

HEADQUARTERS EIGHTH ARMY
United States Army
Office of the Staff Judge Advocate

Yokohama, Japan
24 May 1949

UNITED STATES OF AMERICA VS YOSHIO TSUNEYOSHI

Review of the Staff Judge Advocate

1. The attached record of trial of the case of Yoshio Tsuneyoshi tried at Yokohama, Japan, from 10 October 1947 to 21 November 1947, by a Military Commission appointed by paragraph 2, Special Orders No. 236, Headquarters Eighth Army, United States Army, dated 8 October 1947, as amended by paragraph 14, Special Orders No. 239, same headquarters, dated 11 October 1947, having been referred to the Staff Judge Advocate, this review thereof is submitted to the Commanding General.

Personal Data Concerning Accused

NAME: Yoshio Tsuneyoshi	DATE OF CONFINEMENT: 10 June 1946
AGE: 55	DATE OF ARRAIGNMENT: 10 October 1947
RESIDENCE: 3 Banchi, Hiramatsu cho, Nishinomiya, Hyogo Prefecture	PLACE OF TRIAL: Yokohama, Japan
MARITAL STATUS: Married	PERIOD OF TRIAL: 10 October 1947 to 21 November 1947
RELATIVES: Wife, 3 children, mother, brother, sister	DATE OF SENTENCE: 21 November 1947
EDUCATION: Graduated Military Academy 1915	SENTENCE: .CHL for life.
VOCATION: Office worker	CLEMENCY RECOMMENDED BY COMMISSION: No
MILITARY CAREER: 2nd Lt 1915, discharged 1926; Recalled 1937 to 1940; Third call 1941, discharged as Capt January 1944.	

2. Synopsis of Charges, Pleas, Findings and Legal Sufficiency:

<u>Charge and Specifications:</u>	<u>Pleas</u>	<u>Findings</u>	<u>Legally Sustained</u>
Ch: Accused, during a time of war between the United States of America, its Allies and Dependencies, and Japan, did violate the Laws and Customs of War.	NG	G	Yes
Sp 1: Between 1 April 1942 and 5 July 1942, at or near PW Camp O'Donnell, Luzon, Philippine Islands, the accused did unlawfully disregard and fail to discharge his duties as CO of said Camp by failing and refusing to provide and maintain for American PW's therein confined, adequate food, water, clothing, shelter, hygiene, and available medicine and medical supplies, thereby contributing to the sickness, disease and suffering of said prisoners, and further contributing to deaths of 1,461 American PW's including Sgt Carlton L. Holloman, on or about 1 May 1942, Pvt John R. Roy, on or about 3 May 1942, Pvt George W. Umbaugh and Cpl John Gillis, on or about 4 May 1942, Pvt Albert Loyd Peterson, on or about 5 May 1942, Sgt Albert Cox, on or about	NG	G except the words "5 July", substituting therefor "23 May"; and except the words "adequate food", "shelter"; and except the figures, "1,461", substituting therefor "numerous"; and except the following names and dates: "Sgt Carlton L. Holloman, on or about 1 May 1942, Sgt Albert Cox, on or about 7 May 1942, Lt John H. Bunnell, Pvt Gentry Grady, on or about 23 May 1942, Pvt Palmer G. Garlan, on or about 25 May 1942, Pvt Delton J. Parker, on or about 29 May 1942,	Yes

7 May 1942, Pvt Robert Wright, on or about 10 May 1942, Lt John H. Bunnell and Pvt Lewis M. Fryor, on or about 13 May 1942, Pvt George A. Tribbey, on or about 16 May 1942, Pvt M. Gilmore, on or about 20 May 1942, Pvt Gentry Grady, on or about 23 May 1942, Pvt Palmer G. Garlan, on or about 25 May 1942, Pvt Delton J. Parker, on or about 29 May 1942, Sgt Harry M. Neff, on or about 30 May 1942, and Sgt John L. Clark, on or about 10 June 1942.

Sgt Harry M. Neff, on or about 30 May 1942, and Sgt John L. Clark, on or about 10 June 1942". Of the excepted words, NG, of the substituted words, G.

Sp 2: Between 1 April 1942 and 5 July 1942, at Capas, Tarlac, Philippine Islands, accused did unlawfully disregard and fail to discharge his duty as CO of PW Camp O'Donnell by compelling and permitting PW's under his command, protection and custody to work while sick and physically unfit.	NG	G	Yes
except the words "5 July", substituting therefor "23 May". Of the excepted words, NG. Of the substituted words, G.			
Sp 3: Between 1 April 1942 and 5 July 1942, at Capas, Tarlac, Philippine Islands, accused did unlawfully disregard and fail to discharge his duty as CO of PW Camp O'Donnell by permitting and sanctioning members of his command to commit the following atrocities:	NG	G	Yes
a. On 13 April 1942, the unlawful killing of Lt Col Ralph Hirsch by shooting him.	NG	G	Yes
b. On 13 April 1942, the unlawful killing of Major James H. Hazelwood by shooting him.	NG	G	Yes
c. On 13 April 1942, the unlawful killing of Capt William C. Schultz by shooting him.	NG	G	Yes
d. On 14 April 1942, the unlawful killing of Capt Raynaldo F. Gonzales by shooting him.	NG	G	Yes
e. On 14 April 1942, the unlawful killing of 1st Lt Peterson by shooting him.	NG	G	Yes
f. On 14 April 1942, the unlawful killing of Capt Eddie T. Kemp by shooting him.	NG	G	Yes
g. On 14 April 1942, the unlawful killing of Capt Raymond Traits by shooting him.	NG	G	Yes
h. On 14 April 1942, the unlawful killing of S/Sgt John A. Keeler by shooting him.	NG	G	Yes
i. On 14 April 1942, the unlawful killing of Pvt Barney E. Prosser by shooting him.	NG	NG on motion (R 225)	

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j. On 14 April 1942, the unlawful killing of Pvt Charleston J. Miller by shooting him.	NG	NG on motion (R 225)	
k. On 15 April 1942, the unlawful killing of Pvt William S. Berway by shooting him.	NG	NG on motion (R 225)	
l. On 17 April 1942, the unlawful killing of 3 unidentified American PW officers by shooting them.	NG	NG on motion (R 225)	
m. On 20 April 1942, the unlawful killing of 2 American soldiers and 5 Filipino soldiers, all unidentified, by shooting them.	NG	G	Yes
n. On 15 April 1942, the unlawful mistreatment and torture of Col James and Col Memory H. Cain by beating and otherwise abusing them.	NG	G	Yes
o. In May 1942, the unlawful killing of an unidentified American PW by beating, torturing and otherwise abusing him.	NG	NG on motion (R 225)	
p. Between 1 April 1942 and 5 July 1942, the unlawful mistreatment, torture, beating and killing of numerous other PW's.	NG	Stricken (Nolle Prose) (R 24)	

3. Summary of the Evidence:

a. For the Prosecution:

(1) Of General Application: Accused was the first camp commander of Camp O'Donnell in the Philippines which was established on about 1 April 1942. The prisoners of war began to arrive about 10 April 1942. He was identified from the witness stand by several witnesses (R 54, 83-94, 121, 153, 193). The names of the commanding officer and other Japanese personnel at the camp were concealed, but a sign was seen at the gate on May 10th giving the accused's name. The accused was seen inspecting the camp area and knew the conditions (Ex 7). PW Col Cain went to accused with a chaplain who had the rules of the Geneva Convention in his possession and asked to be permitted to go out and get help and drugs. Accused answered that he knew "all about Geneva Convention" and "all he wanted to know about Americans is their names and their numbers when they died" (Ex 28). Accused became camp commander by written order two weeks before the prisoners of war arrived and was transferred in the latter part of June 1942 at which time 3,500 prisoners of war were still at Camp O'Donnell (Ex 38). However, Exhibit 1 states that accused was relieved of Camp O'Donnell 9 or 10 May and Exhibit 5 states he was transferred about 1 June and was replaced by a Colonel Ito who immediately set about improving conditions and things got better. In R 480 it is stated that accused was appointed commanding officer by General Kawane. Later General Homma sent a number of staff officers to the camp who reported that accused "was not intelligent enough to carry out the duty". General Homma reported the matter to Tokyo and another camp commander was selected. Accused "was a reserve officer had no common sense did not handle matters well had no understanding of the prisoners, to treat the prisoners with a friendly spirit". Former Major Wada inspected the camp in mid-April, May and June; the operation of the camp by the accused was unsatisfactory and so reported to General Homma. In mid-May a plan to replace accused was made the next day (R 480-482).

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(2) As to Specification 1: The evidence for the prosecution, so far as it pertains to the offenses for which the accused was found guilty, is as follows: (It is noted that, as to Specification 1, accused was found not guilty of command responsibility to supply adequate food and adequate shelter and not guilty of contributing to the death of eight of the prisoners of war named.

The water supply at Camp O'Donnell was wholly inadequate. Approximately fifteen former prisoners of war testified that there was no water for bathing or washing of clothes; the prisoners of war were allowed one-half or one canteen of water per day for drinking; that water for cooking was obtained from a river and carried by hand for a distance of three miles; that there were only a few spigots on the line for 7,000 prisoners of war and that there was a constant line up of men, with containers, attempting to get water to drink, who often waited in line from two and a half hours to eight hours in order to get any water. The water was frequently turned off and sometimes the first man in the line at the spigot had to wait four hours before the water was turned on again. There was no water for sanitary purposes (Exs 1, 2, 3, 4, 6, 7, 9, 22, 26, 27; R 84, 122, 153, 176, 194). Former PW Major Conn once stood in line for seven hours to get one canteen full of water (Ex 10). General King talked with the accused about the inadequate water supply and was told by accused that he was doing all he could to get the condition improved. General King stated that the water shortage became better after a week or ten days because a second water pump was secured and installed (Ex 8). One spigot was put in the air force area in the latter part of April (R 176).

No clothing was issued to the prisoners of war and all excess clothing was taken away from them when they were taken into the camp. When clothing became soiled, since no water was available for washing, it was thrown away. Some clothing was salvaged from the dead. The prisoners were given no blankets and extra clothing was confiscated on admission to the camp. None was subsequently issued and the authorities refused to return what had been confiscated. Very few men in the hospital had any clothes on (Exs 4, 6, 7, 9, 25; R 52, 80).

There was very inadequate hygiene. The prisoners were not allowed to bathe. There were a few straddle trenches wholly inadequate because of the tremendous amount of dysentery. They overflowed frequently; there were no disinfectants; no screens were provided and flies swarmed from the feces covered hospital to the kitchens and food. Dysentery constantly increased. Bodies were found every morning all over the camp and stacked up under the hospital. They were often unburied for two or three days. The hospital was filthy and there was no water, soap or disinfectant to clean it. No Japanese doctor ever gave treatments or aid to the sick; and it was impossible to clean mess kits because of lack of water. After May 15 a few men were permitted to go to the river to bathe each day. The area under the hospital was covered with the dead and the dying which could be cleaned only by moving them over to one side, scraping the ground where they lay and covering it with lime, transferring all the patients to that area and scraping and covering the other side (Exs 1, 2, 3, 6, 7, 9, 10, 16, 28; R 52, 66, 125, 195). The "hospital had deteriorated to a filthy charnel house" (Ex 6).

The supply of medicines was wholly inadequate. The senior PW medical officer requested a list of medicines in writing and he was told, by accused, never to write another letter. The only medicines or instruments available were those carried in by the prisoners of war in their medical kits (Exs 1, 2, 3, 5). On two instances the Philippine Red Cross sent truckloads of foods and medicines to the camp which were turned away (Exs 4, 6, 27). Colonel Price stated that the Archbishop of Manila sent one truckload of medicine which was refused (R 195). Major Gochenour testified that the camp authorities received one shipment of medicines from the Philippine Red Cross but 95% of it was retained for the Japanese personnel and only 5% distributed to the prisoners of war (Ex 7). Colonel Cain testified that he was able to get some sulphanilamide and that he heard a Philippine Red Cross man offer accused a 150 bed hospital and the Red Cross man was struck by an interpreter in the presence of the camp commander and a Japanese colonel (Ex 28). General King talked with accused about the shortage

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of medicines and accused told General King that he was only a captain and his many letters to higher authorities on the shortage of medicines did not get much attention (Ex 8). The medical supplies were wholly inadequate. Hospital patients slept on the floor elbow to elbow. There were no beds, no sleeping equipment, no mess gear. The sanitary conditions were terrible--no facilities whatsoever. One surgeon asked for some sugar for the jaundice cases and pointed out sacks of sugar in the camp for which he was slapped in the face by a Japanese lieutenant. There were no plumbing facilities in the hospital. There was no furniture or equipment. Operations were performed with mess kit knives. There were no lights; no means of insect control (Exs 1, 2, 3, 4, 5, 7, 9, 25, 26, 31; R 80, 123, 195). The medical supplies were about 5% inadequate (Ex 7).

Among the deaths recorded at Camp O'Donnell were the following:

Pvt Lewis M. Fryor - May 13, 1942 - dysentery
Cpl John Gillis - May 4, 1942 - dysentery and malnutrition
Pvt M. Gilmore - May 20, 1942 - malnutrition
Pvt Albert Loyd Peterson - May 5, 1942 - malnutrition
Pvt John R. Roy - May 3, 1942 - malaria and malnutrition
Pvt George A. Tribbey - May 16, 1942 - malnutrition
Pvt George W. Umbaugh - May 4, 1942 - dysentery and malnutrition
Pvt Robert Wright - May 10, 1942 - dysentery and malnutrition

(Exs 11, 12). In addition to the list above about 1,500 to 1,800 Americans died in the first month (R 66), or 1,700 Americans died (Ex 6), or 2,000 Americans and 27,000 Filipinos died (Ex 3), 1,508 Americans died (Ex 10), or 17,000 men died in April and May (Ex 4), or in the first two months about 1,200 died (Ex 5), or 1,682 died (Ex 9). (It is impossible to determine from the evidence the exact number that died during the incumbency of this accused as camp commander.)

