absolutely firm but scrupulously dispassionate and reasonable; this must be supplemented by a constant readiness for frankness, understanding, agreement, and even coöperation in removing misunderstanding and causes of strife. This must all be backed up by equally unostentatious but unconcealed maintenance of economic and military power—rehabilitation of that power if it has been allowed to degenerate. Measures of appeasement may safely be undertaken if it is clearly stipulated that no rights are waived in the process, and adequate precautions taken against sharp practices on the part of the adversary. And when confronted by physical *faits accomplis* the choice must be made between being content with public protest, plus refusal of coöperation, even approaching measures of non-intercourse or boycott, and general hostile physical action if the situation justifies it.

Finally, and most important of all, emphasis must be shifted from the concrete cases or issues at stake to the question of their mode of treatment or settlement. Wrangling over specific items is ordinarily the cardinal weakness alike of the position of the aggressive state and of that of the defenders of international law and world peace, as suggested earlier in this discussion. They assert and deny title to or possession of a certain piece of territory, e.g., when they—that is, the defenders—should throw all their weight behind the demand for methods of rational and pacific settlement (inquiry, discussion, agreement or/and adjudication). Insisting on orderly processes of settlement is in the main the keynote of this whole problem, or its solution. It is far more difficult for the aggressive state to meet this proposal than concrete opposition to his concrete demands or action, and this is the only thing which the defenders have a right to ask, *a priori*, in any case. The proper alternative to appeasement is not to match aggressiveness by war or bellicosity but to substitute for appeasement quiet but unflinching insistence on orderly processes of settlement—accompanied by genuine willingness to make changes when this process indicates that they should be made, but also by maintenance of force for use in case of need. Even this will not necessarily accomplish the result desired—maintenance of international law and peace—but it has a far better chance of attaining that end then either appeasement or violence and if it breaks down the position of the aggressor state must be far weaker morally, politically, and hence from a physical standpoint also.[3]

PITMAN B. POTTER

DUE PROCESS AND INTERNATIONAL LAW

In a six to two decision the United States Supreme Court recently sustained the decision of a Military Commission appointed by General MacArthur in the Philippines sentencing General Yamashita for failure to prevent

[3] Since this was written Mr. Dulles, Senator Connolly, and former Secretary Hull have suggested what they believed to be appropriate programs to be followed in the circumstances: *The New York Times*, March 2, 12 (p. 5), and 13, 1946.

atrocities by forces under his command during Japenese occupation of the Philippines. [1] Chief Justice Stone, who wrote the opinion of the Court, and Justices Murphy and Rutledge, who dissented, were together in recognizing that the authority of the Commission came from the law of war and the authority of Congress to "define and punish . . . offenses against the law of nations" which includes the law of war.

The dissenting justices considered that since the Commission was set up under the authority of the United States, the defendant was entitled to the guarantees of due process of law asserted in the Fifth Amendment. According to Justice Murphy, [1a]

> The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribed to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.

The Chief Justice, however, speaking for the Court, declined to hold that "due process" in the sense applicable to domestic tribunals applied to a tribunal established under international law. Except as Congress had expressly declared otherwise, the competence and procedure of such tribunals were, he thought, determined by international law [2] and, in the case of mili-

[1] *In re Yamashita*, 1946, 66 Sup. Ct. 340, text below, p. 432. Cited hereafter as Case.

[1a] Case, p. 353.

[2] There is nothing novel in this doctrine. The Supreme Court has held that the Constitutional Guarantees do not apply automatically to extraterritorial courts established in pursuance of treaties (*In re Ross*, 1890, 140 U. S. 453, 464), to courts in occupied foreign territory (*Neeley* v. *Henkel*, 1901, 180 U. S. 109, 122), or to military commissions (*Ex parte Vallandingham*, 1863, 1 Wall. 243; *Ex parte Quirin*, 1942, 317 U. S. 1). It has even been held that they do not automatically apply in annexed territories not yet incorporated into the United States (*Hawaii* v. *Mankichi*, 1903, 190, 197; *Dorr* v. *U. S.*, 1904, 195 U. S. 138) although the court "suggested" that "certain natural rights (including the right to due process of law) enforced in the Constitution by prohibition against interference with them" may be guaranteed in unincorporated territory but "what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence" are not. (Brown, J., in *Downes* v. *Bidwell*, 1901, 182 U. S. 244, 282).

tary commissions, it belonged in first instance to the commanding officer to apply that law. [2a]

> By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles (of War), Congress gave sanction, as we held in *Ex parte Quirin* (317 U. S. 1), to any use of the military commission contemplated by the common law of war. . . . Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.

