia was faced, and that with the progress of time (for which they also did not account) that the purpose and message intended to be conveyed by such trials would become counter-productive. [25] Hence, a certain reappraisal was of necessity dictated.

Review of the prosecution of war criminals was a reasonably continuous process throughout the duration of the trials held by Australia. Initially the emphasis was on the structural aspect of the trials, an evaluation of the way in which the procedural system of prosecution was working, but it was not long before the policy pursued by Australia in this context, became the subject of scrutiny.

The first major procedural problem encountered in the prosecution of war criminals centred around the question of to what officers the powers of delegation should be given, i.e., the power to convene military courts and to confirm or mitigate sentences and suspend execution. The commander-in-chief of the Australian Military Forces took the view, in a proposal made by him on 1 October 1945 for the consideration of the War Cabinet, that the general officers commanding the 3rd, 7th, 9th and 11th Australian Divisions, the Deputy Adjutant and Quartermaster General of Advanced Headquarters (Morotai), the Chief of Staff of Advanced Headquarters, the general officer commanding the 1st Australian Army, the Deputy Adjutant General (Personal (sic) Services) of Army Head-

quarters, the Australian Adjutant General and himself should be given the delegation of full powers. This was necessary, he urged, in order to avoid excessive delays in the execution of justice, and since those powers were already held by the officers named in relation to courts-martial, he was of the opinion that there was no substantial reason for them not to have it for war crimes jurisdiction. [26]

The Minister for the Army, Mr. Forde, made a submission before the War Cabinet, outlining the Army recommendation and the views of the Commander-in-Chief on the delegation of powers and the action that he had taken regarding it. He read before the meeting, the advice which the Acting Attorney-General (A.A.G.) had provided him,

> The matter has been considered by the A.A.G., and I am directed to inform you that, in his view, the powers of mitigation, remission and the computation of punishments imposed by military courts under the War Crimes Act, and the power of suspension of execution or currency of any sentence imposed by any such court, if delegated at all, should be delegated only to the C-in-C of the A.M.F. [27]

Further, officers holding a delegation to convene military courts should have also a delegation to confirm the findings of these courts, the letter said, but more extensive powers were not recommended. The War Cabinet thereby accepted the advice of the Attorney General's Department and declined to approve the delegation of full powers. Whilst the exact motive for the attitude of the Attorney General remains obscure, it is reasonably certain that the desire to retain strong central control over the sentencing of the convicted war criminals was behind it. It was only in this manner that the implementation of policy could be safeguarded.

The Executive Council subsequently approved a more limited delegation of powers under the Act to the same officers outlined above, and also to the general officer commanding the 6th Australian Division at Wewak. This gave these men the power to convene military courts, and to confirm the finding, or the finding and sentence, and to send back the finding or finding and sentence, to the court for revision. Only the Commander-in-Chief of the Australian Military Forces was granted the power to mitigate, remit or commute sentences, and the power to suspend execution or the currency of a sentence. [28]

Pursuant to the granting of the delegated powers to the commanders of the units aforementioned, the Commander-in-Chief of the AMF issued a communication on the 18 December 1945, which instructed the officers that

> A sentence of death when confirmed will not repeat not be carried out until further order as policy in this regard is subject to reconsideration. 29

This was most likely the reason why full powers were not delegated originally, although the communication does not spell out whether the Government was re-assessing the execution of the death penalty, or some other procedural aspect governed by policy considerations. However, a later message from Mr. Castieau, the Assistant Secretary of the Attorney-General's Department to the Acting Secretary of the Department of the Army clarifies this dilemma. Castieau advises the Secretary that,

> In connexion with the confirmation of sentences of death imposed by military courts under the War Crimes Act it appears to the Attorney General to be desirable that some authority other than a military authority

> should consider the finding and sentence of the court and furnish to the confirming authority such advice as he thinks desirable to assist the confirming authority in deciding whether or not the sentence should be confirmed. 30

The message continues by noting that in practice, the confirming authority has the benefit of the legal advice of the legal section with which he is serving, but that it is advice provided by members of the armed forces (and hence not independent of military considerations).

> The procedure to be adopted to provide for sentences of death to be considered by some judicial or legal executive authority independent of the military forces is at present under consideration. Pending the determination of the procedure to be followed it is desirable that action should not be taken towards the confirmation and carrying out of death sentences already imposed. 31

The Army is accordingly advised to take action to ensure that the latter purpose is achieved.

The advice of Castieau makes it clear that the Australian Government was considering not the abolition of the death penalty in the war crimes jurisdiction but rather that the decisions of courts should be made subject to some external and impartial legal review, presumably to prevent any excesses of zeal on the part of the military. However, rumours were gaining ground that, in the absence of any definitive reports on the execution of convicted war criminals, that the Australian Government was planning to intervene, or had already done so, to prevent the death sentences from being effected. As a result, various members of parliament and ministers of the Government were besieged with protests and demands for explanations from a wide variety of groups and individuals, indicative of considerable public

interest in the progress of the trials. [32]

At this juncture, the idea to have an independent legal assessment of the findings and sentences of the military courts convened under the Act, seems to have dropped from deliberation, a victim of popular pressure for the execution of 'justice'. The irony of this situation is quite patent. [33]

A second revision of the precedural aspect of war crimes prosecutions concerned the admissibility of evidence, altered by Statutory Rule 1946 No. 56. This meant that in any proceedings before a military court convened under the Act, a document purporting to be a certificate by the prosecutor that a person (victim) referred to in the charge was at some time resident in Australia, would be accepted as prima facie evidence of the matter so certified, without proof of the handwriting of the prosecutor. The ostensible reason given for this change was to obviate the delay in proving residence as required by the Act. [34]

Remembering the objections of the Defence in the Yamashita case to the admission of documentary evidence and secondary evidence of the contents of documents, the following revision of procedure counselled by the Director of Legal Services, Army Headquarters, Melbourne, through the Directorate of Prisoners of War and Internees to the 1st Australian War Crimes Section in Singapore, is of considerable interest. Following the practice specified in the War Crimes Act for all military courts to reinforce each other, it was common for copies of the record of cases already tried to be forwarded to war crimes units about to prosecute others for the same crimes against different people, e.g., conditions in

prisoner of war camps. The Singapore Unit had been forwarded such material but the exhibits had been accidentally omitted, leaving the record with affidavits mentioning reports, letters and other documentary material included as exhibits, but which they did not possess. The Director of Legal Services was asked his advice on the propriety of having the Secretary of the War Crimes Commission make an affidavit certifying the validity of the documents and appending them to his affidavit as exhibits. The Director replied that whilst it was quite proper, to avoid any possible objection that the affidavit was irrelevant and the exhibits not authentic, the documents would better be embodied in the affidavit. Alternatively, secondary evidence of the contents of the document could be given, in cases where the person holding the document is outside the jurisdiction and 'all reasonable attempts' to procure it, fail. Official Australian policy, therefore, held that

> Secondary evidence is admissible where it is impossible or highly inconvenient to procure the original, where the document is abroad in the hands of a foreign functionary who is forbidden to produce it, secondary evidence may be given but it seems that an application must first have been made to the person having the legal, even tho' (sic) he has not the actual, custody of the document and must be shown to have been unsuccessful. 35

No such safeguards were apparent in the Yamashita case; a statement of the Prosecutor was sufficient to enable him to enter secondary evidence on the matter of a document. The practice of war crimes jurisdiction then, was subject, in Australia, to one evidential control lacking in the Yamashita case, so that such documents as were introduced into evidence in Australian trials were presumably of clearer authenticity,

the scope for the entry of unsubstantiated documentary evidence having been minimised.

This is not to suggest though, that the Australian rules of evidence applicable to the trials of military commissions were superior to those under which General Yamashita was tried, but rather that on this point they were different. Moreover, evidence exists suggestive of a deliberate Australian policy to keep evidence at such trials on the documentary level instead of the more costly alternative of requiring the attendance of witnesses, and this contradicts any assertions as to the superiority of Australian procedural regulations and practice. [36]

Nevertheless, irrespective of the debate surrounding the exercise of the war crimes jurisdiction, and particularly the controversy over Australian policy with regard to the prosecution of Japanese war criminals, that preoccupied Australian parliamentary leaders, the prosecution of the trials continued (albeit at a slow pace).

On the legal level, Australian policy was clear. Not only were those Japanese who directly participated in the perpetration of war crimes prosecuted, but all Japanese accused of omissions causing or likely to cause death or grievous bodily harm were also charged. Thus, Australian courts regarded the existence of the duty of a commander, as expounded in the Yamashita case, (command responsibility through negative criminality) as being a well established and settled principle of international law (lex lata), and hence, the failure of a commander to discharge such duty was

seen as being a recognised war crime. The emphasis, in the Australian conception of the command responsibility principle, was centred on the dereliction of duty aspect; it was this that rendered the commander justiciable, rather than the alternative construction which viewed the pursuant crimes as the major focus, with the dereliction of the commander merely constituting the 'state of mind' or *mens rea* aspect of the charge.

What makes the Australian cases particularly interesting is the peculiarly Australian way in which the principle was practised; and with the absence of reasoned judgments elucidating why the courts ruled as they did, the comments of the Judge Advocate in summation represent an interesting insight into the way the principle was interpreted and guilt established. One is left to ponder as to the paradox of the Australian attitude to command responsibility. On the one hand, the principle was seized upon and utilised as an established legal principle (*lex lata*) as in any other jurisdiction of law, and yet the necessary criteria for the adjudication or assessment of guilt were recognised to be not legally developed. The principle was thereby equated with *lex lata*, but the criteria necessary in practice for the principle to acquire such status, could at best be described as *de lege ferenda*. Since there was no rigid ruling on the extent of duty for instance, each case with its unique circumstances was considered on its own merits, and verdicts were not identical. The Australian cases therefore, offer an opportunity to see how the principle of command responsibility and the Yamashita precedent were interpreted and developed.

Australian Army authorities were anxious to receive information on trials held by other nations, where the principle of command responsibility was utilised. This helped to apprise them of the pliability of the principle and the range of situations to which it could be applied, as well as to clarify their understanding of its scope. For example, 2nd Lieutenant Nakanishi Yoshio, tried at Yokohama by the United States 8th Army, was convicted of permitting the members of his command in Sub-Camp Yokogawa to commit 'numerous inhumane and brutal atrocities against American and Allied Prisoners of War.' Clearly not only commanding generals were encompassed within the breadth of the principle, it had applications at all levels. [37]

There is evidence indicating that the principle of command responsibility was not understood by some commanders within the Australian Army, despite the Yamashita precedent. This is suggestive of a failure within the Army, or perhaps a deliberate policy, that prevented the percolation downwards of such information to field commanders whom the Army hierarchy demanded administer parts of the investigative process culminating with proseuction of the senior Japanese officers held by Australia.

Army headquarters directed field commanders, such as Major-General Basil Morris, GOC of the 8th Military District, Rabaul,

> (a) To plot in respect of each senior Commander and his principal staff officers, the area embraced in his command from time to time, and the units under command from time to time in each such area.
> (b) To examine all cases already the subject of War Crimes trials where there has been a finding of 'guilty' and to relate those cases to the relative

Commander, area and unit.
(c) After completing (b) to charge the Commander, and his principal staff officers from time to time, of that area with an appropriate War Crime or Crimes.
(d) To use the proceedings of all relative war crimes trials as evidence in support of these charges. 38

This emphasis on tying the commander to his area of command, and the crimes committed by subordinate units, as revealed by the record of conviction was an essentially Australian feature or approach to trials on the principle of command responsibility. Whilst the connection between the commander and the crimes was recognised to be through subordinate commanders and units, in the trial of General Yamashita for example, it was assumed rather than articulated, partly because subordinates had not at that time been tried.

Major-General Morris assumed that, quoting the case of General Imamura Hitoshi to illustrate his perceptual dilemma, where Imamura's subordinates had been convicted of murder, that he would be also, under the command responsibility policy. But, he said,

> at present there is no evidence in possession of this HQ of any order, expressed or implied, by Imamura to authorize murders or any other War Crime, neither is there any evidence of his knowledge or condonation of any War Crime.
>
> In the absence of evidence of knowledge on the part of Imamura the only alternative is to presume knowledge ...A direct bearing on this policy is provided in many murder trials as a perusal of the proceedings will show that there is direct evidence that the murders were committed by junior officers and other ranks in isolated posts without the knowledge or approval of any superior authority.

Morris asked whether, given the above, the confirmed proceedings of the trials of the subordinates were to be used to prove the necessary elements of the charges. [39] Presumably, Morris' basic misapprehension about the nature of

the charge to be laid against commanders such as Imamura was rectified, since the trials of most senior commanders were investigated (within the aforementioned guidelines) and conducted at Rabaul.

General Imamura Hitoshi had been the commander of the Japanese 8th Army in New Britain from October 1942 until August 1945. Following Army policy directing the prosecution of all supreme commanders in New Guinea and New Britain, where atrocities had been so widespread and numerous

> that the commanding officers must be held responsible for these acts which show such a general disregard for the rights of prisoners of war and civilians...as to indicate that the Japanese were following out a policy acquiesced in by their commanders if not laid down by them, 40

Imamura was tried at Rabaul in May 1947.

The Division of Legal Services within the Army counselled the Division of Prisoners of War and Internees that given that there had been a considerable number of atrocities committed by members of units under Imamura's command, and that many of them exhibited a common pattern, and further, that there was no evidence indicating that Imamura was unable to exercise effective control over the units within his command, a prima facie case could be established using a command responsibility charge. The following wording was suggested as appropriate.

> committing a war crime, that is to say a violation of the laws
>
> and usages of war
> in that he
>
> between 26 November 1942 and 2 September 1945 in those islands of the Eastern Pacific within the area of command of Japanese 8 Army Group while a commander of armed forces of Japan at war with the Commonwealth of

> Australia and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against the people of the Commonwealth of Australia and its allies. 41

The charge upon which Imamura was finally arraigned was substantially the same as that recommended by the legal services, but with one significant exception; the charge did not allege that he permitted members of his command to commit atrocities. Rather, he 'unlawfully disregarded and failed to discharge his duty as commander' whereby his subordinates committed atrocities. A similar change occurred in many of the charges rendered in the other trials of senior officers, but there is no memorandum enclosed with their files to explain this. Intuitively, it would seem that the reason for the change was to further reduce the level of proof demanded in support of the charge, although the concept 'to permit' was itself a very broad and malleable notion, as has been noted elsewhere.

The actual crimes for which Imamura was held responsible on a command responsibility basis involved the ill-treatment and death of Chinese and Indian prisoners of war. The evidence tendered by the Prosecution was almost entirely documentary, with the exception of the testimony of Subedar Chint Singh, a former Indian prisoner of war, who alleged that Indian and Chinese soldiers had been taken to Rabaul and were 'unquestionably' prisoners of war. Many statements containing evidence of atrocities committed by Imamura's subordinates were presented, and they showed that 'more than' thirty-one Chinese soldiers, thirty-nine Indian soldiers, one

British and nine Dutch prisoners of war, and nine Indonesians had been murdered by the men named therein. The torture and ill-treatment of Chinese civilians and natives, and the mutilation of the bodies of Australian prisoners of war were also revealed.

General Imamura made a plea of not guilty. The Accused gave evidence in his own defence, and in addition, seven witnesses were called on his behalf. It was the contention of General Imamura that the Chinese and Indians were not prisoners of war but were attached to the Japanese Army as civilians. The Defence also alleged that even though a number of atrocities were committed by troops attached to Imamura's headquarters and in the vicinity of his headquarters, he did not become aware of such crimes until after the surrender.

The court found General Imamura guilty, and awarded a sentence of ten years' imprisonment. A petition lodged by General Imamura against the finding and the sentence was dismissed, and both the finding and sentence were confirmed.

The Judge Advocate General, in his case report to the Adjutant General, said

> In my opinion, the charge and parties thereof constitute a war crime, as in my opinion the laws and usages of war impose responsibilities on General officers commanding to take all the possible and appropriate steps to prevent violations of the laws and usages of war by troops under their command. 42

He then referred the Adjutant General to <u>In re Yamashita</u>, heard before the United States Supreme Court in February 1946. Whilst he acknowledged that most of the evidence in Imamura's case was documentary, it

> was within the strict meaning of the word 'hearsay' but in my opinion it was within the power of the court to accept such evidence by virtue of Section 9 of the War Crimes Act 1945. 43

Continuing, the Judge Advocate General pointed out that if the veracity of the Webb Report was accepted, insofar as it had been included in the evidence, then it was evident that the control by the supreme commander, Imamura, over his officers and non-commissioned officers was quite deficient in comparison with the standards required in international law. Indeed, many of the crimes had been committed by troops attached to Imamura's headquarters and within the vicinity of headquarters. They were also, the Judge Advocate General commented, 'very probably committed consequential on a direction given by signal from his HQ to the Japanese command in Bougainville.' 44

General Imamura, in his testimony and in various exhibits, admitted that,

> My insufficient direction and supervision of my subordinates caused the greater part of their crimes, so that their crimes are in the nature of extenuating circumstances. 45

General Imamura was of the belief that his subordinates had acted to ensure the safety of the Japanese forces and to further military operations, as well as 'meeting' his 'intentions' as commander.

The Judge Advocate General interpreted such admissions to mean, not only that the steps Imamura had taken proved to be insufficient because of the war situation, but also because of the failure of his divisional and brigade commanders to take action in accordance with his directions.

Having no other case reports of such detail available, it is not possible to investigate whether other such misapprehensions occurred.

In recommending to the Adjutant General that the finding and sentence against Imamura be confirmed, the Judge Advocate General stated that Imamura's culpable disregard of duties was inferred from the circumstances surrounding the individual crimes. Therefore, the Accused must have known that crimes were being and had been committed, and he should have taken positive steps to prevent the continuance of such atrocities. His disregard of duty then, was incurred because he did not know of the crimes.

A major factor which militated against General Imamura was the proximity of his headquarters to the location where many crimes were committed. This proximity was undoubtedly reinforced in the minds of the members of the court by the tendering as an exhibit of the maps delineating his area of command, and upon which the spatial relations between his headquarters and the crimes would have been explained. Such an effect would have been further reinforced by one underlying assumption in which the case was based, that there was no evidence suggesting that Imamura was unable to effectively control his subordinate units. *

Hence, it seems that the criterion adopted in this particular case assumed that General Imamura had a duty to know, and the power to intervene; that he was at fault in

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* This lends weight to the suggestion that the Australian authorities confined command responsibility trials to instances where communication between commanders and their units could be inferred; and that in cases where it could not, trials were regarded as being of doubtful conviction-getters.

failing to acquire knowledge, in a situation where the commission of crimes against the law of war was prevalent, and indeed, occurred in the immediate vicinity of his headquarters, and where there was no evidence indicating that he could not effectively control his troops. In other words, communication facilities did not prevent his acquiring the relevant knowledge, and the system of reporting to higher authority had not lapsed, so that the court could, with some impunity, conclude that Imamura had chosen to remain uninformed since the means existed for him to inform himself.

General Imamura Hitoshi, however, approached the question of his guilt from a different perspective. Whilst he admitted that his supervision of his subordinates was insufficient in the circumstances, the gravamen of the charge, he felt, rested on an assumption that the Indian and Chinese victims were prisoners of war, and this was itself erroneous. This question involved not only his case, but the cases of many of his subordinates, and the first petition he made (directed to the Duke of Gloucester, the Governor-General of Australia) was written before arrangements for his trial had even been finalised.

In the petition, Imamura stated that the Indians had been prisoners of war but that they had been released on parole, and had joined the Japanese forces under fixed wage contracts. The majority of the Indians had responded to Chandra Bose's plea for cooperation with the Japanese. The Chinese were volunteers and allies by virtue of Wang Ching-wei of the Nanking Government, and the Indonesians were volunteers who joined the Japanese as quasi-members.

The petition obviously worried the Prisoner of War and Internee section, which requested the advice of the Legal Services division. Although it had already been decided not to forward Imamura's petition to the Duke of Gloucester or to otherwise take any action on it, concern was expressed over the status of the Indians, particularly since seven cases had already been decided where it was found that they were prisoners of war. At the suggestion of Legal Services, it was decided to request affidavits from recovered Indian prisoners of war in Singapore and the Pacific to show that they retained their prisoner of war status, and to reveal examples of their ill-treatment. [46]

It is little wonder that Imamura's petition was not transmitted to the Duke of Gloucester. General Imamura highlighted the weakest points of the trial forum as a system for the dispensation of justice when he drew the attention of the Duke to

> the fact that very few have the command of English among the accused and Japanese legal officers little knowledge in the procedure of the court...No wonder that they often failed in understanding the interrogation and found difficulty in expressing themselves in the procedure of their trial or in submitting the legal documents. Naturally this linguistic barrier brought about undesirable results upon their sentences...
>
> We have very few defending officers with experience as lawyers. As a matter of fact, there are only two or three Army and Navy legal officers, and a few officers who have only the elementary knowledge of law. [47]

He begged that these factors be taken into the consideration of the confirming authority.

The second petition submitted by General Imamura was addressed to Brigadier-General Irving of the 8th Military District headquarters at Rabaul, and it dealt exclusively

with the status of the Indian labourers, including exhibits to support the argument that they were not prisoners of war. A memo to the Japanese 8th Army from Lieutenant-General Kuroda Shigenori, * Chief-of-Staff of the Supreme Southern Command, Singapore, and dated 22 April 1943 revealed that special service corps containing Indians, employed them for labour purposes and that they were on parole. The memo instructed Imamura to treat them as labourers rather than 'Heihos' (sub-soldiers). Several affidavits corroborated this argument, as did a telegram from the Demobilisation Bureau to the Chief-of-Staff of the 8th Area Army. [48] The Indians shared the Japanese quarters and enjoyed a freedom of movement; the cordiality of this relationship further substantiated the fact that they were not prisoners of war.

