

TOMOYUKI YAMASHITA, PETITIONER, VS. WILHELM D. STYER, COMMANDING GENERAL, UNITED STATES ARMY FORCES, WESTERN PACIFIC, RESPONDENT.

G.R. No. L-129. December 19, 1945

Ponente: MORAN, C.J.

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MORAN, C.J.:

Tomoyuki Yamashita, erstwhile commanding general of the 14th army group of the Japanese Imperial Army in the Philippines, and now charged before an American Military Commission with the most monstrous crimes ever committed against the American and Filipino peoples, comes to this Court with a petition for habeas corpus and prohibition against Lt. Gen. Wilhelm D. Styer, Commanding General of the United States Army Forces, Western Pacific. It is alleged therein that petitioner after his surrender became a prisoner of war of the United States of America but was later removed from such status and placed in confinement as an accused war criminal charged before an American Military Commission constituted by respondent Lieutenant General Styer; and he now asks that he be reinstated to his former status as prisoner of war, and that the Military Commission be prohibited from further trying him, upon the following grounds:

- (1) That the Military Commission was not duly constituted, and, therefore, it is without jurisdiction;
- (2) That the Philippines cannot be considered as an occupied territory, and the Military Commission cannot exercise jurisdiction therein;
- (3) That Spain, the "protecting power" of Japan, has not been given notice of the impending trial against petitioner, contrary to the provisions of the Geneva Convention of July 27, 1829, and therefore, the Military Commission has no jurisdiction to try the petitioner;
- (4) That there is against the petitioner no charge of an offense against the laws of war; and
- (5) That the rules of procedure and evidence under which the Military Commission purports to be acting denied the petitioner a fair trial.

We believe and so hold that the petition for habeas corpus is untenable. It seeks no discharge of petitioner from confinement but merely his restoration to his former status as a prisoner of war, to be interned, not confined. The relative difference as to the degree of confinement in such cases is a matter of military measure, disciplinary in character, beyond the jurisdiction of civil courts.

Neither may the petition for prohibition prosper against Lt. Gen. Wilhelm D. Styer. The Military Commission is not made party respondent in this case, and although it may be acting, as alleged, without jurisdiction, no order may be issued in these proceedings requiring it to refrain from trying the petitioner.

Furthermore, this Court has no jurisdiction to entertain the petition even if the commission be joined as respondent. As we have said in *Raquiza vs. Bradford* (pp. 50, 61, ante), "* * * an attempt of our civil courts to

exercise jurisdiction over the United States Army before such period (state of war) expires, would be considered as a violation of this country's faith, which this Court should not be the last to keep and uphold." (Parenthesis supplied.) We have said this in a case where Filipino citizens were under confinement, and we can say no less in a case where the person confined is an enemy charged with the most heinous atrocities committed against the American and Filipino peoples.

True that the rule was made applicable in time of war, and there is a conflict of opinion as to whether war has already terminated. War is not ended simply because hostilities have ceased. After cessation of armed hostilities, incident of war may remain pending which should be disposed of as in time of war. "An important incident to a conduct of war is the adoption of measures by the military command not only to repel and defeat the enemies but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." (Ex parte Quirin, 317 US., 1; 63 Sup. Ct., 2.) Indeed, the power to create a Military Commission for the trial and punishment of war criminals is an aspect of waging war. And, in the language of a writer, a Military Commission "has jurisdiction so long as a technical state of war continues. This includes the period of an armistice, or military occupation, up to the effective date of a treaty of peace, and may extend beyond, by treaty agreement." (Cowles, Trial of War Criminals by Military Tribunals, American Bar Association Journal, June, 1944.)

Upon the other hand, we have once said (Payomo vs. Floyd, 42 Phil., 788)—and this is applicable in time of war as well as the time of peace—that this Court has no power to review upon habeas corpus the proceedings of a military or naval tribunal, and that, in such case, "the single inquiry, the test, is jurisdiction. That being established, the habeas corpus must be denied and the petitioner remanded. That wanting, it must be sustained, and the petitioner discharged." (In re Grimley, 137 U. S., 147; 11 Sup. Ct, 54; 34 Law. ed., 636.) Following this rule in the instant case, we find that the Military Commission has been validly constituted and it has jurisdiction both over the person of the petitioner and over the offenses with which he is charged.

The Commission has been validly constituted by Lieutenant General Styer by order duly issued by General Douglas MacArthur, Commander in Chief, United States Army Forces, Pacific, in accordance with authority vested in him and with radio communications from the Joint Chiefs of Staff, as shown by Exhibits C, E, G, and H, attached to the petition. Under paragraph 356 of the Rules of Land Warfare, a Military Commission for the trial and punishment of war criminals must be designated by the belligerent. And the belligerent's representative in the present case is none other than the Commander in Chief of the United States Army in the Pacific. According to the Regulations Governing the Trial of War Criminals in the Pacific, attached as Exhibit F to the petition, the "trial of persons, units, and organizations accused as war criminals will be by Military Commissions to be convened by or under the authority of the Commander in Chief, United States Army Forces, Pacific." Articles of War Nos. 12 and 15 recognize the "Military Commission" appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war not ordinarily tried by court martial. (Ex parte Quirin, supra.) And this has always been the United States military practice at least since the Mexican War of 1847 when General Winfield Scott took the position that, under the laws of war, a military commander has an implied power to appoint and convene a Military Commission. This is upon the theory that since the power to create a Military Commission is an aspect of waging war, Military Commanders have that power unless expressly withdrawn from them.

The Military Commission thus duly constituted has jurisdiction both over the person of the petitioner and over the offenses with which he is charged. It has jurisdiction over the person of the petitioner by reason of his having fallen into the hands of the United States Army Forces. Under paragraph 347 of the Rules of Land Warfare, "the commanders ordering the commission of such acts, or under whose authority they are committed by their troops,

may be punished by the belligerent into whose hands they may fall."

As to the jurisdiction of the Military Commission over war crimes, the Supreme Court of the United States said:

"From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons and offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." (Ex parte Quirin, 317 U. S., 1, 27-28; 63 Sup. Ct., 2.)

Petitioner is charged before the Military Commission sitting at Manila with having permitted members of his command "to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines," crimes and atrocities which in the bills of particulars, are described as massacre and extermination of thousands and thousands of unarmed noncombatant civilians by cruel and brutal means, including bayoneting of children and raping of young girls, as well as devastation and destruction of public, private, and religious property for no other motive than pillage and hatred. These are offenses against the laws of war as described in paragraph 347 of the Rules of Land Warfare.

It is maintained, however, that, according to the Regulations Governing the Trial of War Criminals in the Pacific, "the Military Commission * * * shall have jurisdiction over all of Japan and other areas occupied by the armed forces commanded by the Commander in Chief, United States Army Forces, Pacific" (underscoring supplied), and the Philippines is not an occupied territory. The American Forces have occupied the Philippines for the purpose of liberating the Filipino people from the shackles of Japanese tyranny, and the creation of a Military Commission for the trial and punishment of Japanese war criminals is an incident of such war of liberation.