The Court discussed the contentions of the defendant that a military commission could not be convened after cessation of hostilities; that the prosecution failed to charge a violation of the law of war; that the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits, and hearsay and opinion evidence; that the defendant was not given the same procedural advantages which a military commission would have accorded to an American soldier charged with the same offense; that advance notice had not been given to the neutral power representing the interests of Japan in the United States; and that the defense was not given time to prepare its case. The Court, however, found "that the Commission had authority to proceed with the trial, and in doing so did not violate any military, statutory or constitutional command," and consequently concluded that the proceedings were lawful. [2b]

The dissenting justices thought that the Court assumed that justice would be done if no positive law was violated. They objected, however, that this would leave the defendant with no constitutional protection at all. Justice Rutledge said: [2c]

> The Court does not declare expressly that petitioner as an enemy belligerent has no constitutional rights, a ruling I could understand but not accept. Neither does it affirm that he has some, if but little, constitutional protection. Nor does the Court defend what was done. I think the effect of what it does is in substance to deny him all such safeguards. And this is the great issue in the cause.
>
> For it is exactly here we enter wholly untrodden ground. The safe signposts to the rear are not in the sum of protections surrounding jury trials or any other proceeding known to our law. Nor is the essence of the Fifth Amendment's elementary protection comprehended in any single one of our time-honored specific constitutional safeguards in trial, though there are some without which the words "fair trial" and all they connote become a mockery.
>
> Apart from a tribunal concerned that the law as applied shall be an

[2a] Case, p. 350. [2b] P. 353. [2c] P. 378.

> instrument of justice, albeit stern in measure to the guilt established, the heart of the security lies in two things. One is that conviction shall not rest in any essential part upon unchecked rumor, report, or the results of the prosecution's ex parte investigations, but shall stand on proven fact; the other, correlative, lies in a fair chance to defend. This embraces at the least the rights to know with reasonable clarity in advance of the trial the exact nature of the offense with which one is to be charged; to have reasonable time for preparing to meet the charge and to have the aid of counsel in doing so, as also in the trial itself; and if, during its course, one is taken by surprise, through the injection of new charges or reversal of rulings which brings forth new masses of evidence, then to have further reasonable time for meeting the unexpected shift.

One may ask in what law did Justice Rutledge discover this essence of justice? The dissenting justices rested principally on the Fifth Amendment though it clearly was not intended to apply literally in courts exercising jurisdiction over the enemy.[3] Perhaps they had in mind the distinction made in the Insular Cases between "natural" and "artificial" rights specified in that amendment.[4] They would have been on firmer ground if they had sought standards established in international law.

That law is to be found, according to the Statute of the International Court of Justice (Art. 38), in international conventions, international customs, general principles of law recognized by civilized nations, judicial decisions and text writers. From these sources arbitral tribunals have assumed that standards can be found determining what constitutes a denial of justice.[5]

According to the practice of international law, Japan is entitled to protest and demand reparations from the United States if General Yamashita was denied justice in his trial. In fact, the Potsdam Declaration of July 26, 1945, acceptance of which by Japan on August 10, 1945, brought hostilities to an end, declared that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." This agreement was cited by the Court[5a] and, like all international agreements, is to be interpreted by standards of international law. It would seem, therefore, that in the Yamashita case the Supreme Court should apply the standards on the basis of which an international tribunal would decide whether justice was denied by the military commission. The Court did in fact utilize various sources of international law but it made little effort to discover the standards by which that law determines whether justice has been denied.

