led to uncertainty and confusion. There has been a tendency for states to accept collective procedures through the League of Nations and the United Nations for according general recognition. Further development of this tendency would add considerably to precision in applying international law.[27]

QUINCY WRIGHT

INTERNATIONAL LAW AND NATIONAL LEGISLATION IN THE TRIAL OF WAR CRIMINALS —THE YAMASHITA CASE

Since the decision of the United States Supreme Court in the case of General Yamashita, denying application for leave to file a petition for a writ of *habeas corpus,*[1] and the subsequent execution of the sentence of the Military Commission, there has been some effort to create opinion against the legality of the proceedings. Recently one of the counsel assigned for the defense has published a book entitled *The Case of General Yamashita.*[2] The argument is based largely, although not entirely, upon the dissenting opinions of Justices Murphy and Rutledge. It is not intended here to discuss the fairness of the trial nor to recapitulate the grounds upon which the Supreme Court held that the Military Commission was lawfully created and that the failure to give advance notice of the trial to the neutral Power (Switzerland) under Article 60 of the Geneva Convention did not divest the authority and jurisdiction of the Commission. However, the arguments now made against the legality of the proceedings are largely based on national legislation and this requires some comment from the point of view of international law.

It has not been sufficiently recognized that Congress, by sanctioning the trial by military commissions of enemy combatants for violations of the laws of war, has not attempted to codify the law of war. In *Ex parte Quirin,*[3] the Supreme Court held that Congress in the exercise of its powers to define and punish offenses against the law of nations had recognized the military commission as an appropriate tribunal for the trial and punishment of offenses against the law of war. The Articles of War[4] enacted under this authority declare (Article 15) that the Articles shall not be construed as depriving military commissions of concurrent jurisdiction in respect of offenders or offenses that, by statute or by the law of war, may be triable by such military commissions. Thus

[27] Lauterpacht, Recognition in International Law, p. 402; Graham, The League of Nations and the Recognition of States, p. 34.

[1] In the Matter of the Application of General Tomouki Yamashita, 66 Supreme Ct. Rep. 340 (1946). This JOURNAL, Vol. 40 (1946), p. 432.

[2] A. Frank Reel, The Case of General Yamashita (University of Chicago Press, 1949). A Memorandum in reply was issued by Brigadier General Courtney Whitney in mimeograph form from General Headquarters, Tokyo, November 22, 1949.

[3] *Ex parte* Quirin (1942), 317 U. S. 1; this JOURNAL, Vol. 42 (1948), p. 152.

[4] 10 U. S. C. §§ 1471–1593.

Congress did not attempt a codification but had incorporated as within the pre-existing jurisdiction of military commissions all offenses which are defined as such by the law of war. It thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention, to which the United States and the Axis Powers were parties.

From the point of view of international law relating to the trial of combatants for violations of the law of war, it is important to distinguish between jurisdiction and procedure applicable to the trial of two classes of persons subject to military law, viz.: (1) members of the Army, and personnel accompanying the Army, and (2) enemy combatants. As the Supreme Court pointed out, Congress gave sanction in its recognition of military commissions to traditional jurisdiction over enemy combatants unimpaired by provisions of national legislation contained in the Articles of War, so far as such offenses and jurisdiction are contemplated within the common law of war. In other words, Congress sanctioned the use of the military commission for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not apply. Article 2 defines the persons subject to and entitled to claim the benefits of the Articles of War as being the members of the Army and personnel accompanying the Army, while Article 15 declares that military commissions have concurrent jurisdiction over both army personnel and enemy combatants.

It is undoubtedly true that by international agreement granting the benefits of national legislation, such as the Articles of War of the United States, a military tribunal may be bound to accord the same benefits to an enemy combatant as are afforded to members of our own forces. General Yamashita urged that by virtue of Article 63 of the Geneva Convention of 1929, he was entitled to the benefits afforded by the 25th and 38th Articles of War. Article 63 of the Geneva Convention provides that "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." This is an instance where national legislation has been incorporated as part of an international agreement so that it becomes unimportant to consider whether the provision has become part of customary international law. This interpretation results from an analysis of Articles 45–67, which deal with "Penalties Applicable to Prisoners of War." These Articles define the nature of these offenses and the penalties to be imposed. The context of the articles of the Convention incorporated into the Articles of War gives a comprehensive description of the substantive offenses which prisoners of war commit during their imprisonment, the penalties which may be imposed and the procedure by which guilt may be ad-

judged and sentence pronounced. The accused was a prisoner of war at the time of his trial, but he was not charged with any crime committed after hostilities had ceased but only with offenses during the conduct of the war before his arrest.