Despite this and other evidence given by General Imamura, it failed to alter the verdict against him and his subordinates.

Another interesting aspect of the trial of General Imamura was the proposal to try his chief-of-staff, Lieutenant-General Kato Rinpei, on a similar command responsibility charge. However, it was the view of Legal Services within the Australian Army that

> although Lt.-Gen. Kato was Chief of Staff 8 Army Group during the relevant period, I am of (the) opinion that a charge of the kind (with which Imamura was charged) would not properly lie against him. There is no evidence available to show what his responsibilities as Chief of Staff were, and, in any event, I consider that the primary responsibility for the control of troops is imposed on the commander and not on his staff. The latter, to my mind, would be responsible only if they are implicated, either generally or specifically in the commission of war crimes. [49]

* Yamashita's predecessor in Philippines.

As a result of the receipt of this advice, Lieutenant-General Kato was tried on a charge of having unlawfully employed prisoners of war on work with direct connection with Japanese military activities. This, of course, rested on the assumption that the Indians concerned were prisoners of war, and evidence to support this contention was drawn by the prosecution from the trial of General Imamura and from that of Lieutenant-General Adachi. In Kato's defence, Imamura testified that it was critical to understand the function and powers of the Chief-of-Staff in the Japanese Army. The order re the employment of the Indians as part of Army strength had been his own, promulgated in the form of a Chief-of-Staff notification, he told the court. The prosecution was reliant here on the direction of the Legal Services section which had adopted the view that the work on which the Indian prisoners of war were allocated had a direct connection with the war, and that this must have been known to him, and his failure to take action to stop this was thus, an endorsement or condonation of the policy. A concomitant of the utilisation of Indian labour was that if they schemed to desert or commit hostile acts, they would be considered as enemies of Japan. Kato's view was that this would enable certain officers to carry out an execution without reference to higher authority, and without an established procedure. Impliedly therefore, Kato's actions could be construed as permitting the perpetration of atrocities.

Since Kato was found not guilty of the charges brought against him, in the absence of a reasoned judgment, it must be assumed that the counsel of the Judge Advocate was per-

suasive. He informed the court members that,

> as to the responsibility of an officer for the acts of his subordinates, the evidence is that the Accused was a staff officer, and it would appear from the evidence that a Japanese Chief of Staff is not in the same position as a staff officer in the Australian Army. Whether that is so or not, there is no doctrine in international law that a staff officer is responsible for the acts of subordinates in the formation to which he belongs, unless he himself is instrumental in the matter. There is such a responsibility on the commander...The responsibility of a commander rests on him alone as commander and not on his staff. A junior officer might become responsible if he were acting as commander, but not otherwise. 50

By finding as it did, the court effectively authorised the adoption of this refinement to the principle of command responsibility.

A later case held at Manus in June-July 1950 was also significant in its findings on the liability of the Chief-of-Staff. In the case against Lieutenant-General Teshima Fusataro, the Chief-of-Staff and others, the charge alleged that Teshima 'unlawfully disregarded and failed to discharge his duty' as commander, 'to control the conduct of members of his command' whereby they committed war crimes against two named Australian pilots.

The two pilots were prisoners of war. After being interrogated by the Kempei Tai, the commander of that unit sent a subordinate messenger to Teshima's 2nd Army Headquarters to request permission to execute the fliers. The request was received by Ryokai, Teshima's Chief-of-Staff, who supposedly transmitted it to the latter, who was said to have agreed by nodding his head.

There was sufficient evidence to convict Ryokai of murder because of his participation in giving the orders to the

messenger assenting to the request. Ryokai further admitted not having reported either the capture of the pilots or the request for an execution order to Lieutenant-General Teshima, so that it was not possible for him to have had fore knowledge of the executions. In addition, there was no evidence before the court suggestive of Teshima's participation or that the Kempei Tai unit was under his command.

In his defence, it was pointed out that Teshima frequently instructed his subordinates not to act against the dictates of international law. Since his instructions to his subordinates had been so thorough, he could not have known of the incident's occurrence. If he had have heard of it, Teshima would have prohibited it, therefore he could not have been informed, and the execution was carried out in secret. Ryokai, the Chief-of-Staff, had to keep it secret, as he fully realised that Teshima would not grant approval. Because the conspirators deliberately disregarded Lieutenant-General Teshima's instructions and concealed the execution, the incident was private conduct. With over 10,000 subordinates, the Defence asked how it could be expected that Teshima could supervise all of their private conduct, in addition to his operational duties. This degree of supervision, they asserted, was impossible, and consequently Lieutenant-General Teshima had no means of preventing the action.

The logical structure of the argument advanced by the defence here, is intriguing. Such a pattern was tacitly advanced by the Defence in the Yamashita case; that the commission of infractions against the law of war were not made the subject of reports, submitted to higher headquarters and

through the command pipeline to the commanding general, and as such, he could not have known of their occurrence. It seems that the distinguishing feature between the two cases was that Teshima was charged with command responsibility for one incident in which two people died, whereas the crimes for which General Yamashita was being held responsible were so extensive that he 'must have known' of their existence, and according to prosecution figures, some 60,000 victims were involved. As so many victims were involved, and atrocities were committed by a wide variety of Japanese troops, the fact of General Yamashita having instructed his subordinates to abide by international law was weakened; either he did not instruct them, or alternatively, his instruction was ineffectual.

From the evidence, it was apparent that Ryokai as Chief-of-Staff was entrusted with the responsibility for managing prisoner of war matters. However, his authority was strictly limited; he could deal only with matters of minor significance without the guidance of his commander, Teshima. With the incident, the subject of the charge, it was Ryokai's duty to bring the matter to the attention of Teshima, and to delay the taking of any action pending his decision. Given that on his own authority, Ryokai assented to the request, it was his duty to have immediately submitted a report of same to Teshima for his ex post facto approval.

Ryokai took neither course of action; he had neglected his duty. He had no authority to issue any orders of major significance, especially an execution without a court-martial. In his defence, Ryokai said that he had received no official

or unofficial report on the prisoners of war, and he could not report to Lieutenant-General Teshima on the basis of rumour. But he told the court that he had left the vicinity before the execution, when he had actually left the day after. Ryokai therefore, unlike Teshima, had the opportunity to know the fact of execution and it is not difficult to presume that he was aware of it. The crimes were committed by a breach of Teshima's orders, with Ryokai's approval.

The court acquitted Lieutenant-General Teshima, but convicted his Chief-of-Staff and sentenced him to eight years imprisonment, which was later mitigated to five years. Two of the other accomplices received sentences of two years, and another, five years.

Lieutenant-General Baba Masao, the commander of the 37th Army in Borneo, from December 1944 until the cessation of hostilities, was arraigned on a command responsibility charge alleging his accountability for two 'death marches', similar to the so-called 'Bataan Death March' for which General Homma Masaharu was tried in the Philippines.

Baba, in the words of the charge 'unlawfully disregarded and failed to discharge his duties' as a result of which members of his command committed 'atrocities' and other 'high crimes' against Australia and her Allies. Originally, it had been intended to present Baba with three specific charges, the first two outlining his liability for having given orders for the two marches and for the casualties resulting therefrom, and the third alleging his responsibility for the execution of the survivors in August 1945. On the advice of the Director of Legal Services this approach was dropped in

favour of the one general charge. But, according to the prosecutor, Lieutenant-General Baba had to answer the same case. [51]

When Baba assumed his command, there was a prisoner of war camp located at Sandakan, in British North Borneo, and for its administration he was responsible. This camp was home to 1,000 British and American prisoners of war. Due to the imminence of an Allied landing at Sandakan, on the coast, it was felt that the continued presence of the camp there constituted a security hazard, and this had led the previous commander of the 37th Army to order a march of the prisoners to a safer locality. Ranau, 150 miles away over 'difficult' terrain, was chosen. The first party of 460 prisoners, plus guards, made the trek in December 1944. However, the meagre rations the prisoners had been receiving meant that their state of health was poor, and many died en route. Baba admitted that he had been aware of the physical state of the prisoners, and had ordered a reconnaisance of the route to be travelled, made, but did not alter the orders after receiving the report.

According to the prosecution, Lieutenant-General Baba was not only responsible for ordering the march which caused the deaths of many Allied prisoners of war, but he was also responsible for the commission of 'atrocities' such as the provision of insufficient food, clothing, boots and medical attention. Two Japanese officers under his command umbrella were directly responsible for the giving of orders which led to the shooting of some of the prisoners.

The Accused received a report of the first march in early

1945. This second march proved more disastrous than the first; only 183 of the 540 prisoners arrived in Ranau, and of those, 150 died shortly after. In August, the remaining 33 prisoners of war were shot on the orders of an officer who was subordinate to Lieutenant-General Baba.

All of the evidence tendered by the prosecution was documentary in nature, and the bulk of it consisted of extracts from the transcripts of earlier trials of Baba's subordinates, convicted of offences allegedly committed as a result of his orders.

In his defence, Baba pointed out that he gained effective command only as from 21 January 1945, and thus, could not be held responsible for the first march. The orders to march were issued by his predecessor before Baba assumed command, and were necessary because of the impending Allied invasion,* coupled with a lack of food, and guards. Baba told the court that the road between Sandakan and Ranau had been newly constructed. The Yamata battalion, which handled the transfer, was the best in his army, in Baba's estimation, and it had been given the authority to lengthen or shorten the duration of the march in accordance with conditions, and to modify the resting points in the villages. In view of the reports he received, Baba was satisfied that it was safe to proceed with the march. In relation to the shortages of food and medicine, Baba described the efforts he had made in an effort to procure more of the commodities, but the Japanese Army was itself in short supply, and his efforts were ineffectual. As a result, many guards also died en route, from the same deprivations.

* Actually landed there July 1945.

Essentially, the thrust of Baba's defence was to the effect that as his command was so extensive, it was not possible for him as commander to police all of the actions of his subordinates. Consequently, he was reliant on the reports of his subordinate officers for guidance, and a degree of trust was thereby necessitated.

The killing of the survivors in August 1945 had been unknown to Baba until after the cessation of hostilities. Because of the Allied landings in Borneo in July, Ranau had been cut off from his headquarters and so Baba had been unable to exercise effective control over the officers there, who had previously been under his command.

The case against Lieutenant-General Baba, according to the minute of the Director of Legal Services, was a dual one, with offences falling into two categories.

> (i) The issuing of orders by HQ 37 Army which clearly indicated a failure on the part of that HQ to take into account its obligations in respect of prisoners of war.
> (ii) The failure on the part of HQ 37 Army to supervise the operations of units under its command and the actions of individual members of such units. 52

In other words, Lieutenant-General Baba was accused of both crimes of commission and of omission. The prosecution, pursuant to this advice, based its case on the fact that the Accused having ordered the marches whilst being aware of the prevailing conditions, he had therefore to be held responsible for the natural consequences of his actions. This was based on the principle that where a commander could be shown to have ordered the commission of violations of the laws and

usages of war, he himself was guilty of such a violation. The applicability of this principle to the case rested on interpretive assertion; that Baba had insisted on the implementation of his order despite Captain Yamamoto's drawing his attention to the shortage of supplies etc., and which Baba did not attempt to provide. In other words, Baba was held to have ordered the march knowing that supplies of food, medicine and clothing were inadequate, and that this was a violation of his responsibility to the prisoners of war.

The third aspect of the charge, the killing of the survivors was quite different, and no evidence existed that Lieutenant-General Baba had ordered it.

Reliance was placed by the prosecution on the duty of a commander to control his troops, especially his obligation under the Hague and Geneva Conventions to ensure that prisoners of war were humanely treated. In his closing address, the prosecutor told the court that,

> It is a well-settled rule of international law that a commander of Armed Forces at war has a duty to control the conduct of the members of his command, and that if he deliberately, or through culpable negligence, fails to discharge that duty, and as a result of such failure members of his command commit war crimes, he is guilty of a violation of the laws and usages of war. 53

Continuing, the prosecutor stated that the only possible defence in such cases was that the failure to discharge the duty resulted from circumstances beyond his control, or alternatively, that the failure was 'mere inadvertence' which did not constitute culpable neglect. Neither was acceptable in the circumstances surrounding Baba's case.

In summing up the case, the Judge Advocate outlined the

duties which Baba was accused of violating. Here he repeated the hackneyed argument that Baba had contravened Article 1 of the Annex to the Hague Convention (1907) whereby to be considered lawful belligerents, troops 'must be commanded by a person responsible for his subordinates.' The treaty obligations covering prisoners of war were also reiterated to emphasise Lieutenant-General Baba's duties in this respect. The Judge Advocate then went on to quote from the majority judgment of the Supreme Court of the United States, handed down by Mr. Chief Justice Harlan Fiske Stone in In re Yamashita:

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

To assist the court in reaching a decision as to what the duties of a particular commander were with respect to the exercise of control over the troops in his command, the Judge Advocate again drew on the majority pronouncement of the Yamashita case. The provisions of the law,

> plainly impose on petitioner who...was military governor...as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. 54

Lieutenant-General Baba Masao was convicted and sentenced to hang after court deliberations of twelve minutes. The

petition he lodged against the finding and sentence was dismissed, and the verdict confirmed by the Adjutant General (upon the advice of the Judge Advocate General); Baba Masao was hanged on 7 July 1947.

In this case, the lack of a reasoned judgment makes a thorough analysis of the development and adoption of the Yamashita precedent of command responsibility somewhat difficult. It is possible that the court may have decided that Baba was guilty because of responsibility for the first or second march, or both, which led to the deaths of many prisoners of war, without simultaneously considering him liable for the death of the survivors. Alternatively, the court's reasoning may have led them to argue that Lieutenant-General Baba failed to take 'such measures as were within his power and appropriate in the circumstances' to ensure the safety of the prisoners who had survived the marches.

One thing is clear however, from the prosecution argument and the summation of the Judge Advocate, the precedent set by the Yamashita case for the negative criminality form of command responsibility was adopted and utilised as a well-settled and established principle of law, even though no strict guidelines for the assessment of guilt had been developed.

Vice-Admiral Shibata Yaichiro, the commander of 2nd Southern Expeditionary Fleet at Surabaya, was tried at Manus between 20 March 1951 and 2 April 1951, along with Surgeon-Captain Nakamura Hirosato, and Lieutenant-Commander Tatsuzaki Ei, Shibata's chief legal officer. The charges against the men were somewhat of a catch-all:

1. Murdering of 15 natives at Surabaya, April 1945, or

2. Unlawfully killing 15 natives by injecting a deleterious substance, or
3. Ill-treatment of inhabitants of a captured territory, by the injection of a deleterious substance. 55

In addition, Shibata was charged with having

> committed a war crime, that is to say, a violation of the laws of war in that he, at Surabaya, Java, about April 1945, being a Commander of Armed Forces of Japan in the field, unlawfully neglected and failed to discharge his duties as such commander, whereby members of his said command committed a war crime, namely, the injection of 17 natives of Lambok, in the Netherlands East Indies, at the time of occupation by Japanese Forces, with a deleterious substance whereby 15 natives died. 56

Allegedly, Shibata was told by the Chief Surgeon, Nakamura, that in the event of casualties, many Japanese naval personnel would die, because with the shortages of medicines and medical supplies, there was no anti-tetanus serum. Shibata replied that no more could be demanded of Nakamura than he should do his best.

Nakamura made or caused to be made a tetanus anatoxin. The prosecution argued that this was done in the presence of Vice-Admiral Shibata, and that he was also present when Nakamura approached Tatsuzaki, the legal officer, with a view to obtaining the custody of seventeen natives scheduled for death, which the latter held, and which Nakamura felt would be useful on which to experiment with his vaccine. The natives were not informed of the type of experiment to be conducted, and neither were they given the opportunity to refuse to participate. Nakamura had though, consulted with the hospital specialists before the experiment, and had assured them and Tatsuzaki that no bodily harm would result. It was not his intention to cause the deaths of the natives, and indeed, he was shocked when this eventuated.

The prosecution evidence was entirely documentary. In Shibata's defence, it was argued that Shibata was unaware of the conduct of the experiments, and that discussions between the parties establishing them had not been conducted within his presence. Nakamura and Tatsuzaki verified this. Consequently, Vice-Admiral Shibata had no way of knowing of the conduct of the experiments, and no means to prevent it. He was acquitted of the charges. Nakamura and Tatsuzaki were both convicted and received four years and three years imprisonment respectively.

With the trial of Major-General Hirota Akiri, the commander of the 26 Field Supply Depot in Rabaul from September 1942 to July 1945, there are indications that it had been intended to try him at a direct participation level but that Legal Services counselled against this course of action. The reasoning applied here is worthy of note. In the minute to the Division of Prisoners of War and Internees, the Division of Legal Services stated that there was

> insufficient evidence to support a charge of direct participation in war crimes but ample evidence that many PWs, both Chinese and Indians, were ill-treated and killed by members of units under his command, and at times within close proximity to his HQ. There is only 1 case of the ill-treatment of natives and that may well have been an isolated instance. 57

This suggests that the Yamashita precedent was utilised by Australia to ensure the conviction of a commander where a case could not be sustained at the level of proof necessary to establish a direct link between the commander and the alleged crimes. In other words, command responsibility (negative criminality) operated in practice as a catch-all legal

principle to be used in cases where the stronger case, that the crimes were committed as part of a deliberate plan and pursuant to the orders of the commanding general, could not be adequately supported.

Again, as in Imamura and Kato's trials reliance was placed on the assertion that the Indians and Chinese did have prisoner of war status, rather than the status of labourers, as contended by the Japanese.

It is apparent also that the Australians were prepared only to bring to court on charges of command responsibility those cases where there was no evidence that the commander could not have maintained close communication and control over his subordinates. The reason for this seems to have originated from the fear of the Australian authorities, aware of the precariousness of war, that in future the precedent set by the Yamashita case and elaborated and refined by later war crimes courts, could well be used against Australian personnel. The idea of having General Blamey and others indicted on command responsibility charges would have been particularly abhorrent, and no doubt would have elicited the same type of response as that of General Westmoreland after the My Lai massacre; he insisted that 'he was no Yamashita.' Consequently, Australia did not pursue the prosecution of such commanders as she did hold on command responsibility charges with as much vindictiveness as might otherwise have occurred.

As with the other trials of senior officers, details of the courts, the charges and the sentences awarded against his subordinates were used to support the charge against Major-General Hirota.

In his opening address, the Prosecutor, Mr. L.C. Badham, K.C., defined what constituted a war crime under the Australian War Crimes Act 1945. The idea of a war crime as used in Australia embraced two different ideas, he said. One was a violation of the laws and usages of war in general terms; that being those laws and usages of war that had evolved and been agreed to by the 'civilised' nations to minimise the barbarity and horror of war. The second aspect was a statutory description of a war crime; the performance of any of the actions listed was declared a breach of the laws and usages of war.

Apart from the above, the Prosecution case was quite uneventful. Most of the evidence introduced to support the charge was documentary, but several live witnesses were called.

It was alleged that Hirota had 'unlawfully disregarded and failed to discharge his duties' as commander, 'whereby' members under his command committed 'atrocities' and other 'high crimes' against Australians and their Allies. Specifications included a range of crimes conducted against the Indians and Chinese who were supposedly prisoners of war; this included cases of ill-treatment and murder.

The thrust of Hirota's defence was to the effect that the state of international law on the responsibilities of the commander could best be described as ambiguous, and that the opinions of the writers on the law were in a similar state of disarray. In the Hague Convention of 1907, Article 3, and in the British Manual of Military Law, page 324, it was stipulated that

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

This was at variance with Article 1 of the Annex to the same convention. No clause existed within international law to spell out to whom the commander was responsible, although it was very clear, the Defence agreed, that some type of responsibility was envisaged. The question, as Hirota's defence counsel saw it, was:

> Is he criminally responsible for the offences committed by his subordinates, or is he militarily responsible for the discipline among his troops? 58

No evidence was before the court, the Defence argued, which attested to Hirota having given orders for the killing or ill-treatment of the Chinese, or that he had been present at the commission of an offence, or had otherwise instigated, aided or abetted their perpetration.

Hirota had no knowledge of the crimes, the Defence Counsel stressed. Under Japanese military law, commanders could only be held responsible for the acts committed by their subordinates if they had knowledge of them and failed to act accordingly, and if the crimes were committed through their personal negligence. Such responsibility was not criminal accountability. Nevertheless, the major point was that Hirota could not, under the system of Japanese law, be held responsible if he was performing his duties to the best of his ability, and if he had no knowledge of the crimes committed.

The Defence then recapitulated the peculiarities of the

particular system of command involved, pointing out that at the time of the commission of the alleged crimes, in late 1942-early 1943, the Japanese Army suffered a shortage of men and inducted troops of poor calibre and training. This situation was exacerbated by the structure of the supply depot; it was composed of members of various units where the system of command differed, unity was lacking during the depot's formation during this period, and hence, the instructions and orders of the Accused were not conveyed as thoroughly as they could have been. However, Hirota had tried to redress the imbalances in the system, but was hampered in this by the other obligations and duties associated with his command. A further complicating factor, and one which repeated itself in many trials commencing with that of Yamashita, was the limited and fragmented command system prevalent in the Japanese armed forces. In his testimony for Hirota's defence, General Imamura claimed that until 20 February 1943 it was he and not Major-General Hirota who was responsible for the discipline of the supply troops; Hirota was only responsible for supplies.

