

13/7/48

AAF A117(a)
(Introduced Jan 46)
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DFW(AG13(2a))/AR.

RECORD OF MILITARY COURT *Ans. 52.*
(JAPANESE WAR CRIMINALS)

AWC No. 2328, 2329, 2327

Accused: Capt SHINOHARA, Eitaro
" NEMOTO, Toyoji
" SHOJI, Takeyasu

Aust W.C. List Ser No.

Court, Place, RABAU
Date and 30 Mar/1 Apr 46
Formation: 8 MD

Charge(s)	Plea	Finding
Violation of the Laws and Usages of War in that they in May 1945, when members of a Military Court convened to try two native of KANBANGURU failed to ensure that such natives were afforded a fair and proper trial.	NOT GUILTY	GUILTY

Precis of Evidence:

Attached.

Sentence and Date: IMPRISONMENT FOR 5 YEARS
1 Apr 46

Confirmation and by Whom: Not confirmed by Chief of General Staff - Lt-Gen V.A.H. STURDEE
4 Jun 46.

Promulgation: Non-confirmation of finding and sentence promulgated to each of the accused on 29 Jun 46.

Petition: Submitted 11 Apr 46 against finding and sentence of the Court.

J.A.G.'s Report on Petition: Findings and sentences should not be confirmed.

Action on Petition: Upheld.

Filed in Attorney-General's Department and Numbered.....

Precis of Evidence:

The native village of KANBANGURU did not supply its quota of sac sac in Apr 45 and Sgt ARAI Kenji Jap MP in charge of the area sent natives to contact the villagers who had gone bush. The villagers were hostile and he reported accordingly to Capt SHINOHARA, who sent 5 or 6 Japs and instructed him to find out where the natives had gone. Two patrols were sent out and were met with a hostile reception. Capt SHINOHARA ordered ARAI to bring the villagers into BRANBA which he did without serious casualties, although it is alleged bows, arrows and spears were used by the villagers. Sgt ARAI interrogated and reported that 5 natives were responsible for the resistance to the Japs. Capt Shinohara came to BRANBA and questioned the 5 natives, two of whom he considered principal offenders. He returned to MOIM and three days later again came to BRANBA with Capt NEMOTO and Capt SHOJI. These three officers interrogated the two natives selected by Capt SHINOHARA as the leaders - POPAKU, No.1 Capt of KANBANBURU and MARAN his boss boy.

The three officers returned to MOIM and a written order was received by ARAI a few days later to execute the two natives. Sgt ARAI states that the natives were found guilty under military law of

- (i) Opposition to the Japanese Army
- (ii) Trying to influence other native to oppose the Japanese Army.

Extract from statement by Capt SHINOHARA Eitaro:-

"I conducted an investigation at BRANBA and as a result reported to HQ 51 Div Inf Gp that these two natives were guilty of rebellion. Capt Shoji arrived from HQ with a convening order for a court martial at BRANBA naming myself as President and Capt Shoji and Capt Nemoto as members. I showed the reports made by Arai and myself to Shoji and Nemoto."

Under cross examination by defending officer, Sgt ARAI stated that the accused were brought before the court separately.

Statement by Capt SHINOHARA Eitaro (contd):

"The Court called in POPAKU and MARAN separately and they were questioned by NEMOTO and SHOJI.

While the accused and Sgt ARAI were in the room we looked up the rules for court martial procedure and agreed that the accused were guilty under Rule 25 of rebellion by carrying weapons, resisting the Japanese and inciting others to take hostile actions against the Japanese.

The death penalty is provided as the only penalty for the leaders of a rebellion.

Maj-Gen KAWAKUBO confirmed the sentence of death.

In this case I knew before the trial started that the accused were both guilty."

Extract from statement by Capt NEMOTO, Toyoji:-

"When the trial opened Capt SHINOHARA, Capt SHOJI, Sgt ARAI, the two accused and myself were present. We all remained together until sentence had been pronounced -- The records of previous investigations were before us. Capt SHOJI and I asked the natives questions. The natives admitted that they had done wrong. Capt SHOJI and I then decided that both accused were guilty of treason under Rules of Court Martial Procedure, Clause 24 or 25. We decided they should be sentenced to death and told Capt SHINOHARA who agreed.

The accused had no defending officer or advocate.
No witnesses were called at the trial."

Extract from statement by Capt SHOJI, Takeyasu :-

"I was sent by Maj-Gen KAWAKUBO to be recorder and observer
of the trial.

Members of the court were Capt SHINOHARA, Capt NEMOTO and
Sgt ARAI. When the Court opened the two natives were
asked questions by Capt NEMOTO and Capt SHINOHARA. I asked
no questions as I had no prior knowledge of the facts.

The 3 officers and Sgt ARAI then went into a room,
Capt NEMOTO and Sgt ARAI conferred and then told me
that the accused were guilty of treason under Clause 26 and
deserved the death penalty to which I agreed. Capt SHINOHARA
also agreed with them."

RECORD OF MILITARY COURT (JAPANESE WAR CRIMINALS)

Cms 216

AWC No. 894

Accused: Lt-Gen BABA Masao

Aust W.C. List Ser No.

Court, Place RABAU
Date and 28 May & 2 June 47.
Formation: 8 M.D.

Charge(s)	Plea	Finding
<p>Committing a War Crime, that is to say A Violation of the Laws and Usages of War in that he between December 1944 and September 1945 in BORNEO, 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 such Commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes against the people of the Commonwealth of Australia and its Allies.</p>	NOT GUILTY.	GUILTY. TO SUFFER DEATH BY HANGING.

Precis of Evidence: The evidence against the accused consisted mainly of statements from 2 former Australian Prisoners of War, and Japanese officers, which had been used at previous war crime trials. The substance of the evidence for the prosecution was as follows:—That members of the accused's command pursuant to orders of the accused, had conducted on 2 occasions, the transfer of a number of Australian and British prisoners of war, by a route march from Sandakan to Ranau in British North Borneo. The physical condition of the Prisoners of War was so poor that these marches amounted to ill-treatment. Evidence was also given of a number of brutal atrocities and ill-treatment such as insufficient food, failure to provide medical attention, and the failure to provide sufficient clothing and boots, thereby causing many Prisoners of War to march barefooted over the Sandakan, Ranau route, a distance of 150 miles. The Prisoners of War encountered such severe hardships on both of these marches that a number of them died on the way. Statements were produced to prove that 2 Japanese Officers under the command of the accused, were directly responsible for the giving of orders which resulted in the shooting and killing of many Prisoners of War during the march from Sandakan to Ranau, and whilst at Ranau.

Over.

Sentence To suffer: DEATH BY HANGING.
and Date: 2 June 47.

Confirmation
and by Whom: Maj Gen M.H. Anderson Adj Gen M.D.F. 17/7/47.

Promulgation: Confirmation of finding and sentence promulgated to the
accused on 6-8-47. Accused executed on the 7/8/47.

Petition: Petition lodged 14 June 47 on behalf of the accused.

J.A.G.'s Report on Petition: Confirm finding and sentence and dismiss petition.

Action on Petition: Dismissed 17/7/47.

Filed in Attorney-General's Department and Numbered.....

Ans. 216.

R 176

LT GEN

BABA MASAO

REPORT OF THE COURT OF A MILITARY COURT

DATE: 27 MAY 47.

Number, Rank, Name and Unit of Accused. (a)	Defense charged.	Flo.	Finding, and if convicted, Sentence. (b)	How dealt with by Confirming Officer. (c)
2d Gen Paul Haseo, General Officer, 37 Japan- ese Army.	<p>CONSPIRACY TO KILL, that is to say, A VIOLATION OF THE LAWS AND USAGES OF WAR, in that he</p> <p>between DECEMBER 1944 and SEPTEMBER 1945 in FORMER 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 such Commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes against people of the Commonwealth of Australia and its Allies.</p>	Not Guilty	Guilty To suffer death by hanging by the neck at the Prison 2 Jan 47	<p>Major General Major-General, Australian Military Force Confirming Officer. 17 Feb 1947</p>

Commandant, 3rd Military District,
Confirming Officer. (d).
27 May 47.

FORM FOR ASSEMBLY AND PROCEEDINGS OF A MILITARY COURT

This 27th day of May 1947.

WHEREAS it appears to me, the undersigned, an Officer authorized to convene a Military Court under the War Crimes Act 1945 that the person named in the annexed Schedule has committed the war crime in the said Schedule mentioned, I hereby convene a Military Court to try the said person, and to consist of the Officers hereinafter named.

PRESIDENT

Major-General J.S. WHITLAM, G.C.B., } Is appointed PRESIDENT
G.O.C. Western Command

MEMBERS

Brigadier E.M. HETTLER, M.C. }
Army School of Artillery }
Colonel W.H. TINSLEY, O.B.E., }
Murchison Prisoner of War Group }
Lieut-Col R.A. PERKINS, } Are appointed MEMBERS
HQ Eastern Command }
Lieut-Col H.C. SMITH, E.O. }
8th Military District }
Major I.C.R. SYMOND, }
8th Military District }

JUDGE ADVOCATE

Major H.J. FOSTER
Headquarters,
8th Military District.

Brigadier
Brigadier,
Commandant, 8th Military District.
Convening Officer.

CERTIFICATE OF PROMULGATION

Promulgated in the case of AWC 2961 Lt Gen BABA Masathis 6th day
of AUGUST 1947 XPOHOK

H. B. ... Maj.
(Sgd) DAAG 8th Military District.....
Name, Rank and Unit of Officer
effecting promulgation.

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VARRANT BY THE EXECUTION

WHEREAS Lt-Gen RARA Masao on the 2nd day of June 1947 was sentenced by military court held at Rabaul to death and whereas the finding and sentence of the said military court have been duly confirmed in accordance with the War Crimes Act, and whereas I have reviewed the said sentence, how the said Lt-Gen RARA Masao, Adjutant General of the Australian Military Forces, hereby approve of the carrying out of the sentence as aforesaid.

Dated this *twentieth* day of *July*
One thousand nine hundred and forty-seven.

Wm. Anderson
Major-General,
Adjutant-General,
AUSTRALIAN MILITARY FORCES.

(11)

CERTIFICATE BY OFFICER SUPERVISING THE EXECUTION

I, *Francis John Dunn* an officer of the AMF certify that I was present at and supervised the execution of the abovenamed Lt-Gen RARA Masao at *Rabaul* at *0800* hrs on the *seventh* day of *August* 1947.

Dated this *seventh* day of *August* 1947.

F. J. Dunn
Signature

(111)

CERTIFICATE BY MEDICAL OFFICER PRESENT AT THE EXECUTION

I, *James Morrison Cairns* a legally qualified medical practitioner certify that I examined the body of the person executed in accordance with the above certificate and pronounced life extinct.

Dated this *seventh* day of *August* 1947.

J. M. Cairns
Signature

NOTE: The records of the proceedings of the Court will be attached to this form.

(a) If the accused is not a member of the naval, military or air force of an enemy or ex-enemy Power, the name, occupation and residence of accused will be inserted.

(b) Recommendation to mercy, if any, to be inserted in this column, or on a separate sheet attached to the proceedings, with the reasons for the recommendation.

(c) It is not necessary that the Confirming Officer should sign his name in this column. Initials are sufficient.

(d) Must be signed by the same Officer who signs on the first page, and all alterations in the first two columns of the Schedule to be initialled by him.

I certify that the above Court assembled on the _____ day of _____ and duly tried the person named in the Schedule, and that the plea, finding, and sentence in the case of such person were as stated in the third and fourth columns of that Schedule and that the Regulations for the trial of War Criminals have been complied with.

I also certify that

1. The members of the Court,
2. The Judge Advocate,
3. The witnesses,
4. The interpreter,
5. The shorthand writers,

were duly sworn.

Signed
② *Signed* this 2nd day of June 1947.

W. J. C. Law
Major-General,
President of the Military
Court.

I have dealt with the finding and sentence in the manner stated in the last column of the Schedule, and, subject to what I have stated, I hereby confirm the above finding and sentence.

W. J. C. Law
Major-General,
ADJUTANT-GENERAL,
Australian Military Forces,
Confirming Officer.

SIGNED this _____ day of July, 1947.

ABSTRACT OF EVIDENCE

against Lieutenant-General B A B A Masao, General Officer
Commanding 37 Japanese Army on the charges

FIRST CHARGE:

Committing a War Crime, that is to say,
Ill-treatment of Prisoners of War,
in that he

in Borneo on or about January 1945 issued
orders that a number of Australian and
British Prisoners of War should march from
Sandakan to Ranau at a time when the said
Prisoners of War were in such a condition
that the said march would necessarily cause
them great pain and suffering.

SECOND CHARGE:

Committing a War Crime, that is to say,
Ill-treatment of Prisoners of War,
in that he

in Borneo in or about May 1945 issued orders
that a number of Australian and British
Prisoners of War should march from Sandakan
to Ranau at a time when the said Prisoners of
War were in such a condition that the said
march would necessarily cause them great pain
and suffering.

THIRD CHARGE:

Committing a War Crime, that is to say,
a violation of the Laws and Usages of War,
in that he

between December 1944 and September 1945 in
Borneo being a Commander of Japanese Armed
Forces at war with the Commonwealth of Australia
and its Allies unlawfully disregarded and
failed to discharge his duty as such Commander
to control the conduct of the members of his
command whereby certain of the members of his
said Command murdered a number of Australian
and British Prisoners of War.