General Yamashita, as Commanding General in the Philippine Islands, was charged with permitting the perpetration of a long list of massacres and mistreatment of men, women and children, unarmed noncombatant civilians, without cause or trial. The facts and circumstances were set out in the specifications with great particularity of time and place. His main defense was that he had neither ordered any of these acts nor had knowledge of them. However, the widespread and continuing nature of these acts, together with the warning of General MacArthur given at the time of his landing on Leyte that the Japanese military authorities in the Philippines would be held immediately liable for any harm which might result from failure to observe proper treatment of the civilian internees or noncombatants, justified the conclusion of his personal responsibility for failure to take proper precautions to prevent the excesses of his troops. The fact that a Supreme Commander could be held responsible for such excesses even though not committed in his presence had already been envisaged at the close of World War I in the report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties.[5] The Commission listed as part of the charges to be brought for violations of the laws and customs of war, among others, the following:

> (c) Against all authorities, civil or military, belonging to enemy countries, however high their position may have been, without distinction of rank, including the heads of states, who ordered, or with knowledge thereof and with the power to intervene, abstained from preventing or taking measures to prevent, putting an end to or repressing, violations of the laws or customs of war (it being understood that no such abstention should constitute a defense for the actual perpetrators). . . .[6]

The reservations made by the United States representatives did not affect this part of the report except so far as to object to the inclusion of heads of state. The reservations emphasized, however, that the accused "should have knowledge of the commission of the acts of a criminal nature and that he should have possessed the power as well as the authority to prevent, to put an end to, or repress them." It is curious to observe that the two Japanese members of the Commission were willing to go further than the American members, because they signed the report without *any* reservations.

[5] This JOURNAL, Vol. 14 (1920), p. 95.

[6] Historical Survey of the Question of International Criminal Jurisdiction, United Nations (1949), U.N. Doc. A/C.N.4/7/(Rev.1); this JOURNAL, Vol. 14 (1920), p. 121.

The Governments of the United States, France, the United Kingdom and the Soviet Union concluded an agreement on August 8, 1945, in London, providing for the establishment of an International Military Tribunal for the trial of war criminals,[7] to which nineteen other governments of the United Nations subsequently adhered. The agreement contained a charter annexed to and forming an integral part of the agreement containing various provisions for the fair trial of defendants and for the expeditious conduct of proceedings. The terms of this agreement followed in many respects the recommendations of the Commission of 1919 and were substantially adopted by General MacArthur as Supreme Commander for the Allied Powers under whose mandate the trial of Yamashita was held. General MacArthur subsequently reviewed the proceedings and approved the sentence.

The regulations governing the procedure for the trial directed that the Commission should admit such evidence "as in its opinion would be of assistance in proving or disproving the charge or such as in the Commission's opinion would have probative value in the mind of a reasonable man." It has long been recognized that military commissions are not bound by the ordinary rules of evidence, but, in the absence of statute, may prescribe their own rules so long as they "act in accordance with the principles of justice, honor, humanity, and the laws and usages of war."[8] It was doubtless intended by Congress to adopt a different procedure in trials of Army personnel but not of enemy combatants for offenses against the customary laws of war. The "due process" clause of the Fifth Amendment had already been held by the Supreme Court not to be applicable to military trials of enemy combatants.[9]

The limitations of an editorial comment prevent an extended appraisal of a trial lasting nearly six weeks with a record of over four thousand pages and over four hundred exhibits. General Yamashita was tried chiefly for crimes against noncombatants committed on a scale so vast that the accomplishment to be hoped for as a result of the trial ought to be far removed from any mere satisfaction of vengeance or even of retributive justice but as a deterrent against similar conduct in the future.

ARTHUR K. KUHN

FREEDOM OF COMMUNICATION ACROSS NATIONAL BOUNDARIES

International lawyers would be gravely delinquent in their duties if they were not giving the most serious thought to the ways and means by which the existing rules of law may be developed and extended to meet the present crisis. Within less than five years of the establishment of the United Nations the system of collective security has broken down and a new bal-

[7] This JOURNAL, Supp., Vol. 39 (1945), p. 257.

[8] Charles Fairman, Law of Martial Rule (2nd ed., 1943), pp. 264–265.

[9] *Ex parte* Quirin, *loc. cit.*, at p. 41.