In conclusion, the Defence Counsel said that,

> All men on the earth are equal and Hirota is not a god or divine creature, he is just an ordinary living being. The accused within the best of his ability controlled the members of his command and carried out his important duties. 59

They then moved that,

> The War Crimes Act of 1945 in no way shifts the burden of proof, and...if the Court pleases,...the Prosecution has failed to establish the charge beyond a reasonable doubt, and (hence) the accused should be acquitted of the charge. 60

Upon the completion of the defence summation, the Judge

Advocate addressed the court at some length discussing the legal concepts involved in the case and the procedural regulations applicable, as well as making special mention of the status of the persons against whom the crimes had been committed.

The Judge Advocate began his comments with an effort to clarify the confusion surrounding the Australian definition of a war crime, it being partly a statutory description, and the way in which the charge against Major-General Hirota had been worded. 'Brutal atrocities' and 'high crimes', the Judge Advocate told the members of the court, simply meant 'war crimes' and defied any other more specific meaning.

From this he moved on to an analysis of '<u>Mens Rea</u>' and the 'Responsibility' element, noting that previously international law had held that war crimes were committed only by States, and not individuals. It was now a matter of settled law that when a crime is committed by a State as an act of that State, the individuals performing the act are also considered liable. This trend had finally been codified in the Judgment of the International Military Tribunal, Nuremberg, he informed the court.

The court must, the Judge Advocate continued, recognise the distinction here between State acts and the private acts of individuals, as this has serious bearing on the guilt of Major-General Hirota for the acts of his subordinates. Private wrong doing was the term given to those acts of an individual perpetrated for his own purposes and not for the purposes of the State, and not within the course of his duty.

> Now, so far as individuals are concerned...it is an essential principle in English Law that in the commission of any offence there must be present an element of guilty mind or intention - a guilty knowledge or intent. The accused's mind must be in such a state that he knew what he was doing was a criminal offence, or that he was so recklessly disregardful of his obligations to abstain from committing offences, that you must infer that his wilful disregard was of a criminal nature. Now the state of (Hirota's) mind in that sense is a question of fact and a fact which you must find to have been proved by the evidence led before you. 61

The charge against Major-General Hirota alleged, the Judge Advocate went on, that he had 'unlawfully disregarded and failed to discharge his duty as commander.' The question therefore was, what was his duty, or his responsibility? As a 'starting point' in a determination of a commander's responsibility, the Judge Advocate seconded the earlier suggestion of the Prosecutor, that reference be made to the Annex to the 1907 Hague Convention, Article 1 (and which had been incorporated into the Manual of Military Law - Australian edition). As will be recalled, this article stated that to qualify as a lawful belligerent, an armed unit 'must be commanded by a person responsible for his subordinates.' The Tenth Hague Convention further stipulated that (in relation to the bombardment of naval vessels), 'commanders in chief of the belligerent vessels must see that the above articles are properly carried out.' [62] The 1929 Geneva Convention on the treatment of the sick and wounded armies in the field, provided that commanders-in-chief should similarly see to it that the details of the convention were implemented in conformity with the principles expressed therein.

> Now, at first sight, each of these Conventions may appear to impose an unqualified responsibility on the Commanders of Forces in the Field, without any question of whether he personally is guilty or innocent of the

> crimes, merely by reason of the fact that he is (sic) a Commander. 63

The meaning of the words being obscure, the Judge Advocate quoted from the dissenting judgment of Mr. Justice Murphy of the United States Supreme Court, in In re Yamashita, heard in January 1946.

> The clause 'responsible for his subordinates' fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated.

Murphy had then gone on to draw attention to the fact that the phrase had been the subject of many differing interpretations amongst jurists and learned authorities. 'It seems apparent beyond dispute,' he concluded,

> that the word 'responsibility' was not used in this particular Hague Convention to hold the Commander of a defeated army to any high standard of efficiency when he is under destructive attack, nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command in such circumstances.

Returning to the case against Major-General Hirota, the Judge Advocate stated that the problem posed by unqualified responsibility had been raised by the Defence Counsel, who to support the case for a limited responsibility interpretation, quoted from the provisions of Japanese Military Law. The court members were instructed that Japanese military law (or portions of it) was not in evidence before them, and neither could they take judicial notice of it since the law being applied by the court was international law as incorporated into the law of England.

Elaborating on the problem the Judge Advocate said that he could not subscribe to the limited responsibility school of opinion; he felt intuitively that the responsibility of a

commander must be broader than merely that owed to his superior. The dilemma was of course, that an unqualified responsibility amounted to liability simply because of position, and this was 'repugnant' to the principle of English law which required that he be of a guilty mind. To throw the issues involved into a clearer perspective, the Judge Advocate presented an analogy for the benefit of the court. Laying the groundwork for the analogy, the Judge Advocate quoted from Wheaton's International Law, (sixth edition, page 422) in which the author stated that:

> The most serious cases where States are responsible, are those in which there is a wilfully or culpably negligent disregard of international duties, these terms being interpreted on lines analogous to those followed in private law systems of the world. 64

The case used for comparison was one of Arbitration between Britain and the United States, where a dispute arose over Britain's having 'permitted' a war vessel to escape from internment. The Judges of the Court of Arbitrators decided unanimously that Britain had 'failed to use due diligence' and that 'after the escape of the vessel, the measures taken for its pursuit were so imperfect as to lead to no results, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred.' 65

The parallel being obvious, the Judge Advocate again referred to the Yamashita case; the majority judgement had urged the view that commanders were 'to some extent' responsible for their subordinates, and that they had an 'affirmative duty to take such measures as were within (their) power and appropriate in the circumstances' to control the actions of such subordinates. Taking the authoritative sources

together, the Judge Advocate considered that

> the element of responsibility which is imposed on a commander in the field by International Law is limited to a responsibility to exercise due diligence to prevent his troops from committing offences and it is limited only to offences, so far as he is concerned as a commander; which it was within his power to prevent. 66

The prosecution having suggested in its case that responsibility was imposed on a commander by virtue of Sub-section 2, Section 9 of the War Crimes Act, in which evidence given by one member of a group was received as evidence of the 'responsibility' of another in cases where there was evidence of 'concerted action', the Judge Advocate discussed the bearing of conspiracy to Hirota's case. Applying the standard rules of statutory construction,* he argued that the conspiracy + provision did not eliminate the necessity for proving individual guilt, an essential factor in the proof of any crime, and that it could not be interpreted so as to make a particular individual responsible merely because of his membership of a unit.

Once the court had evaluated the breadth of the responsibility imposed upon a commander, in this case Major-General Hirota, the next step in the assessment of guilt was to find whether the element of guilt (mens rea) was present in his mind. Mens rea, the Judge Advocate stated, was of two types; the first being the positive intention to commit a wrongful act, and the second, a reckless disregard of his responsibility to such an extent as to be culpable in law.

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* These rules stipulated that construction must be strictly against the Crown and in favour of an Accused, and should not construe it to be an amendment to common law unless it expressly does so.

+ Subsection (2) of Section 9 of the War Crimes Act, (relative to 'concerted action'.)

In ascertaining the existence of the first kind of mens rea, questions such as whether the Accused had given direct orders, whether he had acted as an accomplice, whether he had aided the commission of the crimes by placing the means available to the perpetrators, or whether he subsequently abetted his subordinates by resisting their arrest or other similar actions, had to be answered. The definitions for being an accessory, he reminded the court were, according to Archibald's Criminal Practice (31st edition, page 1434, 1441):

> An accessory before the fact is one who though absent at the scene of the commission of the crime, procures, counsels, commands or abets another to commit a felony. An accessory after the fact is one who, knowing a crime to have been committed by another, receives, relieves, comforts or assists the criminal. (p. 122)

This clearly had application in the case of a commander and offences committed by his subordinates, the court was told. Knowledge on the part of an accused, was an essential element in this form of mens rea.

The reckless disregard of duty in a commander, the Judge Advocate averred, could be of several kinds. The commander may have failed to ensure that breaches of the law of war were brought to his attention, so that he could take the appropriate action. On the other hand, a commander would have failed in his duty if he had knowledge of infractions against the law of war, and did nothing to punish the offenders and to prevent recurrences of such behaviour. If a commander did not take any steps whatsoever to ensure that action was taken to prevent offences which are likely to occur under the stress of war, such as was within his power, then he was similarly negligent.

Contrary to the assertion by the Defence for Major-General

Hirota, the Judge Advocate continued, knowledge was not an essential criterion for the negligent aspect of mens rea, as a commander's negligence may have been a wilful disregard of his duties to guard against the commission of war crimes by the men in his unit. To fully appraise whether a commander's actions had been negligent, an understanding of the principle of 'culpable negligence' in law was essential. Whilst the term did not lend itself to precise definition, the Judge Advocate invited the attention of the members of the court to the Manual of Military Law (Australian edition, page 427), a portion constituting a note to Section 40 of the Imperial Army Act. This deserves to be quoted in full.

> Neglect to be punishable under this section must be blameworthy. If neglect is wilful, i.e., intentional, it is clearly blameworthy. If it is caused by an honest error of judgment and involves no lack of zeal and no element of carelessness or intentional failure to take the proper action it is equally clear that it is blameless and cannot be a ground for conviction. Where it is not thus completely blameless the degree of blameworthiness naturally varies, and a court trying such a case must consider the whole circumstances of the case and in particular the responsibility of the accused. For example, a high degree of care can rightly be demanded of an officer or soldier who is in charge of an armoured vehicle or an aircraft or is responsible for its condition, or who is handling explosives or highly inflammable material, where a slight degree of negligence may involve danger to life; in such circumstances a small degree of negligence may be so blameworthy as to justify conviction and punishment...

The Judge Advocate paused to emphasise that the passage being quoted had to be related to the case at hand, the question of the responsibility of Major-General Hirota for the offences of his subordinates. He then returned to complete his reading,

> On the other hand, such a slight degree of negligence resulting from forgetfulness or inadvertence, in relation to a matter that does not rightly demand a

> very high degree of care, would not be judged so blameworthy as to justify conviction and punishment. The essential thing for the court to consider is whether in the whole circumstances of the case as they existed at the time of the offence the degree of neglect proved is such as, having regard to the evidence and their military knowledge as to the amount of care that ought to have been exercised, renders the neglect so substantially blameworthy as to be deserving of punishment. 67

The unlawful disregard in the performance of duty involved itself the problem of whether the commander negligently disregarded it and of what would 'reasonably' have been required of a commander in the execution of that duty. The Judge Advocate told the court members that the word 'reasonably' implied that they should bring their experience as 'men of the world' and as military officers to bear, and consider also the evidence of circumstances, to the state of the war and the nature of the Accused's command at that time. Also specifically outlined by the Judge Advocate as being topics for evaluation were what action the Accused could reasonably be expected to have taken in view of the area of his command, and what type of unit he commanded, and what function it had within the Japanese military forces. Thus, from the circumstances, such as speech and actions, the state of mind of the Accused had to be deduced. In ascertaining this, the court had the benefit of the rule of law whereby similar acts may be accepted in evidence as a means of proving the state of mind in the Accused, in respect of one particular act of a similar nature with which he is charged, the Judge Advocate informed the members of the court.

Moving on, the Judge Advocate next spoke on the status of the persons against whom the crimes were committed. The first group of offences outlined by the prosecution involved

the ill-treatment of natives on Mioka Island, a part of the Mandated Territory of Papua-New Guinea, administered by Australia. Hence, no difficulty arose with the charge alleging that crimes were committed against the people of the Commwealth of Australia. The second group of offences involved cases of the murder of Chinese citizens. The Judge Advocate noted that the Defence had not denied that the victims were Chinese, and the allegation that they volunteered for service with the Japanese Army did not alter their nationality, he said. Since China was an ally of His Majesty in the present war, and since the charge alleged atrocities against the peoples of the Allies and not against prisoners of war, the question of their status as prisoners of war was irrelevant, it was emphasised. The construction of the charge in this case, by being so general, effectively sidestepped the burning question of the status of the victims, that had plagued some of the earlier trials. The final group of offences (but which was not defined in the actual charge) alleged the ill-treatment of Chinese prisoners of war. There was no evidence before the court, according to the Judge Advocate, indicating the ill-treatment of third power nationals serving with the Japanese Army, unless they were compulsory deportees, and that itself was a war crime. The Chinese, however, were not deportees. It constituted a war crime, though, to ill-treat a prisoner of war or civilian internee, he concluded.

On the nature of proof, the Judge Advocate categorically stated that,

> There is no onus whatever on the accused person to establish his innocence or to disprove the charge, and the War Crimes Act has, in no way, affected that general rule. 68

But proof must be established beyond 'reasonable doubt'; in no circumstances could a 'gamble' be taken in law.

The case must be decided solely on the evidence presented before the court, the Judge Advocate continued, and the testimony of Major-General Hirota under direct and cross-examination should be considered equally with the other material presented. He warned the court members that they had to make up their own minds relative to the facts of the case. The findings of the case proceedings tendered in evidence, and any recollections of past cases in which court members had been involved, were to be divorced from mind.

An unusual and particular caution with which the Judge Advocate issued the members of the court, was to completely disregard the sensational and unfounded reports of the case published in the press, and which could easily have had a prejudicial impact on the outcome of the case.[69] The verdict should be made, he counselled, in accordance with their oath, and without fear, favour or affection.

All irrelevant matter incorporated in the evidence should similarly be divorced from mind. The Judge Advocate then pointed out that many of the normal rules of evidence in English law had been 'set aside' in proceedings held under the War Crimes Act, and hence, whilst much of the evidence tendered in Hirota's case would not normally be legally admissible, it was specifically permitted in such trials. After a brief explanation of the nature of hearsay, the Judge Advocate told the court that 'practically all' of the evidence presented in this case was technically hearsay, and then explained why it was normally excluded from court proceedings:

> First, such statements are not normally made on oath (in this case of course, some of the hearsay evidence has been given on oath), and secondly because the person to be affected by the statements has no opportunity of examining its author. 70

This consideration was of importance to Major-General Hirota's case, since he had not had the opportunity to test the evidence presented against him, and so the court had to decide what weighting such evidence could be appropriately given.

Much other of the evidence before the court was opinion, and not that normally admitted in law, as being proved by experts. The status of the witnesses, and their means of knowledge as disclosed by the documents, therefore assumed a greater importance, and had to be evaluated in order to establish the credibility of the evidence and the weighting to be given it. Some of the evidence was of a corroborative nature, the Judge Advocate said, but a 'large amount' was 'entirely unsupported.' The question of whether corroborative evidence could have been provided, also arose in this context.

A final but important caution completed the extensive summation of the Judge Advocate:

> But while facts cannot lie, they may be misleading and they may be misleading because you may be able to draw more than one inference from them...In other words, the mere finding of a body does not draw an inference as to the cause or circumstances of death. 71

The persuasiveness of the line of reasoning supplied by the Judge Advocate is difficult to objectify; however, it would seem that the restraint he urged may have had some influence. Major-General Hirota Akiri was found guilty as charged, and received a sentence of seven years' imprisonment.

Lieutenant-General Adachi Hatazo, the last case to be

discussed, was tried at Rabaul in April 1947 on a charge of having 'failed to discharge his duty as commander' to control the conduct of the members of his command 'whereby' they committed 'brutal atrocities and other high crimes' against the Australian people and her Allies.

It is interesting to see in connection with the framing of the charge in this case, that advice was sought from the Judge Advocate General, as to his opinion of the sufficiency of the evidence, and whether other charges should also be preferred against Adachi, as well as the question of whether the method of the preparation of the case was adequate within the meaning of the War Crimes Act. He could quite easily have provided the necessary assistance, and thereby disregarded the questions of justice involved, but he chose not to. In a memorandum to the Adjutant General, the Judge Advocate General informed him of his refusal to provide such assistance. He had not read the file submitted to him on the Adachi case, since it was not a part of his job description with the reorganisation of the Army Legal Services; this was the duty of the Directorate of Legal Services, the Judge Advocate General went on;

> Miscarriages of justice could occur if JAG should take a not unprominent part in the preparation of the case for prosecution prior to trial, and should then have cast upon him the obligation of reporting on the petition of the person convicted. 72

A total disregard for the principles of law and justice therefore did not characterise the Australian prosecution of war criminals, although by utilising the principle of command responsibility as established by the Yamashita precedent, it could be argued that the concern was for the facade or form

of legality than its substance.

Lieutenant-General Adachi had been the commander of the Japanese 18th Army in New Guinea from the end of 1942 until the surrender. The gravamen of the charge against Adachi was similar to that involved in the Hirota case; it alleged that Adachi's Emergency Punishment Order of October 1944 allowed the execution of prisoners of war (Indian) without trial, and thus violated international law and convention, but also that Adachi had by his actions tacitly recognised such executions before that time.

In his defence, Adachi stated that in April 1943 he received a memo from the Minister for War informing him that the Indians despatched to New Guinea were not prisoners of war and should be treated as a component part of the Japanese forces. As members of the Japanese Army, the Japanese Army Criminal Code applied to the Indians for any offences that they might commit. This information was corroborated by the testimony of General Imamura Hitoshi and the statements of Lieutenant-General Kuroda Shigenori, Chief-of-Staff of the Southern Army.

The Emergency Punishment Order was issued in October 1944 in an effort to suppress the incidence of serious crimes in Adachi's command area (of 120,000 men) which was under severe Allied attacks and in which units were widely dispersed due to a lack of food, making control difficult. The death of the field judge advocates, meaning that courts-martial could not be held, reinforced Adachi's decision to implement the order. Adachi told the court,

> I did not receive any formal authority (to issue the E.P.O.), but from the war situation at that time, to maintain discipline among the troops, it could not be helped. That is, in order to be able to maintain the command of the army, and it was within the spirit of Article 22 of the Army Criminal Code, and I expected that the Government would recognise my steps. 73

Hence, from the perspective of the defence, Adachi's issuing of the Emergency Punishment Order was an acute appreciation of his duties as commander to control the members of his command.

The Emergency Punishment Order authorised officers of the rank of captain and above (although most were Lieutenant-Colonels) to punish serious offences with death without the necessity of holding a properly-convened trial. A thorough investigation into the alleged crime was, however, expected, and reports were to be made. The execution of the sentences could be made promptly, based in principle upon Article 22 of the Japanese Army Criminal Code, which stipulated that offences liable for death in that code could be executed immediately. The primary crime that carried the death sentence was interference with the war operation.

Since the Emergency Punishment Order was intended for use against members of Adachi's command, i.e., members of the Army and civilians attached to it, it also was for use against any Indian soldiers who might commit acts of wrongdoing. The executions for which members of Adachi's command were tried and convicted of murder of Indian prisoners of war were in fact executions implemented under the terms of the Emergency Punishment Orders, as found by Legal Services:

> From the information made available to me it would seem that the Indians who were executed were members of the Japanese Army but as the accused were found guilty of

> murdering Indian PWs, I assume that there is further evidence available making this clear. 74

In view of this difficulty, and as in Hirota's case, the Prosecution was advised to stress the absence of any documentary evidence of the parole terms given the Indians in order to weaken the defence case. This was the subject of the closing speech of the Prosecution.

In his summation before the court, the Judge Advocate stressed the similarities between the case of Major-General Hirota and that of Adachi, and he reminded the court members of the principal rules of law that were involved. His major concern was the problem of the status of the Indians; were they collaborators or were they prisoners of war?

Some evidence before the court had suggested compulsion was used in getting the Indians to join the Indian National Army under Chandra Bose, but other evidence in which it appeared that the Indians were not held under guard as were prisoners of war presented another picture.

> One inference which might support the Accused's statement that the Indians were collaborators and that they subsequently changed their attitude as the war situation improved on the Allied side, may be drawn from the fact that, although these Indians arrived in Wewak in May 43, there was no continuity or course of ill-treatment against them...until April 44, when, according to the evidence... there was a very serious setback in the situation of the Japanese forces. 75

Stressed the Judge Advocate, these points were of importance in deciding whether the contention of the Defence, that the Indians had ceased to be prisoners of war and were instead members of the Japanese forces, had validity.

If the members of the court considered that the Indians had retained their prisoner of war status, then the effect of

the issuance of the Emergency Punishment Order was placed in a different light. Was the Emergency Punishment Order and Section 22 of the Japanese Army Criminal Code a lawful application of Japanese military law to prisoners of war in accordance with Article 8 of the Hague Convention, and Article 45 of the 1929 Geneva Convention on Prisoners of War?

Any municipal law applied to prisoners of war must be in line with the rules of international law, the Judge Advocate reminded the court. International law, he went on, required that no punishment shall be inflicted on anyone, prisoner of war or resident of occuppied territory, without first having been given a fair trial.

> That rule does not require a trial to be in accordance with the rules of procedure of any particular national law, nor does it require the trial to be by any specified type of Court. In my opinion, it connotes that the investigation should be carried out by a person who is unbiased and who is independent of the allegation made against the individual accused, and it also connotes that the person accused should be allowed to freely state his defence. 76

The question then was whether the Emergency Punishment Order provided for a 'proper free and unbiased, independent investigation' or whether it only allowed 'a mere shadow' of a trial.

> If it allowed a mere shadow of a trial, then, on its face, it is alleged as being contrary to International Law, and the Accused must have so known,

the Judge Advocate concluded.

However, if the Indians did change their status then the Order was properly applied; the application of the Order to them, according to Adachi, was a recognition of that change of status. Due weight must be given to that defence, the Judge

Advocate instructed the members of the court, and it should also be recalled that some seventy Japanese were executed also pursuant to the Emergency Punishment Order.

At the completion of the Judge Advocate's comments, the court withdrew for deliberations. Ten minutes later it reassembled and delivered its verdict: Lieutenant-General Adachi Hatazo was found guilty and sentenced to life imprisonment.

Whilst the findings of other courts were not binding on Adachi's court, clearly if it had have accepted the defence contention on the status of the Indians in Adachi's case, and have found him innocent it would have been an upset judgment, and almost irresponsible given the large number of convictions that had been made on the grounds of the Indians being still prisoners of war. With the verdict the court handed down, it must have keenly felt the responsibility and the need for a strong punishment for the commander who had failed in his duty to prevent his subordinates from having taken illegal actions against the Indians.