1. The Prosecution will rely on and tender in evidence the record of the interrogation of the Accused by Capt Gerke at HQ 8th Military District on 8 May 1947 to prove that the Accused was appointed to the Command of 37 Japanese Army in December 1944 and held the Command until the cessation of hostilities, and other matters.

2. In regard to the first charge the Prosecution will prove the following facts, namely,

- (a) That in January 1945 the prisoners of war at Sandakan were in such a condition that marching from Sandakan to Ranau would necessarily cause them great pain and suffering.
- (b) That the Accused was or ought to have been aware of the condition of the said prisoners of war.
- (c) That at or about the end of January 1945 the Accused ordered that 500 prisoners of war should be marched from Sandakan to TOALAN (35 kilometres North of Jesselton) and that on 1 February 1945 he changed the destination of the prisoners of war to RANAU.
- (d) That at or about the end of January 1945 approximately 470 Australian and British prisoners of war set out from Sandakan to march to Ranau, that in the course of the march they encountered severe hardships which caused them great pain and suffering, and that during the march a number of them died.

In order to prove the abovementioned facts and other matters, the Prosecution will rely on and tender in evidence the following documents: -

- (a) Interrogation of Capt HOSHIJIMA SUSUMI on 24 September 1945 - Exhibit H at trial of Hoshijima.
- (b) Statement of Capt YAMAMOTO SHOICHI - Exhibit O to the proceedings at his trial.

- (c) Interrogation of Capt Yamamoto Shoichi - Exhibit J to the proceedings at his trial.
- (d) Interrogation of Capt Yamamoto Shoichi - Exhibit G to the proceedings at his trial.
- (e) Evidence of WO1 W.H. STIPCEWITCH At the trial of Capt Yamamoto Shoichi.
- (f) Evidence of Keith BOTTERILL at the trial of Capt Yamamoto Shoichi.
- (g) Evidence of Capt Yamamoto Shoichi at his trial.
- (h) Evidence of Capt IINO SHIGERU at his trial.
- (i) Statement of Capt MISUTA RYUICHI - Exhibit AT to the proceedings at his trial.

3. In regard to the second charge the prosecution will prove the following facts, namely,

- (a) That in May 1945 the prisoners of war at Sandakan were in such a condition that a march from Sandakan to Ranau would necessarily cause them great pain and suffering.
- (b) That the accused knew or ought to have known of the condition of the Prisoners of War.
- (c) That at or about the end of May 1945 the accused issued orders that Prisoners of War at Sandakan be moved to Ranau.
- (d) That at or about the end of May 1945 approximately 540 Australian and British prisoners of war began to march from Sandakan to Ranau, that they encountered severe hardships which caused them great pain and suffering, and that during the march a number of prisoners of war died.

In order to prove the foregoing facts and other matters the Prosecution will rely on and tender in evidence the following documents:-

- (a) Evidence of Col Takayama Hikoichi at the trial of Capt Hoshijima Susumi.
- (b) Evidence of Col Takayama Hikoichi at the trial of Capt TAKAKUWA TAKUO.
- (c) Evidence of IWAHASHI MANABU at the trial of Capt Takakuwa Takuo.
- (d) Evidence of Capt Takakuwa Takuo at his own trial.
- (e) Statement of Capt Takakuwa Takuo - Exhibit I to the proceedings at his trial.
- (f) Statement of Lt Watanabe Genjo - Exhibit F to the proceedings at his trial.
- (g) Extract from the interrogation of Lt Watanabe Genjo - Exhibit H to the proceedings at his trial.

4. In regard to the third charge the prosecution will prove the following facts, namely,

- (a) That during the march from Sandakan to Ranau which began at the end of January 1945 a number of prisoners of war were shot by Japanese soldiers under the command of the accused upon the order of Capt YAMAMOTO SHOICHI, an officer under the command of the Accused.
- (b) That during the march from Sandakan to Ranau which began at the end of May 1945 a number of prisoners of war were shot by Japanese soldiers under the command of the accused upon the order of Capt TAKAKUWA Takuo, an officer under the command of the Accused.
- (c) That at Ranau in July 1945 a number of prisoners of war died.
- (d) That at Ranau on or about 1 August 1945 a number of prisoners of war were shot by Japanese soldiers under the command of the Accused upon the order of Capt TAKAKUWA Takuo, an officer under the command of the accused.

In order to prove the abovementioned facts and other matters the prosecution will rely on and tender in evidence the following documents, namely,

- (a) The relevant portions of certain of the documents more fully described in paragraphs 2 and 3 of this Abstract.
- (b) Statement of Sgt OKADA TOSHIHARU - Exhibit W to the proceedings at the trial of Capt Takakuwa Takuo.
- (c) Statement of Formosan HIROTA GINJIRO - Exhibit X to the proceedings at the trial of Capt Takakuwa Takuo.

5. Unless notice to the contrary is given to the accused or his defence representatives the documents above referred to will be tendered to the Court in the order in which they appear in this Abstract.

6. A Photostat or typewritten copy of each of the abovementioned documents will be delivered with a copy of this Abstract to the accused or his defence representative.

Sheet No. 1.

THE WAR CRIMES ACT 1945.

TRIAL OF : Lieut-Gen BABA Masao
 GOC 37 Japanese Army.

DATE OF COURT : 28 May 1947.

PROSECUTING OFFICER:

Maj H.F. DICK (A.A.L.C.) assisted by
Lt P.L. BROWN (HQ. Western Command).

DEFENDING OFFICER:

Maj Gen YAJIMA Masayoshi assisted by
CMAE Takizo and
Interpreter OKURA Takeo.

At 0930 hrs the Court assembles.

The Accused is brought before the Court.

The Members of the Court and Judge Advocate are duly sworn.

Misses E.LAWRENCE, C.NELSON and B.JUPP are duly sworn as
Shorthand Writers.

Capt SUZUKI Heihachiro is duly sworn as Court Interpreter.

The Accused is arraigned on the Charge.

The Accused pleads NOT GUILTY to the Charge.

THE PROSECUTION OFFICER ADDRESSES THE COURT

May it please the Court. The Accused is Lt-Jen TADA MASA, who was General Officer Commanding 17 Japanese Army from December 1941 until the cessation of hostilities. He is charged with having, during that period, unlawfully disregarded and failed to discharge his duties as a Commander of armed forces at war, to control the conduct of the members of his command, whereby they committed brutal atrocities and other high crimes against people of the Commonwealth of Australia and its Allies.

It will be noticed that while the Accused has been arraigned on a single charge, the Abstract of Evidence disclosed three separate charges. In order to give the Defence representatives adequate time to prepare the case for the Accused, I found it necessary to deliver to them an Abstract of Evidence some time before I received the Order for Assembly of this Court. I, therefore, had no option but to anticipate the charges as best I could, so I set out the three charges appearing in the Abstract. At the time the documents were delivered to the Japanese Legal Section, I told Mr. Nishizawa about this and explained to him that the final form of the charge would not be definitely known until the Order for Assembly arrived.

There is only one question of real importance arising out of that, and that is, "Has the accused been prejudiced, in any way, in his defence?" Now, the charge preferred against the Accused by the convening authority is a broad one, and covers all the matters alleged in the three separate charges in the Abstract of Evidence. It may be argued that it is ever wider and may cover more matters than any appear in those charges. Even if that is so, the question is merely academic, because the Prosecution is, in fact, calling on the Accused to answer only matters alleged in the Abstract of Evidence, and will rely only on the evidence listed in that Abstract. Even though the charge is worded differently, the Accused has to answer the same charge no more and no less. For these reasons it is submitted that the Accused is not in any way prejudiced in his defence by the charge being differently worded.

The charge is laid in pursuance of the provisions of the War Crimes Act 1945, and discloses a war crime. A violation of the laws and usages of war is a war crime within the definition of that Act. Now, by a well-settled principle of International Law, a Commander of armed forces at war has a legal duty to control the conduct of the members of his command. If he fails to discharge that duty, and if, as a result of such failure, members of his command commit war crimes, then he himself is guilty of a war crime, that is to say, a violation of the laws and usages of war.

The words "brutal atrocities and other high crimes" appearing in the charge, were used in the charge against General YAMASHITA, and this charge was upheld by the Supreme Court of the United States of America. I submit that these words mean war crimes of a serious nature. The Prosecution will tender evidence to prove that subordinates of the Accused murdered a large number of Australian and British Prisoners of War, and inflicted on many others ill-treatment so severe that many died as a result. I submit that these are war crimes of an extremely serious nature and that, if proved, they constitute brutal atrocities and other high crimes.

The Prosecution will prove that the war crimes alleged were committed against Australian and British Prisoners of War.

and so against people of the Commonwealth of Australia and its Allies.

The charge specifies that the alleged failure of duty on the part of the Accused took place between December 1944 and September 1945. The Prosecution will prove by evidence that the Accused was appointed to the command of 37 Japanese Army in December 1944, that he assumed effective command on 21 January 1945, that he held that command continuously until the cessation of hostilities, and that all the matters alleged against him occurred after 21 January 1945 and before September 1945.

The charge specifies further that the alleged war crime was committed in BORNEO, a place beyond the limits of the Commonwealth of Australia and its territories. Now, Australian and British Prisoners of War are, ipso facto, British Subjects, and Section 12 of the War Crimes Act 1945 provides that a Military Court constituted in accordance with its provisions may try persons accused of a war crime against a British Subject even though the crime is alleged to have been committed beyond the limits of the Commonwealth. This is admittedly legislation designed to operate beyond the territorial limits of the Commonwealth. The Statute of Westminster, however, passed by the Imperial Parliament in 1931, and adopted by the Parliament of the Commonwealth of Australia in 1942, confers on the Parliament of the Commonwealth power to pass legislation having extra-territorial operation, and this Court is bound to take judicial notice of the laws of England and Australia.

The charge further specifies that armed forces of Japan were at war with the Commonwealth of Australia and its Allies. I submit that it is not necessary for the Prosecution to prove this by evidence. The Court is entitled to take judicial notice of the fact that during the period specified in the charge a state of war existed between Japan and the Commonwealth of Australia and its Allies.

For all the foregoing reasons, I submit that the charge is properly brought and that this Court has jurisdiction to try the Accused on this charge.

The Prosecution will tender evidence to prove -
 That at the time when the Accused assumed command of 37 Army, there were more than 1000 Australian and British Prisoners of War at SANDAKAN.
 That as a result of previous ill-treatment and low rations their health was bad.
 That the Accused had ample opportunity to know of the condition of the Prisoners of War.
 That in January 1945, in spite of this knowledge, he ordered Capt YAMAMOTO to march 500 Prisoners of War from SANDAKAN to TUALIN, later changing the destination to RANAU.
 That the order stated that the march must be carried out quickly. The Prosecution will contend that this order for speed greatly increases the Accused's personal responsibility for what later happened.
 That at the end of January and beginning of February a party of 470 Prisoners of War, comprising 350 Australians and 120 British, set out from SANDAKAN.
 That the distance from SANDAKAN to RANAU is 165 miles and the track is over extremely difficult country.
 That as a result of their bad health and the difficulty of the march, Prisoners of War suffered very severe hardships, many of them dying.

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That during the march subordinates of the Accused severely ill-treated Prisoners of War.

That during the march subordinates of the Accused shot a number of Prisoners of War upon the orders of Capt YAMAMOTO, the officer who had received orders for the march directly from the Accused.

That in May 1945 the Accused issued orders that the Prisoners of War at SANDAKAN be moved to RANAU.

That about the end of May 1945 approximately 540 Australian and British Prisoners of War, most of them in bad health, set out from SANDAKAN to march to RANAU.

That hardships, ill-treatments, deaths and shootings occurred much as they had happened during the earlier march.

That towards the end of June 1945 approximately 163 prisoners reached RANAU.

That during the following month they suffered severe hardships, and, on 1 August 1945, only 33 survived at RANAU.

That on 1 August 1945 Capt TAEALURA, an officer under Accused's command, ordered that these survivors be killed, and that his orders were duly carried out.

The Prosecution undertakes to prove by evidence each and every one of the points just enumerated.

There is evidence that the Accused must have known of the condition of the prisoners and the nature of the country, and that he selected the subordinate officers to carry out the marches. There must be a strong presumption that he, as army commander, knew what happened on the first march, but despite that, he ordered the second march. The Prosecution, therefore, contends that the Accused must be held criminally responsible for every hardship, every ill-treatment, and every death, whether from illness or shooting, which occurred during the two marches and at RANAU after the completion of the marches.

The Judge Advocate will, no doubt, advise the Court on this point at a later stage, but I feel it my duty to point out now that the only matters for which the Accused is held responsible are those occurring after 21 January 1945. Some of the documents which will be tendered contain references to matters prior to that date. The Court may consider these as evidence which may help it to decide what was the condition of the Prisoners of War when the Accused assumed command, but on the question of the Accused's responsibility, it must rigorously exclude from its consideration anything which occurred prior to 21 January 1945.

The evidence which the Prosecution will tender is documentary. Most of the documents are relevant to two or more of the points, which the Prosecution has undertaken to prove. For that reason, I shall not at this stage give any outline of the actual evidence but shall, as I tender each document, state briefly to the Court the nature of the document and the matters which the Prosecution relies on it to prove.