(3) As to Specification 2: Compelling prisoners of war to work when sick and unfit. The camp authorities required prisoners to work and do physical labor outside of the camp and in the camp. The work was performed on a quota basis, - a definite number of men being required. Such work aggravated the diseases from which men died (Ex 7). When six men would be assigned to take care of fifty men in the hospital, only one would be well enough to work (Ex 2). When work details returned to the camp some men were dead, others would be hospital patients (Ex 3). "If he (a PW) was able to walk, they sent him to work; didn't make any difference what was wrong with him" (R 51). Men would work on the burying detail one day, be too weak, drop out and the next day the detail would bury them (R 80). Sgt Markham testified that he worked on the grave detail when he had both malaria and dysentery. Since the details were selected on a quota system and the degrees of sickness were graded by American medical officers; only the least sick men were selected but if the quota was not filled, everyone was called out into the hot sun until enough men to work were selected. It was unavoidable that ill men perform arduous service (Ex 25). The quota system was verified in R 152, 155 and, by Col Price, in R 196. Col Price also testified that when he did not send sick men out to work he was not punished for it (R 203). About the only way anyone could be excused from work was by being in the hospital (Ex 26). Lulu Reyes, a Filipina, was able to bring in two loads of food and medicine after great difficulty and objections by accused who was "very angry". She was later informed that very little of it went to the prisoners of war. While in the camp she saw evidently "staggering" sick prisoners of war working on burial details who would ask for "water canteens and food". (Ex 37).

(4) As to Specification 3: Permitting and sanctioning atrocities (it is to be noted that the commission found the accused not guilty of responsibility for contributing to the deaths of Pvt William S. Benway (Sub-Specification k); Pvt Charleston J. Miller (Sub-Specification j), numerous prisoners of war (Sub-Specification p), one American prisoner of war (Sub-Specification o), Pvt Barney E. Prosser (Sub-Specification i), and three American officers (Sub-Specification l, R 24, 225). When the prisoners of war arrived in camp they were searched and if Japanese money or trinkets were found it was claimed that

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the persons in possession of such money and possessions had been looting. They were marched off to the guardhouse and subsequently shot. Among the men so shot were Capt Raynaldo F. Gonzales, Major James Hazelwood, Lt Col Ralph Hirsch, S/Sgt John A. Keeler, Capt Eddie T. Kemp, 1st Lt Peterson, Capt William C. Schultz and Capt Raymond Twaits and two American and three Filipino soldiers (Exs 1, 8, 13, 14, 15, 17, 18, 22, 29, 30, 32). Col Cain saw Major Hazelwood searched by the accused and his noncommissioned officers and saw Hazelwood beaten over the head with sabres (Ex 29) as did PW Donaldson (Ex 15). At about 9:00 A.M. April 14 gunfire was heard to the southeast of the camp and Col Cain saw twenty to thirty American officers and men dead and lying in a common grave. He recognized Major Hazelwood and Capt Kemp among the bodies (Ex 29). Official records show that Major Hazelwood was shot for having Japanese money in his possession between 12 and 13 April 1942 (Exs 32, 33). Paul Beyuka helped bury about thirty American and Filipinos in a common grave on the morning of 13 April. One was an American captain and one Filipino was still alive and screaming when buried (Ex 24). Col Lawrence testified that a short time after he arrived at the camp Col Hirsch was brought in and a search revealed he had some Japanese money. He was placed in a guardhouse and disappeared twenty-four hours later. On inquiry, Japanese officers denied Col Hirsch had ever been in camp. Twenty or thirty Americans disappeared under similar circumstances (Ex 1). General King questioned the accused about Col Hirsch who had been one of his staff officers and who was reported to have disappeared on arrival. Accused refused all information. General King offered to have an American doctor sent to Col Hirsch if that could be done and was told by accused that Col Hirsch needed no doctor (Ex 8). PW Fogerson names S/Sgt Jack Kayler ("Keeler") as one who was marched away with Capt Gonzales, Twaits and Schultz. Col Stubbs names Sgt Keeler, Lt Col Hirsch, Lt Peterson, Capt Gonzales, Capt Schultz, Capt Kemp, Capt Twaits and Major Hazelwood all as having been shot (Ex 13). 1st Lt Limpert witnessed the search and remembers that those marched to the guardhouse were Capt Schultz, Capt Kemp and Major Hazelwood. At the same time he saw Capt Gonzales already in the guardhouse. Later he talked with another prisoner of war who saw these same men the next morning being led across the Philippine compound with their hands tied behind them in the custody of Japanese guards (Ex 16). Col Lawrence was in the same party with Lt Peterson and saw him led away after a one yen note was found in his pocket. He was taken to the guardhouse. The next day Col Lawrence inquired of the Japanese interpreter as to the whereabouts of Lt Peterson and he was told he was to be courts martialed. Two days later Col Lawrence went to the guardhouse and made inquiries of Lt. Peterson and he was told that Lt Peterson had been disposed of (Ex 1). PW Devore witnessed Lt Peterson being searched and taken away (Ex 14). Lt Col Peters was a witness to the same event (Ex 19). Major Donaldson was in the party of prisoners with Major Hazelwood, Capt Gonzales, Capt Twaits and Capt Schultz when they were found to have Japanese money on them. They were beaten by the Japanese guards, taken away and "no one ever saw them again" (Ex 15). These instances are also mentioned in Exhibits 13, 16, 17, 18, 22, 29, 32, in the latter of which it is indicated that the official records show that Capt Schultz was shot for having Japanese money or a Japanese fan in his possession between 12 and 22 April 1942. Capt Raymond Twaits is named as one of the victims in this incident (Exs 13, 15, 18, 29, 42).

As to Sub-Specification n of Specification 3, the affidavit of Col Memory H. Cain, states that on 15 April he was sent to the Japanese headquarters for questioning. Shortly after his arrival a United States Army Col James came out of the room being used for questioning; he was "bloody as a hog." He told Col Cain and those waiting to tell everything the Japanese wanted to know because "look what happened to me". Col Cain was next taken into the room and appeared before the accused, an interpreter and three guards. During the course of the questioning he said that he was "surrendered" and not "captured", whereupon the interpreter hit him (Cain) on the cheek with his hands. All of the Japanese present laughed and accused unsheathed his saber, came up, and cursed and raised his hands and waved his saber in Col Cain's face and the interpreter informed him (Col Cain) that if he did not tell the truth the accused would cut Col Cain's head off. (Ex 30).

As to Sub-Specification m of Specification 3, PW Drummond stated that he helped bury two American and five Filipino soldiers on or about 20 April.