Adachi's case therefore, is less of a development on the command responsibility principle (although a re-statement of the duties of a Chief-of-Staff was made), than an illustration of some of the other factors which limited the response the court could acceptably make.

In a memorandum to the Army Headquarters, Melbourne, on the 11 June 1947, the War Crimes Court, Rabaul commented on its conviction of Adachi, Imamura and Hirota.

> In reaching a finding it was necessary in each case for the Court to weigh the evidence concerning a number of alleged war crimes committed within the respective commands of the accused, and to decide (within the command of the accused):
>
> (a) whether or not each alleged act occurred in fact;
> (b) whether or not each proven act was a war crime;
> (c) whether prevalence of similar acts was sufficient to indicate a 'system' within the command, and if so
> (d) whether the accused culpably or wilfully (1) caused, or (2) encouraged, or (3) failed to discharge, or (4) failed to inform himself regarding such systematic acts...
>
> The Court is satisfied beyond reasonable doubt that the accused in each of the three trials knew that systematic acts of a criminal nature were taking place in his command, and that each culpably failed in his duty in that he took insufficient action to inform himself of particular incidents and to restrain, and if necessary punish offenders as a deterrent to others who might commit similar offences if they were to go unpunished. The Court is satisfied that the specific offences enumerated in each case directly resulted from the culpable negligence of the accused. 77

The Australian trials of Senior Japanese Officers on a command responsibility basis were equated in the Australian perspective to the trial of General Yamashita, and to some extent with the Tokyo and Nuremberg trials in terms of importance and judiciousness, and the parallels in the use of certain prosecutions and Japanese defence attorneys.

There is no doubt that the Yamashita precedent was recognised as being an established principle of law by the Australian authorities, and as such it was seized upon and utilised as being a useful tool to ensure the conviction of the senior officers held by Australia, particularly where the evidence did not support charges of direct involvement or ordering of the crimes committed by subordinates. Nevertheless, the Australian approach to the Yamashita precedent could best be described as cautious; only those commanders who

could have (and should have) maintained close communication with their subordinates were prosecuted. The linking of the convictions of members of a command, to the area of that command and the commanding general, and using the same as support for a charge against the latter, was a peculiarly Australian feature of command responsibility trials.[78] Finally, the Australian approach to command responsibility was one in which each case was evaluated on its own merits, and no hard and fast rules (i.e., as to the extent of duty) were applied.

Command responsibility was for the Australian authorities therefore, an established principle of law, but one which, paradoxically, was still developing, and which had to be carefully administered since war was a precarious venture, and in a future conflict, it could easily have been used against its current proponents.

FOOTNOTES

1 Camilleri, J.A., An Introduction to Australian Foreign Policy, Milton, Queensland: Jacaranda, 1975.

2 Evatt, Herbert V., Foreign Policy of Australia - Speeches, Melbourne: Angus and Robertson, 1945, p. 121.

3 Ball, W. Macmahon, 'Australian Policy Toward Japan Since 1945', in Gordon Greenwood and Norman Harper, Australia in World Affairs, 1956-1960, (Melbourne: Cheshire, for the Australian Institute of International Affairs, 1963, pp. 243-262). Reproduced also (in part) in Ball, Australia and Japan: Documents and Readings in Australian History, Melbourne: Nelson, 1969, pp. 107-122.

4 Menzies, Robert, 'The Pacific Settlement Seen from Australia', Foreign Affairs, Vol. 30, No. 2, January 1952, pp. 188-9. Quoted from excerpt reprinted in Gordon Greenwood, Approaches to Asia: Australian Postwar Policies and Attitudes, Sydney: McGraw Hill, 1974, p. 204.

5 The Board of Inquiry was chaired by Sir William Webb, the Chief Justice of Queensland, with Mr. Justice Mansfield of the Queensland Supreme Court and Judge Kirby of the N.S.W. District Court.

6 For the purposes of the Act, the expression 'War Crime' included the following:

(i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(ii) Murder and massacres - systematic terrorism.
(iii) Putting hostages to death.
(iv) Torture of civilians.
(v) Deliberate starvation of civilians.
(vi) Rape.
(vii) Abduction of girls and women for the purpose of enforced prostitution.
(viii) Deportation of civilians.
(ix) Internment of civilians under inhuman conditions.
(x) Forced labour of civilians in connection with the military operations of the enemy.
(xi) Usurpation of sovereignty during military occupation.
(xii) Compulsory enlistment of soldiers among the inhabitants of occupied territory.
(xiii) Attempts to denationalize the inhabitants of occupied territory.
(xiv) Pillage and wholesale looting.
(xv) Confiscation of property.
(xvi) Exaction of illegitimate or of exorbitant contributions and requisitions.

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(xvii) Debasement of the currency and issue of spurious currency.
(xviii) Imposition of collective penalties.
(xix) Wanton devastation and destruction of property.
(xx) Deliberate bombardment of undefended places.
(xxi) Wanton destruction of religious, charitable, educational and historic buildings and monuments.
(xxii) Destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers and crew.
(xxiii) Destruction of fishing boats and of relief ships.
(xxiv) Deliberate bombardment of hospitals.
(xxv) Attack and destruction of hospital ships.
(xxvi) Breach of other rules relating to the Red Cross.
(xxvii) Use of deleterious and asphyxiating gases.
(xxviii) Use of explosive or expanding bullets and other inhuman appliances.
(xxix) Directions to give no quarter.
(xxx) Ill-treatment of wounded and prisoners of war, including -
(a) transportation of prisoners of war under improper conditions;
(b) public exhibition or ridicule of prisoners or war, and
(c) failure to provide prisoners of war or internees with proper medical care, food or quarters.
(xxxi) Employment of prisoners of war on unauthorized work.
(xxxii) Misuse of flags of truce.
(xxxiii) Poisoning of wells.
(xxxiv) Cannibalism.
(xxxv) Mutilation of the dead.

7 United Nations War Crimes Commission, Law Reports of the Trials of War Criminals, London: His Majesty's Stationery Office, 1948, volume 15, Annex p. 97.

8 Dickinson, George, 'Japanese War Crimes Arraigned', (Royal Australian Historical Society - Journal and Proceedings, XXXVIII, part 2, (July 1952) pp. 67-77) offers a description of Japanese defence lawyers at Manus.

Mr. Nakayama Choji - leader - over 70, graduate of Tokyo University, member Tokyo bar.
Kamimura Yunosuki - graduate of Tokyo University, ex-army legal officer.
Takano Junigiro - most learned member - lecturer Comparitive and Jurisprudence at Tokyo, educated at Sorbonne, Heidelberg and Kyoto Universities.
Sakai Yusuke - Chuo University graduate, naval legal officer.
'They were all inexperienced in conducting a criminal

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defence in a British court and were without any sort of guile. On more than one occasion a Japanese lawyer would produce evidence of a conclusive character against his client. Except in the case of Mr. Takano, they were totally ignorant of the rules of evidence and English law.' (pp. 69-70).

9 Dickinson, George, 'Japanese War Trials', Australian Quarterly, vol. 24, no. 2, June 1952, p. 70.

10 Dickinson, George, 'Japanese War Trials', Australian Quarterly, vol. 24, no. 2, June 1952, pp. 69-75, page 70 emphasis added.

11 Black's Legal Dictionary, Minnesota: West, 1968. (Revised 4th edition). 'Right', p. 1487.

12 For example: Document 'A2' Found Amongst Papers of Lt. Gen. Ito Takeo - dated 4 December 1945 and written by Imamura to those suspected as being war criminals.

'As regards us in Rabaul military discipline was strongly maintained and the Australian (sic) Army which believes that the so-called 'War Crimes' are extremely few in number, also recognises this fact, but because of political reasons in their homeland, it is rumoured that they will open Courts in this area also.' Again:

'"The losers are always in the wrong" - The Allied armies as they think fit have already arrested many thousands of our country men as 'War Criminals' and even in Japan leading figures in the country, cabinet ministers, generals and besides that large numbers of the ruling classes and, even summoned members of the Royal family and are forcing them to lead a life under serveillance the same as yourselves.'

MP 742 336/1/1205 part 1 - Australian Archives, Melbourne.

13 War crimes suspects held by Australia were 'minor' criminals - classes B and C, and mainly men from the bottom end of the command pipeline: e.g., Listing of Japanese W.C. Suspects - 7th Australian Division, Report AQ 041..112, 25 October 1945.

No. 3 - Sup. P.O. Nakatani Nabuo - in charge of guards. Consistent maltreatment of Dutch and Indians. Very bad individual.
- beating Indians and Dutch.
- maltreatment of Indians.
- shortage of rations.

No. 25 - Matsuoka Shigeji - official interpreter and police officer. Extremely brutal.

- withholding rations.
- arrest and disappearance of pro-Allied and Indonesians.

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Or 9th Division Listing - AG 32/6/3648, late 1945. Crimes mainly beatings, one 'suspect' a professional torturer, others blamed for withholding Red Cross supplies. One interpreter Kusimoto (civilian) deliberately misinterpreted the statements of an Australian POW who was ill-treated as a result. (MP 742, 336/1/57 - Apprehension and Naming of War Criminals by A.M.F. - Australian Archives, Melbourne).

Difficulty in making some of these charges 'stick' is obvious.

14 Letter entitled, 'Trials of War Criminals: Confirmation of Death Sentences', dated 8 January 1946; to Mr. Forde, Minister of Army from Sir William Webb, Australian War Crimes Commissioner, Australian Archives, Melbourne: MP 742, 336/1/980.

15 Australian Archives, Melbourne: MP 742, 336/1/980. 'Query', undated, presumably October 1946.

16 Australian Archives, Melbourne: MP 742, 336/1/980. Department of the Army Minute Paper, 'War Crimes Trials', 29 October 1946.

17 See letter, from Secretary of Department of Army (Sinclair) to Secretary, Department of Information, No. 33398, date illegible, presumably late March-April 1946: MP 742, 336/1/569, Australian Archives, Melbourne.

This meant that the only sources of information on the trials were

(a) Hansard and the radio debates of Parliament, which provided scanty details and rather more racial aspersions, or

(b) the newspapers.

Newspaper coverage was often criticised as being sensationalistic; this itself was probably a product of its lack of access to Department of Information-type material. The type of coverage the papers gave tended to stress Japanese bestiality, and criminality, and there is good reason to suppose that the 'Average Australian' remained unaware of the law and procedure being applied at such trials. (There is no guarantee though, that he would have been in opposition to its practice). However, the Australian public remained gruesomely interested in the trials and their outcome.

18 Dickenson, George, 'Japanese War Trials', Australian Quarterly, vol. 24, no. 2, June 1952, pp. 69-75, p. 71.

19 An example of Australian ethnocentricity, one of many herein:

Parliamentary Debates (Hansard) House of Representatives, 20 September 1945, vol. 185, p. 5756.

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Mr. Archie Cameron (honorable member for Barker) stated,

'having so many thousands of Japanese prisoners in our hands, many of whom must be of high rank, there would be nothing wrong with our using the methods that have been used by our enemies during this war.'

Later, in relation to atrocities at Nauru:

'If these Japanese can be identified, they should be singled out. If they cannot, those in command at Nauru at that time should be located. The responsibility for the atrocity must be sheeted home. I am one who believes in the good old law, which often falls into disrepute in these days - an eye for an eye, and a tooth for a tooth.'

In response to question from Mr. Coles and Mr. Bowden as to whether he meant one Japanese for one Australian, Cameron replied:

'I rate the Australian as much superior. I have said quite frankly, that I believe in maintaining the superiority of the white race. Much of what has overtaken us in this war has been due to the kid-glove, mealy-mouth attitude we have adopted in respect of some of these matters since the first war against Germany.'

To this extent, Cameron was only acting as the mouth-piece for many of his constituents, he reflected the attitudes prevalent in Australia at that time.

20 For details on Webb, see Terry Hewton, 'Webb's Justice', unpublished B.A. Honours thesis in history, University of Adelaide, 1976.

21 Evatt, Herbert V, 'Statement on Japanese Atrocities', 10 September 1945. Reproduced in Ball: Australia and Japan, op. cit., pp. 72-3.

22 Australian Archives, Melbourne: MP 742, 336/1/319, AFPAC List 2 and 3, Memo No. 26880, 10 January 1946, from POW Information Bureau to Director, POW and Internees, 'Re: Perpetrators - Supplementary List No. 2.'

23 See Australian Archives, Melbourne: MP 742, 336/1/1130. Report by Major D. McBain on War Crimes Investigations at Rabaul, 9 December 1946. He reported that the inefficiency and disorganisation of early attempts at apprehension and the filing of suspects was compounded by a shortage of Australian Army staff and the high turnover of such personnel. An earlier report dated 23 November 1946, provides details on staff structure and the numbers of personnel involved in the War Crimes Section at Rabaul - See Appendix.

24 Australian Archives, Melbourne: MP 742, 336/1/217, War Crimes Policy, Restricted Memo Telegram DPW (AG13(2a))/ CM. Subject: Investigation of War Crimes. To: Headquarters,

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Morotai Force; 1st Army; Western Command; Queensland, New South Wales, Victoria, South Australia and Tasmanian Line of Communication Areas. From: Adjutant-General, Headquarters, Melbourne, dated 11 January 1946. This memo outlines the responsibility to interrogate, methods for same, and the headquarters responsible depending on the type of evidence required. Australian ex-POWs, Japanese surrendered personnel and POWs in areas under Australian Army control had to be interrogated.

25 Australian Archives, Melbourne: MP 742, 336/1/1503, Report on Legal Situation, SCAP, And The Progress of War Trials, Japan by Major D.M. Campbell, (AALC), 10 October 1946.

The 2nd Australian War Crimes Section, working in co-operation with SCAP through the U.S. 8th Army at Yokohama 'was severely handicapped by the presence of one legal officer until the arrival of Major Hickson. The amount of work is far beyond the capacity of one lawyer who can only devote himself to the particular case in which he is prosecuting. The length of the trials necessitate the absence in Court for considerable periods (in the Murakami case the period was three months) with the result that other cases cannot be given the attention necessary to bring them up to the point of trial. The only solution, in view of the delay in bringing cases on, is that charges and specifications be prepared and listed for trial by 2 Australian War Crimes Section, and that lawyers be sent from Australia for the purpose of prosecuting when the date of the trial is determined by the Defence Section.'

26 The War Crimes Act gave the Governor-General power to convene military courts, but it was necessary for the Executive Council (cabinet sitting with the Governor-General) to formally approve the delegation of powers, either full or limited, to officers recommended by the Commander-in-Chief of the Australian Military Forces through the Minister for the Army.

Proposal of Commander-in-Chief in letter, 1 October 1945, to Minister for the Army; Australian Archives, Melbourne; MP 742, 336/1/382 (War Crimes Act).

27 Australian Archives, Melbourne: MP 742, 336/1/382. Agendum No. 505/45, for meeting November 1945, 'War Cabinet Agendum: War Crimes Act - Delegation of Powers'.

28 Australian Archives, Melbourne: MP 742, 336/1/382. Powers granted by Governor-General in Council, 12 December 1945.

29 Australian Archives, Melbourne: MP 742, 336/1/382. Communication telegram 99751, dated 18 December 1945, from Headquarters, Melbourne to - 3rd Division, 6th Division, 7th Division, 9th Division, 11th Division, Advance Headquarters - Morotai, 1st Australian Army, Deputy Adjutant-General, Adjutant-General. Emphasis supplied.

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30 Australian Archives, Melbourne: MP 742, 336/1/786, Teleprinter message No. 35, 14 January 1946. From Assistant Secretary, Attorney General's Department, Canberra, to Acting Secretary, Department of the Army, Melbourne.

31 Ibid. Surface marked by Adjutant-General (15 January 1946) to indicate that Castieau did not intend staying action for confirmation of sentences, only their implementation.

32 For example, Australian Archives, Melbourne: MP 742, 336/1/555.

(a) Letter from P.O.W. Relatives Association, Sydney on 4 March 1946 to Prime Minister Chifley re the commutation of sentences (PM File R63/1/1).

(b) Letter from R.S.L., Queensland Branch, Ipswich Sub-branch, on 27 February 1946 to the Hon. Joseph Francis, which he referred to Mr. Forde, the Minister for the Army. Not only were interested associations like the above involved in exerting pressure on the government through protests, but other groups and letters of a more surprising character, also followed the events closely. For example:

(a) A letter from The Housewives' Association Inc., South Australian Division, to Mr. Forde, the Minister for the Army, on 2 April 1946, in which the Organising Secretary, a Mrs. Marie Sketch conveys the following resolution adopted by the Executive:

> 'That the above Association register an emphatic protest against the meagre sentences that were imposed upon Japanese war criminals in the Darwin Courts of recent dates.'

or

(b) A letter from the Honorary Secretary, Australian Legion of Ex-Servicemen and Women, Hurstville and District Sub-branch, to the Minister for the Army, Mr. Forde, 1 April 1946, transmitting a resolution adopted by the membership:

> 'That this Sub-branch wishes to strongly protest against the giving of drugs to condemned War Criminals for the purpose of alleviating their fears. We request that in future this practice be discontinued.'

Public interest was seemingly quite strong in the war crimes prosecutions, but was subject, without reputable sources of information, to the development of rumour. It is clear though, that there was little sympathy for the Japanese; not only were they to be denied drugs to alleviate their fears but it was accredited Army policy that they could not be buried in Australian War Graveyards or other recognised cemeteries (336/1/786 , Telegram SM223, 25 February 1946, Subject: Execution of War Criminals, from Adjutant General to all units dealing with war crimes trials).

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33 The Sydney Daily Telegraph reported the views of the State President of the Returned Services League (R.S.L.), a Mr. Neagle, on 22 February 1946 (page 1, reprinted in 336/1/980). His view represented the anger of ex-servicemen's associations both for the Japanese and what they saw as obstructions to 'justice'. He said:

> our own boys suffered at the hands of these jungle apes, yet our own military leader is exercising the power to reprieve them.
>
> There should only be one sentence for them - death. Then this would be too swift for most of them.

Mr. Neagle then concluded by saying that there was no shortage of executioners; many ex-prisoners of war would do the job free.

34 Australian Archives, Melbourne: MP 742, 336/1/207. Telegram DPN (AG13 (2a))/KC from Headquarters, Melbourne to Darwin, Rabaul and 1st Australian War Crimes Section (Singapore) on 2 April 1946 informing them of change. File also contains Explanatory Statement for press. Army wanted averment of Prosecutor to be prima facie evidence - DLS1 (6)/PA - 13935 Minute Paper from Adjutant General to Secretary, Attorney General's Department, Reply W28681 where changed to certificate in view of recommendation of 1st Report of Regulations Advisory Committee in regard to use of averment. DLS16 possibly made because of difference in meaning of words. Oxford English Dictionary (1933) defines aver as 'to assert as fact, to state positively, to affirm',(p. 582, Vol. 1.) Whereas to certify is 'to make a thing certain, to guarantee as certain, attest in an authoritative manner; to give certain information of, or to declare or attest to by formal or legal certificate.' (Vol. 2, pp. 206-7).

35 Australian Archives, Melbourne: MP 742, 336/1/128, DPN (AG13 (2C))/NA, Memo - 'Evidence: War Crimes' from Director, POW and Internees summarising query of 1st Australian War Crimes Section, to Director, Legal Services. Reply of 22 February 1946, entitled 'Evidence: War Crimes', addressed to Director, POW and Internees.

36 For example see Australian Archives, Melbourne: MP 742, 336/1/1781, Memo from External Affairs to Minister for the Army, 16 October 1947, in which the Department suggests that further trials be held before Australian military courts under Australian jurisdiction, which 'would no doubt prove less costly as regards the attendance of witnesses.' Throughout many files there is correspondence between departments debating which one was responsible for meeting the expenses incurred in the presentation of witnesses.

37 Australian Archives, Melbourne: MP 742, 336/1/1291. Information Summary of the Trial of 2nd Lieutenant Nakanishi Yoshio.

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38 Australian Archives, Melbourne: MP 742, 336/1/1205, part 1. Memo AG 22928, 12 June 1946 from Headquarters, Melbourne to Headquarters 8 Military District, Rabaul.

39 Australian Archives, Melbourne: MP 742, 336/1/1205, part 1. Confidential Memo: 'War Crimes - Trials of Senior Japanese Commanders', A 665, 29 June 1946, from Headquarters, 8 Military District, to Headquarters, Melbourne.

40 Australian Archives, Melbourne: MP 742, 336/1/1247, part 2. Memo to Attorney General's Department from Department of the Army, June 1946, entitled 'Trial of Senior Japanese Officers, Rabaul - Civilian Counsel'.

41 Australian Archives, Melbourne: MP 742, 336/1/1205, part 1. Minute paper to Director, POW and Internees from Director, Legal Services, 'Trial of Senior Officers - General Imamura, Lieutenant-General Kato, Major-General Hirose, 20 January 1947. Emphasis added. Quoted sic.

42 Australian Archives, Canberra, Record Group 462, File No. 81635, File of Imamura Hitoshi, Judge Advocate General's report, p. 1.

43 Ibid., p. 2.

44 Ibid., p. 4.

45 Ibid., exhibit AP.

46 Australian Archives, Melbourne: MP 742, 336/1/1205 part 1. Minute paper to Director of Legal Services from Director, POW and Internees, 9 October 1946, in reference to Imamura's petition.

47 Australian Archives, Melbourne: MP 742, 336/1/1205, part 1. Petition to His Royal Highness, Duke of Gloucester, 23 July 1946.

