

ASIOKA, MISAO et al.

(15 DEC 1947)

(162423)  
PART 2 OF 2

2000

An interpreter read the original in Japanese of "Exhibit 5", appended, marked "Exhibit 6."

The accused did not desire to recross-examine this witness.

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness was duly warned and withdrew.

The prosecution rested.

Commander Martin E. Carlson, a counsel for the accused, read a written plea in abatement, appended, marked "Q."

The judge advocate replied.

The commission announced that the plea was denied.

Commander Martin E. Carlson, a counsel for the accused, read a written plea in abatement, appended marked "R."

The judge advocate replied.

The commission announced that the plea was denied.

The defense began.

Mr. Karasawa, Takami, a counsel for the accused, stated he would waive the reading in Japanese of the request for judicial notice.

An interpreter read the request for judicial notice in English as follows:

The defense respectfully requests the commission to take judicial notice of the following:

1. Article 61, Articles for the Government of the United States Navy:  
"Imitation of trials: offenses in general.--No person shall be tried by court martial or otherwise punished for any offense, except as provided in the following article, which appears to have been committed more than two years before the issuing of the order for such trial or punishment, unless by reason of having absented himself, or of some other manifest impediment he shall not have been amenable to justice within that period. (R.S., sect. 1684, art. 61; Feb. 25, 1895 c. 128, 28 Stat. 680)."

2. The fact that Palau Islands were mandated to Japan on 17 February 1920 and occupied until 2 September 1945.

3. The Fifth Amendment to the Constitution of the United States:  
"AMENDMENT V--CAPITAL CRIMES; DUE PROCESS.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,



liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

4. Articles 60 and 63, Geneva Convention, 27 July 1929:

"Article 60. At the opening of a judicial proceeding directed against a prisoner of war the detaining power shall advise the representative of the protecting power thereof as soon as possible and always before the date set for the opening of the trial..."

"Article 63. 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."

5. The fact that neither Italy nor Bulgaria have ratified the Hague Convention of 1907.

6. Articles of War 25 and 38:

"Sec. 1496. Depositions: when admissible (Article 25.) A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or a military board, if such deposition be taken when the witness resides, is found, or is about to go beyond the State, Territory, or district in which the court, commission, or board is ordered to sit or beyond the distance of one hundred miles from the place of trial or hearing, or when it appears to the satisfaction of the court, commission, board, or appointing authority that the witness, by reason of age, sickness, bodily infirmity, imprisonment, or other reasonable cause, is unable to appear and testify in person at the place of trial or hearing; Provided, That testimony by deposition may be adduced for the defense in capital cases. (June 4, 1920, c. 227, subchapter II, section 1, 41 Stat. 792.)"

"Sec. 1509. President may prescribe rules (article 38). The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall, in so far as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be so prescribed: Provided further, That all rules made in pursuance of this article shall be laid before the Congress annually. (June 4, 1920, c. 227, subchapter II, Section 1, 41 Stat. 794.)"

7. Section 454, Naval Courts and Boards:

"454. Limitation when a deposition is used. -- In any case where a deposition is used in evidence by the prosecution by reason of the fact that oral testimony can not be obtained, as authorized by article 68, A.G.N., the maximum punishment which may be imposed shall not extend to death or to imprisonment or confinement for more than one year.

"Also, as a matter of policy, where a deposition has been used by the prosecution in the trial of a commissioned or warrant officer, the maximum punishment adjudged should not extend to dismissal.

"These limitations apply to all cases, whether or not the trial is for an offense for which a limitation is otherwise prescribed. Where a deposition does not enter into proof of all the specifications, the limitation applies only to those specifications into which it enters."

8. Regulations governing Military Life (November 8, 1943, Army Ordinance No. 16).

"General principle.

5. Military discipline is the life-blood of the military forces, therefore military discipline must always be promoted in the military forces. The proof of military discipline being promoted is exemplified in that the superiors and the subordinates lay the true principle of the military force in their hearts regardless of time or place, that military duty is executed with zeal and that orders are carried out without fail. Obedience is an essential fact in order to maintain military discipline; therefore it is vital that superiors are obeyed with heart and soul, and that their orders are implicitly carried out so as to have it become a habit. And then, obedience should flow out of the spirit of loyalty and fostered to the extent that even under the densest showers of bullets one sacrifices his life for his country and obeys the command of his superior most faithfully. And in order to realize the foregoing, the superiors themselves must obey orders and set an example of obedience."

"Chapter II. Obedience.

No. 9. The obedience of a subordinate to one's immediate superior must in all occasions be most strict.