It is maintained that Spain, the "protecting power" of Japan, has not been given notice before trial was begun against petitioner, contrary to the provisions of the Geneva Convention of July 27, 1929. But there is nothing in that Convention showing that notice is a prerequisite to the jurisdiction of Military Commissions appointed by the victorious belligerent. Upon the other hand, the unconditional surrender of Japan and her acceptance of the terms of the Potsdam Ultimatum are a clear waiver of such a notice. It may be stated, furthermore, that Spain has severed her diplomatic relations with Japan because of atrocities committed by the Japanese troops against Spaniards in the Philippines. Apparently, therefore, Spain has ceased to be the protecting power of Japan.

And, lastly, it is alleged that the rules of procedure and evidence being followed by the Military Commission are a denial of a fair trial. The supposed irregularities committed by the Military Commission in the admission of allegedly immaterial or hearsay evidence, cannot divest the commission of its jurisdiction and cannot be reviewed in a petition for habeas corpus. (25 Am. Jur., 218; Collins vs. McDonald, 258 U. S., 416; 66 Law. ed. 692; 42 Sup. Ct, 326.)

For all the foregoing, petition is hereby dismissed without costs.

Jaranilla, Feria, De Joya, Pablo, Hilado, Bengzon, and Briones, JJ., concur.

PARAS, J.:

I concur in the result.

CONCURRING AND DISSENTING

OZAETA, J.,

I concur in the dismissal of the petition for habeas corpus and prohibition on the ground that the Military Commission trying the petitioner has been legally constituted, and that such tribunal has jurisdiction to try and punish the petitioner for offenses against the law of war. (Ex parte Quirin, 317 U. S., 1; 63 Sup. Ct, 2.)

I dissent, however, from the portion of the opinion of Court which cites and applies herein its decision in the case of Raquiza vs. Bradford (pp. 50, 61, ante), to the effect that an attempt of our civil courts to exercise jurisdiction over the United States Army would be considered as a violation of this country's faith. The decision in the Raquiza case, from which I dissented, was based mainly on the case of Coleman vs. Tennessee (97 U. S., 509), in which was mentioned merely by way of argument the rule of international law to the effect that a foreign army, permitted to march through a friendly country to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. After reviewing the facts and the ruling of the court in the Coleman case, I said in my dissenting opinion in the Raquiza case the following:

"* * * Thus it is clear that the rule of international law above mentioned formed no part of the holding of the court in the said case.

"Neither can such rule of international law of itself be applicable to the relation between the Philippines and the United States, for the reason that the former is still under the sovereignty of the latter. The United States Army is not foreign to the Philippines. It is here not by permission or invitation of the Philippine Government but by right of sovereignty of the United States over the Philippines. It has the same right to be here as it has to be in Hawaii or California. The United States has the same obligation to defend and protect the Philippines, as it has to defend and protect Hawaii or California, from foreign invasion. The citizens of the Philippines owe the same allegiance to the United States of America as the citizens of any territory or State of the Union."

That the case of Coleman vs. Tennessee was erroneously invoked and applied by this Court in the case of Raquiza vs. Bradford, was admitted by Mr. Wolfson, the attorney for Lieutenant Colonel Bradford, who, notwithstanding the judgment in favor of his client, moved this Court to modify the majority opinion "by eliminating all references to the case of Coleman vs. Tennessee (97 U. S., 509). because, as well pointed out in both dissenting opinions, said case has no application whatever to the case at bar."

The rule of international law mentioned in the Coleman case and erroneously applied by analogy in the Raquiza case, has likewise no application whatever to the case at bar. A mistake when repeated only becomes a blunder.

CONCURRING AND DISSENTING

PERFECTO, J.,

1. FACTS IN THIS CASE

Petitioner prays that a writ of habeas corpus be issued directed to respondent Lt. Gen. Wilhelm D. Styer, Commanding General, United States Army Forces, Western Pacific, commanding him to produce the body of the petitioner before this Court and that "he be ordered returned to the status of an internee as a prisoner of war in conformity with the provision of article 9 of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war and of paragraph 82 of the Rules of Land Warfare, F. M. 27-10, United States War Department, and that a writ of prohibition be issued by this Court prohibiting the respondent from proceeding with the trial, and that the petitioner be discharged from the offenses and, confinement aforesaid."

Prior to September 3, 1945, petitioner was the commanding general of the 14th Army Group of the Imperial Japanese Army in the Philippines. On said date, he surrendered to the United States Army at Baguio and became a prisoner of war of the United States and was interned in New Bilibid Prison, in Muntinlupa, in conformity with the provision of article 9 of the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, and of paragraph 82 of the Rules of Land Warfare of the United States War Department.

On October 2, 1945, respondent caused to be served on petitioner a charge for violation of the laws of war, signed by Colonel Alva C. Carpenter, wherein it is alleged that between 9 October, 1944, and 2 September, 1945, petitioner "while commander of the armed forces of Japan at war with the United States and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting: them to commit brutal atrocities and other high crimes against the people of the United States and its allies and dependencies, particularly the Philippines." Thereafter petitioner was removed from the status of a prisoner of war and was placed in confinement as an accused war criminal and is presently confined in the custody of respondent at the residence of the United States High Commissioner of the Philippines in Manila.

On October 1, 1945, by command of respondent and pursuant to authority contained in a letter from the General Headquarters, United States Army Forces, Western Pacific, dated September 24, 1945, a Military Commission was appointed to try petitioner. At the same time several officers were designated to conduct the prosecution and several others to act as defense counsel.

The commission was instructed to follow the provisions of the letter of September 24, 1945, and was empowered to "make such rules for the conduct of the proceedings as it shall deem necessary for a full and fair trial of the person before it. Such evidence shall be admitted as would, in the opinion of the president of the commission, have probative value to a reasonable man and is relevant and material to the charges before the commission. The concurrence of at least two-thirds of the members of the commission present shall be necessary for a conviction or sentence."

Said letter (Exhibit G) addressed to respondent by Brigadier General B. M. Fitch, "by command of General MacArthur," empowers respondent "to appoint Military Commissions for the trial of such persons accused of war crimes as may hereafter be designated by this Headquarters," with the instructions that "all the records of trial including judgment or sentence and the action of the appointing authority will be forwarded to this Headquarters. Unless otherwise directed, the execution of judgment or sentence in all cases will be withheld pending the action of the Commander in Chief.

On the same date "by Command of General MacArthur" (Exhibit H), respondent was instructed to proceed

immediately with the trial of General Tomoyuki Yamashita for the charge served on petitioner on October 2, 1945 (Exhibit B).

Upon arraignment on October 8, 1945, by the above mentioned Military Commission, petitioner entered a plea of not guilty. On the same date the prosecution filed a bill of particulars (Exhibit 1) with 64 items of crimes, and on October 29, 1945, a supplemental bill of particulars (Exhibit J) with many other additional items, adding up to 123, of specified crimes imputed to petitioner.