Judge Advocate: Is the Defence ready to proceed with the case in view of the alteration to the Charge?

Defending Officer: Yes, I am ready to proceed.

Prosecuting Officer: I tender the interrogation of the Accused at HQ BMD on 8 May 47 to prove that the Accused was appointed to command 37 Japanese Army and continued in that command until the cessation of hostilities, and certain other matters.

A" The interrogation of Maj Gen BABA Masao is admitted in evidence, marked Exhibit "A ()-()", read, signed by the President and annexed to the Proceedings.

Prosecuting Officer: I tender the interrogation of Capt HOSHIJIMA Susumu dated 24 Sep 45. This document is annexed as Exhibit "H" to the Proceedings of the trial of HOSHIJIMA. I request that in this instance and in all other instances where a document is tendered and forms part of completed proceedings the Court sight the original document, annex a certified copy to the Proceedings, and return the original to me. This document is tendered to prove, amongst other matters, that there were Australian and British Prisoners of War at SANDAKAN, that, at the time the Accused took command of 37 Army the health of prisoners was so bad that they were not fit to undertake a long march, that Army HQ ordered 500 Prisoners of War to go on the first march, even though they were not fit, and that Army HQ ordered the second march after HOSHIJIMA had said that the march was too difficult and would cause many deaths.

B" The document is admitted in evidence, marked Exhibit "B ()-()" read, signed by the President and a certified copy annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I might say, if the Court pleases, that the document just tendered is one containing matters which occurred before 21 Jan 45, and which is tendered to the Court only to show what condition the prisoners may have been in at the time the Accused took command. The Prosecution does not suggest in any way that the Accused can have been responsible for what happened before 21 Jan 45.

I tender a statement by Capt YAMAMOTO Shoichi which is annexed as Exhibit "AO" to the Proceedings of the trial of YAMAMOTO and ten others in connection with the first SANDAKAN-RANAU march. This document is tendered to prove, amongst other matters, that Army HQ ordered YAMAMOTO to march 500 Prisoners of War from SANDAKAN to TOALAN, that the order stated that the march had to be carried out as quickly as possible and that on 29 Jan 45 YAMAMOTO issued his orders for the march, which duly began. That on 31 Jan, Army HQ sent a signal urging haste, that on 1 Feb the destination was changed to RANAU and that YAMAMOTO ordered Capt ABE to dispose of Prisoners of War if necessary for carrying out the march.

C" The document is admitted in evidence, marked Exhibit "C ()-()", read, signed by the President and a certified copy annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I tender the interrogation of Capt YAMAMOTO Shoichi, annexed as Exhibit "J" to the Proceedings of his trial, to prove, amongst other matters, that he received his orders for the march in January 1945, the orders came from Gen BABA, he was very worried about how to get the Prisoners of War to RANAU, that he gave orders to Capt ABE to kill Prisoners of War in certain circumstances and that he gave orders to men of his own Unit that no matter how sick a Prisoner of War was, he had to be brought on.

"D" The interrogation is admitted in evidence, marked Exhibit "D (-)-(3)", read, signed by the President and a certified copy annexed to the Proceedings, the original being returned to the Prosecuting Officer.

At 1030 hrs the Court adjourns.
At 1047 hrs the Court resumes, the same President, Members and Judge Advocate being present.

Prosecuting Officer: I tender the interrogation of Capt YAMAMOTO Shoichi, annexed as Exhibit "G" to the proceedings of his trial, to prove, amongst other matters, that in January 1945 he received orders direct from Gen BABA to march Prisoners of War to TUARIN, which is apparently the same place as TOALIN - referred to in YAMAMOTO's statement to the Court. TOALIN was stated to be 35 kilometres from JESSELTON and TUARIN 23 miles. That the Prisoners of War were to carry ammunition and equipment, that YAMAMOTO knew they were unfit for the work, that he did not have time to equip the Prisoners of War, that he knew it was wrong to make them march in the condition they were then in and that some Prisoners of War died and some were shot.

"E" The interrogation is admitted in evidence, marked Exhibit "E (-)-(4)", read, signed by the President and a certified copy annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I now tender the evidence of W01, W.H. STIPCEWITCH given at the trial of Capt YAMAMOTO Shoichi and others and contained in sheets 4 to 9 of the proceedings of the trial. This witness was present when the parties left on the first march, he took part in the second march and gained a good deal of information about the first march. His evidence is tendered to prove, amongst other matters, that 470 Prisoners of War, about 120 being British and the rest Australians, were concerned in the first march, that they were in a very bad state of health and only about 40 were even reasonably fit, that they were badly clothed and on short rations, that when witness reached RANAU on 26 Jun 45 (after the second march) there were only six survivors of the first march at RANAU, that the track along which the marches took place was very difficult, that on the second march Prisoners of War suffered severe hardships and heavy losses, that on the second march only 183 reached RANAU alive, that on 17 July there were only 76 alive, that Prisoners of War were ill-treated on the first march and that the distance from SANDAKAN to RANAU is 164 or 165 miles.

"F" The document is admitted in evidence, marked Exhibit "F (-)-(5)", read, signed by the President and a certified copy annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I tender the evidence of KEITH BOTTERILL given at the trial of Capt YAMAMOTO and others and contained in Sheets 12, 13 and 14 of the Proceedings of the trial, to prove, amongst other matters, That during the first march Prisoners of War were kept very short of rations and compelled to carry heavy loads. That they suffered severe hardships. That many Prisoners of War were shot. That during and after the march there were a great many deaths.

"G" The document is admitted in evidence, marked Exhibit "G (-)-(6)", read, signed by the President, and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

At 1145 hrs the Court adjourns.

At 1200 hrs the Court resumes, the same President, Members and Judge Advocate being present.

Prosecuting Officer: I now tender the evidence given by Capt YAMAMOTO Shiroshi at the trial of himself and others contained in Sheets 22-31 inclusive of the Proceedings of the trial, to prove, amongst other matters, that Army Headquarters laid down a Schedule for the first march and that YAMAMOTO gave orders to ABE to dispose of Prisoners of War in certain circumstances.

"E" The document is admitted in evidence, marked Exhibit "E" (1)-(12), signed by the President, and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

The Court: Major Dick, is there any map available for the information of the Court?

Prosecuting Officer: I have not tendered one in evidence, I was relying on the description of the witnesses but, as Exhibit "G", not to these Proceedings, but the Proceedings against Capt YAMAMOTO, there is a sketch map attached. I made endeavours through every branch of this Headquarters to get a map of BORNEO but was unsuccessful. The only thing that I can offer to the Court is this sketch, and in order to put it in now I will require the consent of the Defence representatives because it was not included in the Abstract, and I will have copies made for the Court.

(The map is shown to the Court).

(The map is shown to Defence Officer).

The Court: Counsel for the Defence, have you any objection to that being tendered now for the information of the Court?

Defence Officer: No.

Prosecuting Officer: In those circumstances I tender that in evidence and will have copies made to be annexed to the Proceedings in the Court.

The Court to Prosecuting Officer: How does this involve your Proceedings from now on - having tendered this document?

Prosecuting Officer: In what way?

The Court: The document as a whole.

Prosecuting Officer: I tender this now and it can be returned while a copy is made to be annexed to the Proceedings.

"F" The document is admitted in evidence, marked Exhibit "F", signed by the President, and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

At 12.40 hrs the Court adjourns.

At 1400 hrs the Court resumes, the same President, Members and Judge Advocate being present.

Prosecuting Officer: If it please the Court, in addition to the sketch map which I had tendered just before the luncheon adjournment, which is Exhibit "C" to the proceedings against Capt YAMAMOTO, I also tender a sketch showing the names of the places on the actual route between SANDAKAN and RANAU which is Exhibit "Aq" to the proceedings against Capt YAMAMOTO.

"K" The document is admitted in evidence, marked Exhibit "K", signed by the President and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I now tender the evidence given by Capt IINO Shigeru at the trial of Capt YAMAMOTO, Capt IINO and others, contained in sheets 32 - 36 inclusive of the proceedings of that trial to prove that 37 Army HQ issued the orders for the first march, and other matters.

"L" The document is admitted in evidence, marked Exhibit "L (-) - (-)", read, signed by the President and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I tender the statement of Capt MIZUTO Ryuichi, annexed as Exhibit "AT" to the proceedings of the trial of Capt YAMAMOTO and others to prove, amongst other matters, that the Prisoners of War were unfit to undertake the march in January and that hardships and deaths occurred during the march.

"M" The document is admitted in evidence, marked Exhibit "M (-) - (-)", read, signed by the President and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I tender the evidence of Col TAKAYAMA Hikoichi given at the trial of Capt HOSHIJIMA Susumu contained in sheets 97 - 102 inclusive of the proceedings of the trial to prove, amongst other matters, that, in April 1945 he inspected the SANDAKAN Prisoner of War camp, that Capt HOSHIJIMA told him that it would be difficult to march Prisoners of War to RANAU and that the Accused made the decision to carry out the second march to RANAU.

"N" The document is admitted in evidence, marked Exhibit "N (-) - (-)", read, signed by the President and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I now tender the evidence of Col TAKAYAMA Hikoichi and Lt Col IWASHI Manabu given at the trial of Capt TAKAKUWA Takuo and contained in Sheets 30-33 inclusive of the Proceedings of the trial. In these proceedings the evidence of a witness frequently begins on the same sheet as that on which the evidence of the previous witness finished. That is so in this particular case, and the photostat copy is made up as a single document. Both the witnesses were staff officers on 37 Army HQ and their evidence is similar in character. In these circumstances, I ask the Court to accept these two statements as a single exhibit.

L.

Prosecuting Officer: (Contd.). The evidence is tendered to prove that 37 Army HQ had information of the bad health of Prisoners of War at SANDAKAN, particularly Capt TAKAHARA's having that if Prisoners of War were marched to RAHUU only one-fifth would survive, and that in spite of all this, the General still gave the order for the second march.

"C" The document is admitted in evidence, marked Exhibit "C" (1)-(a), read, signed by the President, and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: For reasons similar to those advanced in the case of the last preceding exhibit, I ask the Court's leave to tender as a single exhibit the evidence of Capt TAKAHARA Takuo and Capt WATANABE Genzo, given at their joint trial and contained in Sheets 8-16 inclusive, of the Proceedings of the trial. Here again the evidence of the two witnesses is similar in character, and is tendered to prove the condition of the Prisoners prior to the second march, the information supplied to Army HQ, the orders from Army HQ, the hardships of the march, the shootings and deaths from other causes during the march, the deaths amongst the survivors during the month after the march, and the killing of the 33 survivors on 1 August 1945. I notice that in the Abstract the document is listed only under the title of TAKAHARA, the first of the witnesses whose evidence appears in the document, and that Capt WATANABE's evidence was not listed separately. The Defence representatives, however, were supplied with a complete document containing a copy of both witnesses' evidence, and they now state that they have read the document and fully expect both sets of evidence to be tendered.

"D" The document is admitted in evidence, marked Exhibit "D" (1)-(a), read, signed by the President, and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

At 1505 hrs the Court adjourns.

At 1515 hrs the Court resumes, the same President, Members and Judge Advocate being present.

(Prosecuting Officer continues reading Exhibit "F")

Prosecuting Officer: I tender the statement of Capt TAKAHARA Takuo, annexed as Exhibit "F" to the Proceedings of his trial, to prove, amongst other matters, that 37 Army was fully aware of the condition of the Prisoners of War. That 37 Army's orders stated that it did not matter if Prisoners of War died while on their allotted task.

"E" The document is admitted in evidence, marked Exhibit "E" (1)-(a), read, signed by the President, and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I tender a statement by Lt WATANABE Genzo, annexed as Exhibit "F" to the Proceedings of the trial of TAKAHARA and WATANABE, to prove, amongst other matters, that 33 Prisoners of War were shot at RAHUU on 1 August 1945.

"F" The document is admitted in evidence, marked Exhibit "F" (1)-(a), read, signed by the President, and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

RB
3
Prosecuting Officer: I tender an extract from the interrogation of Lt WATANABE Genzo annexed as Exhibit "H" to the proceedings of the trial of TAKAKUWA and WATANABE to prove, amongst other matters, that during the second march sick Prisoners of War were shot.

The document is admitted in evidence, marked Exhibit "S (1)-(2)", read, signed by the President and a certified copy is annexed to the Proceedings the original being returned to the Prosecuting Officer.

3
Prosecuting Officer: I tender a statement by Sgt OKADA Toshiharu, annexed as Exhibit "W" to the proceedings of the trial of TAKAKUWA and WATANABE, to prove that at RANAU on 1 Aug 45, Prisoners of War were shot.

3
T
The document is admitted in evidence, marked Exhibit "T (1)-(2)", read, signed by the President and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

Prosecuting Officer: I tender a statement by Formosan HIROTA Ginjiro annexed as Exhibit "X" to the proceedings of the trial of TAKAKUWA and WATANABE to prove, amongst other matters, that on 1 Aug 45 at RANAU, Prisoners of War were shot. I think that the list of Japanese names may be taken as read if the Defence will agree.

The Court: The reading of the list of names may be omitted if the Defending Officer agrees.

Defending Officer: I agree.