[3] It has been held that Constitutional guarantees do not prevent condemnation without compensation of enemy property in prize courts (*The Prize Cases*, 1862, 2 Black 665), or even in ordinary courts (*Miller* v. *U. S.*, 1870, 11 Wall. 268, 307; *U. S.* v. *Chemical Foundation*, 1926, 272 U. S. 1, 11).

[4] Note 2 above.

[5] "The propriety of governmental acts should be put to the test of international standards." Neer case (*U. S.* v. *Mexico*, 1927, Opinion of the Commissioners, p. 71; Green Hackworth, *Digest of International Law*, Vol. 5, p. 528.

[5a] Case, p. 345.

It is clear that international law sets less precise standards of justice than does due process of law in the United States Constitution. The civilized countries of the world vary in their technical rules. Some require juries in criminal cases, others do not. Some prefer an inquisitorial procedure, others a litigious procedure. Some, especially those utilizing juries, have rigorous rules of evidence, others leave the court a wide freedom to examine and weigh every sort of evidence. Some will not admit criminal liability unless the offense and its penalty were very precisely defined by law before the act was committed, others leave the tribunal a considerable latitude to find criminal liability and determine penalties on the basis of general definitions of offences and principles of law. International law cannot apply the technicalities of any one system of municipal law but must discover the general principles underlying all civilized systems of law and the customs inherent in international practice as evidenced by conventions, diplomatic discussions, and opinions of international tribunals and text writers. Professor Edwin Borchard, after noticing that diplomatic practice and arbitral decisions "have established the existence of an international minimum standard to which all civilized states are required to conform under penalty of responsibility," writes:

> But the existence of the standard and its service as a criterion of international responsibility in specific instances by no means give us a definition of its content. Frequent reference to it may easily give rise to the erroneous inference that it is definite and definable, whereas the variability of time, place and circumstance makes it even less precise than the term "due process of law," which has also with the passage of time added substantive content to its procedural controls. The international standard is compounded of general principles recognized by the domestic law of practically every civilized country, and it is not to be supposed that any normal state would repudiate it or, if able, fail to observe it. Referring to its procedural aspects, Mr. Root in 1910 characterized it as "a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world." [6]

Among definitions of denial of justice from the procedural aspect the following may be noted:

> The state is responsible on the score of denial of justice . . . when the tribunals do not offer the guarantees which are indispensable to the proper administration of justice.
>
> The state is likewise responsible if the procedure or the judgment is manifestly unjust, especially if they have been inspired by ill-will towards foreigners as such, or as citizens of a particular state. [7]

A state is responsible if an injury to an alien results from a denial of

[6] "The Minimum Standard of the Treatment of Aliens," in *Proceedings of the American Society of International Law*, 1939, p. 61.

[7] Institute of International Law, 1927, this JOURNAL, Vol. 23 (1929), *Special Supplement* p. 229.

justice. Denial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment. An error of a national court which does not produce manifest injustice is not a denial of justice.[8]

In exercising jurisdiction under this Convention, no State shall prosecute an alien who has not been taken into custody by its authorities, prevent communication between an alien held for prosecution or punishment and the diplomatic or consular officers of the State of which he is a national, subject an alien held for prosecution or punishment to other than just and humane treatment, prosecute an alien otherwise and by fair trial before an impartial tribunal and without unreasonable delay, inflict upon an alien any excessive or cruel and unusual punishment, or subject an alien to unfair discrimination.[9]

Everyone has the right to have his criminal and civil liabilities and his rights determined without undue delay by fair public trial by a competent tribunal before which he has had opportunity for a full hearing. The state has a duty to maintain adequate tribunals and procedures to make this right effective.

Everyone who is detained has the right to immediate judicial determination of the legality of his detention. The state has a duty to provide adequate procedures to make this right effective.