On October 19, 1945, petitioner's defense filed a motion to dismiss the case before the Military Commission for the reasons that the charge, as supplemented by the bills of particulars, "fails to state a violation of the laws of war by the accused, and that the commission has no jurisdiction to try this cause." The motion was denied on October 29.

On said day, which was the first day of trial, the prosecution offered in evidence an affidavit of Naukata Utsunomia (Exhibit M) executed on October 1, 1945, and subscribed and sworn to before Captain Jerome Richard on October 22, 1945. The affidavit was made in Japanese through interpreter Tadashi Yabi. The defense objected to the admission of said affidavit, invoking to said effect article 25 of the Articles of War prohibiting the Introduction of depositions by the prosecution in a capital case in proceedings before a court martial or a Military Commission. (Exhibits L and N.)

Again on the same first day of trial, hearsay evidence was offered, defense counsel objected, but the objection was again overruled. (Exhibits O and P.) The defense counsel alleged then that the admission of hearsay evidence was violative of Article of War 38, the manual for courts-martial, and the rules of evidence in criminal cases in the district courts of the United States. It is alleged by petitioner that violations of legal rules of evidence have continued and are continuing during the trial.

At the opening of the trial, "the prosecution stated that no notice of impending trial had been given the protecting power of Japan by the United States," such notice being required by article 60 of the Geneva Convention of July 27, 1929, and of paragraph 133 of the Rules of Land Warfare, United States War Department.

2. REMEDIES PRAYED FOR

After alleging the above-mentioned facts, petitioner maintains that his confinement and trial as a war criminal are illegal and in violation of articles 1 and 3 of the Constitution of the United States and the Fifth Amendment thereto, and a certain other portions of said Constitution, and laws of the United States, and article 3 of the Constitution of the Philippines and certain other portions of said Constitution and laws of the Philippine Islands, and of certain provisions of the Geneva Convention of July 27, 1929, in that:

(a) There being no martial law, no Military Government of occupied territory and no active hostilities in the Philippines at the time of the appointment of the commission, there was no authority to appoint the same, and the commission is without jurisdiction.

(b) There being no charge of an offense against the laws of war by the petitioner, the commission is without jurisdiction.

(c) The rules of procedure and evidence under which the Military Commission purports to be acting deny the petitioner the fair trial guaranteed by the Constitution of the United States and the Constitution of the Philippines, and are in violation of Articles of War 25 and 38 and of other provisions of the laws of the United States and of the Philippines.

(d) The respondent was granted no authority by the Commander in Chief, United States Army Forces, Western

Pacific, to appoint a military commission and/or to try the petitioner in the Philippine Islands, and the Commission is, therefore, without jurisdiction to try this case.

(e) The United States, not having" given notice of the impending trial to the protecting power of Japan as made mandatory by the Geneva Convention of July 27, 1929, relative to the treatment of prisoners of war, cannot properly and illegally try the petitioner on the charge.

3. KULES OF INTERNATIONAL LAW

In the Kules of Land Warfare, paragraph 133 (Exhibit Q), it is provided that "at the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the protecting power thereof as soon as possible, and always before the date set for the opening of the trial," and "at all events, at least three weeks before the opening of the trial."

Article VIII of the Convention respecting the laws and customs of war on land, agreed in The Hague on July 29, 1899, provides: "Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State into whose hands they have fallen."

Section 59 of General Orders No. 100, dated April 24, 1868, containing instructions for the government of armies of the United States in the field, provides: "A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities."

Secretary of State Daniel Webster, in a communication addressed to Mr. Thompson, Minister to Mexico, on April 5, 1842, said: "The law of war forbids the wounding, killing, impressment into the troops of the country or the enslaving or otherwise maltreating of prisoners of war, unless they have been guilty of some grave crime; and from the obligation of this law no civilized state can discharge itself."

4. IN ANCIENT GREECE AND ROME

Many of the basic ideas which prevail today in the customs and usages of nations and became part of the international law emerged from the human mind centuries before the Christian Era. Such is the idea that prisoners of war are entitled to humane treatment, that treasons of war should be discountenanced, and that belligerents must abstain from causing" harm to non-combatants.

On his return to Peloponnesus in 427 B. C, Alcibiades touched at Mayonnesus and there slew most of the captives taken on his voyage. According to Thucydides, the Samian exiles remonstrated with him for putting to death prisoners who have not been in open hostilities against him.

The same historian narrates that the year before, the Mytileneans of Lesbos revolted from Athens, but they were obliged to capitulate in the following year to Paches, who dispatched to Athens over a thousand prisoners. Their disposal provoked discussion in the Athenian assembly. At the instigation of Cleon, the demagogue and former opponent of Pericles, an order was issued to slaughter not only the men who arrived in Athens, but the entire male population of Mytilene that was of military age, and to enslave the women and children. The execution of the order was delayed, and another assembly was called. There an amendment of Theodotus was carried, and the previous order countermanded.

The roman treatment of prisoners was less rigorous than the Greek. As stated by Virgilius, "the Roman policy from the first was, on the one hand, debellare super bos, to subdue the proud and arrogant peoples and, on the other, parcellare subiectes, to spare those who have submitted."

"Dionisius states that a rule existed in Rome as early as the time of Romulus, which prohibited the putting to death or enslaving of men captured in the conquered cities, and also the devastation of their territories; it provided, on the contrary, for the sending of inhabitants, either to take possession by Jot of some part of the country, for making the conquered cities Eoman colonies, and even for conceding to them some of the privileges of Koman citizenship." (Philipps on the International Law and Custom of Ancient Greece and Rome, Vol. II, p. 254.)

In 407 B. C. the Spartan commander Callicratidas took the town of Methymna by storm. In spite of the persuasion of his allies, according to Xenophon, he refused to sell the Athenian garrison and Methymnaean citizens as slaves, declaring that so long as he exercises the command no Greek should ever be reduced to slavery. Grote in his History of Greece could not refrain from praising this gesture of the Macedonian admiral by saying: "No one who has familiarized himself with the details of Grecian Warfare can feel the full grandeur and sublimity of this proceeding * * *. It is not merely that the prisoners were spared and set free * * *. It is that this particular act of generosity was performed in the name and for the recommendation of Pan-Hellenic brotherhood and Pan-Hellenic independence for the foreigner * * *. It is, lastly, that the step was taken in resistance to the formal requisition on the part of his allies." (History of Greece, Vol. VI, p. 387.)

Philip, the Macedonian King, liberated Athenian prisoners without ransom after the taking of Olynthus in 348 B. C. and ten years later, after the Battle of Chaeronee, he dismissed the prisoners with all their baggage.

Xenophon quotes Agesileus reminding his soldiers that "prisoners were meant to be kept, and not criminals to be punished." And Pausanias narrates that when Epaminondas, the greatest Theban general, had taken Phoebeia, where most of the Boeotian fugitives had gathered together, he nominally assigned to each of the men he captured there a different nationality, and set them all free, and there are cases where captives were dismissed on parole to have chance of finding ransomers.