3
The document is admitted in evidence, marked Exhibit "Y" (1)-(2)", read, signed by the President and a certified copy is annexed to the Proceedings, the original being returned to the Prosecuting Officer.

THE CASE FOR THE PROSECUTION IS CLOSED.

Defending Officer: I will have to ask the Court for an adjournment until next Monday so as to have more time to change the statements and addresses and make other preparations on the grounds that the charge has been altered and is different from that shown in the Abstract. I am making this request with the Prosecution's consent.

The Court: I would prefer not to grant an adjournment until Monday definitely. If you are ready to proceed before Monday the Court will sit.

Defending Officer: Yes.

The Court: I will adjourn the Court indefinitely and I ask the Defending Officer to let me know when he is ready to proceed.

At 1630 hrs the Court adjourns until a day to be fixed.

At 0900 hrs on 2 Jun 47 the Court resumes, the same President, Members and Judge Advocate being present.

R.P. 40 (A) is complied with.

The Accused elects to give evidence on oath, but does not intend to call any other witnesses on his behalf.

DEFENDING OFFICER ADDRESSES THE COURT:

If the Court please, in this case the Accused is the sole witness whom the Defence propose to call. He will give evidence on oath before the Court. Most of his evidence will be produced in the documentary form. The Defence has no intention of tendering any other documentary evidence. Now I call the Accused into the witness box.

FIRST WITNESS FOR THE DEFENCE: BABA MASAO.

JUDGE ADVOCATE:

- Q. What is your name?
A. BABA MASAO.
Q. What is your religion?
A. Buddhist.

Witness is duly sworn according to the Buddhist rite.

- Q. Are you bound by that oath?
A. Yes.

EXAMINED BY DEFENDING OFFICER:

- Q. What is your rank, name and unit?
A. I am COC of 37 Army, Lt-Col BABA MASAO.

(Witness is shown document written in Japanese).

- Q. Is that your signature appearing at the bottom of that statement?
A. Yes.

- Q. Did you read it over before you signed it?
A. Yes.

- Q. Are you satisfied with the contents?
A. Yes.

(Witness is shown document written in English).

- Q. Is that your signature appearing at the bottom of that statement?
A. Yes.

- Q. Was that document read over to you in your own language before you signed it?
A. Yes.

- Q. Are you satisfied with that translation?
A. Yes, I am.

Defending Officer: Now I tender in evidence his statement written in Japanese with the English translation.

The statement of the Accused in Japanese, together with the English translation, are admitted in evidence, marked Exhibit "1" (13), read, signed by the President, and annexed to the proceedings.

Defending Officer: Who was the deputy officer of the COC during your absence effective command?
A. Gen YAMAWAKI.

- Q. After your arrival in LORNO, did you ever go to any place on official business?
A. Yes.

- Q. Where did you go?
A. BUNNIA and BOMOTO.

- Q. When, and how long?
- A. I visited these places for about a week, two or three days after my arrival in BORNEO.
- Q. What for?
- A. To draft out the new operational plans for the expected operations.
- Q. What was the strength of the Japanese 37 Army in BORNEO?
- A. Approximately 15,000.
- Q. What was its quality like?
- A. They were of poor quality.
- Q. What about its organization?
- A. There were twelve Infantry Battalions and no Artillery, and as to the communication and Commissary Units, Hospital and Supply Depots, all of them were imperfect.
- Q. Could you, as the GOC Army perfectly fulfil your duties with such organization?
- A. No, it was quite impossible for me to perform my duties.
- Q. I will repeat my question. Could you perfectly fulfil your duties?
- A. No, I could not.
- Q. Why not?
- A. The reasons for this was because there were defects in the organization of my unit, and also the strength of my units could not be displayed when the enemy attacked, because of insufficiency of communication facilities.
- Q. What was the course of the movement of the units in the East Coast of NORTH BORNEO to the West Coast?
- A. From TAWAU to SANDAKAN and RAHAU.

Q. In or about May 1945, was there any ship to be made available in the waterways through the River LABUK?
A. Yes, there were some.

Q. Where were these ships?

A. The barge engineers had 10 barges, and the NAMI Unit had quite a number of small boats. The barge engineers had its barges at these three places - DABEL, SEGAMA River and KINABATAN River, and the NAMI Unit had its small boats at SANDAKAN and the LABUK River.

Q. According to the investigation of the waterway through the River LABUK, what was it like?

A. It was possible for a boat to go up as far as BOTO, but whenever the situation was best, a boat could go up as far as TAMPIAS.

Q. Did you ever issue any instructions as to how to deal with the Prisoner of War Camp in case SANDAKAN should be attacked by the enemy?

A. I previously instructed them to contact with the Army HQ immediately.

Q. Where was the electric power station at SANDAKAN?

A. It was in a place adjoining to the sawmill, near the beach of SANDAKAN.

Q. Is there any signal station inside the Prisoner of War Camp at SANDAKAN?

A. No.

Q. How far is it from the Prisoner of War camp to the signal station?

A. Approximately 10 miles.

Q. What was the extent of command that you had over the Prisoner of War camps in BORNEO?

A. I had only the power to conduct their garrison and food supplies.

Judge Advocate to Court Interpreter: Capt SUZUKI, would you repeat that please?

A. I had only the power to conduct their garrison and guard, and their food supplies.

THE CASE FOR THE DEFENCE IS CLOSED.

NO CROSS-EXAMINATION.

At 0952 hrs the Court adjourns.

At 1010 hrs the Court resumes, the same President, Members and Judge Advocate being present.

NO QUESTIONS BY THE COURT

QUESTIONS BY THE JUDGE ADVOCATE:

- Q. When you took up your command in Borneo, did you ascertain the conditions of the Prisoners of War at SANDAKAN ?
A. Yes.
- Q. And you knew what the conditions of the Prisoners were did you ?
A. Yes.
- Q. When your Chief of Staff, Col TAKAYAMA, visited SAEDAKAN in April, did you get him to ascertain and report on the conditions of the Prisoners?
A. He is not the Chief of Staff, he is a Senior Staff.
- Q. A Senior Staff Officer?
A. Yes.
- Q. Did you obtain a report from him?
A. Yes, I did.

At 1014 hrs the Court adjourns.

At 1030 hrs the Court resumes, the same President, Members and Judge Advocate being present.

His evidence is read back to the Witness who does not desire to correct same.

THE CASE FOR THE DEFENCE IS CLOSED

At 1028 hrs the Court resumes, the same President, Members and Judge Advocate being present.

The Prosecuting Officer Addresses the Court:

May it please the Court.

When I opened the case against the Accused I enumerated the matters which the Prosecution undertook to prove. I presented those in some detail, and tendered detailed evidence to substantiate each and every one of them beyond reasonable doubt.

I now submit that these matters may be looked at from a more general point of view and they resolve themselves into a few broad issues which the Court must decide on the evidence:-

On and after 21 Jan 45, were there Australian and British Prisoners of War at SANDAKAN and if so, was their health and equipment bad?

Had the Accused knowledge of this?

Did the Accused order the January march to RANAU?

Did the Accused order the May march to RANAU?

Did members of the Accused's command commit war crimes against Prisoners of War during these marches and at RANAU?

Is the Accused personally criminally responsible for those war crimes?

As to quantity, I suggest that there is a lot of evidence against the Accused on every issue. As to quality, I submit that all the evidence is very good and worthy to be given great weight. The only two victims whose evidence is tendered told their stories very simply, without dramatic flourishes, giving credit to those Japanese who treated them well. This sort of evidence is very convincing. The rest of the Prosecution's evidence is provided by members of the Accused's command - two high-ranking officers of his staff, three Captains exercising responsible commands, and a number of junior officers and other ranks. There are discrepancies as to dates and details, but that is natural. I will go further and say that if there were no discrepancies I would be very suspicious of the evidence.

On the first issue the Court has before it the evidence of WO 1 Stipswitch, Pte Botterill, Capt HOSHIJIMA, Capt YAMAMOTO, Capt TAKAKUWA, Col TAKAYAMA and Lt Col IWAHASHI. This evidence, I submit, proves clearly that there were Australian and British Prisoners of War at SANDAKAN, that after nearly three years of ill-treatment and inadequate rations they were, on and after 21 Jan 45, in a bad state of health and quite unfit to undertake a severe march over difficult country, and that they were not clothed or equipped adequately for such a march.

On the second issue the Court has before it, the evidence of Col TAKAYAMA, Lt Col IWAHASHI, Capt HOSHIJIMA, Capt YAMAMOTO and Capt TAKAKUWA. This evidence does not prove that the Accused was ever personally informed of these matters, but the Accused, when questioned by the Judge Advocate admitted that he was fully informed of the conditions of the Prisoners of War at SANDAKAN.

In the case of the third issue, the Prosecution has not proved that the Accused originated the order for the January march, but this is of no importance. Even if the Accused's predecessor originated it, there can be no doubt that the Accused's staff issued the order to his subordinates and saw that it was put in operation. This is admitted by the Accused.

So far as the fourth issue is concerned, the Accused has admitted issuing the order.

On the issue of whether or not members of the Accused's command committed war crimes against Prisoners of War there is a great deal of evidence, which, I submit, proves beyond reasonable doubt, that during both marches Prisoners of War were ill-treated, that many died as a result of such ill-treatment or as a result of being forced to march when unfit to do so, that many were shot, that a large number died at RANAU, and that no fewer than 53 survivors were shot on 1 Aug 45. The evidence on these points is of the highest quality - that of eye-witnesses and men who actually participated in the war crimes described. These latter had nothing to gain by giving this evidence and everything to gain by suppressing it. The fact that it is given by them against their own interests renders it very weighty indeed. The Accused himself admits the war crimes were committed by members of his command. If the Court finds against the Accused on the matters I have mentioned it must proceed to the ultimate issue - is the Accused personally criminally responsible. 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.

In this case the Accused had an undoubted duty to ensure that Prisoners of War were treated in accordance with the requirements of International Law. Whether or not the Prisoners of War camp was part of his command is immaterial. Col TAKAYAMA says it was not, but that 37 Army could give orders on certain things. The Accused says his powers of command were limited, but questions of what he had power to do and what he did not have power to do are not material to this issue. The real issue is what he in fact did do. The fact that the Accused actually did give the orders renders merely academic any argument about his legal right to give them. Now Prisoners of War are not in the hands of any individual Commander or Force but in those of the state which captures them. No individual commander has any right to do what he likes with Prisoners of War who may for the time being be in his control. He has a positive legal duty to ensure that all members of his Command treat them according to law. In view of the evidence tendered by the Prosecution I submit that it has been proved beyond any possible doubt that the Accused failed to discharge that duty.

In these circumstances the only defence open to him is that the failure resulted from circumstances beyond his control or from a mere inadvertence not amounting to culpable neglect. I submit that in view of the evidence such a defence is impossible.

If his failure resulted from culpable neglect, then the guilty mind - always an essential element in a criminal charge - has been proved, and the Accused is guilty of the charge. The Prosecution places the guilt of the Accused on a much higher plane. It contends that the Accused wilfully failed to discharge his duty, and that this wilfulness is clear from the evidence.

The Prisoners of War were at SANDAKAN in an organized camp whose Commandant was in communication through normal channels with the Accused's Hq. I do not propose to argue whether or not the Accused was guilty of any crime in ordering Prisoners to march from one place to another. I merely say that before giving any such order he had certain positive duties to perform. It was his duty to satisfy himself that they were fit physically to undertake the march and that they were adequately clothed and otherwise equipped for the purpose. The Court has before it ample evidence of the actual condition of the Prisoners, and the Accused had every facility for informing himself on this point.

The Accused has admitted that he was aware of the conditions of the Prisoners of War and still sent them on the march. This admission places his guilt beyond doubt.

It was his duty, before ordering such a big movement, to make a reconnaissance. The Court has before it graphic evidence of the nature of the country over which the march took place. If he made a reconnaissance and still ordered the march he is guilty. He has admitted making a reconnaissance.

It was his duty to make adequate arrangements to ensure that the Prisoners made the journey without harm to themselves. The fact that so many left SANDAKAN and so few reached RANAU is irresistible evidence of his failure to discharge this duty.

It was his duty to inform himself of all details relating to the first march. If he did so and still ordered the second march his guilt is beyond question. In his statement to the Court the Accused admits having been fully informed of the losses on the first march. Whatever excuse may be made for the Accused in the case of the first march, his ordering the second march after the disastrous events of the first indicates in the highest degree a definite criminal intent.

It was his duty, in the case of both marches, to ensure that on reaching RANAU Prisoners were properly cared for. The evidence of WOL Stipcewich shows that at the end of June there were only six survivors of the first march. The evidence of various Japanese proves that although 183 reached RANAU at the end of June there were only 33 survivors on 1 August. These facts speak for themselves.

The Prosecution contends that far from controlling the conduct of his subordinates the Accused put them in a position where it was virtually impossible for them to carry out his orders without committing some war crimes against Prisoners of War. YAMAMOTO's evidence shows that the order to him stated that the march had to be carried out quickly and that Army Headquarters laid down a very fast schedule. If YAMAMOTO had merely driven these sick and ill-clothed Prisoners over the route without any beatings or shootings he would still have committed the war-crime known as ill-treatment of Prisoners of War. If any had died as a result of such driving, YAMAMOTO would still have been guilty of the war-crime known as murder. The beatings and shootings were merely natural consequences of the Accused's orders and although he did not specifically order them, his guilt is as great as it would have been if he had ordered them.