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They had been shot and were lying in a common grave. Before that they had been marched "through headquarters" and the shooting and burying took place within sight of the Japanese headquarters where accused had his office. It was about two hundred yards away and the day was clear. Two of the prisoners of war thus shot at the site of their graves were still unconscious when buried (Ex 22).

b. For the Defense:

The defense requested the court to take judicial notice of the record of trial of General Masaharu Homma, wherein he was convicted of failing to discharge his duty as commander in chief of the Imperial Japanese Army in the Philippines, one incident of which was, between 9 April 1942 and 1 August 1942, at Camp O'Donnell, "the systematic, cruel, barbarious and uncivilized treatment of prisoners of war by failing to provide sanitation, food, medicine and water and by forcing prisoners of war sick and physically unfit to work as a result of which 1,522 American prisoners of war died (R 225).

Former Major General Toshimatsu Takatsu, then colonel and a member of the Staff of Lt General Maeda in charge of prisoners of war, among other things, testified that the campaign of Bataan terminated much quicker than the Japanese high command expected. They were wholly unprepared for the surrender of 20,000 Americans and 30,000 Filipino soldiers and were only in preparation of their prisoner of war camps, one of which was Camp O'Donnell (Ex A). It had been thought there were about 30,000 American and Filipino soldiers on Bataan (R 233). Col Takatsu looked over Camp O'Donnell and decided the area could hold 20,000 prisoners of war (Ex A). This occurred in March 1942 (R 227). Prior to the surrender of Bataan he sent personnel there to prepare the camp believing they would have at least thirty days to get it ready. Instead, prisoners of war began to arrive in about fourteen days and when Bataan surrendered 70,000 prisoners of war were unexpectedly forced upon the camp (Ex A). General Homma ordered the number of prisoners of war to go to Camp O'Donnell (R 235). The prisoners were sent there only as a matter of military necessity. The housing facilities, food, water facilities, medicines and everything else were wholly inadequate. The inadequate water supply as well as the other inadequacies were due to the large numbers of prisoners of war. The camp was not enlarged in the short time before the prisoners were moved due to a lack of materials (Ex A).

Major General Takatsu also stated that Major General Kawane was the "real commandant of Camp O'Donnell; accused was a branch camp commander." He could obtain supplies by requisition on supply depots but they were unable to secure sufficient supplies. Accused had no authority to accept Red Cross supplies direct. It was General Homma's policy that the Red Cross supplies intended for the prisoners of war had to pass through regular Japanese supply channels (Ex A).

On surrender large numbers of the prisoners of war were suffering from malaria and dysentery and other diseases. General Takatsu inspected the camp in the middle of May on the orders of General Homma and saw the inadequate supplies of food, etc., and saw the large number of prisoners of war. He talked with the accused who said that he had requisitioned all needed food and supplies on numerous occasions and had reported the conditions but that the food and supplies had not come forward in "sufficient quantities". The witness reported the conditions to General Homma and medical officers, etc., were sent immediately to inspect the camp to see what improvements could be made (Ex A). About three hundred prisoners of war were dying a day about that time (R 229), which fact he learned from the daily report of accused (R 231). There was a severe shortage of food and medicines in the Japanese Army at the time and its personnel were dying of malaria and like diseases (R 232, 234).

Accused had no authority or materials to do any "large work" of improvement. He could do "small works" (R 236). The witness doubts that accused could have obtained materials to improve the sanitation and water supplies (R 237). He could have dispatched small units to the river for washing and bathing (R 238). The prisoners in the camp performed no labor except that connected with the improvement, operation and maintenance of the camp (Ex A).

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Takeo Kumagai, then lieutenant on the staff of Col. Hirano, was sent to Camp O'Donnell about two weeks before the fall of Bataan to determine the number of prisoners it would hold. The number was fixed at between 15,000 and 20,000 but at that time a pump was needed for the well (Ex B).

This witness made four visits to the camp; two before any of the prisoners of war arrived. The third was an inspection with Col Hirano about a week or ten days after the prisoners of war arrived. The fourth was when the American prisoners of war were being sent to Cabanatuan. They found on both trips that the food, medicine, water and facilities were inadequate (Ex B; R 246). The campaign for Corregidor was then in progress and supplies for the Japanese Army as well as prisoners of war were "inadequate and insufficient". There was nothing a camp commander could do but make requisitions. He was not authorized to buy food or get it at any source except at regular Japanese Army supply channels (Ex B). Supplies first must be requisitioned; if they were not available, then a commanding officer might receive permission to buy them from whatever source they were available (R 243). He could not obtain medicines by local procurement and could not procure food locally without permission (R 253). General Homma required Red Cross supplies to go through regular Red Cross channels. Accused had no authority to receive it direct (R 254). The regular supply people were attempting to purchase supplies locally (R 258) but there were no supplies to be purchased in the vicinity of Camp O'Donnell (R 241). If a Philippine Red Cross offered supplies to the accused, it was his duty to report the offer to higher headquarters and, if they approved, he could receive such supplies, otherwise not (R 261).

It was never intended that Camp O'Donnell would receive 60,000 prisoners and when that number was sent all facilities were overcrowded and inadequate. General Homma and not the accused was responsible for the overcrowded condition (Ex B). Accused could report the condition and request more equipment (R 245). The fence around the camp was not completed until the last visit by this witness (Ex B). There were about twenty-five Japanese personnel at the camp in addition to the military guards. With this small personnel they were still engaged in making a roster of prisoners of war thirty days after the first prisoners arrived. The commanding officer, accused, did not know who were prisoners and who were missing because he did not have a complete roster (Ex B).

Masao Takenoshita, former 1st Lt and a medical officer, Japanese Army, stated that he served on Bataan in 1942. There was much more malaria and dysentery among the Japanese soldiers than anticipated. It caused a heavy drain on medicine and medical supplies which became very short and all were rationed. Very seldom was the full amount requisitioned received. There was very little quinine or atabrine and very little of sulpha drugs (Ex C). Accused could not have accepted volunteer medicines and drugs except through regular supply channels (Ex 264).

Extracts from the testimony of various witnesses in the trial of General Homma were read into evidence (Ex D). A S/Sgt Bogie testified that "the poor physical condition" of the U.S. soldiers prior to surrender was due to lack of food two meals a day those cut in half for two weeks. Lt Col Watrous, Medical Corps, 28 years of service, stated that he had 5,000 patients in his hospital in Bataan. They were very short of food. The Japanese colonel who took the surrender stated, on being asked, that he could supply no more food than they had been getting. He stated that if the U.S. had not fed its men adequately, he did not choose to feed them any more. According to Col Watrous, for a month before the surrender the men had nothing but rice. "The physical condition of the men (U. S. soldiers) was terrible." They were suffering from malaria, dysentery and malnutrition. Col Ball, Field Artillery, on General Parker's staff (2nd Corps), testified that they surrendered on April 17 and had been on half rations since January 5. He described the sickness, lack of food and the dying men on the "death march". According to Col Ball there were a great many sick men of malnutrition. During the march 6,000 were crowded into a warehouse in Lubao for the night and 200 to 300 were lying on the floor dead or dying in the morning (Ex D).