Among the Greeks much was done to humanize warfare, and to remove from it the atrocities which prevailed amongst the most of the nations of antiquity. The Oracle of Delfi refused to listen to the Milesians as they had not duly expiated the excesses committed in their civil wars, though it responded to all others, even to barbarians, who consulted it. "C'etait comme l'excommunication du paganisme", comments Leurent (Vol. II, p. 135).

Poets, philosophers, artists, and men of intellectual distinction in general, even though they became invested with enemy character on the outbreak of war? were honored and respected. In 335 B.C. Alexander the Great destroyed Thebes, but he left Pindar's house uninjured and honored the poet's descendants. In ancient Hellas was already known the practice of neutralizing cities and protecting them from the ravages of war. Temples, priest, and embassies were considered inviolable. The right of sanctuary was universally recognized. Mercy was shown to suppliant and helpless captives. Safe-conducts were granted and respected. Burial of dead was permitted, and graves were unmolested. It was considered wrong to cut off or poison the enemy's water supply, or to make use of poisonous weapons. Treacherous stratagems of whatever description were condemned as being contrary to civilized warfare. Poets and philosophers, orators and historians proclaimed humane doctrines. Plato constructed his ideal republic on the basis of what he conceived to be perfect justice. Aristotle condemned the principle of retaliation as being antagonistic to true justice. Euripides speaks of excesses in war not only as acts of intrinsic wickedness and transgression against universal law, but, indeed, as a suicidal folly on the part of the offender. In one of his dramas he makes Poseidon declare: "But foolish is the mortal who lays waste cities, temples, and tombs, the sanctuaries of the dead; for having consigned them to solitude, he is one himself to perish afterwards."

The mild and clement nature shown by Caesar to many belligerent peoples was recognized even by his political enemy Cicero, to whom he wrote: "You are not mistaken about me * * *. Nothing is far from my nature than

cruelty * * *, I am told that some prisoners I set free \$eize the first opportunity to take up arms against me; nevertheless, I shall not renounce my policy."

The Roman conduct far transcended in its civilized and humane character that of the German leader Arminius, who is reported by Tacitus to have burned to death and otherwise barbarously slain the centurions and tribunes of the Varian legions, and nailed the skulls to trees. The sanction of Roman jurisprudence and the submission to the fundamental principles of justice proved effective.

Livy narrates that in 393 B. C. a certain school master of Falerii, who was in charge of the sons of the principal citizens of the town, took the opportunity to lead them to the Roman camp and threw them into the power of the enemy. The Roman general Camillus, indignant at this treason, ordered the boys to drive their master back to the town, and flog him all the way. There were, he pointed, laws of war as well as of peace, and the Romans had learned to put them into practice not less justly than bravely—" sunt et belli, sicut pacis, iura; iusteque ea, non minus quam fortiter, didicimus gerere."

When Adgantestrius made an offer to the Roman Senate to poison Arminius, according to Tacitus, he was at once informed that it was not by secret treachery but openly by arms that the Romans proceeded against their enemies.

The same historian mentioned the fact that the Roman generals rejected the scheme, suggested by the king's physician, of poisoning Pyrrhus (280 B. C.) and even delivered up the traitor, Pyrrhus, in return for the Roman generosity, allowed his prisoners to go to Rome on parole in order to celebrate the Saturnalia; after which, they faithfully returned.

5. UNQUENCHABLE THIRSTINESS OF PERFECTION.— PETITIONER ENTITLED TO LEGAL GUARANTEES

Impelled by irrepressible endeavors aimed towards the ideal, by the unconquerable natural urge for improvement, by the unquenchable thirstiness of perfection in all orders of life, humanity has been struggling during the last two dozen centuries to develop an international law which could answer more and more faithfully the demands of right and justice as expressed in principles which, weakly enunciated at first in the rudimentary juristic sense of peoples of antiquity, by the inherent power of their universal appeal to human conscience, at last, were accepted, recognized, and consecrated by all the civilized nations of the world.

Under these principles, petitioner General Tomoyuki Yamashita is entitled to be accorded all the guarantees, protections, and defenses that all prisoners should have, according to the customs and usages, conventions and treaties, judicial decisions and executive pronouncements, and generally accepted opinions of thinkers, legal philosophers and other expounders of just rules and principles of international law. The seriousness or unfathomable gravity of the charges against him, the unthinkable magnitude of the wholesale murders, rapes, and destructions for which he is called to answer, the beastly massacres and horrors by which he was thrown from the pedestal of military glory as the "Tiger of Malaya" into the bottom of perversity of a human monster, must not be taken into consideration, must all be forgotten, in order that true justice may be administered in this case.

6. WAR CRIMINALS

"There is very little limitation on what a victorious nation can do with a vanquished State at the close of a war. One shudders to think what Germany and Japan would- do if they were the victors! But the common law of nations probably requires a fair trial of offenders against war law as a prerequisite to punishment for alleged offenses; and the Geneva Convention so prescribed in the case of prisoners of war. But in the final analysis a decent respect for the opinion of mankind and the judgment of history is, in effect, a victorious belligerent's main limitation on its treatment of the surrendered at the close of a war; and this is self-imposed. The United

Nations are solemnly committed to the vindication and the rule of law which has been ruthlessly destroyed by the Nazis and Japanese." (Sheldon Glueck, War Criminals, p, 77.)

"Formalized vengeance can bring only ephemeral satisfaction, with every probability of ultimate regret; but vindication of law through legal process may contribute substantially to the re-establishment of order and decency in international relations." (Report of the Subcommittee on the Trial and Punishment of War Crimes, 37 Am. J. Int. L. [1943], 663, 666.)

"Centuries of civilization stretched between the summary slaying of the defeated in a war, and the employment of familiar process and protections of justice according to law to air the extent and nature of individual guilt * * * and in the civilized administration of justice, even the most loathsome criminal caught redhanded must be given his day in court and an opportunity to interpose such defenses as he may have." (Sheldon Glueck, Id., p. 78.)

7. ALLIED PRONOUNCEMENTS

According to a number of official pronouncements by United Nations' statesmen, the vast majority of offenders will be tried in the domestic criminal or military tribunals of the injured nations. Thus on August 21, 1942, President Roosevelt, in condemning the crimes committed against the civil population in occupied lands, solemnly announced that " the time will come when the criminals will have to stand in courts of law in the very countries which they are now oppressing, and to answer for their acts."

On September 8, 1942, Mr. Churchill promised that "those who are guilty of the Nazi crimes will have to stand up before tribunals in every land where the atrocities have been committed."

The Moscow Declaration of November 1, 1943, sternly warned that: "at the time of granting of any armistice to any government which may be set up in Germany, those German officers or men and members of the Nazi party, who have been responsible for or have taken a part (in the various) atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein," and that "the Allied Powers will pursue them to the utmost ends of the earth and will deliver them to the accusers in order that justice may be done."