No one shall be convicted of crime except for violation of a law in effect at the time of the commission of the act charged as an offense, nor be subjected to a penalty greater than that applicable at the time of the commission of the offense.[10]

Commenting on international practice as evidenced by the awards of arbitral tribunals and treaties, Borchard writes:

> While military law, operating in time of war only, gives military officers and courts a greater discretion in the matter of arrest, detention and imprisonment than is accorded to civil authorities in time of peace, they must nevertheless comply with the requirements of due process of law. Treaties usually provide for due process of law in the litigation, civil or criminal, to which the respective citizens of the contracting states are parties, by stipulating for free access to courts, formal charges, an opportunity to be heard, to employ counsel, to examine witnesses and evidence, and a guaranty of essential safeguards against a denial of justice.[10.1]

Did the trial of General Yamashita measure up to these standards? It is not proposed to examine the questions in detail, but some remarks may be pertinent in regard to the complaints made by the defendant.

[8] Harvard Research in International Law, Draft Convention on Responsibility of States, Art. 9, this JOURNAL, Vol. 23 (1929), Special Supplement, p. 173; Hackworth, Vol. 5, p. 527.

[9] Harvard Research, Draft Convention on Jurisdiction with respect to Crime, Art. 12, this JOURNAL, Vol. 29 (1935), Supplement, p. 596.

[10] Statement of Essential Human Rights by committee representing principal cultures of the world appointed by the American Law Institute, 1944, Arts. 7, 8, 9.

[10.1] *Diplomatic Protection of Citizens Abroad*, 1919, p. 100.

(1) Could a military commission be convened after hostilities were over for trial of breaches of the law of war by enemy persons? On this point the court examined international law and concluded: [10a]

> No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commissions after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.

The dissenting justices made little objection on this point, though Justice Rutledge thought there was less necessity for a military commission after active hostilities were over. [10b]

(2) Did the prosecution charge acts which were violations of the law of war when committed? On this point the court said: "Obviously, charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment." [10c] Provisions of the Hague Conventions, arbitral awards, and opinions of United States Courts were cited, enabling the court to conclude, "that the allegations of the charge, tested by any reasonable standard, adequately alleges a violation of the law of war and that the commission had authority to try and decide the issue which it raised."

Justice Murphy argued at length, however, that a commanding officer could not be considered responsible for the action of persons in his command when in fact, because of the military situation at the time, he could not control or even know what they were doing. He said: [10d]

> The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice.

The issue is a close one, but it would appear that international law holds commanders to a high degree of responsibility for the action of their forces. They are obliged to so discipline their forces that members of those forces will behave in accordance with the rules of war even when military circumstances in considerable measure eliminate the practical capacity of the commander to control them.

(3) Does international law permit the submission of depositions, affidavits, and hearsay and opinion evidence in trials in military commissions? On this point the court did not adduce international practice but merely said: [10e]

> We cannot say that the commission, in admitting evidence to which objection is now made, violated any act of Congress, treaty or military command defining the commission's authority. For reasons already stated we hold that the commission's rulings on evidence and on the

[10a] Case, p. 346. [10b] P. 362. [10c] P. 349. [10d] P. 359. [10e] P. 351.

> mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require and as to that no intimation one way or the other is to be implied.

Justice Rutledge argued at length that admission of such evidence violates a fundamental principle of justice. It is clear, however, that international tribunals have hesitated to exclude any sort of evidence [11] and the courts in many civilized countries are similarly free in the admission of evidence leaving it to the judges to appreciate the weight that should be attached to the materials. [12] Such evidence has been commonly admitted in military tribunals although in American courts martial certain limitations are imposed by statute. It is not believed that admission of such evidence constitutes a denial of justice in international law.

(4) Does international law require that an enemy be given the same rights as a national tried for the same offense?