48 Australian Archives, Melbourne: MP 742, 336/1/1205, part 1. Petition of Imamura to Brigadier-General Irving, 8 Military District, 18 February 1947, re 'Status of Indian Labourers.'

49 Australian Archives, Melbourne: MP 742, 336/1/1205, part 1. Minute paper to Director, POW and Internees from Director, Legal Services, 20 January 1947. 'Trial of Senior Japanese Officers, General Imamura, Lieutenant-General Kato, Major-General Hirose.'

50 Australian Archives, Melbourne: MP 742, 336/1/1247, part 2. File, Lieutenant-General Kato Rinpei, page 48 of trial record, summation of Judge Advocate.

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51 Australian Archives, Canberra, Record Group 462, File 81631. File of Lieutenant-General Baba Masao, opening statement of prosecution.

52 Australian Archives, Melbourne: MP 742, 336/1/1180. Memo to Director, POW and Internees from Director, Legal Services, 6 May 1947. 'War Crimes Act 1945 - Lieutenant-General Baba Hasao.'

53 Australian Archives, Canberra, Record Group 462, File 81631. Closing address of Prosecution in trial of Baba. Reproduced in United Nations War Crimes Commission Law Reports, op.cit., Vol. XI, Case No. 64, pp. 56-61. Emphasis added.

54 Australian Archives, Canberra, Record Group 462, File 81631. Summation of Judge Advocate.

55 Australian Archives, Canberra, Record Group 462, File 81968. File of Vice-Admiral Shibata Yaichiro et al. Companion files on trials held at Manus not released until end of 30 year term.

56 Ibid.

57 Australian Archives, Melbourne: MP 742, 336/1/1247, part 2. Memo to Director, POW and Internees from Director, Legal Services, 13 January 1947.

58 Australian Archives, Melbourne; MP 742, 336/1/1247, part 2. Trial of Hirota, proceedings, closing statement for defence, p. 101.

59 Ibid., p. 102.

60 Ibid., p. 107.

61 Australian Archives, Melbourne: MP 742, 336/1/1247, part 2. Trial of Hirota, proceedings, summation of Judge Advocate, p. 119.

62 This was also raised in the Yamashita case, as noted by the Judge Advocate, who referred the Court to In re Yamashita, American Journal of International Law, April 1946, p. 439 (as quoted).

63 Australian Archives, Melbourne: MP 742, 336/1/1247, part 2. Trial of Hirota, proceedings, summation of Judge Advocate, p. 120.

64 Ibid., p. 121 (as quoted).

65 Ibid., quoted p. 121 - Wheaton, case of the Alabama, p. 984. (As quoted).

66 Ibid., p. 121.

FOOTNOTES

67 Ibid., p. 123.

68 Ibid., p. 128.

69 Ibid., p. 128 - An example of media reporting was quoted by the Judge Advocate: 'In pursuance to an order by Major-General Hirota, 80 Chinese POWs (sic) were shot or beheaded because they had been sick for more than three days' or 'large piles of photostats of original orders given by Hirota's staff will be produced.'

70 Ibid., p. 129.

71 Ibid., p. 130.

72 Australian Archives, Melbourne: MP 742, 336/1/1247, part 1. Memo to Adjutant-General from Judge Advocate General, 27 September 1946, 'Trial of Senior Japanese Officers,' no serial number.

73 Australian Archives, Melbourne: MP 742, 336/1/1205, part 2. Trial of Adachi Hatazo, proceedings, p. 72.

74 Australian Archives, Melbourne: MP 742, 336/1/1205, part 1. Undated minute to Director, POW and Internees from Director, Legal Services re Lieutenant-General Adachi Hatazo.

75 Australian Archives, Melbourne: MP 742, 336/1/1205, part 1. Trial of Adachi, proceedings, summation of Judge Advocate, p. 137.

76 Ibid., p. 138.

77 Australian Archives, Melbourne: MP 742, 336/1/1247, part 1. Memo to Headquarters, Melbourne, from War Crimes Court, 8 Military District, Rabaul, 11 June 1947, re Outcome of Trials of Senior Officers.

78 Piccigallo, Philip, In the Shadow of Nuremberg: Trials of Japanese in the East, 1945-1951, (PhD Thesis, City University of New York, undated) offers a summary of all Australian trials, p. 201.

FOOTNOTES

Summary of all Australian Trials - from Piccigallo, p.201.

	No. of Trials	No. of Accused	Acquitted	Convictions
Singapore	23	62	11	51
Morotai	25	148	67	81
Labuan	16	145	17	128
Wewak	2	3	1	1
Rabaul	188	390	124	266
Darwin	3	22	12	10
Hong Kong	13	42	4	38
Manus	26	113	44	69
	296	924	280	644

23% of those convicted : sentenced to death and were executed.

77% of those convicted : sentenced to terms of imprisonment.

69.5% of all accused: were convicted.

CONCLUSION

CONCLUSION

With the trials of Japanese war criminals and particularly that of Yamashita, the historian is confronted with the problem of maintaining objectivity and perspective. Criminal trials do not occur in a socio-political vacuum; they are not isolated phenomena and cannot be considered as such. The trials of Japanese war criminals - tried not by the judiciary of their own nation but that of their recent enemy - are no exception. Therefore, it is a mistake to view the question of the Yamashita trial in isolation. Broader considerations impose themselves upon this issue.

The Yamashita trial was a political trial; political factors were paramount in its inception and in the manner in which it was conducted. The decision to try alleged Japanese war criminals, such as General Yamashita, Admiral Toyoda and the government leaders charged before the IMTFE, was a product of firstly, American foreign policy goals which she had outlined for herself in post-war Asia, predicated as they were on the American assessment of the causes of Japanese aggression, and secondly, of the dictates of domestic political parameters in the United States.

The American design for post-war Asia, in part manifested in the policies of the Occupation of Japan, had as a primary objective the maintenance of free trade and equal access to natural resources for all nations, within the context of new defensive agreements for the containment of Communism in the region. Japan was to be an important part of this design, as an ally of the United States.

The trials of alleged war criminals were important in this context for several reasons. America emerged from the war as one of the two most powerful nations in the world, but this was not achieved without enormous cost in terms of manpower as well as material. This was especially true of the campaign to reconquer the Philippines in which there was a prohibitively expensive loss of life. The trial of Yamashita, as the trial of the last Japanese commander in the Philippines, served as a focus for Filipino hostility - he was the ideal target to be blamed for their war-induced troubles - and distracted attention away from what they would have felt was a lenient Occupation of Japan under American auspices.

Domestically, American policy planners had to operate within the limitations of public opinion toward Japan (which they had in part created). American public opinion, in turn, was largely resultant from the attack on Pearl Harbour, and the ferocity and tenacity the Japanese exhibited in the war.

Seen to be dangerously aggressive, harsh penalties were demanded by the American public for the Japanese action in causing the war. American domestic parameters dictated also that the United States, as a powerful nation and a victor in the Pacific War, had a right to demand harsh penalties for Japan; such attitudes had to be (seen to be) satisfied. The American public demanded a show of national power, and the administration would have lost credit with its electors if this need had remained unfulfilled. This led to the agreement between the upper echelons of the major ministries to hold trials of Japanese war criminals to satisfy the demands placed upon policy. Intricately involved in this was the philosoph-

ical aspect of the issue; the war, from the American viewpoint, was conceived of as an ideological struggle, in which the forces of goodness and morality triumphed over the forces of evil. By utilising judicial forums for the trial of Japanese war criminals, Allied actions in the war and their concomitant loss of life, could be vindicated by branding the Japanese commanders and government leaders as responsible for all war-caused misfortunes, and thereby simultaneously disgracing them and their policies before their countrymen.

In this situation, the historian is confronted with a dilemma to which no universal principles or judgments may be applied. The injustices which were perpetrated against General Yamashita in the procedure of his 'trial' were not without purpose; the showpiece trials were designed to expedite and ease the reintegration of Japan back into the community of civilised nations from whence she had strayed with her expansionist and militarist ideology. General Yamashita Tomoyuki was not sacrificed without cause; he was sacrificed for the future of Japan, so that his fellow Japanese could succeed in their survival as a nation in the post-war world. He was as much a pawn in this wider socio-political framework as Japan herself was in American global strategical objectives.

This is that contradiction; that whilst we cannot approve of the injustices of the Yamashita trial, it is not possible to condemn in absolute terms. The question becomes one of means and ends; we can deplore the means through which the United States chose to effectuate her goals, and ask whether the ends involved in this case can justify the injustices of

the trial, (which occurred through the lapses in normal procedural rules), and the hanging of Yamashita. Is it a case of excitus acta probat? *

Whatever way we approach this problem it is clear that the departures from the standards of law which were a hallmark of the Anglo-American jurisprudential tradition sanctioned a dangerous precedent, all the more so since it was directed against persons who could least defend themselves against it and because it did little to uphold notions of the integrity and impartiality of the law.

Nations cannot co-exist without agreements forged in international law, to regularise and harmonise international relations.

The law then, is a shared normative system, or code of agreements. Law is that key, that fusion which holds order together. It developed because of the need for orderliness in the conduct of relations between sovereign political entities, such as the United States and Japan, engaged in a multiplicity of international contacts, both between themselves and other states, arising from the international exchange of capital, goods, services, technological expertise and modern communications, and demanding a definition of mutual rights, duties and obligations of states in relation to each other.

The legal rules agreed upon by civilised nations encompass all aspects of international interaction. They include international business law, diplomatic and treaty law, the law of the sea and of outer space, and most

* The event justifies the deed.

importantly, the laws of armed conflict, the law of war. Within this framework or code of agreements, states are free to disagree with one another, but such disagreement is normatively within the framework thereby allowing for a reconciliation either with a change of circumstances or with the parties to the disagreement modifying their position on the question involved. Thus, any disagreements which occur between civilised nations do not live on.

Law, however, is maintained by observance. States must accept and master observance to the law of nations in order to be a part of civilisation. Those nations who do not obey international law are labelled as dishonest and do not give themselves much of a chance to be successful in their surroundings and in their relations with other countries.

Law is fulfilled only through the behaviour or conduct of civilised states in their international intercourse. Civilisation, therefore, is based on an agreement within a group of people who, organised into nation-states, agree to be ruled by the principle of law - international law - and who obey its dictates.

War erupted from a breakdown of the international agreements underpinning the Washington Treaty system, with comity fracturing along the lines of weakness inherent in the system, and which in turn were exacerbated by the Depression. But even in the midst of war, it was anticipated that the laws of armed conflict, the laws of war would be upheld. Since Japan had not ratified the 1929 Geneva Convention on Prisoners of War, both parties to the conflict were bound by the 1907 Hague Conventions (which the former was intended to

supplement, not replace). In addition, agreement was reached between the parties whereby Japan agreed to apply the provisions of the Geneva Convention as far as was practicable for her to do so, and mutatis mutandis.

The question of the alleged infractions against the law of war with which General Yamashita was charged is only meaningful within this under international context. The law, in this case, the law of war, is relative to the lawbreaker. Hence, the question should be 'who lapsed in their adherence to the laws of war?' Did Yamashita actually break the law, or cause the law to be broken as a charge of command responsibility implies, or were there other considerations which dictated the necessity for the Americans, his accusers, to say that he had?

The primary purpose of a judicial trial has always been recognised to be the achievement of justice and equity between plaintiff and defendant, based upon the analysis, by the court, of the evidence placed before it, and the relevant points of substantive law. Juxtaposed against this constant, is the behaviour of the United States in its prosecution of the Yamashita case. In attempting to square the former with the way in which the United States behaved, one is led to conclude that Yamashita's real guilt or innocence was not the point at issue, but instead, that for reasons of political necessity, his trial and conviction was required.

Precedent for the judicial trial of a defeated enemy commander was far from concrete, despite the fact that the United States handled herself as if it was. The 'principle' of command responsibility with which General Yamashita was

charged was a principle of law unknown in the past practice of the civilised nations. There can be no other conclusion, therefore, than that the United States paid little serious attention to the problems posed by international law.

Such an assessment is reinforced when the procedural anomalies of the military commission are examined. The position of moral superiority and righteousness adopted by the United States in the question of war guilt and criminality, (such as the position of gross malevolence represented by Schwarzenberger), acted to countenance departures from fundamental standards of judicial practice; departures from tenets normally regarded as indispensable, and which were the object of much pride in the Anglo-American system of jurisprudence. The charge was ex post facto in nature, meaning that Yamashita did not have access, in terms of the law by which he was charged, to an ascertainable standard of guilt. Given that he was not judged by the military standards prevailing within the Japanese Army, and that in addition, the charge was unprecedented, there was no way in which Yamashita could have had the opportunity to know that he was acting in a criminal manner such that he could be brought to trial.

The Regulations Governing the Trial of War Criminals under which the trial was conducted, freely admitted normally prohibited types of evidence; hearsay, often several times removed, and indeed from a dead source; opinion evidence and documentary material that circumvented the right of the accused to cross-examine adverse witnesses, were utilised. Much of the evidence tendered by the Prosecution was of a prejudicial type, such as the photographic and physical rev-

elation of scars and wounds, and was introduced for prejudicial reasons. Whilst much of this evidence was of a grossly inferior standard in strictly legal terms, with the lack of legal expertise of the Commission, it was not viewed in this light, and hence, the case against Yamashita, even though lacking a direct connection between the alleged actor and the resultant crimes, was made to appear stronger than it actually was. Exacerbating this tendency, was the subtle shift in the burden of proof from the Prosecution to the Defence, thereby making it Yamashita's responsibility to prove that he did not thus 'permit' the commission of atrocities and other 'high crimes' by subordinate members of his command. As Yamashita was appearing before a military commission composed of members of his recent enemy's armed forces, it was not an easy task to fulfil.

Turning to the specific issues raised by the evidence, it could not be said that resolution or definition was achieved. The tribunal approached the trial from the standpoint of what American officers might have expected to be the workings of the Japanese armed forces, rather than wanting to elicit information as to how they actually did function, and the standards of conduct upon which they were predicated. This military/cultural bias inhibited the depth of analysis of the information they did receive, and shaped the way in which Yamashita's behaviour was evaluated so that he was judged not by the standards prevailing in the Japanese Army, but by American desk generals' appreciation of what they should have been.

The debate surrounding the chain of command issue was

typical; many of the troops alleged to be within his command umbrella were not (or not at the time stated), and others were only nominally within it. With the responsibility for the Manila atrocities, for example, the evidence was somewhat contradictory, but pointed to the fact of Iwabuchi having remained in the City to complete the naval mission assigned to him by Vice-Admiral Okawachi immediately prior to the transfer of command. Yamashita's power of command over Iwabuchi (exercised through Yokoyama) was limited to matters of land combat, and even then lacked disciplinary powers, as the evidence showed. But the military commission chose instead to denigrate the Japanese performance of their command duties in terms of the standards expected of American commanders in positions removed from combat, and to hold Yamashita responsible for the misdemeanours of the marines since they were ostensibly engaged in 'land operations'. It did not address itself to the more pithy and legal problems of how the duty to act and knowledge could properly be evaluated, but this again was probably a reflection of the commission's legal naivety. It is surprising, though, that given the importance of knowledge to the principle of command responsibility on which Yamashita was being charged, that more attention was not devoted towards a study of the communications facilities available to him - his means of acquiring knowledge, but this however, is representative of the justificatory tone which the trial took.

All of the factors outlined above are suggestive of the intrusion of external matters into what was portrayed as a strictly judicial trial of a person accused of violations of

the law of war. The manner in which the United States conducted the trial did nothing to allay suspicions of the supremacy of political/foreign policy considerations in the decision to try General Yamashita, or to remove the consequent doubts surrounding his guilt; the indecent haste of the trial, the stress on expeditious procedure and the use of desk generals lacking legal experience, when coupled with the sweeping procedural powers endowed the commission, are telling.

The laws and customs of warfare, particularly as they had been codified in the Hague Conventions, constituted the rules of the group of civilised nations who agreed on certain values that they considered to be right and wrong in situations of armed conflict. As such an agreement, it should have been respected and obeyed; but without the ratification of such an agreement by both parties, lapses in the observance of the law by either or both belligerents would have little meaning. Thus, it follows that if states conduct the hostilities of war according to rules that are intended to be more than just morally binding, then some degree of legal responsibility should be invoked by breaches of the same. With this principle there can be little argument.

But justice - the primary objective of the law - was in the Yamashita case, no more than an establishment adjusted by the laws, the new principle of command responsibility through negative criminality, and thereby conditioned to get results - the conviction of Yamashita. Thus, the law itself is an elastic and dualistic concept enforceable through the power of judgment. The self-righteousness of the Allies, a

quality only victors can afford, guaranteed the power of judgment handed down against Yamashita; it allowed the victor to serve out to the vanquished their judgments as to what (they thought) constituted right and wrong.

The law then, far from being an impartial and objective code, is subject to varying interpretations; it generally reflects the interests and attitudes of the powerful. The particular construction of the law adopted and applied by the United States in relation to the prosecution of war criminals in general and the charge of command responsibility, represented an agreement on the part of the policy planning agencies within that government, to view the law in such a way that would dovetail into and reinforce her foreign policy and domestic political considerations, supporting the achievement of decided national goals. As a victor in the Pacific War, the United States had the power to enforce her views upon the vanquished, and to sell her ideas to the other Allies, who for various domestic reasons, agreed to concur with her interpretation of the law.

It is into this framework of strategy that the trial of Japanese war criminals, and predominantly that of Yamashita, fits. The precedent offered by the trial of Yamashita, in which a commander was found to be responsible for the illegal actions of his troops in which he did not participate, either actively or through the issuance of orders, of which he had no fore- or after-knowledge, and which he did not condone, was seized upon and utilised in the trials of many other Japanese for war crimes. Many of the same criticisms which have been levelled against the trial of Yamashita could properly also

be directed against these subsequent trials, particularly with regard to the admissibility of evidence and the question of prisoner of war status.

The later trials held at Nuremberg and the IMTFE in Tokyo received gladly the precedent offered by the Yamashita judgment, not only in terms of the principle of command responsibility itself (re law), but also in the procedural aspect. Standards were postulated for the assessment of guilt - the relationship between knowledge, power and duty, and its measurement - by the Nuremberg trials, thereby developing and refining the original principle. In the Tokyo trials, the majority judges did set forth standards to be applied in the appraisal of individual responsibility for the treatment of prisoners of war, but little effort was made to apply them to the accused. By far the greatest contribution to the honing of the principle and to a greater care in its use came from the dissentient judges who were quite outspoken in their criticism of the conduct of the tribunal.

Whilst the Toyoda trial bore the imprint of the Yamashita precedent, it was distinguished from the latter trial in the attitude and approach manifested by the tribunal toward the war crimes jurisdiction as a whole, but particularly towards the procedure employed in such trials and especially as it related to the guilt of the accused. Although normally prohibited forms of evidence were permissible under the Regulations and were admitted, care was taken in its use and it was generally of a higher calibre than material which was offered as 'proof' at the Yamashita trial. There was considerable debate on the principle of command responsibility,

and a stress on law rather than expeditious procedure. Toyoda was innocent until proven guilty; guilt could not be imputed merely because of position, the tribunal declared.

Viewing the Yamashita trial through these later trials draws attention to the fact that military tribunals convened under the Regulations Governing the Trial of War Criminals were invested with discretionary powers. They did not have to apply the provisions regarding the admission of evidence in their widest sense. The fact that the Yamashita tribunal chose to do so can be seen as a sufficient demonstration of intent. It is not surprising, therefore, that the finding against General Yamashita was one of guilt. Of dubious legal strength, the biggest asset to the case against Yamashita were the rules of evidence and the legal inexperience of the commission.

The barbarities of a later war and the acquittal of the superiors of Lieutenant William Calley led one writer to condemn those who opposed the decision of the courts-martial, claiming that they had

> a penchant for procedures of the military commission that produced (the)...Yamashita standard. No doubt a commission of that type would have been able to convict (Captain) Medina, but it could also have convicted a six-year old of rape. 1

Such is the judgment of posterity.

FOOTNOTES

1 Campbell, Robyn, 'Military Command Liability for Grave Breaches of National and International Law: Absolute or Limited?' Ph.D., 1974, Duke University.