The American members of the commission on responsibilities appointed at the close of World War I, had strenuously opposed the trial of German war criminals in an international high tribunal on the grounds that it was unprecedented and that there existed no international statute or convention making violations of the laws and customs of warfare international crimes, defining such offenses more specifically than the definitions to be found in the prohibitions of the unwritten or written law of nations, affixing a specific punishment to each crime, and giving jurisdiction to a world court.

But Doctor Glueck is of opinion that "If the Germans were to try an American soldier for violating German statutes implementing the laws and customs of warfare in a newly established type of military tribunal, the accused would not be heard to complain that he had no prior notice that a new type of court had been set up. Provided the international tribunal affords as adequate a trial as the accused would have had in the court of any injured belligerent, he has no valid ground for complaint." (P. 116.)

"One of the arguments—he continues—advanced by the American participants on the commission on responsibility at the close of World War I, against the establishment of an international criminal tribunal was that it was unprecedented. But all courts were at one time unprecedented. The problems presented by our epoch are unprecedented. The atrocities committed by Axis powers led by Germany, even by comparison with their behavior in World War I, are unprecedented. Can history show a better age than our own to initiate a

series of much-needed precedents? Few symbols of this new era which heralds the neighborly cooperation of civilized peoples in the vindication of the laws of civilized nations would be more impressive than an international criminal court, in which the plaintiff would be the world community. * * * The international criminal court would be a more vivid symbol of the reign of justice of an international plane than even the permanent court at The Hague has been. In domestic polity, the administration of criminal justice is the strongest pillar of government. The doing of justice on an international plane and under international auspices is even more important. It is indispensable to the survival, in the intercourse of nations, of the very traditions of law and justice. The besmirching of the prestige of international law is not the least of the evils perpetrated by the Axis powers led by Nazi Germany. The peerless and efficient administration of justice in the case of Axis war criminals is today indispensable as a token to the peoples of the world, a sign that crimes-committed by one country's subject against the people of another member of the family of nations will be relentlessly punished even though they run into huge numbers, were committed by men in uniform, and are instigated by a Fuehrer endowed by himself and his intoxicated followers with the attributes of a demigod." (Page 178.)

"Adequate law for use by an international court now exists; and its enforcement by such a tribunal would violate no fundamental tenets of civilized nations. The law for an international tribunal can be drawn from the rich reservoirs of common and conventional law of nations and the principles, doctrines, and standards of criminal law that constitute the common denominator of all civilized penal codes.

"The punishment to be applied by domestic military and civil courts depend upon local law and practice. Those to be imposed by the international tribunal could be based either upon the punishments permitted by the law of nations in the case of piracy and violations of the laws and customs of warfare or upon those provided for crimes of similar nature and gravity by the law of the accusing State, taking into account, also, where necessary in individual instances, the law of the defendant's States." (Page 181.)

8. NO SURPRISES TO PETITIONER

Petitioner in this case cannot allege ignorance of the fact that the criminal acts alleged in the specified charges against him are punishable by law, not only in all civilized nations, but in his own country.

Since January 1, 1882, the Japanese Government had been enforcing a Criminal Code based on the Code of Napoleon of 1811, prepared by the French jurist M. Boissonade, said criminal code having been superseded by a new one on October 1, 1908.

Under the last, arson may be punished with death (article 108); rape is heavily punished (articles 176, 177, and 178); and murder or homicide may be punished with death or penal servitude for life (article 109). These offenses and many others, punished by our Penal Code, are known to the Japanese as crimes, which in Japanese is tsumi.

From the Lauterpacht edition (1944) of Oppenheim's International Law, Vol. II, pp. 450-458, we quote:

"Sec. 251. In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders. They include acts contrary to International Law perpetrated in violation of the law of the criminal's own State, such as killing or plunder for satisfying" private lust and gain, as well as criminal acts contrary to the laws of war committed by order and on behalf of the enemy State. To that extent the notion of war crimes is based on the view that States and their organs are subject to criminal responsibility under International Law.

"Sec. 253. The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. A different view has occasionally been adopted in military manuals and by writers, but it is

difficult to regard it as expressing a sound legal principle. Undoubtedly, a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received; that rules of warfare are often controversial; and that an act otherwise amounting to a war crime may have been executed in obedience to orders conceived as a measure of reprisals. Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime. Also, the political authorities of the belligerent will frequently incline to take into consideration the danger of reprisals against their own nations which are likely to follow as a measure of retaliation for punishing a war crime *durante bello*. However, subject to these qualifications, the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity. To limit liability to the person responsible for the order may frequently amount, in practice, to concentrating responsibility on the head of the State whose accountability, from the point of view of both international and constitutional law, is controversial.

"Sec. 257. All war crimes may be punished with death, but belligerents may, of course, inflict a more lenient punishment, or commute a sentence of death into a more lenient penalty. If this be done and imprisonment take the place of capital punishment, the question arises whether persons so imprisoned must be released at the end of the war, although their term of imprisonment has not yet expired. Some answer this question in the affirmative, maintaining that it could never be lawful to inflict a penalty extending beyond the duration of the war. But it is believed that the question has to "be answered in the negative. If a belligerent has a right to pronounce a sentence of a capital punishment, it is obvious that he may select a more lenient penalty and carry it out even beyond the duration of the war. It would in no wise be in the interest of humanity to deny this right, for otherwise belligerents would be tempted always to pronounce and carry out a sentence of capital punishment in the interest of self-preservation.

"Sec. 257a. The right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well-recognized principle of International Law. It is a right of which he may effectively avail himself after he has occupied all or part of enemy territory, and is thus in the position to seize war criminals who happen to be there. He may, as a condition of the armistice, impose upon the authorities of the defeated State the duty to hand over persons charged with having committed war crimes, regardless of whether such persons are present in the territory actually occupied by him or in the territory which, at the successful end of hostilities, he is in the position to occupy. For in both cases the accused are, in effect, in his power. And although normally the Treaty of Peace brings to an end the right to prosecute war criminals, no rule of International Law prevents the victorious belligerent from imposing upon the defeated State the duty, as one of the provisions of the armistice or of the Peace Treaty, to surrender for trial persons accused of war crimes. In this, as in other matters, the will of the victor is the law of the Treaty. It is not to be expected that he will concede to the defeated State the corresponding right to punish any war criminals of the victorious belligerent. The resulting inequality is the unavoidable concomitant of the existing imperfections of international organization and of the institution of war itself.' But the victorious belligerent may achieve a substantial approximation to justice by making full provision for a fair trial of the surrendered enemy nationals, and by offering to try before his tribunals such members of his own armed forces as are accused of war crimes. Such conduct may go a long way towards reducing substantially the inequality of treatment as between the victor and the vanquished."

The permissible acts of warfare are, by the authority of long and common usage, strictly limited. The treaties entered into between members of the family of nations are but specific definitions and reinforcements of the general common law of nations, the "unwritten" rules of warfare, which for centuries have limited the method and manner of conducting wars. The common law of nations, by which all states are and must be bound, dictates that warfare shall be carried on only in accordance with basic considerations of humanity and chivalry.