A similar argument applies in TAKAKUWA's case. He had to take 540 Prisoners, most of them very sick, over this route. On the second sheet of his evidence IWAHASHI states that the Chief of Staff ordered that the men had to go irrespective of their condition. TAKAKUWA gave a message that only one fifth would survive. IWAHASHI and the Accused state that Army Headquarters replied "Send only the healthy ones to RANAU", but TAKAKUWA states in evidence on sheet 14 of the proceedings of his trial that he did not receive the message. I suggest that TAKAKUWA is to be believed. The fact that the earlier message included the words "irrespective of their condition" indicates knowledge at Army Headquarters of the condition of the Prisoners, and it indicates a settled policy. It is unlikely that the policy would be changed simply because TAKAKUWA told Army Headquarters something it already knew.

The Accused has admitted that he was aware of the conditions of the Prisoners of War and still sent them on the march. This admission places his guilt beyond doubt.

It was his duty, before ordering such a big movement, to make a reconnaissance. The Court has before it graphic evidence of the nature of the country over which the march took place. If he made a reconnaissance and still ordered the march he is guilty. He has admitted making a reconnaissance.

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It was his duty to inform himself of all details relating to the first march. If he did so and still ordered the second march his guilt is beyond question. In his statement to the Court the Accused admits having been fully informed of the losses on the first march. Whatever excuse may be made for the Accused in the case of the first march, his ordering the second march after the disastrous events of the first indicates in the highest degree a definite criminal intent.

It was his duty, in the case of both marches, to ensure that on reaching RANAU Prisoners were properly cared for. The evidence of WO1 Stipcewich shows that at the end of June there were only six survivors of the first march. The evidence of various Japanese proves that although 183 reached RANAU at the end of June there were only 33 survivors on 1 August. These facts speak for themselves.

The Prosecution contends that far from controlling the conduct of his subordinates the Accused put them in a position where it was virtually impossible for them to carry out his orders without committing some war crimes against Prisoners of War. YAMAMOTO's evidence shows that the order to him stated that the march had to be carried out quickly and that Army Headquarters laid down a very fast schedule. If YAMAMOTO had merely driven these sick and ill-clothed Prisoners over the route without any beatings or shootings he would still have committed the war-crime known as ill-treatment of Prisoners of War. If any had died as a result of such driving, YAMAMOTO would still have been guilty of the war-crime known as murder. The beatings and shootings were merely natural consequences of the Accused's orders and although he did not specifically order them, his guilt is as great as it would have been if he had ordered them.

A similar argument applies in TAKAKUWA's case. He had to take 540 Prisoners, most of them very sick, over this route. On the second sheet of his evidence IWASHI states that the Chief of Staff ordered that the men had to go irrespective of their condition. TAKAKUWA got a message that only one fifth would survive. IWASHI and the Accused state that Army Headquarters replied "Send only the healthy ones to RANAU", but TAKAKUWA states in evidence on sheet 14 of the proceedings of his trial that he did not receive the message. I suggest that TAKAKUWA is to be believed. The fact that the earlier message included the words "irrespective of their condition" indicates knowledge at Army Headquarters of the condition of the Prisoners, and it indicates a settled policy. It is unlikely that the policy would be changed simply because TAKAKUWA told Army Headquarters something it already knew.

The Accused has admitted that he was aware of the conditions of the Prisoners of War and still sent them on the march. This admission places his guilt beyond doubt.

It was his duty, before ordering such a big movement, to make a reconnaissance. The Court has before it graphic evidence of the nature of the country over which the march took place. If he made a reconnaissance and still ordered the march he is guilty. He has admitted making a reconnaissance.

It was his duty to make adequate arrangements to ensure that the Prisoners made the journey without harm to themselves. The fact that so many left SANDAKAN and so few reached RANAU is irresistible evidence of his failure to discharge this duty.

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If TAKAKUWA had never beaten or shot a prisoner, he would, by merely carrying out BABA's orders, have still been guilty of war crimes. The mere act of forcing sick men to march was ill-treatment. In the case of every man who died as a result, he was guilty of murder. The shootings and beatings in this case also were merely a natural consequence of the order. In his evidence, on the lower half of Sheet 11 of the Proceedings of his trial, TAKAKUWA pleaded a kind of military necessity for the killings he ordered, and that alleged military necessity arose only as a result of BABA's orders.

In his evidence just referred to, at Sheet 13, TAKAKUWA made a similar plea of a sort of military necessity for the shooting of the 33 survivors on 1 Aug 45 :-

Q. Was not your reason for killing the 33 Prisoners of War on 1 Aug because they were too weak and too ill to be of use to the Japanese?

A. Those were not the only reasons. The biggest reason was because the Prisoners of War might attempt to escape, also there was a shortage of food, and they could not transport rice or carry weapons for the KANNO Unit.

I submit that the Accused must be held criminally responsible for this crime of his subordinate officers.

It is possible, though difficult, to make some excuse for YAMAMOTO and TAKAKUWA, but it is impossible to make any for the Accused, who placed them in a predicament where, in their judgment, they felt it necessary to commit a series of very grave war crimes.

The principal evidence implicating BABA is supplied by Japanese witnesses. At first sight it might seem that this amounts to pleading superior orders and sheltering behind the Accused. But an examination of the evidence shows that this is not so. The staff officers, TAKAYAMA and IWASHI, whose evidence weighs very heavily against the Accused, were not on trial at all. They were merely witnesses, and I can think of no motive to induce them to implicate BABA unnecessarily. The others were on trial for murder and massacre, and had they wished to shelter themselves at the expense of the Accused, they would have pleaded superior orders in those matters. On the contrary, however, they specifically stated that they committed these crimes entirely on their own initiative and denied having superior orders. The fact that they denied superior orders in the matters which most closely concerned them, suggests very strongly that those portions of their evidence which in fact directly implicate the Accused, may be believed.

The defence consists firstly of an admission of most of the important matters alleged by the Prosecution, and secondly, of an apology.

The Accused admits that he reconnoitred the route and satisfied himself that it was suitable for the purpose. The evidence of the Australian and Japanese witnesses tendered by the Prosecution, proves clearly the extreme difficulty and unsuitability of the route. The fact that the Accused did make a reconnaissance places his guilt on a higher plane.

He admits ordering the first march, and later learning of the heavy loss. He admits that, in spite of these losses, he ordered the second march, stating that he gave orders with a view to preventing a recurrence of those losses. Whether or not he gave those orders is quite immaterial. The undisputed fact is that the second march was even more disastrous than the first. He is being charged in respect of what happened as a result of his orders.

He admits that his subordinates committed atrocities, and says he is sorry. The Prosecution has proved beyond doubt that the Accused himself put those subordinates in a position where they had to commit war crimes if they were to carry out their orders. The Accused's regret is not an answer to the charge against him.

Those parts of the Accused's evidence relating to military operations are interesting, but they have no bearing at all on the matters in issue - war crimes committed against Australian and British Prisoners of War.

It is the duty of the Prosecution to be fair to the Accused. He has been given every possible facility for making his defence, but I submit that he has not answered the case against him. I submit that he is personally criminally responsible for a series of war crimes which resulted in the deaths of approximately 1000 Australian and British Prisoners of War, and that he is guilty of the charge.

DEFENDING OFFICER ADDRESSES THE COURT:

If the Court please, the fact that during and after the two marches from SANDAKAN to RANAU in BORNEO, a number of Australian and British Prisoners of War fell in their unfortunate fates is so serious an incident that Mr. KEENAN, the Chief Counsel for the Prosecution, described it as the world-wide atrocities together with the "Death March" in BATAAN Peninsula, in his opening address on 4 Jun 46 before the International Military Tribunal, Far East.

I can deeply feel and fully understand that these atrocities, as well as the tragedy in the course of the construction of the BURMA-SIAMENSE Railway, must have been retained at the bottom of minds of Australian and British people with so sad impressions that could never be wiped out.

Therefore, I must deeply reflect on myself as to what I ought to plead in favour of the Accused in the face of these drastic facts. I am now imagining in my mind with deep sympathy their figures and feelings with which, about this time just two years ago, about 650 Australian and British Prisoners of War, who had been made to start in confusion, out of a state of panic caused by the battles at SANDAKAN, marched, plodding on the road along the river LABUK, for RANAU, hearing near their ears the bombings of their friendly forces.

And at the same time I am imagining the painful mind of Lt Gen BABA, who was watching severe bombardments against the coast of the BRUNEI Bay, being unable to know if even he tried to know, about the progress of battles at SANDAKAN and feeling the fighting on the West Coast imminent, and worrying himself about the operational dispositions not having been completed in the expected time.

And I can not help sympathizing with these two facts. I think, however, such sentiments of mine must be thrown off, and cool reason and infallible veracity only must guide my address.

And the Accused is ready to disclose the truth of the facts relevant to him, without modification, mistake, and omission in order to receive a fair and proper judgment by the Court.

I believe the veracity included in his individual words which will come out of the mouth of the Accused, standing alone in the box, recollecting the incidents which occurred about this time two years ago, in his purest state of mind, will be a more reliable evidence than any other.

I am prepared to stress the following points in this trial in favour of the Accused, Lt Gen BABA :

1. The orders regarding the first march of Prisoners of War had been issued before the arrival of the Accused as new GOC, 37 Army, at JESSELTON, BORNEO - that is, on 21 Jan 45.
2. In order to examine the orders regarding the second transfer of Prisoners of War issued by the Accused, I will pay attention to the relation between the contents of the orders and the circumstances at the time when the transfer began; and I will examine to what extent the Accused learned of the results of the first march in order to make preparations for the second transfer and what kind of efforts he made for the purpose of not repeating such disastrous results.
3. In examining the atrocities against Prisoners of War, especially such conducts committed inside the Prisoner of War Camp, it weighs with me to make clear the power of the Accused as GOC 37 ARMY, over the Prisoner of War Camps.

4. I will examine to what extent the Accused's control ought to have been exerted in the matters regarding these three items, (1), (2), and (3). Especially in the examination of his control, I will examine the peculiarities of the 37th Army, and the course of operations in BORNEO, and their peculiarities, and consider how much these matters gave their influences over the fulfillment of the duties of the Accused as GOC.

Now, I am going hereinafter to express my opinion as to the Charge, according to the classification of the evidence the Prosecution made in the Abstract of evidence, dividing them into three: The orders regarding the first march, the orders regarding the second transfer, and atrocities committed by some members under the Accused. And then I intend to examine the controlling power by the Accused over his subordinates which should be taken into account commonly in each of these three items. For all of these we hope we could receive your fair and proper judgment.

I. With regard to the orders regarding the first march.

A. I must make clear whether or not the motive with which the transfer of the SANDAKAN Prisoner of War Camp to RANAU was decided on is lawful.

That motive is clearly shown by the evidence of IWASHI, the staff officer of the 37 Army (Exhibit "O"), and that of the Accused, and it is also clear, these same evidences show, that RANAU possessed all the conditions required for a Prisoner of War Camp. It might, however, require for the present to inquire into the question whether or not there was any other place near SANDAKAN suitable for Prisoner of War Camp. For that purpose, I should like to give some strategical appreciation on the circumstances which would be brought about in case fighting took place in the districts around SANDAKAN.

Suppose the Allied Forces started the landing in SANDAKAN district, the place chosen for their landing point would have been either of the three - the front of the town of SANDAKAN, or the front of the Aerodrome, or the coast on the LABUK Bay, including the mouth of the LABUK River.

If it is not mistaken, I will consider each of them.

It is clear the area between SANDAKAN and BELURAN would become dangerous owing to battles. And the riverside area along the LABUK River, West of BELURAN, would have much fear of having the danger of fighting spread over as well because armed boats could go up the River. On the other hand, the coast on the LABUK Bay, near the mouth of the LABUK River, is a marshy district, and the area along the upper stream becomes gradually mountainous, where, being no poor in natural products, Prisoners of War might fall into difficulties to live on.

Thus, it should be understood that except RANAU, any place which would be suitable to establish Prisoner of War Camp could not be found out in any area near SANDAKAN.

Therefore, I maintain that the motive of the transfer of the Prisoners of War Camp to RANAU had no unlawfulness. I rather submit that the good will shown therein should be recognized.

B. The orders regarding the first march of Prisoners of War were issued on 12 Jan 45, that is, ten days before on 21 Jan 45, when Lt Gen BABA, as new GOC the 37th Army, arrived at JESSSELTON.

Therefore, it is not just to hold him responsible for issuing the orders regarding the first march, as the Prosecution alleged in the opening address.

G. The evidence which the Prosecution tendered give such impression as if there were a fact that after Lt Gen BABA's arrival the Army HQ urged YAMAMOTO to make an expeditious march, showing him an itinerary and changing the destination from RANAU to TOARAN. Lt Gen BABA denies this. Capt YAMAMOTO, OC the first march, states he received the orders to transfer Prisoners of War on about 13 Jan, and the itinerary on 23 Jan. But IINO, his adjutant, gave evidence (Exhibit L) that the itinerary with the original orders was received about the middle of Jan. The two evidences contradict each other. And YAMAMOTO alleges he received a telegram urging an expeditious march on 24 Jan, but IINO made a statement (Exhibit L) inconsistent with YAMAMOTO's evidence as follows:

"The instructions (Army HQ order) was that the YAMAMOTO Unit was to start on the march as soon as possible it stated that we were to march to TOARAN within 19 days." That is to say, it means that it was a demand to "start" quickly, but not to "march" quickly. But it cannot be thought of that a higher HQ should issue such unreasonable orders in such an ordinary war situation as, showing an itinerary on 23 Jan, demanded to start on a rapid march on the following day. The question of the itinerary was not at all contended by the accused persons in the LABUAN Trial, but was taken up by them for the first time in the KABAUL Trial.