The argument that under Article 63 of the Geneva Prisoners of War Convention, prisoners of war are entitled to the same procedure as would be applied to an American soldier in similar circumstances was dealt with by the tribunal on the basis of interpretation of the convention. It held that Article 63 referred to offenses committed while the individual was a prisoner of war, not to earlier violations of the law of war. The dissenting justices gave a broader interpretation to this article. Irrespective of the interpretation of the particular article, it is to be noted that denial of justice in international law has frequently been interpreted to require, as a minimum, treatment of aliens equal to that of nationals. It may be questioned, however, whether international law requires the application of this principle in military commissions. The enemy can, apart from specific convention, claim only the international standard even if the national is given more. [13]

(5) Does the Geneva Convention (Article 60) require notice to the protecting power before trial of a prisoner of war? The Court held that this Article, like Article 63, referred only to trials for offenses committed while the individual was a prisoner of war. The prosecution had charged that General Yamashita had violated the law of war by trying American prisoners of war without notifying the protecting power, an inconsistency emphasized by the defense. The court dealt with the point in a footnote pointing out that it was not clear that the trials authorized by General Yamashita had dealt with

[11] Manley O. Hudson, *The Permanent Court of International Justice, 1920-1942*, p. 571.

[12] "With responsibility for the ascertainment of facts vested in professional judges, the stress will be shifted from the crude technique of admitting or rejecting evidence to the more realistic problem of appraising its credibility." C. T. McCormick, "Evidence," in *Encyclopedia of the Social Sciences*, Vol. 5, p. 646. See also A. H. Feller, "Evidence, Modern Civil Law," in same.

[13] Only "unreasonable," "unfair," or "arbitrary" discriminations against aliens are forbidden. See Harvard Research, Draft Convention on Responsibility of States, Art. 5, this JOURNAL, Vol. 23 (1929), Special Supplement, pp. 147, 184; American Law Institute, Essential Human Rights, Art. 17; United Nations Charter, Art. 1, par. 3; notes 7, 9 above.

violations of the law of war before the individuals were prisoners, and that, in any case, this charge was not an element in General Yamashita's conviction. [13a]

(6) Was the defense given a reasonable opportunity to prepare its case after the charges were known? The defendant was arraigned on October 8, 1945, and served with a bill of particulars specifying sixty-four items. The trial began on October 29th and a supplemental bill of particulars with fifty-nine more specifications was filed by the prosecution. Copies had been given the defense three days earlier. Several motions of defense counsel for a continuance were denied, and sentence was pronounced on December 7th. According to Justice Rutledge the burden of the defense under these circumstances was not only "tremendous," but was "impossible." [13b]

On this point the Court said nothing except that "Congress by sanctioning trial of enemy aliens by military commissions for offenses against the law of war had recognized the right of the accused to make a defense," [13c] and "we hold that the commission's rulings on evidence and on the mode of conducting these proceedings against petitioner are not reviewable by the courts, but only by the reviewing military authorities." [13d] In holding that certain trials authorized by General Yamashita and conducted without proper opportunity to defend could be charged as offenses, the Court said: "It is a violation of the law of war, in which there could be a conviction if supported by evidence to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense." [13e] Inadequate opportunity of defense counsel to prepare its case would seem to be a denial of justice under international law. [14] The rules of court for the Nuremberg trial required thirty days after lodging of indictment before trial began and the tribunal implied that if any new defendants were added that period of time must be permitted. [15]

Examining the case as a whole, it would appear that due process of law was accorded in the sense that under international law Japan would not have sufficient ground for asserting that its national had been denied justice, though an international tribunal might sustain that assertion on the ground that the defense was not given sufficient time to prepare its case. Examination of the points urged by the defense suggests that the standards of international law defining denial of justice are unfortunately vague. There has been a great deal of writing on this subject, and many arbitral decisions and treaty provisions, but more concrete exposition of procedural requirements would be desirable. While this is a field which can be developed by precedents, such as those being established by the International Military Tribunal at Nuremberg, the United Nations Commission on human rights may also be able to make important contributions. QUINCY WRIGHT

[13a] Case, p. 352. [13b] P. 368. [13c] P. 345. [13d] P. 351. [13e] P. 353. [14] Notes 8–11 above.

[15] Rule 2a and statement of Presiding member, Opening Session, Berlin, Oct. 18, 1945; Record, Session, Nuremberg, Nov. 14, 1945. The Geneva Prisoner of War Convention, Art. 60, requires notification of charges and specifications to the protecting power at least three weeks before the opening of the trial.