Further testimony in the trial of General Homma introduced by the defense was the evidence given by Sgt Horace M. Clark, who testified that his unit, from January to surrender, got a small amount of rice twice a day and there

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were "two large kitchen spoonful of rice" for each meal and about "every four days" a little carabao meat. There were no vegetables and only such fruits that could be picked off the trees. The condition of the men at the time of surrender was very poor. Malaria was prevalent and there was no quinine for about two weeks before the surrender. Large numbers had dysentery for which there was a medicine that soothed the cramps but did not cure the disease. James Baldassarre testified that at the time of surrender "there was plenty of dysentery, malaria and beri-beri". On the way to O'Donnell the prisoners of war were "mostly sick". They were more sick than before Everybody had dysentery, malaria, beri-beri and all kinds of diseases (Ex D).

Further, from the record of trial of General Homma, Col Cain testified that the condition of the prisoners of war when they arrived at Camp O'Donnell was as follows: "in very poor condition; dysentery was prevalent and most everybody suffered" from malnutrition and malaria (Ex D). In the same trial of General Homma, Major Tisdelle, a member of General King's staff, testified that, prior to surrender, there was "so much malaria and other diseases, debilities . . . that a great many of the patients were out in the jungles surrounding the building"; "there was a good deal of dysentery and beri-beri, pellagra and some scurvy", in addition to malaria; the figures compiled by the surgeon, Luzon Force, indicated that during the final weeks before the surrender "the defensive combat efficiency had been reduced 75% . . . due to malnutrition, avitaminosis, malaria and intestinal infections and infestations;" . . . "By April 1 the combat efficiency was rapidly approaching its zero point" . . . The ration was 2,000 calories per day in January; 1,500 in February; 1,000 in March; conservatively estimated the need was 3,500 to 4,000 calories; "by March 1 serious muscle wasting was evidenced beri-beri became universal" (R 268). Major Tisdelle also testified in the Homma case that when General King personally took over Camp O'Donnell there was some improvement. Capt Tsuneyoshi told General King how sorry he was that conditions were so bad; that he was trying to get supplies without much success; and on one instance at 1:00 A.M., in a very bad rainstorm, Capt Tsuneyoshi came over from his quarters with a lantern and called on General King and went with him to look at the hospital. When they left Capt Tsuneyoshi left his lantern for use in the hospital and returned to his headquarters in the dark (R 269-70). Major Tisdelle further testified that at the time of surrender to the Japanese they were not told of the physical condition of the U. S. troops; they were only told the number (R 289-90).

Terumitsu Ikeda testified that he was a 2nd Lt on the staff of Col Hirano. He arrived in Camp O'Donnell as one of the camp personnel on May 10. Accused was relieved as camp commander and was transferred, leaving the camp on the same day. There were two large water tanks when Lt Ikeda arrived, with about an eight inch pipe that went, from them, through the American section of the camp, then the Japanese headquarters section and finally to the Filipino section. There were about ten smaller lines leading out from the main pipe in the American section each of which had spigots (Ex E). There were two American engineers in charge of the water plant. The water supply to the American section could not be turned off without turning off the water to the Japanese section because it was one large pipe (R 280-281). There was a shower in the American section, none in the Japanese section. The witness saw American prisoners of war taking a shower when he passed (R 281-282). There were about 50,000 prisoners of war when he arrived (Ex E).

Former Major General Yoshikata Kawane testified (R 291) that the Japanese Army was short of food and supplies during the assault on Bataan; it was hard to supplement food from the Philippines because the Filipinos and guerrillas destroyed some. General Homma established supply depots and the witness was in charge of transportation between them. During the assault on Bataan the Japanese Army was "underfed and all of the hospitals were overflowing with sick and injured patients". There was a shortage of medicines and medical supplies, particularly quinine. Very few American supplies were captured in Bataan; being in charge of transportation, the witness knows there was none to transport. There was a shortage of supplies in Camp O'Donnell's supply depot. Accused spoke with the witness about the shortages at O'Donnell but because of the general shortage throughout the Japanese Army he could not be helped. Accused was authorized

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to purchase any food or other supplies he could find. Since other units and supply depots were buying food and the Filipinos were destroying it, accused probably could not buy any (Ex F). The authorization included food, etc., but not tools (R 323). Accused could not accept donations which had to go through the army supply system (R 324, 326, 342).

General Kawane on orders of General Homma inspected Camp O'Donnell as a possible prisoner of war camp and reported that it would accommodate 20,000 prisoners of war or with some improvements 30,000 (Ex F). This inspection took place about ten days before the end of March. Preparation for the occupation of the camp was begun at the orders of General Homma. The witness himself decided the number of personnel required and that it would consist of a commanding officer, two subordinate officers, about twenty noncommissioned officers and a company of guards, basing his decision on the expectation that the camp would contain about 20,000 prisoners of war. Accused was selected as camp commander and was sent there about April 1 to repair and prepare the camp. He was advised that he would have about thirty days in which to do so. Bataan surrendered unexpectedly and the prisoners of war began to arrive in about two weeks. The camp then received 60,000 to 70,000 prisoners of war who were in very bad condition at the time of surrender. Many were suffering from malaria and other diseases. They were sent there at the order of General Homma, there being no other camp available. Accused could not refuse to receive them. He could only take them in and do the best he could. His personnel were insufficient for the number of prisoners of war he actually received (Ex F). The witness talked with General Homma about conditions at the camp on about April 10 and reported that there were more prisoners of war than expected. He was instructed by General Homma to leave them there because it was only temporary (R 334). The witness made a return trip to Camp O'Donnell shortly after the fall of Bataan (R 293) around April 15 and stayed one or two hours. He noted that the accused was very busy receiving the prisoners of war; that they were very tired and that the fence around the camp was not yet completed (Ex F; R 296).

According to the witness, accused could not send out any work details of his own volition. Work details were sent out from various prisoner of war camps in May and June, on various jobs, the reports of which would pass through the office of the witness. He does not now recall what any of the details were (R 308). The witness believes the reports he received from accused through Col Hirano were accurate (R 315).

Ichimatsu Miyake, an official of the repatriation office, testified that the records of that office show the names of eleven of the officers that served at Camp O'Donnell at times in April, May and June (R 346). Only two are now living. There is no record made at the time, but the names were compiled from memory in 1944 (R 347).

Excerpts from the rules and regulations of the Japanese Army were read into the record, "opening and closing of a prisoner of war camp shall be determined by the Minister of War"; a prisoner of war camp "shall be administrated by a commander of an army or a commander of a garrison"; to whom the commandant of the camp is responsible and he "shall manage all the affairs of the camp" and that the army or garrison commander "shall establish the standing orders" (R 349-50).

Four pictures of the accused taken in the courtroom during trial were introduced as evidence (R 412; Ex G).

c. By the Accused:

After arriving in the Philippine Islands accused trained noncommissioned officers and did some propaganda work. He was well known to the civilian public, officers, etc., in and around Tarlac (R 353, 421). On April 1 he was orally assigned as commanding officer of the Prisoner of War Camp O'Donnell. He had no previous experience in operating a prisoner of war camp and received only general instructions from General Kawane and Col Hirano. He did not volunteer to be commanding officer of the camp but was so ordered by Col Hirano. He was told that the prisoners of war would arrive in about a month and there would be about 20,000 of them (R 353). He was also told that the camp would be temporary (R 361). His

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statement to the prosecution in 1947 in which he stated that the order assigning him to Camp O'Donnell was written was a mistake (R 424).