And YAMAMOTO did not leave SANDAKAN till 29 Jan, despite that he said he received the urging orders on 24 Jan. This proves that the Army HQ did not urge him to march quickly. And at that time the Army HQ had not felt such imminence of the operational situation as it had to require a rapid march, and there is no evidence in which we can find out any war situation which would be a cause for such a rapid march.

Next, I should like to examine YAMAMOTO's statement that the destination of the transfer of the Prisoners of War was altered by the Army HQ from TOARAN to RANAU.

In his statement the Prosecution produced (Exhibit "D"), YAMAMOTO makes such inconsistent statement as follows:

"-----I received orders from 37 Army HQ that a number of Prisoners of War were to be moved from SANDAKAN towards TOARAN".

Despite his saying so, he stated just a little thereafter:

"I was very worried as to how to get the Prisoners of War to RANAU".

This seems to be his unjust fabrication having been exposed in his careless statement.

I believe the Army HQ from the beginning had decided on RANAU for the destination to move the Prisoners of War and ordered so, on the following grounds:

1. The first of the reasons for the transfer of the Prisoners of War Camp, as stated above, was to make Prisoners of War evacuate the operational dangerous zone. TOARAN is in the West coast, which would be directly influenced by the landing operations. There is no reason to make the Prisoners of War move to such a dangerous area.

2. There is no evidence produced in which we can find out any

reason for which the Army HQ changed the destination to RANAU on 1 Feb, just after 29 Jan when YAMAMOTO Unit started. I believe the instructions of the Army HQ was that the destination of the march of YAMAMOTO Unit was 'TOARAN' and that of the Prisoners of War 'RANAU', and YAMAMOTO should take the Prisoners of War with him up to RANAU en route to TOARAN. It is an undeniable fact that the Prisoners of War were transferred to RANAU. And also YAMAMOTO answered in his interrogation (Exhibit "g") ;

"The purpose of sending these prisoners was to make them carry ammunition and equipment required at JESSELTON."

But he makes an inconsistent statement in his statement (Exhibit

"I was not informed of the Army HQ's intentions and the reasons why we should carry out the disastrous march....".

As a matter of fact, there is no evidence which shows that ammunition was carried by any Prisoner of War whatsoever at TOARAN as well as JESSELTON.

As stated above, the evidence given by YAMAMOTO does not deserve any reliability because of many inconsistencies.

I believe these two questions are all the stories which YAMAMOTO cooked up in order to exonerate them for the reason that they were rushed to march by the Army HQ. And I stress that it is a fact that the Accused, Lt Gen BABA, did not issue such orders that urged to march as quickly as possible.

D. Next I must mention as to whether or not Lt Gen BABA ought to have been aware of the conditions under which the march necessarily would cause the Prisoners of War much pain and suffering. The orders regarding the Prisoners of War's march were issued before his assuming effective command, and the commencement of the march was made after it, and Lt Gen BABA received a report regarding the march of Prisoners of War from the Chief of Staff soon after his arrival. The contents of that report are stated in his statement. He approved of them. I submit he did so because he believed in the report by the Chief of Staff and did not believe that the march should necessarily cause Prisoners of War great pain and suffering. The reporter was the Chief of Staff, who held the most important post and responsibility in the Army HQ and the GOC should have believed in him with the greatest credit.

I submit there is neither malice nor negligence on the part of Lt Gen BABA, who had no preparatory knowledge of the things of BORNEO, in believing in the report.

And in the statements of YAMAMOTO (Exhibit "C") and HOSHIJIMA, (Exhibit "B") they state that they submitted to the Army HQ their opinions regarding the lessening of the difficulties of the march. It might be true. But Lt Gen BABA did not know of it. If it be true, I submit that they were disposed of by the staff members and not reported to Lt Gen BABA or that they were submitted during Lt Gen BABA's absence from the Army HQ. In fact, Lt Gen BABA was absent after he went out to BRUNEI on 24 Jan.

What Lt Gen BABA took the greatest interest in after his arrival was a new operation plan. Under the orders of the South General Army, Lt Gen BABA, GOC the 37 Army, was to fundamentally alter the defensive and operational plan in BORNEO.

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It was one of the most important and imminent duties of the GOC to rapidly establish and prepare the operational plan of the main body of the Army which was to be disposed in important areas around the BRUNEI Bay after 500-500 miles march. I submit it can be fully understood why Lt Gen BABA spent about seven days from 24 Jan in inspecting the BEAUFORT-BRUNEI Area.

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11. With regard to the orders regarding the 2nd Transfer.

A. As his statement shows, Lt-Gen BABA, by Capt YAMAMOTO's report, was aware of the conditions of the first march of Japanese soldiers and Prisoners of War from SANDAKAN to RANAU which were not so easy as he expected. Then it would be a question to what extent he was or ought to have been aware of them. The results of this march, contrary to his expectation, were a serious matter to Lt-Gen BABA. The fact that he was not indifferent to the result nor had negligence therein to be charged with can be proved, I submit, by the facts that under Lt-Gen BABA's orders issued after YAMAMOTO's report, the repair of the first line of Communication route and reinforcement of commissary facilities thereon were, immediately and surmounting difficulties, carried out under careful co-operation among the units concerned extending over a long period.

Now, I should like to examine the steps of Lt-Gen BABA that he took for the purpose of not repeating the unexpected results of the first march, according to Lt-Gen BABA's statement and evidence, and the evidence the Prosecution tendered.

1. Lt-Gen BABA examined the following three plans as the fundamental problem of the steps:-

- 1st plan: To transfer the Prisoner of War Camp to a place which is near to SANDAKAN and is easy to move to.
- 2nd plan: To leave the Prisoner of War Camp at SANDAKAN as it is, without transferring it.
- 3rd plan: According to the already decided plan, to transfer it to RANAU which possessed the best conditions to accommodate Prisoners of War.

And, out of the above three plans Lt-Gen BABA particularly endeavoured to investigate the first plan. The fact that the Army HQ once issued orders to move to KAMANSIT, which was mentioned in HOSHIJIMA's evidence (Exhibit "B") and HOSHIJIMA undertook to make preparations for that move, is a weighty evidence which shows the Accused made efforts in regard to the first plan. But, after further consideration, he thought KAMANSIT was, in principle, improper, because it had big probability of becoming the dangerous zone of fighting, and also had defects with regard to foodstuffs. TAKAKURA's statement (Exhibit "Q") clearly shows that KAMANSIT had defects in the food problem.

And Lt-Gen BABA thought of the move making use of the waterway, and investigated the waterway of the LABUK River. His conviction in its value in use made him decisively determine that the transfer of the Prisoner of War Camp to RANAU was proper in view of the whole field of affairs.

For the same reason as mentioned in regard to the orders regarding the first march, I consider it by no means unlawful that Lt-Gen BABA approved the second transfer of the Prisoners of War to RANAU.

2. What Lt-Gen BABA had to consider most after the adoption of the above-mentioned third plan, was a problem how to transfer the Prisoners of War safely, to which, I assume, your attention is being particularly paid.

What Lt-Gen BABA had to consider in order to solve this problem was firstly to accurately understand what were the conditions which would cause Prisoners of War great pain and suffering in the transfer itself.

I think such conditions are, in principle, as follows:-

1. Health conditions of Prisoners of War.
2. Conditions of the march course.
3. Daily stages and speed of the march.
4. Rationing and accommodations during the march.
5. Medical facilities during the march.
6. Quantities to be carried by each Prisoner of War.

Did Lt-Gen BABA make efforts to meet the needs in these conditions?

Gentlemen, I hope you may infer from the statement of the Accused and evidence, the preparations for the transfer which Lt-Gen BABA made for about four months encouraging the units concerned. I am going to mention about the matters which I consider important in the above-mentioned principal conditions.

(a) First, I think, whether or not Lt-Gen BABA ordered to transfer all the Prisoners of War, reckless of their health, in the second transfer, is an important point. In this respect, Lt-Gen BABA states that he, in the orders on 20 May, clearly showed his intention, as the GOC, of transferring the said Prisoner of War Camp to BANAU, and ordered on 26 May that healthy Prisoners of War only be made to move to BANAU. IWASHI, a staff officer, states that at first the Chief of Staff ordered to transfer all the Prisoners of War and later on the Army orders to transfer healthy Prisoners of War only, being based upon the suggestion made by Capt TAKAKURA, was issued. On the contrary, TAKAKURA states that it was an order that said all the Prisoners of War be made to move (Exhibit "a"). I have doubts on this IWASHI's testimony (Exhibit "a"); for, under the Japanese Military Regulations, the Chief of Staff who is not authorized to issue orders is not allowed to issue Army orders regarding any matter whatsoever. It is strange that IWASHI, being a staff officer, stated such a thing, as it is contrary to this undeniable principle. And TAKAKURA states he did not receive such an order that said "Make healthy Prisoners of War only transfer." But, from the fact that TAKAKURA received the orders issued on 20 May on the same day, it must be recognized that the communication between SANDAKAN and the Army HQ could reach him within one day. If so, it is strange that TAKAKURA did not receive the Army orders which are stated to have been issued on 26 May. But, the distance between the SANDAKAN Signal Station and the Prisoner of War Camp was about ten (10) miles. Therefore, I submit, there can be some presumption that the delivery of the telegram might be delayed for some reason until 27 May, when the Allied Forces launched attack, and after that, TAKAKURA might have no opportunity to receive it until 29 May when he set out.

(b) The second is the point that Lt-Gen BABA made efforts for the purpose of transporting Prisoners of War, if possible, by the waterway, utilizing the River LABUK. He worked out the following three methods of transporting Prisoners of War:-

- (1) The Prisoners of War able to endure the march should march overland.
- (2) Those who were too weak to march should be transferred by the waterway.

- (3) Those unable to endure the move should remain and recuperate themselves at SANDAKAN.

And, as his statement shows, Lt-Gen BABA learned by the investigation made by the Waterway Investigation Branch that waterway through the River LABUK covered two-thirds of the whole course between SANDAKAN and RANAU. He made efforts in gathering ships and boats which had been scattered in various places, ordering the Barge Engineer Unit and NAMT Unit. Even by this, it would be established that Lt-Gen BABA had no intention to transfer all the Prisoners of War disregarding hardships in the course.

(c) The third point is that the period spent for the preparations of the transfer extended over four months. I understand the reason why so many days were required for the said preparations is that for the said preparations all kinds of measures were taken with careful considerations, and that extreme endeavours were required to carry the said preparations out. And it proves the intensity of his concern that Lt-Gen BABA ordered almost all the units between SANDAKAN and RANAU to assist the transfer. And this fact is made clear by IWASHI's testimony, too.

(d) The fourth is an important point, that is, whether or not the orders to transfer the Prisoners of War issued on 20 May were the orders of departure. I submit the orders on 20 May were merely the expression of the decided intention of the GOC to transfer Prisoners of War to RANAU, in which his demand to make Capt TAKAMURA OC of the Prisoners of War Camp, arrange with the units concerned in regard to the final preparation was included and, moreover, it was implied that the time of departure would finally be shown by the GOC, who would decide it from the viewpoint of the whole field of affairs, after the decisions of those conferences were completely put into effect. This fact is testified by IWASHI, the staff officer of the Army in charge of operations, who actually drafted that order. There is no fact that the Army HQ urged TAKAMURA to proceed on, even when the order of 20 May was not carried out by him by 29. Therefore, straightforwardly speaking, the time of departure was not indicated in the order of 20 May, and plenty of time was given to the units for preparation, and attention was paid for this movement to be carried out smoothly, depending on the actual circumstances. I believe, from what has been mentioned above, that it is improper to allege that Lt-Gen BABA wilfully disregarded or failed to discharge his duty to ameliorate such a condition that the march would necessarily cause the Prisoners of War great pain and suffering, but that, on the contrary, Lt-Gen BABA did make the greatest endeavours and take the greatest consideration as he could.

B. Despite that, the results of the second transfer, too, were contrary to the intention of Lt-Gen BABA, the GOC the Army, and his incessant efforts for four months came to naught.

Judging from the results, it may be inferred that Lt-Gen BABA disregarded the results of the first march in preparing and carrying out the second transfer.

But I should like to scrutinize the results which were brought about by his efforts made for a long time in the preparations of the second transfer after he learned the results of the first march, not being misled by the results of the second transfer.

1. From the evidences of HOSHIMURA (Exhibit "E"), STICEWITCH (Exhibit "F"), YAMAMOTO (Exhibit "G"), and MIZUTA (Exhibit "H"), it is inferred that there were about 300 Prisoners of War whose health condition could endure the march before the commencement of the first march.

And it is inferred from the evidences of IWAHASHI (Exhibit "O"), TAKAKURA (Exhibit "P"), WATANABE (Exhibit "Q"), and STICEWITCH (Exhibit "F"), that there were about 150-200 of such Prisoners of War before the commencement of the second transfer.