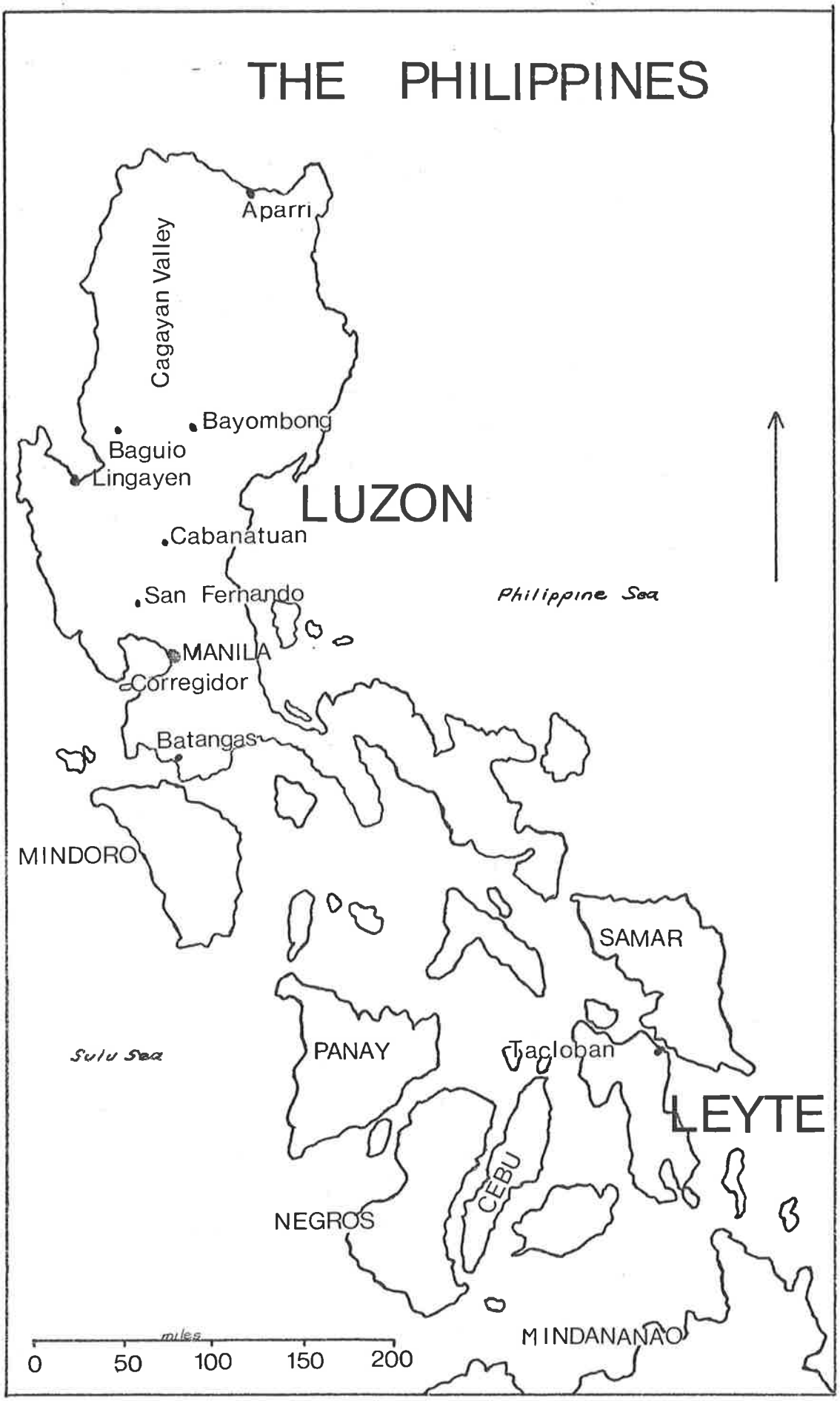
APPENDIX

BIBLIOGRAPHY

appendix 1

JAPANESE MILITARY TERMS

division	shūdan	師団
group	heidan	兵団
brigade	ryodan	旅団
regiment	rentai	聯隊
battalion	daitai	大隊
company	chūtai	中隊
platoon	shotai	小隊
line of communication -	heitan	兵站
major HQ	shireibu	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Bayombong
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LUZON
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San Fernando
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Batangas
MINDORO
SAMAR
Sulu Sea
PANAY
Tacloban
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CEBU
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miles
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50
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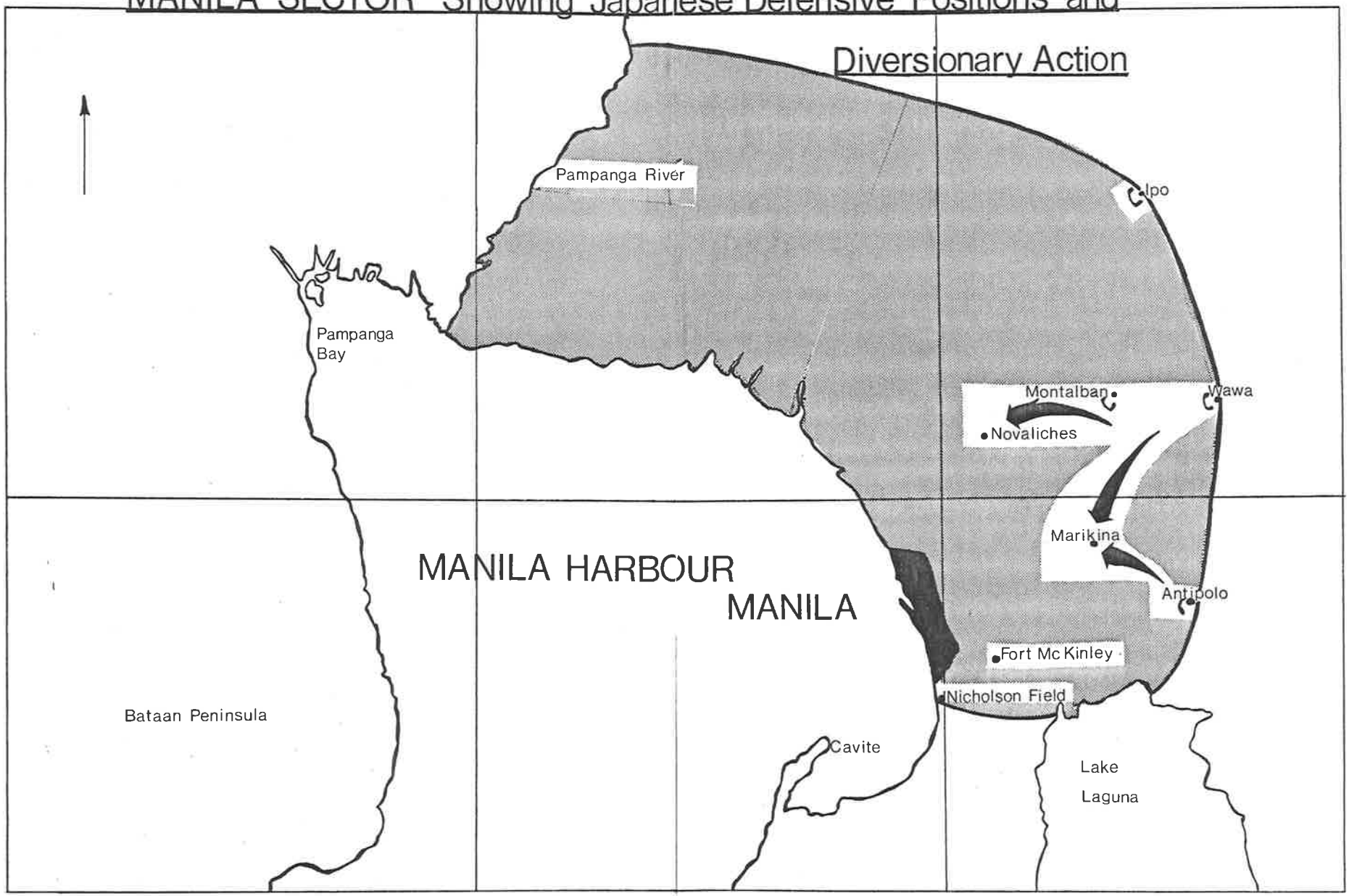
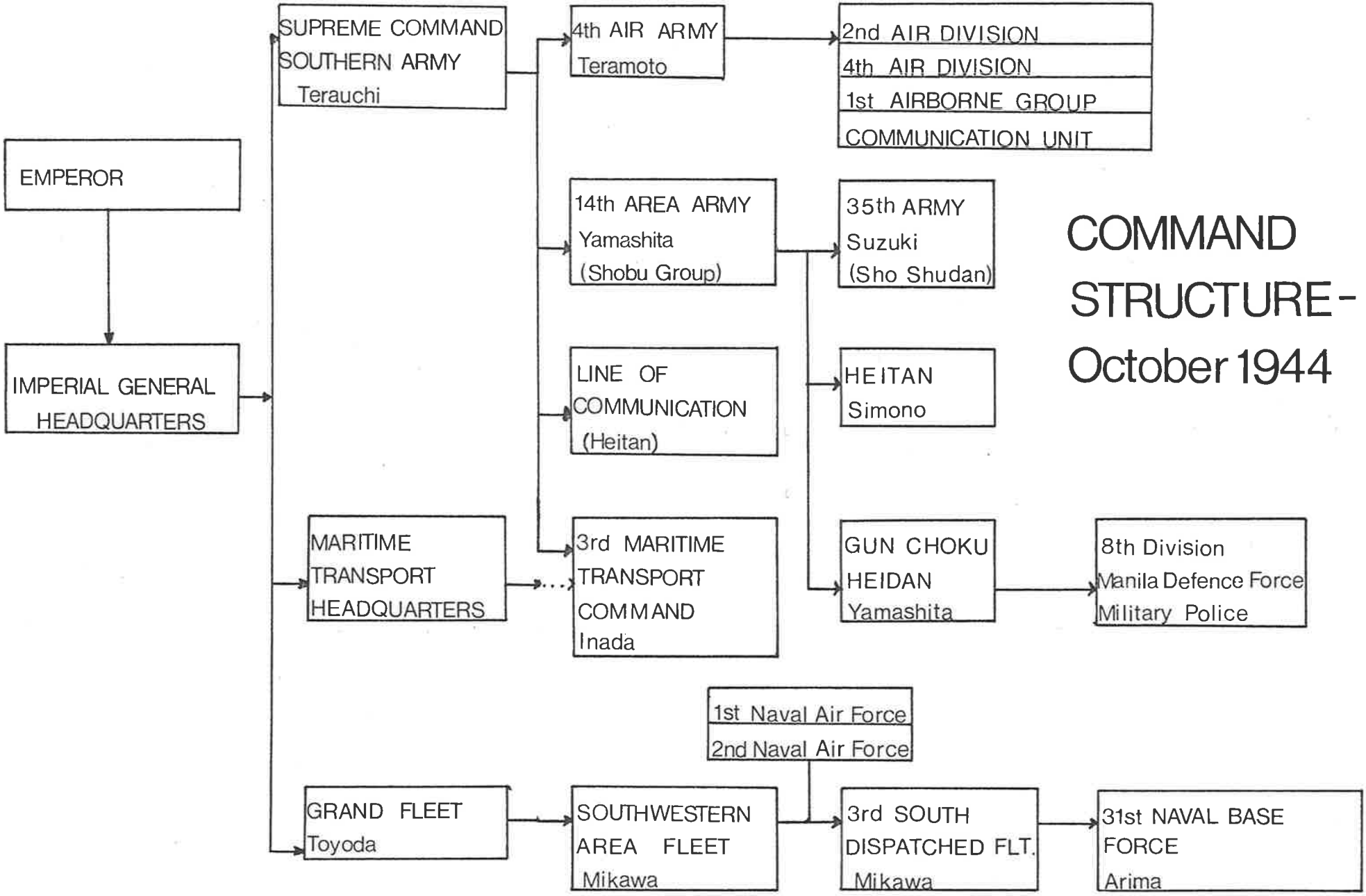
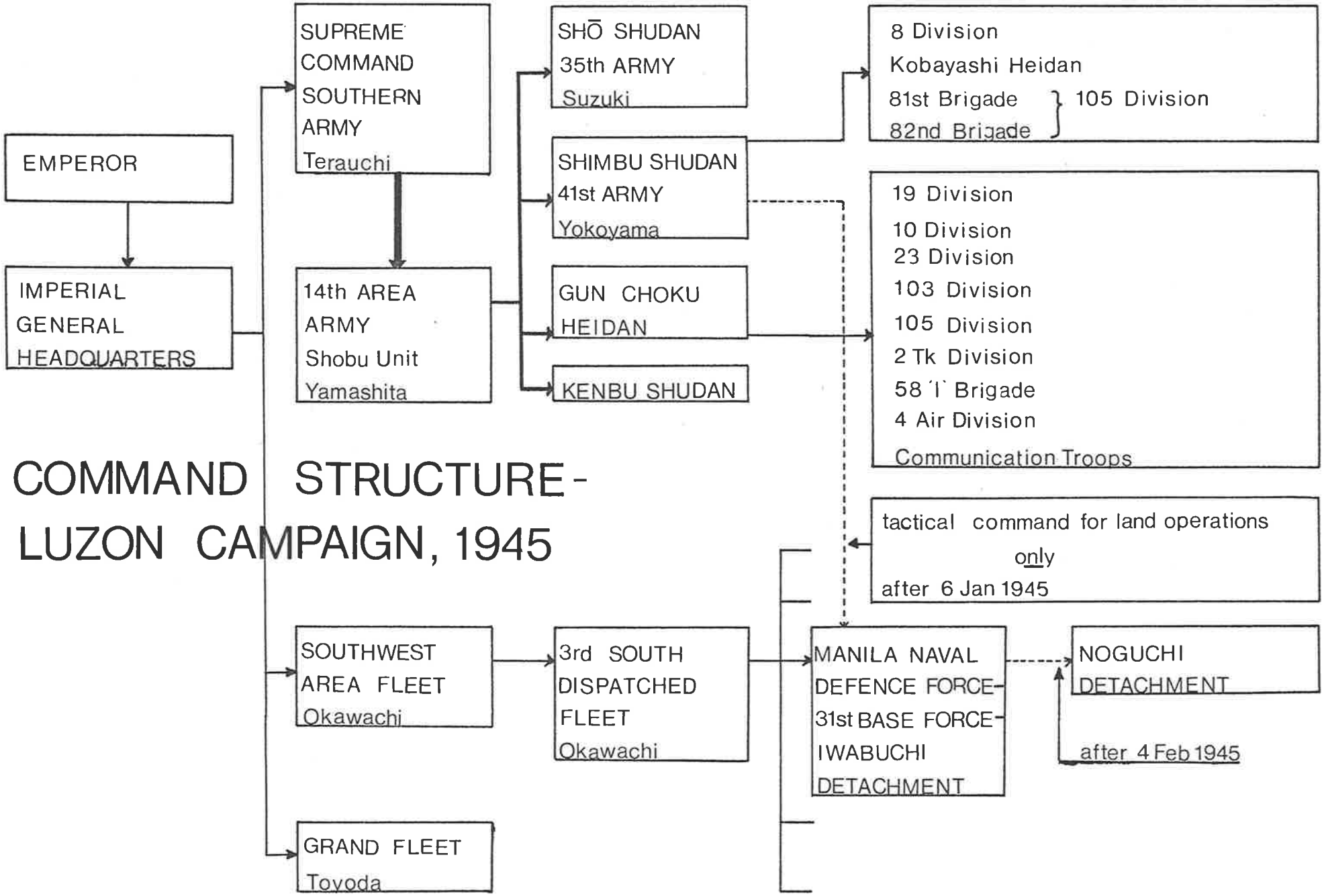
MANILA SECTOR Showing Japanese Defensive Positions and Diversionary Action



COMMAND STRUCTURE - October 1944

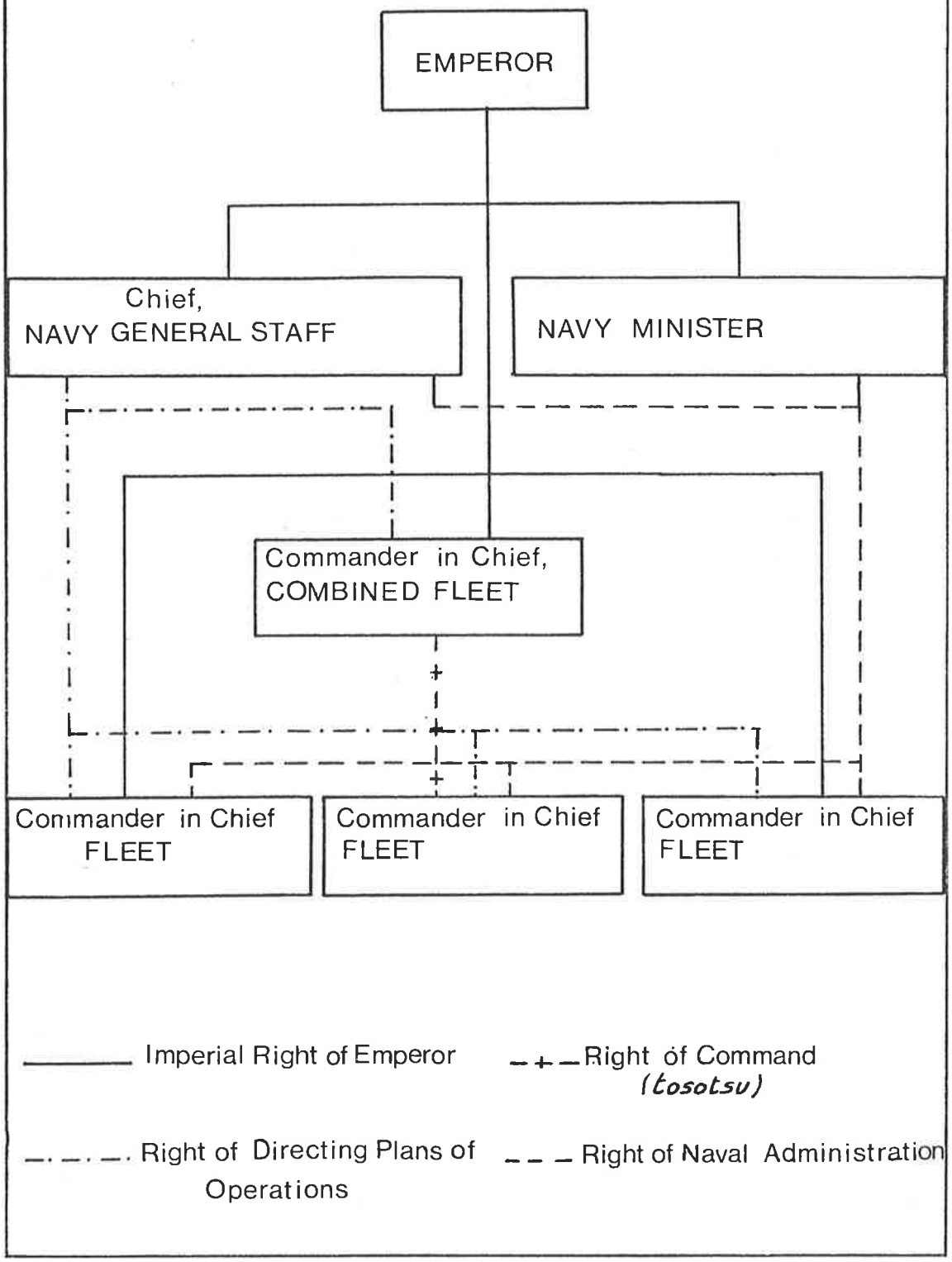




COMMAND STRUCTURE - LUZON CAMPAIGN, 1945

TOYODA ≈ EXHIBIT 'EF'

COMMAND STRUCTURE



ADMIRAL TOYODA SOEMU - EXHIBIT EF

Setting forth his views on the responsibility of a fleet commander

(1) It is not proper to place the blame upon a fleet commander in such case, when he could not learn the occurrence of an event at all, either by report given to the superiors of the unit involved in the event or by other informations or general signs, and consequently could not take measures punishing the participants of the event.

(2) While a fleet commander had received a report from his subordinates on the occurrence of an event, he did not punish the persons concerned, because it was admitted that the measures taken by his subordinates had not violated any law, or, had been, if somewhat illegal, an unavoidable step in view of the various conditions at the time.

In this case, the responsibility of the fleet commander is to be judged according as to whether his judgment and his measures were proper or not. If it is admitted that they were proper, there will be no need to call him to account.

(3) A fleet commander could have known the occurrence of a case judging from the other conditions even though he was given no report by his subordinates. Accordingly, he should take proper measures for it. If this is neglected or his measures are improper he should be blamed.

(4) Same as mentioned in the above (3) is the position of a fleet commander in case he is informed of an occurrence of a case by his subordinates.

(b) The responsibility of a fleet commander depends upon his effort made after he has learned of an occurrence of a case and as to the degree of difficulty met in investigating the situation. He is to be blamed if the duty which he should perform has been neglected and some faults have been found in the management of his subordinates.

(c) It is a question of whether a fleet commander's application of the law to the involved persons was right or wrong. In this respect if he has taken an illegal measure, he will be called to account.

(d) This is not clear because of being constructed in a double meaning including both of the cases, one where a fleet commander punishes the involved persons and the other where a fleet commander himself is punished by his senior officer (The Navy Minister is the only one). Let us interpret, however, that both are meant.

In the former part, a fleet commander had knowledge of the occurrence if a case, and judged that it deserved punishments, but he stopped the punishments or alleviated the punishments, since the execution of punishments would bring about impediments to military operations or cause other bad effects. If, in this case, a fleet commander's judgment and measure should not be considered proper in some points, he is called to account.

In the case of the latter, a fleet commander shall be called to account due to some defective points in his management of a case. It seems to be meant that punishment shall be inflicted on him after the influences upon

operation and other matters were taken into consideration.

When construed as mentioned above, there is no objection in particular about the whole of Item 5 of the text. However, I cannot recall any examples that a fleet commander was subjected to disciplinary or administrative punishments due to such a case.

COMMONWEALTH OF AUSTRALIA

WAR CRIMES ACT

ACT NO. 48 OF 1945

An Act to provide for the Trial and Punishment of War Criminals.

(Assented to 11th October, 1945.)

Whereas it is expedient to make provision for the trial and punishment of violations of the laws and usages of war committed during any war in which His Majesty has been engaged since the second day of September, One thousand nine hundred and thirty-nine, against any persons who were at any time resident in Australia or against certain other persons:

Be it therefore enacted by the King's Most Excellent Majesty, the Senate, and the House of Representatives of the Commonwealth of Australia, as follows:-

1. This Act may be cited as the War Crimes Act 1945.

2. This Act shall come into operation on the day on which it receives the Royal Assent.

3. In this Act, unless the contrary intention appears—

"any war" means any war in which His Majesty has been engaged since the second day of September, One thousand nine hundred and thirty-nine;

"Australia" includes the Territories of the Commonwealth;

"military court" means a military court convened under this Act;

"officer" means an officer of any part of the Defence

Force or of any naval, military or air forces of any Power allied or associated with His Majesty in any war;

"this Act" includes all regulations and rules made thereunder;

"war crime" means—

(a) a violation of the laws and usages of war; or

(b any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September, One thousand nine hundred and forty-five, under the National Security (Inquiries) Regulations (being Statutory Rules 1941, No. 35, as amended by Statutory Rules 1941, Nos. 74 and 114 and Statutory Rules 1942, No. 273).

committed in any place whatsoever, whether within or beyond Australia, during any war.