He was in a party which inspected the camp site in the middle of March but having no knowledge at the time that he would later be the commanding officer he paid no attention to the details (R 354). There were about thirty large barracks in the camp and one hundred small barracks. The sizes varied from six meters by a hundred meters to six meters square. In addition there was a hospital about thirty meters square (R 361-362).

There was a water system, consisting of two cement tanks into which water was pumped by motor. The water pipes ran from the tanks to the American section then to the Japanese section and then to the Filipino section. From the main pipe smaller pipes ran to spigots of which there were five or six in the American section. All of the water could be cut off at the tank and that was done from time to time when the water got so low in the tank that pressure would not carry water to all parts of the camp (R 362). During his time as commanding officer the pump was operated by American prisoners of war all day long and at night until the tanks were full. The water supply was inadequate and river water was used (R 363). Accused did not limit the prisoners of war in using the river to get water or to bathe or to wash clothes; they did not have to ask permission (R 364). It would not have been possible to dig another well "in a couple of days" as the camp was on too high ground (R 417).

Several latrines were built before the prisoners arrived in all parts of the camp. The prisoners of war dug more after they arrived (R 372). The American commander selected the site and size of the latrines dug by the prisoners of war (R 373).

For cooking there were only a few Japanese style iron pots. More were requisitioned and some were received. Some of the prisoners of war did not have mess kits on arrival so "things of bamboo" were made by the Japanese carpenter (R 373). Food was requisitioned from the depot at Tarlac and received daily. It was rice, canned meat and dried vegetables. The amounts received were always less than the amount set by the army or requisitioned. Accused went to Tarlac several times a week on that account and also purchased some vegetables from Filipinos. Accused complained about the food shortages to General Kawane or Chief of Staff Takatsu when he visited the camp (R 376-377). There was no special authority to purchase food but he could buy some food locally if they were not "staple food". He negotiated with the governor of Tarlac for meat but it did not arrive until after accused was transferred. He was able to get some pork at one time. He also got two truckloads of sugar at a local refinery because he knew a Japanese officer who was put in charge there (R 378). The sugar was issued to the prisoners of war in honor of the Emperor's birthday and he also obtained a supply of cigarettes which were issued for that day (R 419). He tried to enlist the aid of the mayors of Capas and Tarlac and their subordinates in obtaining food (R 379). The daily reports to General Kawane showed that the camp was receiving insufficient food; at least two or three hours a day were spent in trying to get food from the start (R 381).

When he was sent to the camp his assistants as ordered were one officer each of infantry, medical and intendance and about twenty noncommissioned officers and soldiers (R 354). Accused had nothing to do with selecting the members of his staff (R 355). The military guards arrived two or three days before the prisoners of war. At first there was one platoon and later one company. The platoon has fifty men and the company one hundred and fifty (R 355-58).

Filipino labor was not used to repair the camp (R 354). It consisted of repairing buildings, setting up pumps, arranging the water pipe system and setting up fences. Accused had to go to Manila to get a motor for the pump (R 358). Some of the buildings were repaired before the prisoners of war arrived (R 366).

Records of the prisoners of war were prepared by taking the rolls brought in with the prisoners (R 360). No complete roster of the camp was finished by the time accused was transferred (R 383-84). Daily written reports were sent to accused's superior (R 359) which showed the number of prisoners of war, their conduct and the food and medical situation. They showed the number who were sick or had died (R 360).

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The number who had died was received from the liaison man (R 404). The largest number both American and Filipino combined were two hundred per day (R 437). Requisitions for food and medicines were sent out and accused believes some were received and stored at the camp before the prisoners of war started to arrive in the camp but he has "no definite recollection" (R 359). The foods and medicines were not received before the prisoners of war arrived (R 416). The prisoners of war arrived before they were expected, some arriving ten days after accused got there instead of one month after. The camp was not prepared (R 359). 70,000 prisoners of war arrived in groups of 300 to 700 or 800, sometimes as many as 4,000 to 5,000 per day (R 361). There was no advance notice before the first prisoners of war arrived (R 390). On arrival accused had a conference with General King who was among the first of the arrivals and told General King that the fence was not finished and the camp unprepared. He asked General King to take charge of the camp and to prevent the prisoners from escaping since he had no fence (R 366). General King was to manage the camp, which included sanitation, feeding and water supply (R 460). During the first few days when prisoners of war arrived accused was present when they were searched for weapons and roll call taken. He issued instructions at that time. He had intended to be present as each group arrived but after two or three days he was unable to do so. At no time did he see anyone taken out of line and marched away and he did not order anyone to do so. He believes no one was ever taken to the guardhouse for possession of Japanese money at the time of search (R 391). He never received a report that that had been done either from the Japanese camp personnel or the reports of the prisoners of war. He never heard of any prisoner of war being executed (R 392) or that any prisoner of war had been bayoneted or killed (R 399). There were no executions and no courts martial of prisoners of war while he commanded the camp (R 413). There were prisoners of war in the guardhouse for breaking camp rules (R 403). There were no regulations that prisoners of war could not have yen in their possession (R 410). As to Col Hirsch, accused does not remember General King asking about him at Camp O'Donnell. The first time he heard that Col Hirsch had been executed was after accused was confined in Sugamo (R 430-32). If General King did request to see Col Hirsch or have an American medical officer see him, that could not have been permitted if he (Col Hirsch) was in the guardhouse (R 445). Accused once struck a tall American prisoner of war because he and about ten other prisoners of war were bathing above the dam of the river which dam had been built to provide drinking water. The order was to the effect that bathing was to be done below the dam. When he happened upon the scene he ordered the ten out of the water and struck the first man to come out one blow and, by mistake, broke the prisoner's glasses. This is the only instance in which he struck a prisoner of war. He did not draw a saber on Col Cain or threaten him (R 400).

As to work details, accused does not remember any requests made of him to send prisoners of war out of camp to work. They did work on jobs around the camp building the fence, a watch tower, building a dam across the river, etc. Accused ordered the number of men for details, the number to go were selected by the prisoner of war commander. The most required for one day was about one hundred exclusive of burial details (R 382). No prisoners of war were sent from O'Donnell to work on the Capas bridge detail (R 444).

About two hours per day were spent in conferences with General King, the commander of the Filipino section, and other representatives and out of these came the permission to use the river for bathing, the return of razors to the prisoners of war a week or ten days after prisoners of war came in, etc. (R 396). Accused worked ten to twelve hours a day and sometimes at night (R 399).