2. The Prisoners of War who reached RANAU after the first march were about 150-200 in number inferring from the evidences of YAMAMOTO (Exhibit "G"), STICEWITCH (Exhibit "F"), BOTTHILL (Exhibit "O"), and OKADA (Exhibit "T"), but in the second transfer about 180 Prisoners of War reached there, inferring from the evidences of TAKAKURA (Exhibit "P"), WATANABE (Exhibit "Q"), and STICEWITCH (Exhibit "F").

3. Reckoning from the above-mentioned figures, while the death-rate to the whole healthy Prisoners of War who could endure the march was 30-40% in the first march, it was almost 0% in the second transfer. Therefore, if the second transfer was carried out according to the Accused's plan, those disastrous results would not have been brought about.

In other words, it is inferred that re-inforcement of the first Line of Communication route for which the Accused made preparations for a long time, must have been fully carried out.

C. Furthermore, after I heard Lt-Gen BABA plainly tell the true state of affairs, and I made a thorough investigation of the evidences tendered by the Prosecution and the statement given by the Accused, I could not help sympathizing with Lt-Gen BABA having been successively harassed by blunders peculiar to war, as well as I felt deep sympathy for the British and Australian Prisoners of War in their unfortunate destiny.

Then I found it my duty to examine the conditions under which the second transfer of the Prisoners of War was really started all of a sudden by flurried Capt TAKAKURA's arbitrary decision, the OC the Prisoner of War Camp, under the circumstances entirely contrary to Lt-Gen BABA's expectation and, in a way, entirely contrary to his intention.

At 1145 hrs the Court adjourns.

At 1155 hrs the Court resumes, the same President, Members and Judge Advocate being present.

Defending Officer continues: For this purpose, I think we have to notice the panic state at SANDAKAN caused by the severe attack of the Allied Forces against SANDAKAN and SANDAKAN aerodrome area at the end of May.

For three days from May 27, severe bombardments and shellings were carried out by a large number of planes and several warships. At that time the whole strength of the defending forces at SANDAKAN had been decreased to approximately 1,500 as a result of the movement of the forces to the western coast, and was taking charge of the defence of the vast front. This fact was testified by IWAHASHI.

Due to this attack on 27, the Japanese and the natives in the SANDAKAN area began to take refuge to the hinterland. It can be inferred from the testimony by TAKAKURA (Exhibit "P"), that negotiations were conducted between the SANDAKAN garrison commander and OC the Prisoner of War Camp concerning the necessity of the refuge of the Prisoner of War Camp as well out of the dangerous zone. It seems that, in fact, TAKAKURA was preparing for the transfer from 27 May on. The Prisoner of War Camp was located near the SANDAKAN aerodrome at that time, and it is evident that TAKAKURA suddenly started to transfer the Prisoner of War Camp, having fallen into a panic mentality, at a time when the Allies' severest attack took aim at the aerodrome area on 29 May, and the Prisoner of War Camp fell into a state of confusion. I could find this fact out by the evidence tendered by the Prosecution (Exhibit "P"), according to which there was such a confusion such as the burning down of the SANDAKAN Prisoner of War Camp, together with lots of provisions and hygienic materials, which we could not imagine by calm common-sense, and TAKAKURA's command was carried out very thoughtlessly at the time of departure. I think the departure of the second transfer was influenced by mentality of retreat rather than pursuant to a plan. Then, could Lt-Gen BABA not prevent this departure of the Prisoners of War opposed to his intention? Why couldn't he prevent unfortunate results which would necessarily be caused by this transfer at the earliest opportunity after the departure? It was around 10 Jun when Lt-Gen BABA learned of the said departure and the state of affairs at SANDAKAN, because the communication between SANDAKAN and the Army HQ had been stopped due to the attack on 27 May. That is why Lt-Gen BABA could neither learn of it nor take any preventive measures against it. As soon as Lt-Gen BABA on or around 10 Jun knew the progress of battles at SANDAKAN, he dispatched Capt NAWAYAMA to the 1st Line of Communication route to take necessary measures to make the transfer of the Prisoners of War safe.

I think we have to take notice especially to the circumstances at that time under which the main body of the 27 Army was expected to face decisive battles, for the Allied landing operation against the coast of the BRUNEI BAY was started around 10 Jun.

After having examined as above, I came to the conclusion that it was owing to the departure of the second transfer, starting in a panic state, that the unfortunate results were brought about in spite of Lt-Gen BABA's efforts to prevent them. It can be inferred, therefore, that unfit Prisoners of War might be included in the march, and that there might be many defects in the equipment of the Prisoners of War and organization of the march which, I think, were the direct causes of the unfortunate results.

Thus, I believe, in the light of the real state of affairs at that time, the unfortunate results in this second transfer were not due to malice or negligence on the part of the Accused, but due to the panic state of the Prisoner of War Camp under the special circumstances at SANDAKAN from 27 May till 29 May. Therefore, I submit it would not be proper to hold Lt-Gen BABA wholly responsible for it.

III Regarding the atrocities committed by some members under the Accused.

A. First, in this respect, the Prosecution has alleged as follows :

1. During the march from SANDAKAN to RANAU at the end of Jan 45, Japanese soldiers under the command of the Accused shot a number of Prisoners of War under the orders of Capt YAMAMOTO, an officer under the command of the Accused.
2. During the march from SANDAKAN to RANAU at the end of May 45, Japanese soldiers under the command of the Accused shot a number of Prisoners of War under the orders of Capt TAKAKUWA, also an officer under the command of the Accused.

However, in the evidence tendered by the Prosecution, there is no evidence which shows that Lt Gen BABA ordered, suggested, or connived at, such conduct. Neither is there any evidence which shows that Lt Gen BABA received a report regarding them from his subordinates nor any which shows that he was aware of them. Lt Gen BABA testifies that these facts were made known to him only after the cessation of hostilities for the first time. Lt Gen BABA, however, admits it is a plain fact that such atrocities were committed by his subordinates to which he has expressed deepest regret.

I should like to make it clear that such conducts were committed at the discretion of his subordinates at various spots 100 to 200 miles away from the Army HQ at TENOM; and especially that the murders committed during the second transfer could not have been informed of to him in any measure, traffic and communication from TENOM to RANAU being intercepted by the advance of the Allied Forces.

I submit that Lt Gen BABA, who had/had the slightest fear that such atrocities might be committed by his subordinates, should not be impeached with the fact that he did not take any particular counter-measures to prevent the occurrence of such incidents.

Therefore, Lt Gen BABA's ignorance, from every viewpoint, does not at all implicate that he unlawfully disregarded these facts with intention or he failed to discharge his duty by negligence, I submit.

B. Then the Prosecution has alleged the following two facts :

3. A number of Prisoners of War died at RANAU in Jul 45.
4. Japanese soldiers under the command of the Accused shot a number of Prisoners of War under the orders of Capt. TAKAKUWA who was also under the command of the Accused.

In order to study these problems, what extent of command, in principle, Lt Gen BABA, being GOC the 37th Army, was authorized to exert over the Prisoner of War camps is an important question.

Regarding this power of command, Lt Gen BABA has stated clearly and also Col TAKAYAMA, senior staff officer of the 37th Army, in reply to the cross-examination (Exhibit "C"), by the Prosecution at the LABUAN Trial, stated as follows :

- Q. Is the BORNEO POW Unit under command 37 Japanese Army?
- A. No. However, the 37th Army can give them orders concerning on some of things.

This testimony is an evidence much serving to prove Lt Gen BABA's statement.

That is, Lt Gen BABA should never be held responsible for the matters for which he had not authority, such as personnel affairs, reward and punishment and the general office routines of the camps. Then, what kind of command did Lt Gen BABA have over the Prisoner of War camps?

As Lt Gen BABA has testified, his responsibilities for the Prisoner of War camps are that for the defence of the same, which is a part of his general duties to defend the areas under his command and that for supply. Then let us find out such evidence as appears to be relevant to these responsibilities of his out of the evidence the Prosecution tendered in regard to the incidents in (3) and (4).

Namely -

(a) In the interrogation (Exhibit "P") TAKAKUWA answered to the defending officer :

"So on the 1st August I issued orders that all the PW were to be killed. This order of killing the PW was entirely based on the necessity of war operations."

And he stated in reply of the cross-examination by the Prosecuting Officer :

"I did not know of this. I personally thought they were much closer."

This testimony of his proves that these orders were issued by him on the necessity of operation which he personally thought there was, so that these orders have nothing to do with the Army HQ.

(b) In addition, he states in his statement (Exhibit "Q") :

"I knew that I would have to move in the near future and rather than be encumbered and hampered with sick Prisoners of War thought it best to kill them. My other reasons were that there was no food and I feared that they would all escape."

"The movement order from 37th Army HQ told me to make the PWs available to KANHO BUTAI (Machine Gun Unit) to assist them in carrying their ammunition to BEAUFORT, and it did not matter if they died while employed on this work."

This evidence given by TAKAKUWA is full of unreasonableness. That is to say, there is no fact that such orders were issued, and no such evidence elsewhere. Around 1 Aug BEAUFORT had already been occupied by the Australian forces, whereby BEAUFORT and RANAU had been completely intercepted. In such circumstances it is beyond our common sense to transport ammunition from RANAU to BEAUFORT (100 miles from RANAU). I would like to assert TAKAKUWA's evidence is a cooked-up story.

Having inferred as above, I am convinced that it is too much to hold the Accused responsible for (3) and (4) in sub-para B.

IV With regard to the controlling power of the Accused over his subordinates.

I must further state the most important problem for the defence of the Accused. It is the point as to in what degree the controlling power as the GOC of the 37th Army should be required from the Accused, who has been put in the extremely unadventurous and difficult situation. In order to make this point clear, according to the statement made by the Accused, I will first frankly express my

opinion obtained from my inquiry into the peculiarity of the 37th Army and the nature of its operations in BORNEO.

It might result in exposing before the Court the weakness of the 37th Army in those days. Gentlemen, it is really very unpleasant for me to state such weakness of the former Army of my own country. And also I am especially afraid that the exposure of the weakness may give such impression to other persons as if a supplicating and voice of the vanquished. My personal feelings of honour, however, must be renounced for the cause of justice. The real conditions of the 37th Army which I am going to state in such a state of my mind were as follows :

A. The 37th Army was substantially not a combatant force, but a mere garrison. That is to say, its strength did not come to that of one division, and its quality was inferior because of having been hastily organized on the middle of 1944, and trained in a low degree, and its organization was so poor that there is no artillery in it, - it was really the relics of the former centuries. This fact will be clearly understood if you see the conditions of the weapons handed over by the GOC 37th Army to the GOC the Australian 9th Division. The defects of this Army lay especially in the small strength and poor quality of the signal, supply, and sanitary corps and commissariats.

These essential defects of this Army were the first cause that made the control, operations and supply of this Army very difficult.

B. Lt Gen BABA had to defend the broad and uncultivated districts of British North BORNEO, Kingdom of BRUNEI and Kingdom of SARAWAK with these inferior and weak forces. The problem he had to consider most for this defence was how to stand against the severe attacks by the Allied Forces having the modern equipments with these inferior and weak forces. I asked to myself looking at the map of BORNEO - Could any prominent general of any country in the world perfectly fulfill such duty as imposed upon Lt Gen BABA? So excessive and difficult Lt Gen BABA's duty was. Having no aeroplane nor warship to cooperate with and the supply being suspended, the 37th Army was just like the army on an isolated island left alone in the waves of the SOUTH CHINA SEA, JAVA Bay and CELEBES Bay. And the individual units of poor strength, disposed from place to place, in the coast lines extending over one thousand miles, with difficult communication were also the units on small isolated islands. Even to these units that had become like isolated islands, and whose fighting power was declining day by day, any reduction of the duties was not permitted. The BORNEO Operation assigned upon the 37th Army was forced to expose its weakness. The success of the operation by such isolated troops solely depends upon the superiority of troops, especially upon the superiority of the commanding officers. This is especially because there are many cases in such situation where the controlling power of the higher commanding officer does not reach the OC each unit, whereby the arbitrary decision of the OC each unit is needed. But the 37th Army was not given superior forces, and the staff members to be OC each unit were of poor quality and it was an inferior army which was organized in the final stage of the Pacific War.

This weak point was exposed more and more after the Base of the Allied Air Forces advanced to PALAUA Island in Mar 45, until the 37th Army fell into a state of hemiplegia. Furthermore, it fell into a state of perfect suffocation when the Australian Forces advanced to NORTH BORNEO on 10 Jun.

Next, I am going to state the two hard tasks which Lt Gen BABA met with just after his arrival in BORNEO. The first task was the movement of the main forces covering a long distance of 300-500 miles from the East to the West coast which was in itself a difficult task. The loss of the fighting power due to this longway movement might cause the failure of a new operation in the West coast. Therefore, it was the operational demand for Lt Gen BABA to prevent such loss and to maintain the military power of the Army as much as he could. The second was to accomplish the operational disposition in the West Coast as soon as he could, in order to face the situation in which the landing of the Allied Forces was anticipated at every possible moment. So it was the operational demand to accomplish the said movement as quickly as possible.