4. This Act shall extend to every Territory of the Commonwealth.

5. (1) The Governor-General may—

(a) convene military courts for the trial of persons charged with the commission of war crimes;

(b) appoint officers to constitute military courts;

(c) confirm the finding or finding and sentence of any military court or send back the finding and sentence or either of them for revision;

(d) mitigate or remit the punishment or any part of the punishment awarded by any sentence, or commute the punishment for any less punishment to which the

offender might have been sentenced by the military court; and

(e) suspend the execution or currency of any sentence on such terms and conditions (if any) as the Governor-General determines.

(2) Any appointment of an officer under this section may be by name or by designation of an office and may be subject to such restrictions, reservations, exceptions and conditions as the Governor-General determines.

(3) A military court shall consist of not less than two officers in addition to the President of the court.

(4) Nothwithstanding anything contained in this Act, the Governor-General or any person authorized under this Act to convene military courts may appoint as a member (other than the President) of the court one or more officers of the naval, military or air forces of any Power allied or associated with His Majesty in any war, who are serving under his command or placed at his disposal for the purpose.

(5) The number of officers appointed in any case under the last preceding sub-section shall not comprise more than half the members of the court, excluding the President.

6. (1) The Governor-General may delegate any of his powers under the last preceding section, either generally or in relation to any particular case or class of cases.

(2) Any such delegation shall be revocable at will, and shall not prevent the exercise of any power by the Governor-General.

(3) No revocation of a delegation shall affect anything done under the delegation prior to the revocation.

7. A military court shall have power to try persons charged with war crimes committed, at any place whatsoever, whether within or beyond Australia, against any person who was at any time resident in Australia, and for that purpose, subject to any direction by the Governor-General, to sit at any place whatsoever, whether within or beyond Australia.

8. (1) If it appears to an officer authorized under this Act to convene military courts that a person within the limits of his command has, at any place, whether within or beyond those limits, committed a war crime, he may direct that that person, if not already in military custody, shall, pending trial, be taken into and kept in military custody in such manner and in the charge of such military unit as the officer directs.

(2) The commanding officer of the unit having charge of the person shall be deemed to be the commanding officer of the person for the purposes of all matters preliminary and relating to trial and punishment.

(3) Nothing in the last preceding sub-section shall authorize the commanding officer to dismiss the charge or deal with the accused summarily for a war crime.

9. (1) At any hearing before a military court the court may take into consideration any oral statement or any document appearing on the face of it to be authentic, provided the statement or document appears to the court to be of assistance in proving or disproving the charge, notwith-

standing that the statement or document would not be admissible in evidence before a field general court martial.

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

(3) A military court shall take judicial notice of the laws and usages of war.

10. Except so far as is inconsistent with this Act, and subject to such exceptions, modifications, adaptations and additions as are prescribed by or under the Defence Act 1903-1945 or this Act, the provisions of the Imperial Act known as the Army Act and any Imperial Acts amending or in substitution for it and for the time being in force and the Rules of Procedure made thereunder, in so far as they relate to field general courts-martial and to any matters preliminary or incidental thereto or consequential thereon, shall, so far as applicable, apply to and in relation to military courts and any matters preliminary or incidental thereto or consequential thereon, in like manner as if military courts were field general courts-martial and the accused were persons subject to military law charged with having committed offences on active service.

11. (1) A person found guilty by a military court of a war crime may be sentenced to and shall be liable to suffer death (either by hanging or by shooting) or imprisonment for

life or for any less term; and, in addition or in substitution therefor, either confiscation of property or a fine of any amount, or both.

(2) Where a war crime consists wholly or partly of the taking, distribution or destruction of property, the court may, in addition to any such sentence, order the restitution so far as practicable of such property, and, in default of complete restitution, award a penalty determined by the court to be equal in value to the property which has been so taken, distributed or destroyed, and not restored.

(3) Sentence of death shall not be passed on any person by a military court without the concurrence of—

(a) the members of the court—if the court consists of not more than three members; or

(b) at least two-thirds of the members of the court—if the court consists of more than three members.

12. The provisions of this Act shall apply in relation to war crimes committed, in any place whatsoever, whether within or beyond Australia, against British subjects or citizens of any Power allied or associated with His Majesty in any war, in like manner as they apply in relation to war crimes committed against persons who were at any time resident in Australia.

13. Every military court shall be auxiliary to, and act in aid of—

(a) every other military court; and

(b) every court of any other part of His Majesty's dominions or of any Power allied or associated

with His Majesty in any war, constituted to try persons charged with war crimes, where those courts are required to be auxiliary to, and act in aid of, military courts.

14. The Governor-General may make regulations or rules prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular for prescribing matters providing for or in relation to—

(a) the constitution of military courts;

(b) the laying of charges for war crimes;

(c) matters preliminary or incidental to the trial of war crimes;

(d) the segregation, arrest and custody of persons charged with, or suspected of having committed, war crimes;

(e) the powers, duties and procedure (including the reception and admissibility of evidence and the onus of proof), and the revision, confirmation, effect and consequences of the findings and sentences of military courts, and the mitigation, remission and commutation of the sentences imposed by those courts; and

(f) the powers, functions and obligations of any person or class of persons in relation to the trial and punishment of war crimes or in relation to matters preliminary to the trial of war crimes.

WAR CRIMES SECTION

8.M.D.

W.E. (estimate)

NO. 1 COURT (for trial of Senior Japanese Officers)

PRESIDENT - (to be supplied by AHQ)

ONE SENIOR MEMBER - (to be supplied by AHQ)

OTHER MEMBERS - 3 Officers (Majors or above)

NO. 2 COURT (for trials other than above)

PRESIDENT - Lieutenant Colonel

MEMBERS - One Major and one other officer (Major or Capt.)

LEGAL STAFF

(a) C.L.O. - Lieutenant Colonel

(b) PROSECUTION TEAM FOR SENIOR TRIALS - Three officers to be supplied by AHQ

(c) OFFICERS FOR NO. 2 COURT AND GENERAL LEGAL DUTIES - Three AALC Officers

(d) CLERK-TYPIST FOR C.L.O. - 1 Sgt.

COURT REPORTERS — 3 N.C.Os.

INTERPRETERS — 4 N.C.Os.

OFFICE STAFF — Chief Clerk - 1 WO 11.
Clerk-Typists 2 Cpls.
Clerk-Orderly 1 Pte.

PROVOST — 2 Court Orderlies
2 Escorts
1 Driver

"A" BRANCH PERSONNEL FOR WAR CRIMES DUTIES

STAFF CAPTAINS - 2 Captains

INVESTIGATION OFFICERS - 3 Lieutenants.

BIBLIOGRAPHY

I. Major Sources

Australia, Department of the Army, documents on Australian trials of Japanese war criminals. Personal files of those prosecuted are located in record group 462, files commencing with the number 81,000 (e.g. Imamura, file No. 81635), which are held at the Australian Archives, Canberra. Companion volumes on case histories, trial transcripts, Australian war crimes policy and relationships with the United Nations War Crimes Commission and the Allied nations are to be found in series MP 742, files with the prefix 336/1/-.

The major difficulty encountered in the use of these documents was the 30-year closure rule and the problem of security. Australian trials of Japanese war criminals did not cease until 1951, meaning that many files have not yet been opened for scholarly scrutiny, and even amongst those files which have been opened, not all of them have complete open access status, so that research using such materials is not yet complete, and can be a frustrating experience, many tantalising pieces of information remaining beyond the historian's grasp. Credit should be given however, to the extremely helpful and cooperative archives staffs, whose knowledge makes the researcher's job considerably easier.

Australia, Government, Parliamentary Debates, (Hansard).
Session 1945: 3rd Session of 17th Parliament, 1st Period, 9 Geo VI, Volume 185 (14 September 1945 - 5 October 1945). Combined Senate and House of Representatives.
Session 1946: 1st Session of 18th Parliament, 1st Period, 10 Geo VI, Volume 189 (6 November 1946 - 6 December 1946).
Session 1950: 1st Session of 19th Parliament, 1st Period, 14 Geo VI, Volume 206 (22 February 1950 - 6 July 1950).

Far Eastern Commission, Activities of the Far Eastern Commission: Report by Secretary-General, Washington; Government Printer, 1947. (Department of State publication 2888, Far Eastern Series 24).

Far Eastern Commission, 3rd Report of Secretary-General, Washington; Government Printer 1950. (Department of State publication 3945, Far Eastern Series 35).

Far Eastern Commission, Proceedings, synoptic and provisional minutes 1946 - 1952. Other details missing - microfilm copy from National Library, Canberra.

International Military Tribunal for the Far East, Record of Proceedings, Majority Judgment, Dissenting Opinions and Court Papers. General Headquarters, (S.C.A.P.) Tokyo, Japan, 1946-1948. Available in Barr-Smith Library, University of Adelaide on microfilm (Library of Congress) but this series does not include dissentient opinions or court papers. However, the University of Queensland Library has the complete series available on SCAP-National Archives microfilm. This, unlike the bound equivalent available in the Library, Australian War Memorial, is available for inter-library loan. N.B. - The two microfilm series above referred to, do not match reel-for-reel in numbering; the first is composed of some 39 reels and the latter, 60, and hence page locations etc. may be quite at variance between the two copies. The Dull and Umemura index does not refer to any microfilm editions.

Before the Military Commission Convened by the Commanding General, United States Army Forces, Western Pacific; USA v YAMASHITA Tomoyuki, Proceedings, Manila, 1945. Microfilm copy (Library of Congress) - 4 reels, 3 reels proceedings, 1 reel exhibits. Film exhibits not included. Available in Barr-Smith Library, University of Adelaide.

Supreme Commander for the Allied Powers (S.C.A.P), Government Section; The Case of General Yamashita: a Memorandum, by Brigadier Courtney Whitney, Chief, Government Section. General Headquarters, Tokyo, 1950.

This memorandum, intended as a refutation of Reel's, The Case of General Yamashita, is available on microfilm in the Barr-Smith Library of the University of Adelaide.

Supreme Commander for the Allied Powers, Record of Proceedings in Trial of USA v Soemu Toyoda, The War Crimes Tribunal, General Headquarters - (S.C.A.P.), Tokyo, Japan, 1948-1949.

Available at National Library, Canberra, on

microfilm (negative): 6 reels, privately copied. Also available in bound form in the Library, Australian War Memorial, Canberra (but not available for inter-library loan).

II. Other Sources

(a) General Works

Benda, Harry; 'The Japanese Interregnum in South East Asia', in Grant K. Goodman, Imperial Japan and Asia - A Reassessment. New York and Columbia University, East Asian Institute, Occasional Papers, 1967; pp. 65-79.

Butow, Robert J.C; Tojo and the Coming of the War. Princeton, Princeton University Press, 1961.

Feis, Herbert; The Atomic Bomb and the End of World War II. Princeton, Princeton University Press, 1966.

Kajima, Morinosuke; Modern Japan's Foreign Policy. Rutland, Vermont, Tuttle, 1969.

Kawai, Kazuo; Japan's American Interlude. Chicago, University of Chicago Press, 1960.

Lory, Hillis; Japan's Military Masters: The Army in Japanese Life. Washington, The Infantry Journal, 1945.

Maruyama, Masao; Thought and Behaviour in Modern Japanese Politics. London, Oxford University Press, Expanded edition, 1969.

Reischauer, Edwin O; The United States and Japan. Cambridge, Massachusetts, Harvard University Press, 3rd edition, 1965.

Scalapino, Robert A; 'The United States and Japan', in Willard L. Thorp (ed.), The United States and the Far East. Englewood Cliffs, New Jersey, Prentice-Hall, 1962; pp. 11-73.

Yoshida, Shigeru; Japan's Decisive Century, 1867-1967. New York, Praeger, 1967.

Yoshida, Shigeru; The Yoshida Memoirs: The Story of Japan in Crisis. Translated by Yoshida Kenichi, Boston, Houghton Mifflin, 1962.

(b) American Foreign Policy Framework

Almond, Gabriel; The American People and Foreign Policy. New York, Harcourt Brace, 1950.

Acheson, Dean; Present at the Creation: My Years in the State Department. London, Hamish Hamilton, 1969.

Bergamini, David; Japan's Imperial Conspiracy. London, Granada (Panther), 1972.

Borton, Hugh; 'American Occupation Policies in Japan', Proceedings of the Academy of Political Science, Vol. 22, (January 1948), pp. 397-405.

Borton, Hugh; American Pre-Surrender Planning for Post War Japan. Occasional Paper of East Asian Institute, Columbia University, New York, Columbia University Press, 1967.

Bosch, William J; Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials. Chapel Hill, North Carolina, University of North Carolina Press, 1970.

Campbell, John C; The United States in World Affairs 1945-1947. New York, Harper and Brothers for Council on Foreign Relations, 1947.

Cohen, Bernard C; The Political Process and Foreign Policy: The Makings of the Japanese Peace Settlement. Princeton, Princeton University Press, 1957.

Dennett, Raymond and Robert K. Turner (eds.); Documents on American Foreign Relations, Vol. VIII, July 1945 - December 31st, 1946. Princeton, Princeton University Press, 1948.

Dower, John; 'Occupied Japan and the American Lake: 1945-1950', in America's Asia: Dissenting Essays in Asian-American Relations. Edward Friedman and Mark Selden (eds.), New York, Random House, 1971.

'Emperor, Zaibatsu, Militarists', New Republic, Vol. 113, (27 August 1945), p. 255: and Vol. 113, (17 September 1945), pp. 351-352.

Feis, Herbert; The Sinews of Peace. New York, Harper, 1944.

Feraru, Arthur N; 'Public Opinion Polls on Japan', Far Eastern Survey, Vol. 19 (17 May 1950), p. 101-103.

'The Fortune Survey', Fortune, Vol. 32 (December 1945), pp. 305, 305-6.

Foreign Relations of the United States: 1942, 1944, 1945 and 1948, Diplomatic Papers. Washington, Government Printer, 1965-1974.

Forrestal, James; The Forrestal Diaries, edited by Walter Millis. New York, Viking Press, 1951.

Goodrich, Leland and Marie Carroll (eds.); Documents on American Foreign Relations, Vol. VII, July 1944 - June 1945. Princeton, Princeton University Press on behalf of World Peace Foundation, 1947.

Grew, Joseph; Turbulent Years. London, Hammond, Hammond & Co., 1953. Two volumes, edited by Walter Johnson; Volume 2 consulted.

Hull, Cordell; Memoirs. Two volumes - See Chapter 37, 'Crusade for Economic Sanity' for his views on the economic causes of the war.

Iriye, Akira; Across the Pacific: An Inner History of American - East Asian Relations. New York, Harcourt Bruce, 1967.

Iriye, Akira; The Cold War in Asia. Englewood Cliffs, Prentice-Hall, 1974.

Johnstone, William; The United States and Japan's New Order. New York, Oxford University Press, Revised edition, 1941.

Koestler, Arthur; The Lotus and the Robot. London, Hutchinson, first published 1960, 1966 edition. The value of this book lies in its contribution to an understanding of the principles guiding Japanese ethics.

Kolko, Gabriel; The Politics of War: Allied Diplomacy and the World Crisis of 1943-1945. London, Weidenfeld and Nicolson, 1968.

Latourette, K; The American Record in the Far East, 1945-1951. New York, Macmillan, 1952.

Loewenheim, Francis L. and Harold D. Langley with Manfred Jonas; Roosevelt and Churchill: Their Secret Wartime Correspondence. London, Barrie and Jenkins, 1975.

Minear, Richard H; Victor's Justice: The Tokyo War Crimes Trial. Princeton, Princeton University Press, 1971.

Nehmer, George; 'Japan Under MacArthur', Current History, Volume II (August 1946), pp. 118-127.

Notter, Harley; Post-War Foreign Policy Preparation, 1939-1945. Washington, Government Printer, 1950. (Department of State Publication 3580, General Foreign Policy Series 50).

Pomeroy, William; 'The Philippines: A Case History of Neo-colonialism', pp. 157-199 in Remaking Asia: Essays on the American Uses of Power, Mark Selden (ed.), New York, Random House, (Pantheon), 1974.

Rosenau, James N; Public Opinion and Foreign Policy. New York, Random House, 1961.

Supreme Commander for the Allied Powers; History of the Non-Military Activities of the Occupation of Japan 1945-1951. Monograph 5: Trials of Class 'B' and 'C' War Criminals. General Headquarters, Tokyo, 1952. Series editor, William E. Hutchinson, (Statistics and Reports Section).

Svensson, Eric H.F; 'U.S. Initial Post-Surrender Policy for Japan', Department of State Bulletin, Vol. 13, (23 September 1945), pp. 423-7. Also in Maki, John M. (ed.); Conflict and Tension in the Far East - Key Documents, 1894-1960. Seattle, University of Washington Press, 1961, pp. 124-132.

Taylor, Telford; Nuremberg and Vietnam: An American Tragedy. Chicago, Quadrangle Books, 1970.

Truman, Harry S; Memoirs, Volume 1: 'Year of Decisions, 1945'. London, Hodder and Stroughton, 1955.

Wheeler-Bennet, John W. and Anthony Nichools; The Semblance of Peace: The Political Settlement After the Second World War. London, Macmillan, 1972.

Wright, Quincy (ed.); A Foreign Policy for the United States. Chicago, University of Chicago Press, 1947.

(c) War Crimes in General

Benedict, Ruth; The Chrysanthemum and the Sword: Patterns of Japanese Culture. London, Routledge and Kegan Paul, first published 1945, 1967 edition.

Hart, Richard H; Eclipse of the Rising Sun. New York, Foreign Policy Association, 1946. (Headlines series No. 56).

Miller, Robert W; 'War Crimes at Yokohama', Brooklyn Law Review, Vol. 15 (April 1949), pp. 191-208. Also in Oklahoma Bar Association Journal, Vol. 20, (August 27th, 1949), pp.1212-1223.

'The Outlook in Japan', World Today, Vol. 2, (November 1946), pp. 512-523.

Redman, H. Vere; 'Japan's Surrender: What Next?' Asiatic Review, Vol. 41 (new series, October 1945), pp. 407-409.

Russell, Edward F.L; The Knights of Bushido: The Shocking History of Japanese War Atrocities. New York, Dutton. This is an extremely biassed and prejudicial account, and whilst the author does quote from the IMTFE transcripts, he fails to document same, thus rendering the book of little scholarly worth, although a fascinating insight into human nature.

Shigemitsu, Mamoru; Japan and Her Destiny: My Struggle for Peace. London, Hutchinson. Although written in 1952, this book was not published until 1958.

Sleeman, Colin (ed.); The Trial of Gozawa Sadaichi and 9 Others, London, William Hodge, 1948. (War Crimes Trials series, volume 3).

Sleeman, Colin and S.C. Silkin (eds.); The Trial of Sumida Haruzo and 20 Others. (The 'Double Tenth' Trial). London, William Hodge, 1951. (War Crimes Trials series, volume 8).

Spurlock, Paul; 'Yokohama War Crimes Trials', American Bar Association Journal, Vol. 36, (May 1950), p. 387.

'Unregenerate Japan', Nation, Volume 161, (22 September 1945), pp. 273-274.

(d) Yamashita Trial

Daly, J.J.A; 'The Yamashita Case and Martial Courts', Connecticut Bar Journal, Vol. 21, (April - June 1947), pp. 136-158, 210-229.

Feldhaus, J. Gordon; 'The Trial of Yamashita', Current Legal Thought, Vol. 13 (August 1947), pp. 251-262. One of Yamashita's defence counsel.

Fuqua, Ellis E; 'Judicial Review of War Crimes Trials', see under Legal Problems.

Ganoe, J.T; 'The Yamashita Case and the Constitution', Oregon Law Review, Vol. 25 (April 1946), pp. 143-158.

Guy, George; 'The Defence of Yamashita', Wyoming Law Journal, Vol. 4 (Spring 1950), pp. 153-180.

Katona, Paul; 'Japanese War Crime Trials', Free World, Vol. 12 (November 1946), pp. 37-40.

Kuhn, Arthur; 'International Law and National Legislation in the Trial of War Criminals: The Yamashita Case', American Journal of International Law, Vol. 44, (July 1950), pp. 559-562.

Lim, Manuel; 'Highlights of the Yamashita and Homma Trials', Philippine Law Journal, Vol. 22, (1947), pp. 9-11.

Lyon, Charles S; Book review of Reel's Case of General Yamashita. Columbia Law Review, Vol. 50, (1950), p. 393.

MacArthur, Douglas (General); Reminiscences. Greenwich, Connecticut, Fawcett Publications, 1964.

Nippon Times; (newspaper, English language, Tokyo). Period October 11th 1945 - February 24th 1946; Useful for providing official SCAP views on Yamashita's trial.

Perlman, Philip; 'Habeas Corpus and Extraterritoriality', American Bar Association Journal, Vol. 36, (March 1950), pp. 187-190, 249-252. Perlman was the United States Solicitor-General at the time the article was written.

Potter, John Deane; A Soldier Must Hang: The Biography of an Oriental General. See under Yamashita, the Man.

Redford, Larry; 'The Trial of General Tomoyuki Yamashita: A Case Study in Command Responsibility', unpublished M.A. thesis, Old Dominion University, Virginia, 1975.

Reel, Adolf Frank; The Case of General Yamashita. Chicago, University of Chicago Press, 1949. This book by one of Yamashita's defence counsel was originally banned by S.C.A.P. It lacks documentation, but is a clear and useful account of the main issues raised by the trial, and offers an insight into the person behind the general.