No clothing was issued and none was requisitioned. He does not remember having ever received a request from representatives of the prisoners of war for clothes (R 394). The overcrowded conditions of the camp were shown to General Kawane, Chief of Staff Takatsu, Col. Hirano, a medical officer and intendant officer from the headquarters and a representative of the Chief of Staff of Army Headquarters (R 360). Since the number of prisoners sent to the camp was set by higher authority, accused could not refuse to accept them (R 363). Accused is not sure what his medical assistant did about preparing or maintaining the hospital and since the assistant was killed in action he has not been able to find out (R 366-67). The American prisoners of war assigned to work in the hospital were selected by General King (R 368). There was no equipment in the hospital but accused believes his

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assistant requested it and once in the latter part of April he sent the assistant to Manila for medicines and supplies. Accused heard the assistant got some quinine and medicines for dysentery. Some Filipino sleeping mats were secured locally (R 369). Accused never went personally to the supply depot for medicines and supplies and there were no supplies and medicines in the depot at Tarlac (R 370). Requisitions for medicines were sent to Manila every week or ten days. When filled "the amount was less". Requisitions for medicines for the camp personnel were handled separately and what was received was always short (R 371). He does not know how many prisoners of war were in the hospital (R 372). Medicines were rationed (R 375). The Red Cross came with medicines on trucks on one occasion and he told them he had no authority to receive the medicines but to take them to army headquarters in Manila (R 384). That was in accordance with army regulations (R 385). The Red Cross came only once. They had medicines but no mention was made of food (R 386-89). Accused does not recall any tender of Red Cross blankets. Japanese army blankets were issued (R 390). Accused does not recall Mrs. Reyes and does not believe he ever permitted her to bring food and medicine into the camp (R 394). There were many tenders of food but he accepted only those from the mayors of Tarlac and Capas (R 386). The regulations against accepting donations were a matter of security to prevent things from being smuggled in (R 388-89). The hospital was inadequate and accused saw patients quartered under it. He admits that it was his responsibility "to improve the hospital and lessen the number of deaths". He did take steps to do so (R 407). He thinks that if he had sent his medical officer to Manila for medicines more often and had permitted the Red Cross to bring in medicines there might have been fewer deaths (R 441, 446). But there were shortages of medicines for the Japanese Army because of inadequate preparation for the amount of diseases that arose (R 447). The reason he did some things then that he would do different now was because at the time "he adhered to regulations strictly" (R 458).

Accused thinks he was at Camp O'Donnell until May 26 but is not sure (R 404). He believes it would have been between May 10 and 26 when he was transferred, the exact date is written down in his papers at Sugamo and if the commission or counsel will get them he can tell definitely (R 406, 424). Two requests have been made for his belongings but they would not be "brought down" (R 425). (In connection with this final portion of accused's testimony Major Martin testified that he attempted to get accused's papers from Sugamo but was refused (R 497). Accused said he made two requests to get them but was told that officials had sent all his belongings to his family (R 498). Col Ito, accused's successor, took office on May 22 or 23, 1942 (R 501).)

4. Comment:

(a) The commission was properly constituted, was appointed by proper authority, and had jurisdiction over the accused and the offenses charged. There is nothing in the record to indicate that accused was insane or mentally incompetent at the time of the commission of the alleged offenses or at the time of trial. Accused had a fair trial and there are no errors or irregularities that adversely affect his substantial rights. The record is legally sufficient to support the findings and sentence.

The prosecution offered, and the commission received, a considerable volume of what was called rebuttal testimony both oral and documentary. Largely this testimony was not proper rebuttal testimony, was inflammatory in nature, and should have been presented as a part of prosecution's evidence in chief. The testimony of Sgt Markham (R 472-477) was read into the record; testimony of Tisdelle and Wachi were read into the record at R 478-81; Exhibit 42, the letter of Sgt De Lapp; Exhibit 41, the affidavit of Major Boyer; and Exhibit 42, the affidavit of Major Hewitt; were all presented as rebuttal testimony. Of all the testimony and documents introduced by prosecution as rebuttal only the testimony of Moriya Wada read into the record at R 481-82 was proper rebuttal testimony. It serves to refute affirmative testimony produced by the defense.

" . . . the usual rule will exclude all evidence which has not been made necessary by the opponents case in reply . . . the evidence offered thus tardily may consist either in new facts which ought to have been put in before or in a

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repetition (either by a new witness or by the same former witness) of former facts already once evidenced. The customary rule will equally forbid both." (Wigmore on Evidence Vol VI, Par 1873).

"The common law practice that plaintiff is limited in rebuttal to new matter which has been raised in defense prevails in the District of Columbia." (App 11 D.C. 132)

"Where testimony offered in rebuttal was a substantive part of plaintiff's case in chief, the fact that it tended to contradict defendant's evidence did not make it competent in rebuttal." (208 Fed 158).

Col Roscoe Price was called as a witness for prosecution and he identified accused from the witness stand. The record fails to reveal that Col Price was sworn as a witness. Par 5c (1) Supreme Commander for the Allied Powers, Letter Order, dated 5 December 1945, subject: Regulations Governing the Trials of Accused War Criminals, sets forth that "the commission shall have power; . . . to administer oaths or affirmations of witnesses . . ." Section II, Eighth Army, Letter Order, dated 5 February 1946, subject: Rules of Procedure and Outline of Procedure of Trials of Accused War Criminals, provides (p 7) for the swearing of witnesses. No objection was made by defense to Col Price's testimony. These rules as quoted do not make it mandatory that a witness be sworn and, since "commissions are not bound by strict rules of evidence", U. S. vs Fujii, Case Docket #90, it may be said that the failure to swear Col Price as a witness does not adversely affect the substantial rights of accused.

At R 430 prosecution stated, "This man (Capt Tsuneyoshi) has been sitting on the stand as a witness and he has been lying day after day". This was a part of the second cross-examination of the accused by a second member of the prosecution staff during all of which accused was being severely harassed. This conduct on the part of the prosecution was improper.

"It is the duty of the court of its own motion to protect litigants from abuse by opposing counsel. Conduct of plaintiff's counsel (in referring, inter alia, to one party as having 'all the earmarks of a common, ordinary and enthusiastic liar' and 'that Mr. Dawson had lied on the witness stand') was not only improper, it was reversible error." (51 Fed 709).

Many cases in the United States hold that similar conduct of prosecutors in criminal cases is reversible error. (150 U.S. 108, 279 U.S. 310, 150 U.S. 76, 149 U.S. 60) Fortunately for the prosecution, the commission's action in sustaining an "objection" to the language and the fact that these cases are tried by a commission and not under the jury system, where such improper and prejudicial remarks are deemed to be reversible error, prevents serious consequences. Inasmuch as the commission functions as court and jury and not as jury alone, it cannot be said that the substantial rights of the accused were adversely affected. A higher concept of the standards of Anglo-Saxon justice would have prevented the remark. The president of the commission in directing that it be stricken minimized its effect.