However, should the GOC the Army harmonize this contradiction between power and time? That was a serious question. But Lt Gen BABA was specially afraid of the loss and deterioration of the fighting power. Accordingly the movement of the main body of the Army was carried out so slowly that the concentration of fighting power was not yet completed at the time when the Australian Forces landed at the coast of the BRUNEI BAY.

It is to be understood that, as stated above, the GOC, BABA, who could not exercise his full controlling power over even the Japanese units under his command, felt it more difficult to control the Prisoner of War Camps over which he had only a part of command than to control his own subordinate units. The source of controlling power in the army is the power concerning personnel affairs and the power of reward and punishment. I believe the fact that these two powers over the Prisoner of War Camps were not given to him is all the more the cause of his control not having been exercised over the Prisoner of War Camps.

C. As mentioned above, Lt Gen BABA had faced extremely difficult tasks since his arrival as new GOC 37th Army in BORNEO at the end of Jan 45 until the cessation of hostilities, yet the war situation became more unfavourable as time went on. Accordingly the control of the GOC was needed all the more, but in spite of this need the influence of the unfavourable war situation made the control itself be felt more difficult. Then, what did cause him to lose this control? I believe the biggest of the causes was the incessant attacks by the Allied forces. The breakdown of the control of HQ 37th Army seems to have been one of the causes of the extremely easy success of the landing operation of the Australian Forces on the coast of the BRUNEI Bay on 10 Jun.

It is my opinion that since the beginning of 1945, the 37th Army in fact was unknowingly stepping on the way to defeat. Lt Gen BABA assumed the command of the 37th Army on this way to defeat, and devoted himself in checking its progress desperately, but he became unable to check it as time went on.

Recollecting the war history since ancient times, I find how difficult the control of the defeated forces is, and furthermore, I have heard that there are very few prominent generals even in the long war history of the world who could control the defeated forces at his own will under the most unfavourable conditions. The Accused is nothing of a prominent GOC the Army in Japan, but seems to be a mere common GOC, I dare say.

I maintain that it is too cruel to hold this common GOC responsible for his having been unable to exercise perfect control in a war situation in which his hands and feet were in a manner, tied up, and that even if control is demanded of him, there should be given full consideration for the limit to that demand.

In addition, I must especially strongly stress that his failure to exercise control was caused by neither negligence nor indifference on his part.

I said, in the presence of Lt-Gen BABA, that he is a mere common GOC and the 37th Army of his command was an inferior force who stepped on the way to defeat.

The reason why I ventured to say such words in spite of my full understanding of soldiers' feeling of honour, is that I believe that it is not just to modify the truth, merely sticking to the honour of an individual and the pride of the Army and that it is my duty in this trial to disclose the facts as they were, which I wish would help the Court in approaching to a fair and proper judgment.

Now I come to conclusion of my address.

V. Conclusion:

So far I have dealt with the alleged facts dividing them into three parts. I should like to pause here to look back and review the charge which he has been arraigned before the Court to answer.

At first sight, we notice there are three main factors in the charge, and it goes without saying that in order to find the Accused guilty of the charge his guilt must be proved in respect of each of these three factors beyond any reasonable doubt, and the onus of proof rests entirely on the Prosecution. If any doubt remains, it must be considered in favor of the Accused. These three factors are as follows:-

1. There must be war crimes of an extremely serious nature committed by his subordinates.
2. There must be unlawful disregard of duties or failure to discharge them on the part of the Accused.
3. There must be a chain of causation between the aforementioned two factors.

Now, as to the first factor, it is undeniable, and the Accused himself has admitted, that war crimes of a serious nature have been committed by his subordinates, though he had not any knowledge of them until the cessation of hostilities, much less at the time of their commission.

Then I will pass on to the second factor. But, before I deal with this factor, I should like to remind the Court of an important point in considering the right or wrong of an act. That is, the circumstances under which the act in question was done should always be taken into consideration to estimate the right or wrong of it. Needless to say, any human act always happens under certain circumstances. It is not to the point to criticize a commander's act of supervising his subordinates disregarding the war situation and the other circumstances which have any connection with his act, and to enquire into whether or not his control of the subordinates was right irrespectively of the circumstances. This is why I have rather entered far into details of the war situation and the circumstances during the period of the Accused's command. His act done or omission made, if there were any, must be considered in relation with the war situation and the circumstances of which, I think, I have given before you, the vivid picture reproducing it from the evi-

defences tendered by the defence as well as the Prosecution. Can we find any disregard or any failure on the part of the Accused? Suppose he had been placed in a peaceful circumstance or he had a great many well-disciplined soldiers under his command at that time. In such a case, surely, we could have and should have expected of him much more in his discharging his duties as GOC of an Army. However, under the above-explained circumstances, and with the above-mentioned military quality, I submit, he can be said to have done all he could do. Moreover, I think you who are the combatant officers easily can understand that he as a GOC of an army in the battlefield shouldered on his back the destiny of the whole forces under his command. It was the most important duty for him to bring the war by all means to a victorious conclusion. With such diversity and gravity of duties on his shoulders, and under the aforesaid circumstances, could we expect of the Accused, who was nothing but a Commander of common ability, to do more than what he actually did? Sense of proportion leads me to answer in the negative.

However, if the Court finds any failure or disregard on his part, I should like to ask the Court, in considering the next step, if there be a chain of causation between the said disregard or failure on his part, and the offences committed by his subordinates, to bear in mind that it is a settled rule in jurisprudence in all civilized countries to put an end to a chain of causation at a certain point, which is commonly accepted as appropriate by the world, and to make enquiry only within this limit in deciding whether a man is criminally responsible or not. It must be remembered that a commander is not to be held responsible for all acts by his subordinates and the effects resulting from those acts, but only to be held responsible within certain limits which are commonly accepted as appropriate by the community in general.

As to the guilty mind, which is the indispensable ingredient in all crimes in the British Law, I leave it to the learned Judge Advocate to explain it to the Court. Gentlemen, you are the Judges of laws and facts, regarding both of which I think I have said all what is deemed to be said on behalf of the Accused. The victims in this case are Australian and British Prisoners of War. For my duty's sake, I dare ask you to disregard any personal feelings you may have in the matter and to judge the Accused according to the British Law and the evidences including the oral evidence given by the Accused on oath, which you are all entitled to consider in arriving at your verdict, and I desire to conclude my address believing firmly that the same law administered in other trials with nerveless and impartial hands will be applied equally in this case, and the Accused will surely be given the fairest verdict.

At 1235 hrs the Court adjourns.

R. S.

At 1430 hrs the Court resumes, the same President, Members and Judge Advocate being present.

THE JUDGE ADVOCATE STANDS UP:

Gentlemen, the Court derives its jurisdiction from the War Crimes Act 1945, and under that Act has power to try any individual charged with a war crime committed at any place whatsoever within or beyond Australia, against any person who was at the time a resident of Australia, against British Subjects or Citizens of any allied or associated power. Both provisions are contained in Sections 7 and 12 of the Act. The War Crimes Act is within the legislative power of the Commonwealth under the Defence Power contained in the Commonwealth Constitution.

"War crime" is defined by Section 3 of the Act to mean (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 3rd day of September 1945 under the National Security Inquiry Regulations, and committed at any place whatsoever, whether within or beyond Australia, during any war.

The crimes referred to in part (b) of the definition include murder, the ill-treatment of wounded and Prisoners of War, including transportation of Prisoners of War under improper conditions, and failure to provide Prisoners of War or Internees with proper medical care, food, or quarters.

The laws and usages of war have in part come into being through the years, and are in part laid down by International Conventions. The treatment of Prisoners of War is covered by the Annex to the Hague Convention of 1907 and by the Geneva Convention of 1929. Great Britain is a signatory to both Conventions; Japan has ratified that of the Hague but not of the Geneva Convention. This is immaterial, as the Law applied in this Court is that of England as embodied in Australian Law.

Article 1 of the Annex to the Hague Convention, which is quoted on Page 327 of the Manual of Military Law, lays down as a condition which an armed force must fulfil in order to be accorded the rights of lawful belligerents, that it must be commanded by a person responsible for his subordinates. The first paragraph of Article 4 of that Annex reads: "Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated." Article 2 of the Geneva Convention, on Page 365 of the Manual, reads: "Prisoners of war are in the power of the hostile Government, but not of the individuals or formation which captured them. They shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity."

Article 11 of that Convention provides that the food ration of prisoners shall be equivalent in quantity and quality to that of depot troops.

The Accused is charged with committing a war crime, that is to say, a violation of the laws and usages of war, in that he, between December 1944 and September 1945 in BORNEO 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 such Commander to control the conduct of the members of his command whereby they committed brutal atrocities and other high crimes against people of the Commonwealth of Australia and its Allies.

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The expression "brutal atrocities and other high crimes" has to be considered by the Court in considering the charge. An atrocity is an extremely cruel and wicked act and, as such, is not a war crime. The expression "high crime" is not a legal term. "High" as used in English law is "high treason," is treason against the Sovereign or a member of the Royal Family. The only reasonable meaning to be given "high crime" is "serious crime." I advise the Court that the meaning of "brutal atrocities and other high crimes" is simply "serious war crimes." I advise the Court that it has jurisdiction to entertain the charge before it, and that the charge discloses an offence under the War Crimes Act.

In order to succeed, the Prosecution must prove (a) That war crimes were committed against Australians or people of an allied or associated power; (b) That such war crimes were committed by personnel under the command of the Accused; and (c) That the Accused was in command of armed Japanese forces at war with the Commonwealth of Australia and its allies, and that such war crimes were committed as a result of his failure to discharge his duties as such Commander - either by deliberately failing in his duties, or by culpably or wilfully disregarding them, not caring whether they resulted in the commission of war crimes or not.

Provision regarding the responsibility of commanders appears in both the Hague and Geneva Conventions - it appears in Article 1 of the Hague Convention, which I have quoted, and in Article 6 of the Geneva Convention.

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The matter was considered by the Supreme Court of the United States of America in the case of *In re YAMASHITA*, and the judgment of the Court appears in the *American Journal of International Law*, Volume 40 No. 2, at pages 432 and 433. I quote from the judgment -

"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 violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."

This is recognized by the Annex to the Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates."

Similarly, Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out." And Article 26 of the Geneva Red Cross Convention of 1929, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commander-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, (of the convention) as well as for unforeseen cases." And, finally, Article 43 of the Annex of the Fourth Hague Convention, requires that the commander of a force occupying enemy territory, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This duty of a commanding officer has heretofore been recognized, and its breach penalized by our own military tribunals. A like principle has been applied so as to impose liability on the United States in international arbitrations.

It is a principle of English Law that in the commission of an offence, there must be *mens rea*. This may be evidenced, for instance, by a direct participation in the crime, or by counselling or commanding a crime, or by the commission of an act unlawful in itself, from which the crime resulted, or the performance of a duty with such wilful or culpable negligence as to display indifference as to whether or not the offence was committed.

With regard to the first march from SANDAKAN to RANAU, there is evidence before the Court by Capt HOSHIMIZU, Capt YAMAMOTO, WO STIPCENICH and Capt MIIZUKA, that the prisoners, or some of them, were not in a fit state to undertake that march. I will quote one short passage from the evidence of WO STIPCENICH - "The men had just on 3 years of gruelling Prisoner of War life, and were very worn, starved and practically physical wrecks. There would only be reasonably fit out of the whole lot, actually about 50 men. Prior to the march they had been on short rations and the rations had been cut. The state of the rations had a bearing on the conditions of the men."

The conditions of the march and the sufferings and deaths of the Prisoners in its course are described by Ito BOTTERILL, a survivor; and there is also evidence by Capt YAMAMOTO, who commanded the march, as to the shooting of Prisoners who could not keep up with their parties. YAMAMOTO admits that he instructed Lt ABE to dispose of Prisoners of War if necessary, that is, if they could not keep up. W/O STIPCEWITCH did not take part in the first march, and his evidence in regard to it, apart from the actual physical results that he saw, is largely hearsay. It is a matter for the Court as to what weight should be given to evidence of that nature.

As to the second march, which commenced in May of 1945, evidence as to the condition of the Prisoners has been given by W/O STIPCEWITCH, Capt TAKAKUWA, and Capt WATANABE. It appears that their condition was somewhat worse than that of those back in the earlier march. WATANABE says that from five to eight Prisoners were dying each day during the fortnight immediately prior to the march. Capt TAKAKUWA in his statement in evidence says that 37 Army was fully aware of the condition of the Prisoners. W/O STIPCEWITCH gives a very detailed description of the march itself, and there is also the evidence regarding it of TAKAKUWA and WATANABE.

Regarding the killing of Prisoners of War at RANAU, the Court has before it the evidence of TAKAKUWA and WATANABE, who is described sometimes as "Capt WATANABE" and sometimes as "Lt WATANABE," who appears, however, to be the same individual, Sgt OKADA and Civ HIROTA. TAKAKUWA states in the document Exhibit "C", that he issued orders for the shooting of the Prisoners as a last resort, rather than leave them behind on the march.

The Accused has stated, in respect of the two marches from SANDAKAN to RANAU, that the orders were issued by HQ 37 Army, and that he had informed himself of the condition of the Prisoners of War prior to the commencement of the two marches.

It is necessary for the Court to consider the responsibility of the Accused for any ill-treatment of Prisoners of War - the proof of which has satisfied the Court.