These matters are of course well known to the German and Japanese warlords and statesmen, as well as to their henchmen. They will also believe the brutal pronouncements of German military philosophy in such cynical handbooks for the guidance of officers as the *Kriegsbrauch im Landkriege* in which, although Germany had to observe the provisions of the Hague Convention regulating warfare, their human tenets of international law are referred to as expressed generally "sentimentalism and flabby emotionalism" and are declared to be "in fundamental contradiction with the nature of war and its object"; and in which the German officer is sternly warned to "guard himself against exaggerated humanitarian ideas."

From Doctor Glueck's book we quote:

"If ever there was a domain to which Mr. Justice Holmes' illuminating; dictum about a page of history being worth a volume of logic is applicable, it is that concern the war criminal's problem (P. 12.) The law of nations has a long- way to go before it can claim to be a coherent and fixed system. Its relevant tenets were developed under the presupposition that members of the community of nations are governed by self-imposed restraints in accordance with international law; but the emergence of states with a national policy of deliberate lawlessness and with their invasion of 'total war in the service of a program of world enslavement, compels a realistic modification of inadequate doctrines and principles of law.' (P. 13). Nobody who has made a thorough study of the status of the branch of law of nations involved can adhere to the view that it is anywhere near as well developed or subject to the same techniques of 'rigorous legal logic' as the more sophisticated branches of private law. (P. 14.) On September 8, 1942, Churchill assured the House of Commons that 'those who are guilty of the Nazi crimes will have to stand up before tribunals in every land where their atrocities have been committed, in order that an indelible warning may be given to future ages and that successive generations of men may say, 'so perish all who do the like again.' "

On January 25, 1919, the preliminary peace conference of World War No. I set up a commission of fifteen to inquire into and report upon violations of international law chargeable to Germany and her allies. This commission recommended the setting up of a high tribunal which was to apply "the principles of the law of nations as the result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience." Upon a finding of guilty, the court could sentence to such punishment as could be imposed for the offense in question "by any court in any country represented on the tribunal or in the country of the convicted persons." The recommendation was not adopted. They were opposed by American and Japanese members. The Japanese members raised the basic question, among others, "whether international law recognizes a penal law as applicable to those who are guilty." And it seemed to them "important to consider the consequences which would be created in the history of international law by the prosecution for breaches of the law or customs of war of enemy states before a tribunal constituted by the opposite party," an argument rejected at the treaty.

In the Treaty of Versailles there were inserted the punitive articles 228, 229 and 230. By article 228 the German Government recognized "the right of the allied and associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws to "punishments laid down by law." Article 229 provided for the trial of the accused in military tribunals of the power against whose nationals the alleged crimes were committed; and specified that "in every case the accused will be entitled to name his own counsel."

9. SOME CONCLUSIONS

From all &ie foregoing, with regards to the petition for a writ of habeas corpus, we conclude:

- (1) That petitioner Yamashita, if he is responsible for the acts imputed to him in the charges filed before the Military Commission, can properly and justly be prosecuted and punished for them.
- (2) That the fact that he was the Commander in Chief of a belligerent army does not exempt him from criminal

liability either for violations of international law or for the commission of crimes denned and punishable under the laws of the country where committed.

(3) That his rights and privileges as a prisoners of war, under the Geneva Convention, are not incompatible with nor are violated by his prosecution for the international and domestic crimes committed by him.

(4) That under the principles of natural law, all persons guilty of such crimes are amenable to be arraigned before a court of justice and, after a fair trial, if found guilty, should bear the full weight of the law.

(5) That petitioner Yamashita can be prosecuted before the Philippine civil courts in the like manner as a common criminal and be punished under' the provisions of the Philippine Penal Code.

(6) That the Military Commission set up to try him possesses a jurisdiction which is concurrent with that of the Philippine civil courts, and the choice of the competent tribunal where he should be tried, which is a mere procedural technicality, is left to the wise discretion of the officials in charge of the prosecution.

(7) That in violation of the law of nations, the offended party is the people of the whole world, and the case against petitioner could be properly entitled as "Humanity versus Tomoyuki Yamashita," and no person in position to prosecute the violators can honestly shirk the responsibility of relentlessly prosecuting them, lest he be branded with the stigma of complicity.

(8) That the absence of a codified International Penal Code or of a criminal law adopted by the comity of nations, with specific penalties for specific and well-defined international crimes, is not a bar to the prosecution of war criminals', as all civilized nations have provided in their laws the necessary punishment for war crimes which, for their very nature, cease to be lawful acts of war, and become ordinary crimes with the extraordinary character of having been committed in connection with war, which should be considered as an aggravating circumstance.

10. THE SUPREME COURT'S JURISDICTION

Whether this Court has jurisdiction or not to take cognizance of this case is the first question raised herein.

We believe that no doubt should be entertained that it has.

The petition pertains to a judicial case, to a case wherein justice is to be administered. It is a criminal case initiated for the prosecution and punishment of Tomoyuki Yamashita, Commander In Chief of the Japanese Army in the Philippines, alleged as the greatest war criminal in the Pacific and in the whole eastern hemisphere.

The case calls for the exercise of the judicial power, one of the three government powers, firstly defined by Aristotle and upon which Montesquieu elaborated later in his "Spirit of the Laws."

"The judicial power shall be vested in one Supreme Court and in such inferior courts as may be established by law." (Art. VIII, sec. 1, Constitution of the Philippines.)

By this provision, the judicial power is primarily vested in the Supreme Court, which can exclusively exercise the whole power. But it also authorizes the enactment of laws sharing the power to inferior courts, which include all other courts and tribunals of all description, whether ordinary or extraordinary, whether civil or criminal, whether industrial or military, whether designated as "courts" or simply as "commissions."

"The Congress shall have the power to define, prescribe, and apportion the jurisdiction of the various courts, but may not deprive the Supreme Court of its original jurisdiction over cases affecting ambassadors, other public ministers, and consuls', nor of its jurisdiction to review, revise, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in—

"(1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulation is in question.

"(2) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto.

"(3) All cases in which the jurisdiction of any trial court is in issue.

"(4) All criminal cases in which the penalty imposed is death or life imprisonment.

"(5) All cases in which an error or question of law is involved." (Art. VIII, sec. 2, Constitution of the Philippines'.)

From the foregoing it is evident that this Supreme Court jurisdiction, which Congress is powerless to abolish, to review, revise, reverse, modify, or affirm any and all actuations of judicial nature of the party respondent and the Military Commission before whom petitioner Yamashita is tried for his life. In fact, this Supreme Court's jurisdiction extends, not only to courts and judicial institutions, but to all persons and agencies which form part of the whole machinery of the administration of justice, in so far as is necessary to the administration of justice.

We have jurisdiction over the person of respondent Lt. Gen. Wilhelm D. Styer, not as to the discharge of his military functions and duties, but in regards to his official acts in connection with the administration of justice in the criminal case against Tomoyuki Yamashita, and that jurisdiction became effective since November 13, 1945, his refusal to sign receipt for the summons and the refusal of the subordinate officers in his office to accept said and the summoning of said military commission.