Reel, Adolf Frank; 'Even His Enemy', Ohio Bar Association Report, Vol. 19, (3 June 1946), pp. 163-175.

Reston, James B. Jnr.; 'Is Nuremberg Coming Back to Haunt Us?', Saturday Review, Vol. 53, No. 29, (July 18 1970), pp. 14-17, 61. A comparison of the Yamashita and Calley cases.

Solf, Waldemar A; 'A Response to Telford Taylor's "Nuremberg and Vietnam: An American Tragedy"', in The Vietnam War and International Law; Richard A. Falk (ed.), 4 Volumes, Princeton, Princeton University Press, 1968-1976, Vol. 4, pp. 421-446. Solf is critical of the justice meted out to Yamashita.

'Two Japanese War Criminals', New Republic, Vol. 114, (25 February 1946), p. 269. Discusses trials of Yamashita and Homma.

United Nations War Crimes Commission; Law Reports of the Trials of War Criminals. London, His Majesty's Stationery Office, 15 Volumes, 1948-1949. Report on Yamashita's case, vol. 4, pp. 1-96.

United States Supreme Court; 'Judicial Decisions in re Yamashita and in re Homma', American Journal of International Law, Vol. 40, No. 2, (April 1946), pp. 432-482.

General Yamashita Tomoyuki vs Lieutenant-General Wilhelm Styer, United States Supreme Court Records, Lawyer's edition, 327;499-545, October 1945 term.

(e) Yamashita, the Man

Bergamini, David; Japan's Imperial Conspiracy. See American Foreign Policy Framework.

Caffrey, Kate; Out in the Midday Sun: Singapore 1941-1945: The End of an Empire. New York, Stein and Day, 1973.

Potter, John D; A Soldier Must Hang. See Yamashita's trial.

Stratton, Lieutenant-Commander Samuel S; 'The Tiger of Malaya', United States Naval Institute Proceedings, February 1945, pp. 136-143. Stratton was one of the team of psychiatrists to interview Yamashita prior to his trial.

Swinson, Arthur; Four Samurai: A Quartet of Japanese Army Officers in the Second World War. London, Hutchinson, 1968.

Tsugi, Masanobu (Colonel); Singapore: The Japanese Version. Sydney, Ure Smith, 1960. Tsugi was the chief of the operations and planning staff of General Yamashita's 25th Army, Malaya, 1941-1942.

(f) Japanese Occupation of the Philippines

Agoncillo, Teodoro A; The Fateful Years: Japan's Adventure in the Philippines, 1941-1945. Quezon City; Garcia, 1965. Two volumes. Agoncillo is the major source for this part of the thesis; he has written extensively on Filipino history.

Agoncillo, Teodoro A; 'Occupation in the Philippines', in Japan's Greater East Asia Co-Prosperity Sphere in World War II - Selected Readings and Documents; Joyce Lebra (ed.), Kuala Lumpur, Oxford University Press, 1975. This article is a contraction of Agoncillo's book and concentrates on Japanese attempts to reorient Filipino life and impose 'thought control'.

Benda, Harry; 'The Japanese Interregnum in South East Asia'. See 'general' section.

Hartendorp, A.V.H; The Japanese Occupation of the Philippines. Manila, Bookmark, 1967. Two volumes. This views the Japanese occupation from a civilian internment camp to which Hartendorp was unofficial camp historian. It offers some valuable and interesting insights unobtainable elsewhere.

Lear, Elmer N; 'Japanese Occupation of the Philippines - Leyte, 1941-1945'. Ithaca, New York, Cornell University Press, 1961. Asian Studies Department of South East Asia Programme, data paper No. 42.

Ward, Robert Spencer; Asia for the Asiatics? The Techniques of Japanese Occupation. Chicago, University of Chicago Press, 1945.

(g) Structure and Hierarchy of Command in Japanese Armed Forces

Horner, Layton; Japanese Military Administration in Malaya and the Philippines. PhD Thesis, University of Arizona, 1973. Available from University Microfilms, order No: 73-20,637. A valuable pioneering work.

Ito, Masanori; The End of the Imperial Japanese Navy. Translated by Andrew Kuroda and Roger Pineau. London, Weidenfeld and Nicolson, 1956. Deals particularly with the command division in the Battle for Leyte Gulf, and offers corroborative evidence of Japanese military technical backwardness.

Lory, Hillis; Japan's Military Masters: The Army in Japanese Life. Washington; The Infantry Journal, 1945.

Maxon, Yale; The Control of Japanese Foreign Policy: A Study of Civil-Military Rivalry, 1930-1945. Berkley, University of California Press, 1957. (University of California Publications in Political Science No. 5).

Toland, John; The Rising Sun: The Decline and Fall of the Japanese Empire, 1936-1945. London, Cassell, 1970 and New York, Bantam Books, 1971.

Tsuji, Masanobu; Singapore: The Japanese Version. See under Yamashita, the Man. Provides useful information on Army/Navy rivalry, by discussing the unusual extent of their cooperation at Yamashita's insistence in the Malayan-Singapore campaign.

(h) Legal Problems

Akehurst, Michael; A Modern Introduction to International Law, London, Allen and Unwin, 1970.

Appleman, John A; Military Tribunals and International Crimes. Indianapolis, Bobbs-Merrill, 1954. Offers a legal apology for the trials of Axis war criminals, and attributes a major responsibility for the outcome of the Yamashita trial, given the dissatisfaction of the Defence with the verdict, to their conduct of their case. Nevertheless, a major source that cannot afford to be overlooked. Located in the Law Library of the Australian National University. (At the time of researching, the book had been newly transferred from the Menzies collection of that university to the Law Library and carried a Bliss call number indicating its presence in that former collection, as recorded in the library catalogue. However, it was traced, along with the Sleeman books and others, to the Law Library).

Blakeney, Ben Bruce; 'International Military Tribunal', American Bar Association Journal, Volume 32, (August 1946), pp. 475-477, 523. Blakeney was a defence counsel in the IMTFE, defending Togo Shigenori whose book he later translated. He was also a defence counsel, with George Furness, for Admiral Toyoda Soemu.

Blewett, George F; 'Victor's Injustice: The Tokyo War Crimes Trial', American Perspective, Volume 4, (Summer 1950), pp. 282-292. Blewett, the defence counsel for Tojo Hideki, alleged basic departure from Western legal traditions.

Campbell, Robyn M. Jnr.; Military Command Liability for Grave Breaches of National and International Law: Absolute or Limited? PhD Thesis, Duke University, 1974. Available from University Microfilms, order No. 74-13,469. An especially valuable pioneering work.

Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties; (part of the Versailles Peace conference, 1919), American Journal of International Law, Vol. 14, (1920), pp. 95-154. This Commission was of special significance to the later development of the war crimes jurisdiction, particularly in view of the American delegates' opposition to what was in effect the charge on which General Yamashita was charged some 25 years later - command responsibility through negative criminality.

Comyns-Carr, A.S; 'The Tokyo War Crimes Trial', Far Eastern Survey, Vol. 18, (18 May 1949), pp. 103-114. The author was a member of the British prosecution team at the IMTFE.

Corbett, Percy; Law and Society in the Relations of States. New York, Harcourt, Brace and Company, 1951. Corbett has had a significant effect on the pattern and direction of international law, and hence, should be essential reading.

Falk, Richard A. with Gabriel Kolko and Robert J. Lifton (eds.); Crimes of War: A Legal Political-Documentary and psychological inquiry into the responsibility of leaders, citizens and soldiers for criminal acts in wars. New York, Random House, 1971. Prompted by the Vietnam War, this book cannot be ignored; it offers a provocation to serious thought on the question to which it is addressed, and emphasises the hypocrisy behind the exercise of war crimes jurisdiction. (See also Falk's other book, The Vietnam War and International Law, 4 volumes, Princeton, Princeton University Press, 1968-1976).

Franklin, Mitchell; 'Sources of International Law Relating to Sanctions Against War Criminals', Journal of Criminal Law and Criminology, Vol. 36, (1945), pp. 153-179.

Fuqua, Ellis E; 'Judicial Review of War Crime Trials', Journal of Criminal Law and Criminology, Vol. 87, (May 1946), pp. 58-64. Also in Illinois Law Review, Vol. 40, (March-April 1946) pp. 546-553.

Green, A. Wigfall; 'The Military Commission', American Journal of International Law, Vol. 42, (1948), pp. 832-848. The most comprehensive source dealing with this subject, but itself justificatory in tone.

Greenspan, Morris; The Modern Law of Land Warfare. Berkley and Los Angeles, University of California Press, 1959. A valuable book, but generally too modern for this topic, with the exception of the section in which the author discusses war crimes and their legal precedents. Greenspan offers a good catalogue of changes in the law of war with the 1949 Geneva Conventions etc.

'Have We Lost the Peace?', Christian Century, Volume 66, (13 July 1949), pp. 838-839. It is felt that the decision by the United States Supreme Court that convicted war criminals have the right of appeal through federal courts, handed down after the hanging of seven men, was evidence of a fear amongst the victors that whilst they won the war, they morally had lost the peace.

Hessel, Eugene; 'Let the Judges do the Hanging', Christian Century, Vol. 66, (24 August 1949), pp. 984-986. The author is critical of the 'justice' of the trials contemporaneously held in Manila.

Hewton, Terence C; 'Webb's Justice: The Role of Sir William Webb in the Tokyo Trials', Unpublished B.A. (Hons.) Thesis in History, University of Adelaide, 1976.

Hogan, Willard; 'War Criminals', South Atlantic Quarterly, Vol. 45, (October 1946), pp. 415-424.

Horwitz, Solis; 'The Tokyo Trial', International Conciliation, No. 465, (November 1950), pp. 473-584.

'International Hangings', Commonweal, Vol. 49, (26 November 1948), p. 165.

'I.M.T.F.E.'; International Organisation, Vol. 3, (February 1949), pp. 184-186.

Ireland, Gordon; 'Uncommon Law in Martial Tokyo', Yearbook of World Affairs, Vol. 4, (1950), pp. 50-104. Ireland persuasively argues that the IMTFE could not apply international law and did not apply common law.

Kaufman, Mary K; 'The Individual's Duty under the Law of Nuremberg: The Effect of Knowledge on Justiciability', Guild Practitioner, Vol. 27, (Winter 1968), p. 16.

Keenan, Joseph; 'Observations and Lessons from International Criminal Trials', University of Kansas City Law Review, Vol. 17, (April-June 1949), pp. 117-128.

Kelsen, Hans; 'Punishment of War Criminals - Collective and Individual Responsibility', California Law Review, Vol. 31, (1943), pp. 530-571. Kelsen has had a profound influence on the direction of international law, but in this article endorses what was to become official American war crimes policy.

Lauterpacht, H; 'The Law of Nations and Punishment of War Crimes', British Year Book of International Law 1944, pp. 58-95. Lauterpacht is probably the most authoritative commentator on international law (along with Oppenheim) and cannot afford to be overlooked.

Lauterpacht, H; International Law: being the collected works of Hersch Lauterpacht, systematically arranged and edited by Elihu Lauterpacht. Cambridge, Cambridge University Press, 1970.

Manner, George; 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War', American Journal of International Law, Vol. 37, (1943), pp. 407-435.

Minear, Richard H; Victor's Justice: The Tokyo War Crimes Trial. See American Foreign Policy Framework.

O'Connell, O.P; International Law. London, Stevens and Son, 1970. Two volumes, 2nd edition. This is a fundamental and definitive text, particularly useful on the relationship between mumicipal and international law, and the legal status of declarations and treaties.

Oppenheim, Lassa F.L; International Law: A Treatise. London, Longmans Green. Original edition published between 1926-1928. Differing editions since that time with varying editors. MacNair edited the 4th edition,

but subsequent editions up to and including the 8th revised edition (1955) have been the work of Hersch Lauterpacht. These later editions are those most often cited (usually as Oppenheim/Lauterpacht). The number of volumes varies also with the edition.

Perlman, Philip B; 'Habeas Corpus and Extraterritoriality', American Bar Association Journal, Vol. 36, (March 1950), pp. 187-190, 249-252.

Schwarzenberger, Georg; International Law. Two volumes; volume 2 used - 'The Law of Armed Conflict'. London, Stevens and Sons, 1968.

Taylor, Telford; 'The Nuremberg War Crimes Trials: An Appraisal', Proceedings of Academy of Political Science, Vol. XXIII, (January 1948), pp. 239-254. Taylor was Chief of Counsel for War Crimes, Office of Military Government, U.S.A. and a leading figure in the debate on war crimes and criminality, and standards of command responsibility in the Vietnam era. See his Nuremberg and Vietnam: An American Tragedy (Chicago, Quadrangle Books, 1970) for an exposition of his later views.

Tsai, Paul Chung-tseng; 'The Judicial Administration of the Laws of War: Procedures in War Crimes Trials', Unpublished LLD Thesis, Yale University, 1957. An immensely useful analysis of war crimes trials procedures and the guides that ought properly to have been utilised in setting standards for such trials. The work is very well annotated. The major drawback with the thesis is the difficulty in procuring a copy of it; it is not easily available through University Microfilms or any similar arrangement, and it was only after some degree of effort and a prohibitive financial expenditure that Yale forwarded an unbound loose-leaf photocopy. This is a somewhat disappointing attitude to scholarship, especially in view of the contribution to the field that Tsai makes.

United Nations War Crimes Commission; Law Reports of the Trials of War Criminals, London, His Majesty's Stationery Office, 1948-1949. Fifteen volumes. Quite a useful series despite its justificatory status, particularly given the paucity of serious information on the topic. It is probably the only popularly accessible source of information on the Australian provisions regarding the prosecution of war criminals, for example.

Walkinshaw, Robert; 'The Nuremberg and Tokyo Trials: Another Step Toward International Justice', American Bar Association Journal, Vol. 35, (April 1949), pp. 299-302, 362, 363.

West, Luther C; They Call it Justice: Command Influence and the Court-Martial System. New York, Viking Press, 1977. West discusses the limits to the impartiality of military justice, including references and parallels between the trial of Calley and his superiors and General Yamashita. An interesting contribution to a question not popularly discussed.

Woetzel, Robert K; The Nuremberg Trials in International Law. London, Stevens and Son, and New York, Praeger, 1960. A major authority in the field.

(i) The Toyoda Trial

The major sources for this aspect of the thesis in addition to the transcripts of the trial were readings in American foreign policy, the minutes of the Far Eastern Commission and newspaper comment, some of which was appended to the microfilm copy of the trial proceedings. The significant debates on the law had already been defined, and such legal comment as the trial attracted added little to this, and so references have been omitted. The foreign policy aspect surrounding the Toyoda trial, as was revealed in the Far Eastern Commission proceedings and in the Foreign Relations of the United States, and Documents on America's Foreign Policy, dovetails somewhat with the question of Australian war crimes policy, although the major part of this fascinating problem has had to be treated as 'given' for the purposes of this study.

(j) Vietnam and the Calley Case

It had originally been intended to include a chapter on the Calley, Medina and Henderson cases that grew out of the revelation of the Song-My or My-Lai Massacre in the early 1970s, partly because of the obvious legal comparisons between Calley and Yamashita, and the benefits of having a 'modern' aspect to the thesis, and due also to the revival of (and awakening of) interest in the earlier trial, but this was unfortunately found to be beyond the scope of this dissertation. Nevertheless, some references have earlier been included for their contribution to our understanding of the full ramifications encompassed within the whole question of war crimes.

Reference has been made to the book by Falk, Kolko and Lifton, and to Falk's Vietnam War and International Law, to Solf's article therein, to West's book on command influence, and to Minear's Victor's Justice. In addition, many of the

other authors previously cited have been at least tacitly influenced by the My Lai revelations and the ensuing legal battles. The two works at the centre of the My Lai controversy deserve also to be listed; -

Opton and Duckles; My Lai: It Never Happened and Besides, They Deserved It. Berkeley, Wright Institute, 1970. Also abbreviated in New Republic, 21 February 1970. This is the report of surveys conducted on American public opinion and reaction to the news of My Lai. Illuminating and compelling.

Reston, James B, Jnr; 'Is Nuremberg Coming Back to Haunt Us?' Saturday Review, Volume 53, No. 29, (18 July 1970), pp. 14-17, 61.

(k) The Australian Aspect

The major sources for this section of the thesis were the materials of the Department of the Army, held at the Australian Archives in Canberra and Melbourne. These were supplemented by the Far Eastern Commission minutes and Hansard, with the following secondary sources:-

Australian Institute of International Affairs, Study Group; 'Australia's Interests and Policies in Regard to Problems of Economic and Social Reconstruction in the Pacific'. Sydney, published by the Institute in mimeograph, 1947. (Institute of Pacific Relations, 10th Conference, Australian paper No. 2, 1947).

Australia, Government; War Crimes Act, 1945, Act No. 48 of 1945. Assented to 11th October 1945.

Australia, Government, Department of External Affairs; 'War Crimes', Current Notes on International Affairs, Vol. 16, (October/November 1945), pp. 217-220.

Australia, Government, Department of External Affairs; 'Trends in United States Policy Towards Japan', Current Notes on International Affairs, Vol. 19, (May 1948), No. 5.

Baba, Masao; tried Rabaul 1947, Record Group 462; File 81068, Australian Archives, Canberra. See also United Nations War Crimes Commission, Law Reports, for discussion of this trial.

Ball, William Macmahon; Australia and Japan: Documents and Readings in Australian History. Melbourne, Nelson, 1969. Ball was the first Australian representative on the Allied Council for Japan, in Tokyo.

Ball, William Macmahon; 'Australian Policy Towards Japan Since 1945', in Australia in World Affairs, 1956-1960; Gordon Greenwood and Norman Harper (eds.), Sydney, Cheshire, 1963 (on behalf of the Australian Institute of International Affairs).

Camilleri, J.A; An Introduction to Australian Foreign Policy. Milton, Queensland, Jacaranda Press, 1973, 1975 edition.

Dedman, J; 'Manus Island', Australian Outlook, Vol. 20, No. 2, (August 1966).

Dickinson, George; 'Japanese War Criminals Arraigned', Royal Australian Historical Society, Journal and Proceedings, Vol. XXXVIII, Part 2, (July 1952), pp. 67, 72-77. This article supplies a list of all Japanese tried at Manus, and whilst it points to significant areas of debate, it is of poor scholastic standard, although in part this may reflect a lack of freely available information on the trials.

Dickinson, George; 'Japanese War Trials', Australian Quarterly, Vol. 24, (June 1952), pp. 69-75. Almost identical to the above, but important as one of very few articles on the Australian trials.

Evatt, Herbert Vere; Australia in World Affairs. Sydney, Angus and Robertson, 1946.

Greenwood, Gordon; Approaches to Asia: Australian Postwar Policies and Attitudes. Sydney, McGraw Hill, 1974.

Greenwood, Gordon; Australian Policies Toward Asia. (Australian Papers Presented to the Institute of Pacific Relations Conference, 1954). Melbourne, Australian Institute of International Affairs, 1954.

Harper, Norman; 'Australian Policy re Japan', Australian Outlook, Vol. 1, No. 4, (December 1947), pp. 14-24.

Hasluck, Paul; The Government and the People. Canberra, Australian War Memorial, 1970.

Imamura, Hitoshi; tried at Rabaul, 1947. Record group 462, file No. 81635, Australian Archives, Canberra.

Ohashi, Shigeru; tried at Rabaul, March 1946. Summary in Friedman, The Law of War, (volume 2) - See Legal Problems.

Okada, Tametsugu; tried at Rabaul, 1947. Record group 462, file No. 81209, Australian Archives, Canberra.

Piccigallo, Philip Rocco; In the Shadow of Nuremberg. See War Crimes in General. The Australian part of Piccigallo's dissertation rests solely on the reports of Australian trials in the United Nations War Crimes Commission Law Reports. Isolated references are made to the Sydney Morning Herald, but upon investigation, all of these were found to be incorrect. A useful, although somewhat superficial account of the trials of Japanese war criminals by the United States, including Yamashita, the IMTFE, Australia and the other Allies.

Rosecrance, Richard N; Australian Diplomacy and Japan, 1945-1951. Parkville, Melbourne, Melbourne University Press on behalf of the A.N.U., 1962. 1966 edition. A particularly valuable book using a combination of sources - Hansard, Far Eastern Commission minutes - not all of which were available for perusal at the time the book was written.

Ryan, R.S; 'Some Thoughts on Japan', Australian Outlook, Volume 3, No. 1, (March 1949), pp. 62-69.

Shibata, Yaichiro; tried at Manus, 1951. Record group 462, file No. 81968, Australian Archives, Canberra.

Tennant, Kylie; Evatt: Politics and Justice. Sydney, Angus and Robertson, 1970.

Teshima, Fusataro; tried at Manus, 1950. Record group 462, file No. 81944, case A3, Australian Archives, Canberra.

Watt, Alan; The Evolution of Australian Foreign Policy: 1938-1965. Cambridge, Cambridge University Press, 1967.

It should be noted that only the personal files of the Japanese war criminals have been here included; companion volumes contemporaneously kept at Victoria Barracks, Melbourne (Australian Army Headquarters), and now in the Australian Archives, Melbourne, are too numerous to separately list and so the reader is directed to those folio descriptions appearing in the text. A full listing of all folios of MP 742, 336/1/- may be obtained upon request from Australian Archives, Melbourne, who will photocopy same at the inquirer's cost (currently 10 cents per page).

Webb, Sir William Flood; Summary of Facts and Findings on Japanese Atrocities. (No publication details, mimeographed copy in State Library of South Australia) was consulted, but the full report, the Webb Report, was unobtainable from the Australian War Memorial, Canberra, on inter-library loan, due to its status as an original document.