It is noted that the commission found accused not guilty of failure to supply adequate food and failure to supply adequate shelter but found accused guilty in failure to supply available medicine, medical supplies, adequate water, adequate sanitation facilities and adequate clothing. The reason for these differences is not readily apparent. While accused admitted his failure to issue or requisition clothing, the need for clothing in a tropical climate immediately after the surrender is less obvious than the need of adequate food or adequate shelter. A major portion of the testimony of prosecution went to establish that accused had failed to provide adequate food of which portion of his offense he was found not guilty. The general presumption is that the bountiful fertility of this section of Luzon would have made it much easier for accused to supply adequate food than it would have been for him to dig new wells, erect new storage tanks and procure new engines and pumps which would have been necessary to supply adequate water. Accused's offense so far as the

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supply of water is concerned appears to merit conviction only on the theory that he did not permit prisoners of war to make full use of the nearby river for bathing and washing and there is uncontradictory evidence that after a time he did extend that right. That the conditions of sanitation were horrible is well established. To what extent this may have been due to the lethargy and debility of the prisoners themselves, in constructing inadequate latrines too near the kitchens and hospital, cannot be exactly measured. Certainly it could not have been expected accused with his limited personnel would have constructed the latrines for the prisoners of war, a function that is always performed by the members of a military organization for itself when in the field. It is a matter of common knowledge among military men that tools for the policing of areas and soaps and disinfectants are extremely difficult to procure in adequate quantities even in the best administered armies. The evidence of what accused could have done or did do in this regard has been most inadequately developed although there is some evidence on the part of the prosecution that lime was used under the hospital for sanitary purposes. It cannot be denied that the lack of adequate sanitation and hygiene accounted for or contributed to a large portion of the deaths that occurred.

The specification as to sanitation and hygiene, food and clothing refers to the failure of accused to supply "adequate" facilities. As to medicines and medical supplies the allegations state that he failed to supply "available medicine" or "available medical supplies". In light of the opinion and the addenda opinion of the Army Judge Advocate in the case of U. S. vs Toshio Hatakayama, Case Docket No. 203, no discussion of the distinction between "adequate" and "available" will be made. There is strong and compelling evidence that supplies of medicines were very inadequate throughout the Japanese Army in the Philippines; that accused attempted to secure medicines by requisition and dispatched his medical officer to Manila expressly for that purpose; and that the amount of disease requiring medicines for both the prisoners of war and the members of the Japanese Army was greatly in excess of expectations. Witnesses for the prosecution testified that there were 12,000 hospital patients among the American forces on Bataan at the time of surrender (a number so greatly in excess of hospital facilities that many patients were lying about in the jungle); that by the time of surrender the effectiveness of the American troops was reaching its "zero point"; and that malaria and dysentery was almost universal. Under these circumstances the supply of medicines and medical supplies would be inadequate in any army. While accused's conduct in turning away Red Cross trucks with medicines cannot be condoned, in the light of the emergency that existed, the degree of his guilt must be judged on the basis of the overwhelming burden that would have devolved upon any camp commander who in a period of ten days or two weeks received 50,000 to 70,000 prisoners, all or nearly all of whom had been reduced to the extremes of debilitation and illness these prisoners were shown to have. The duty of a State or its officials to safeguard and protect prisoners of war established by the Geneva Convention must be construed to be a reasonable duty under all of the circumstances. It would not be reasonable to require a military commander to anticipate that all of the prisoners of war he received upon surrender or capture would immediately require hospitalization and extended medicines and medical care.

Specification 2 merits brief comment. Accused is found guilty of failure to perform his duty as camp commander by compelling and permitting prisoners of war to perform manual labor while sick, diseased and physically unfit. There is no compelling evidence that the prisoners performed such labor under the order or permission of the accused except the necessary details in and about camp such as the construction of a dam to increase the water supply, the completion of the fence, the digging of latrines, the burial of the dead, etc. In a camp containing 50,000 to 70,000 prisoners of war it is difficult to believe that there were insufficient able-bodied men to perform these functions and it is firmly established that the actual selection of the men to work devolved upon the American commanders. The finding of guilty of this specification points up the horrible physical condition of all of the American prisoners on their arrival at this camp. All of the evidence indicates clearly that the conditions at Camp O'Donnell during the incumbency of this accused were of unspeakable horror. The language of the Supreme Commander for the Allied Powers as quoted by prosecution, "The transgression resulting therefrom, as revealed by the trial, are a blot upon the military profession, a stain upon civilization, and constitutes a memory of shame and dishonor

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that can never be forgotten" is applicable to the conditions disclosed by this record. Nonetheless, fairness requires a statement that accused alone was not at fault. The conditions in the camp were a result of all of the factors heretofore mentioned which must be laid at the threshold of many above accused as well as accused.

The other offenses are adequately established by competent and compelling evidence and require no comment.

Defense motion for disapproval of findings and modification has been considered. A petition for clemency signed by Major John F. Henry, a member of the commission, has also been considered. This member of the commission feels that highly objectionable testimony was submitted and that clemency is warranted. Accused is 55 years of age. He was a graduate of the Imperial Japanese Military Academy and had been a commissioned officer for twenty-six years at the time of the commission of these offenses, but his service was not continuous. He is a man of mature years and experience. Any sentence less than life imprisonment, for any term of years commensurate with the offenses adequately established, would be ineffectual and without benefit to the accused. The offenses in Specification 3 alone warrant the sentence adjudged. General Homma, General Kawane and Colonel Hirano, Case Docket #304, who were accused's superiors in this sordid affair, received death sentences. Presumably this commission gave due consideration to theory of "superior orders" and the higher responsibility for inadequacies in the camp facilities and supplies in sentencing this accused to a lesser punishment.

5. Recommendations:

It is therefore recommended that the findings and sentence be approved.

6. Action:

The form of action designed to carry into effect the above recommendations is attached.

MAC ALAN FRETTAG
Reviewer
Judge Advocate Section

I concur in general.

Ample and satisfying proof established each of the points involved in the findings of guilty. The accused cannot relieve himself of his duty to protect his charges the prisoners of war by attempting to "pass the buck" to them or his other subordinates. Failures by subordinates is properly shown in mitigation, however, and it is evident from the lenient sentence in a case involving such numbers of deaths which could have been prevented that the commission considered that defense in arriving at its sentence.

The assertion that unexpected numbers of sick PW's prevented adequate treatment is countered by the proof of failure to utilize available supplies for the prisoners' good and its use instead for Japanese personnel. Thus a callous disregard for the health of the PW's was demonstrated. The brutality of the system of unnecessarily forcing said PW's to hard work by the quota system further emphasizes this want of responsible actions on the part of accused.

It is gratifying to those charged with the fair conduct of War Crimes Trials to note the following excerpts from the closing argument of Japanese defense counsel:

DEFENSE: (MR. NAKAMURA): I feel greatly honored to have the pleasure of

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making my argument by leave of the commission. As to the defense of the accused, Mr. Lackey worked his best, fulfilled his duties and is now going to deliver his perfect argument.

And in the last, I wish to express my heartfelt gratitude for America. In cordial rules and customs of international law, the conquered nations can judge the war criminals by her own court without restriction; but America established such magnificent tribunal, consisting of the commissions by high ranking officers, American prosecutor, excellent American defense lawyers, and even Japanese lawyers. Who would have thought that Japanese lawyers can take part in the trial. Indeed the people of America are fair; and I am sure the verdict of this case will indicate just that.

That is all; and I thank the court."

ALLAN R. BROWNE
Lt Col JAGC
Army Judge Advocate

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