No one questions our jurisdiction over the person of petitioner, he having voluntarily submitted himself to it by his petition.

With respect to the military commission trying him, under the questions raised in the petition, it is a proper party respondent and the petitioner should have included it as among the party respondents. But petitioner's omission is just a technical error of no vital consequence, because under the judicial rules, we can order the inclusion and the summoning of said military commission.

The amici curiae want us to be cautious and slow in exercising jurisdiction in this case, in view of the possibility that our orders might be disregarded by the military officers concerned. The fear entertained by the amici curiae might find some ground in the attitude of respondent General Styer, when the latter refused to sign receipt for the summons or to receive the papers thereof.

The same warning has been made in a case decided by this Supreme Court several weeks ago. In answer to the warning, we can do no better than to repeat what we said therein.

"It has been argued with energy by those who oppose our issuing" the order for the release of the petitioners, that if we decide to issue it, the United States Army might refuse to set them at liberty, with the result that the order of release will become a mere scrap of paper and the Supreme Court of the Philippines will be placed in the unenviable position of utter ridicule. We have to answer in the most definite way that we can not agree with such a narrow point of view.

"But suppose the most unexpected should happen, that there might be members of the United States Armed Forces who will be blind enough to ignore the order of this Supreme Court, to make a mockery of the administration of justice, shall that unthinkable hypothesis deter us from doing our duty? Our answer is simple. No. No one and nothing in the whole world, neither the all-powerful army which humbled Germany and forced the surrender of the 'invincible' Japanese Army, nor weapons more dreadful than the atomic bomb, nor the menace of an imminent catastrophe, shall be powerful enough to make us flinch from complying with our plain

duty as Justices of the Supreme Court. We must do our duty as our conscience 'dictates, without fear nor favor. It is our duty to make reason and right supreme, regardless of consequences. Law and justice might suffer setbacks, endure eclipses', but at the end they shall reign with all the splendors of real majesty." (Raquiza vs. Bradford, G. B. No. L-44, pp. 76, 88, ante, dissenting.)

We recognize no one to be above the law. Mere military might cannot change and nullify the course of justice. In the long run, everybody must have to bow and prostrate himself before the supreme majesty of the law.

11. HABEAS CORPUS

In praying for a writ of habeas corpus, petitioner wants us to order that he be returned from the status of an accused war criminal to that of a prisoner of war.

He is not seeking release from confinement.

We are of opinion that the petition for a writ of habeas corpus must be denied. The purpose of said writ is to restore liberty to a person who is being deprived of it without due process of law. Such is not the case of petitioner. He does not complain of any illegal detention or deprivation of personal freedom.

He is deprived of his liberty because he is, according to his own allegation, a prisoner of war. Whether or not he should be accused as a war criminal, is not a proper question to be raised in habeas corpus proceeding.

The fact that petitioner is an accused war criminal does not change his status as a war prisoner. He remains to be so, whether he is prosecuted as a war criminal or not.

Not having lost his status as a war prisoner because he was placed and regarded as a war criminal, there is no reason for ordering his reversion to a status which he did not cease to retain since his surrender or capture on September 2, 1945.

For these reasons we voted for the denial of the writ of habeas corpus.

12. JURISDICTION OF THE MILITARY COMMISSION

We are of opinion that the Military Commission conducting the trial of petitioner has jurisdiction to try him for the crimes alleged in the 123 items in the specified charges filed against him.

From the very allegations and exhibits of petitioner it appears that said Military Commission was created and organized by orders of General Douglas Mac Arthur, Commander in Chief of the United States Army Forces in Western Pacific.

We are of opinion that said Commander in Chief has authority to convene said Military Commission.

Petitioner contends that "there being no martial law, nor Military Government of occupied territory and no active hostilities in the Philippine Islands at the time of the appointment of the commission, there was no authority to appoint the commission, and the commission is without jurisdiction."

We do not agree with this contention. Neither martial law, nor the existence of Military Government, nor the waging of active hostilities is a prerequisite for exercising the power of appointing a Military Commission.

In the absence of pre-established tribunals clothed with authority to try war criminals, Military Commissions may be established for said purpose, and, unless organized by the Chief Executive himself, they may be organized by the military Commander in Chief, representing said Chief Executive.

The American Representatives (Lansing and Scott) in the Allied commission of 15 organized after the first World

War, although opposed, with the Japanese Representatives, the creation of an international criminal court, which became abortive, were of opinion that war criminals may be tried by Military Commissions of the offended countries.

13. COLLECTIVE RESPONSIBILITY

Although we maintain that the Military Commission here in question has jurisdiction to try the case for war crimes against petitioner Yamashita, in the regulations governing the trial of war criminals, Exhibit F, there are several features which should not be left unchallenged. Section 4-b, under the title of "Jurisdiction" of Exhibit F, provides: "Any military or naval unit or any official or unofficial group or organization, whether or not still in existence, may be charged with criminal acts or complicity therein and tried by a Military Commission."

This provision, undoubtedly, advances the principle of collective responsibility in contradistinction to the principle of individualized criminal responsibility.

Under the principle of individualized criminal responsibility, no person may be convicted of any offense without due process of law and without proving in said process in which he should also enjoy the guarantee of equal protection of the laws, that he is personally guilty of the offense.

Under the principle of collective criminal responsibility, any member of any social group or organization may be convicted without any hearing if, in a process where he did not have his day in court, the social group or any other member thereof is found guilty of an offense.

During the Japanese regime, when a member of a family was found by the military police, with or without ground, as responsible for an alleged offense or being a member of a guerrilla unit, the remaining members of his family were also made to suffer.

When a town or barrio was suspected of harboring guerrilleros, the Japanese would punish the whole town or barrio by mowing down all the inhabitants, or burning all the houses, or, at least, subjecting all the male inhabitants thereof to brutal zonings. The ruins of Manila are graphic illustrations of how the principle worked.

It is unnecessary to elaborate more to show the grave iniquities to which the principle of collective criminal responsibility leads.

We are of opinion that said principle violates the constitutional guarantee of due process of law and, therefore, we should have issued a writ of prohibition enjoining the Military Commission from exercising the unconstitutional jurisdiction granted in section 4-6 of Exhibit F.

14. EVIDENCE

Section 16 (1), under the title of "Evidence," provides what may be admitted as evidence as follows: "Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document."

The following may also be admitted as evidence according to section 16 (3) : "Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority."

We are of opinion that the admission of documents as evidence, "without proof of the signature or of the issuance of the document," is a denial of the due process of law constitutionally guaranteed to all persons before he could be deprived of his life, liberty, or property. The authenticity or genuineness of a document is an essential element

in order that it may acquire the nature of an evidence. Proof of signature or of the issuance of the document is essential to show its genuineness.

The admission of affidavits "or other statements taken by an officer detailed for that purpose by military authority." is a clear violation of the constitutional guarantee that in all criminal prosecutions the accused shall enjoy the right "to meet the witnesses face to face." (Art. III, sec. 1 [17], Constitution of the Philippines.) The Military Commission accepted as evidence against accused Yamashita the affidavits of Naokata Utsunomiya (Exhibits L and M), denying said Yamashita the constitutional right "to meet face to face" affiant Naokata Utsunomiya.

According to section 16 (4) of the regulations (Exhibit F); "Any diary, letter or other document appearing to the commission to contain information relating to the charge," may also be admitted as evidence. This provision denies also to the accused the constitutional guarantee of meeting a witness face to face and, therefore, of cross-examining him.

We are of opinion that the admission of the evidence above-mentioned must be prohibited, and that a writ of prohibition issued by this Court is a proper remedy.

15. HEARSAY

The regulations (Exhibit F) authorizes also the admission of hearsay as evidence.

Section 16-d of said regulations provides: "If the accused is charged with an offense involving concerted criminal action upon the part of a military or naval unit, or any group or organization, evidence which has been given previously at a trial of any other member of that unit, group or organization, relative to that concerted offense, may be received as prima facie evidence that the accused likewise is guilty of that offense."

In section 16-e, the objectionable feature of a hearsay evidence is aggravated by the adherence to the principle of collective criminal responsibility. It provides: "The findings and judgment of a commission in any trial of a unit, group or organization with respect to the criminal character, purpose or activities thereof shall be given full faith and credit in any subsequent trial by that or any other commission of an individual person charged with criminal responsibility through membership in that unit, group or organization. Upon proof of membership in such unit, group or organization convicted by a commission, the burden of proof shall shift to the accused to establish any mitigating circumstances relating to his membership or participation therein."

We are of opinion, too, that the Military Commission should be prohibited to follow the unjust procedures delineated in the above-quoted provisions, the objectionable character of which was explicitly admitted even by the amicus curiae who appeared to argue in this case in opposition to the granting of remedies sought by petitioner.

16. FUNDAMENTAL RIGHTS GUARANTEED TO EVERYBODY

No matter who the petitioner is, we are of opinion that he is entitled to all the safeguard of a fair trial.

The fundamental rights and freedoms guaranteed in the Charter of the United Nations are guaranteed to all human beings, without exception.

In his annual proclamation setting November 22, 1945, as Thanksgiving Day, President Truman, among other things, said; "Liberty knows no race, creed or class in our country or in the world. In unity we found our first weapon, for without it, both here and abroad, we were doomed. None have known this better than our very gallant dead, none better than their comrade Franklin Delano Roosevelt. Our Thanksgiving has the humility of our deep

mourning¹ for them, our vast gratitude for them.

"Triumph over the enemy has not dispelled every difficulty. Many vital and far-reaching decisions await us as we strive for a just and enduring peace. We will not fail if we preserve, in our own land and throughout the world, the same devotion to the essential freedoms and rights of mankind which sustained us throughout the war and brought us final victory."

And Prime Minister Attlee, in the face of the potential destructiveness of the atom bomb, said before the English Parliament: "It is well that we should make up our minds that in a war on the scale to that which we have just emerged every weapon will be used. We may confidently expect the fullest destruction of great cities, death of millions and the setting back of civilization to an unimaginable extent.

"No system of safeguards which could be devised will of itself—I emphasize of itself—provide an effective guarantee against production of atomic weapons by a nation or nations bent on aggression.

"With the terrible march of the science of destruction, every nation will realize more urgently the overwhelming need to maintain the rule of law among nations and to banish the scourge of war from the earth.

"We have in prospect the meeting of the United Nations Organization and there is an instrument which, if all are resolved to use it, could establish the rule of law and prevent war—I resolved."

In the eternal struggle between the principles of right and wrong, there is no choice if humanity must survive. Lincoln said: "That is the real issue that will continue in this country when these poor tongues of Judge Douglas and myself shall be silent. It is the eternal struggle between these two principles, right and wrong, throughout the world. They are the two principles that have stood face to face from the beginning of time."

When we voted for the granting of the writ of prohibition, we did it out of consistency, as the vibrant words of Jefferson must not cease ringing in our ears when he said: "What a stupendous, what an, incomprehensible machine is man! who can endure toil, famine, stripes, imprisonment, and death itself, in vindication of his own liberty, and, the next moment be deaf to all those motives whose power supported him through his trial, and inflict on his fellowmen a bondage, one hour of which is fraught with more misery than ages of that which he rose in rebellion to oppose."

17. NEEDED SERVICE TO THE MORAL AND CULTURAL PURPOSES OF HUMANITY

If petitioner is tried and convicted under a process in which some of the recognized essential guarantees for a fair trial are violated, it would produce a result opposite that expected by those who are following up the trials of all war criminals; the arousing of a deep-rooted universal conviction that law must be supreme and that justice should be equally administered to each and every member of humanity.

The peoples of all nations who are keenly watching the prosecution of Yamashita should be convinced, by conclusive evidence, that said prosecution is not a mere parody of the administration of justice, devised to disguise the primitive impulses of vengeance and retaliation, the instinctive urge to crush at all costs, no matter what the means, a hated fallen enemy.

The prosecution, trial, and conviction of Yamashita must impress all the peoples of the world that the principle of law is paramount, and supersedes and wipes out all other considerations in dealing with war or common criminals. Otherwise, their faith in the supremacy of law as the invulnerable bulwark of all fundamental human rights will be shaken, and the moral position of the victorious United Nations, the ethical value of the grandiose pronouncements of their great leaders, and the profound significance of the lofty ideals for which millions of their soldiers have fought and died, will be weakened and diminished to such an extent as to make barren all the

tremendous sacrifices made by so many countries and so many peoples in the last global hecatomb.

It was Ihering who, in his "LAW AS A MEANS TO AN END," said that: "There is no human life which exists merely for itself, every one is at the same time for the same of the world; every man in his place, however limited it may be, is a collaborator in the cultural purposes of humanity * * *. I cannot imagine a human life so poor, so devoid of content, so narrow, so miserable, that it is not of some good to some other life; even such a life has not seldom borne the world the richest fruit." (Page 60.)

So, even the shameful exploits in the Philippines with which Yamashita ingloriously crowned his military career, at its peak when he conquered Malaya and Singapore, and descended from the pedestal of the greatest Nippon military hero in all her history to the moral abyss of that abominable monstrous figure, the greatest war criminal in Asia and in the Pacific, cannot put render some service to the cultural purposes of humanity if, by his due trial in accordance with the elemental rules in criminal procedure, the sense of law and justice is further developed in the conscience of the present and future generations.

18. OUR VOTE

From, all the foregoing, when the resolution to dispose of this case was put to a vote, we concurred in the denial of the petition for a writ of habeas corpus, and we voted for the granting of the writ of prohibition in order that the objectionable features in the trial before the Military Commission may be eliminated, so that petitioner Yamashita may be given the full justice due to all human beings.

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