No. 10. The way of obedience must be adhered to between the senior superiors in direct line or those who are not in the relation of command and the newly appointed subordinates as far as their duties allow.

No. 11. Orders must be obeyed respectfully and carried out immediately. On any occasion, to argue upon its propriety or to question its cause, reason, and the like is not allowed. When the newly received orders and the previous ones vary, patiently state this and request instruction.

No. 12. To express to the superiors with a sincere feeling of assisting one's superior points which one is fully convinced will benefit the armed forces is the duty of all military personnel, particularly the officer. In expressing this, however, it is imperative that it is done in an orderly manner. Moreover, even if one differs in opinion with the matters already decided by the superior, one must efface oneself and endeavour to promote the intention of the superior with heart and soul.

9. Japanese Army Criminal Code, Chapter 4, Crimes of resisting Orders.

"Article 57. One who resists the superior officer's orders or who is not subordinate to them, shall be condemned to such penalties as follows:

1. In the face of the enemy, he shall be condemned to death or a life term or above ten years confinement.
2. In war times or in an area under martial law, from above one year to ten years confinement.
3. In other cases, under five years confinement."

10. Japanese Criminal Code, particularly the following articles:

- Chapter I Article 1
- Chapter II Article 85
- Article 86
- Article 87
- Article 88

11. German relinquishment of sovereignty over islands in the Pacific.

12. Treaty of Versailles, June 28, 1919, particularly Article 119.

13. Marriage laws of the British Empire.

14. Laws pertaining to British nationality and citizenship.



The judge advocate objected to the commission taking judicial notice of item 8 unless the matter was made accessible in authentic form. Objection was also made to items 9, 10, 13, and 14, on the ground that they were foreign laws and in accordance with Section 309 of Naval Courts and Boards must be proved the same as any other fact. Item 12 was objected to because the commission was not furnished with the substance of Article 119 of the Treaty of Versailles.

The accused replied to the objections of the judge advocate.

The commission announced that it would take judicial notice of items 1 through 7 and item number 11.

The defense requested that the commission adjourn until 9 a.m., tomorrow, Saturday, December 20, 1947. *JK*

The commission announced that the request was granted.

The commission then, at 11:10 a.m., adjourned until 9 a.m., tomorrow, Saturday, December 20, 1947.

SIXTH DAY

United States Pacific Fleet,  
Commander Marianas,  
Guam, Marianas Islands.  
Saturday, December 20, 1947.

The commission met at 9 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,  
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States  
Army,  
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United  
States Army,  
Major Andrew I. Lyman, U. S. Marine Corps,  
Lieutenant Commander John S. Cheredes, Medical Corps, U. S. Navy, members,  
and Lieutenant Commander Joseph A. Regan, U. S. Navy, and  
Lieutenant James P. Kenny, U. S. Navy, judge advocates.  
Archie L. Haden, junior, yeoman first class, U. S. Navy, reporter.  
The accused, their counsel, and the interpreters.

The record of proceedings of the fifth day of the trial was read and  
approved.

No witnesses not otherwise connected with the trial were present.

Commander Martin E. Carlson, a counsel for the accused, read a written  
request for judicial notice, appended, marked "S."

The judge advocate objected to the commission taking judicial notice of  
items two and three on the ground that they were foreign law and must, in  
accordance with Section 309 of Naval Courts and Boards, be proved like any  
other fact. JH

The accused made no reply.

The commission announced that it would take judicial notice of item one  
of the request for judicial notice by the accused, viz, the Treaty of Ver-  
sailles, particularly Article 119.

Ajioka, Misao, an accused, was, at his own request, duly sworn as a  
witness in his own behalf.

Examined by the judge advocates:

1. Q. Are you an accused in this case?
- A. Yes.

Examined by the accused:

2. Q. When did you enter the Japanese army?
- A. 20 January 1933.
3. Q. Have you ever had duty on Palau?
- A. I have.



4. Q. During what periods of time did you serve there?  
A. From September, 1943, to December, 1945, when I was demobilized.
5. Q. During December of 1944 to what unit were you attached?  
A. South Sea Kempeitai, Palau Kempei Detachment.
6. Q. What was your duty around December of 1944?  
A. Around the end of November 1944, the South Sea Kempeitai Headquarters and the Palau Kempeitai Detachment moved to Shisui-Zan, therefore I was ordered to protect the buildings and provisions that were left behind. At this time I was the senior member of this group. I was a warrant officer but a warrant officer is not an officer.
7. Q. Was there any name for this group that remained?  
A. For convenience's sake, it was called the Gasupan Kempeitai Detachment but this was not an official detachment. *JK*
8. Q. Was this made an official detachment later?  
A. Yes.
9. Q. When?  
A. Around February, 1945, when several detachments were established in various areas on Babelthuap, Gasupan Detachment was also made an official detachment.
10. Q. Then, to whom did the personnel that were left belong?  
A. We belonged to the First Kempeitai Detachment or Company and were under the command of Commanding Officer Captain Nakamura, Kazuo.
11. Q. Do you know a person by the name of Charlie Smith?  
A. I do, but, that is, the other persons called him by that name but I do not know whether he was or not.
12. Q. How did you know this person, Smith?  
A. Around the middle of December, 1944, First Lieutenant Sano of the headquarters ordered me as follows, "Until further orders, keep him here temporarily," therefore I only kept him here temporarily.
13. Q. What happened to Smith after that?  
A. Finally, by orders of Commanding Officer Nakamura, he was executed.
14. Q. How do you know about the execution of Smith?  
A. I was at the scene of the execution.
15. Q. When did you first learn about the execution of Smith?  
A. In the afternoon of the day of the execution, First Lieutenant Nakamura, with one assistant Kempei, came and said, "Smith is to be executed." That is the first I knew of the execution.
16. Q. Did Nakamura say whose order it was?  
A. He said it was an order of Commanding Officer Miyazaki.
17. Q. Before this conversation with Nakamura, did you order anyone in regard to this execution?  
A. I absolutely did not order anyone. *JK*

18. Q. What did you reply when Captain Nakamura said he was to be executed?  
A. I replied saying that, "It is a pity and therefore please send him back home."

19. Q. What did Nakamura say to this?  
A. He said, "It is an order of the commanding officer, so the execution will be performed."

20. Q. What did you say?  
A. I replied, "As he is a pitiful old man, please let him return to his home. We have lived our lives together in the air raid shelter every time we were bombed, so please send him back home." But First Lieutenant Nakamura did not listen to my request. This was the most I could do for him.

21. Q. Did you do anything at the scene of the execution?  
A. Captain Nakamura did not order me to do anything so I did not do anything. Furthermore, I had no authority and in regard with the execution of Smith I had nothing to do with it. Captain Nakamura testified that I told Yamada to shoot, but I did not give such an order.

The judge advocate moved that the words "Furthermore, I had no authority and in regard with the execution of Smith I had nothing to do with it. Captain Nakamura testified that I told Yamada to shoot, but I did not give such an order" be stricken from the record on the ground that they were not responsive. *JK*

The commission directed that the words be stricken out.

22. Q. Did you, at the scene, order anyone to do anything?  
A. No, I did not order anyone.

23. Q. After Captain Nakamura gave the order to shoot, what happened?  
A. Captain Nakamura ordered Yamada to shoot but Yamada hesitated for a while, then Captain Nakamura said to him, "What are you hesitating about? Hurry up and shoot." So Yamada was feeling for his pistol with his hand and then I heard a shot.

Defense counsel moved that this answer be stricken from the record on the ground that one accused was testifying against his co-defendant.

The judge advocate replied.

The commission announced that the motion was denied.

Cross-examined by the judge advocate?  
*JK*

24. Q. Didn't you see who fired that shot?  
A. No, the plane was flying over at that time and furthermore I did not want to see this old man shot.

25. Q. Whose pistol fired the shot?  
A. I do not know but I believe it was the pistol of Yamada.

26. Q. How many people were at the scene of this execution?  
A. I recall that there were four.



27. Q. Were you carrying a pistol?  
A. I was.

28. Q. Was Nakamura carrying a pistol?  
A. I recall that he carried a pistol.

29. Q. Was Yamada carrying a pistol?  
A. Yes.

30. Q. Did you, yourself, receive any orders to shoot Smith?  
A. No.

31. Q. Who actually shot Smith?  
A. I recall it was Yamada.

32. Q. On the afternoon of the execution, was there a grave prepared for Smith's body?  
A. On this day I went to Misuh Village early in the morning and came back to the remaining group at Gasupan around noon. When I came back I heard from Corporal Nakagawa what happened while I was away. I heard that a prisoner, I believe it was Inuzuka, went into the navy provision storage house and stole canned goods and that they put palm leaves over the air raid shelter.

The witness was directed to answer the question.

A. (Continued) Yes.

33. Q. Who prepared the grave?  
A. As Corporal Nakagawa told me that while I was away Captain Nakamura telephoned and ordered to dig a grave of certain size behind the Sumida Unit, I believe Corporal Nakagawa dug this.

34. Q. Didn't you, yourself, order Nakagawa to dig this grave?  
A. Absolutely not.

35. Q. Didn't you, yourself, order Uemura to go along with the grave digging party so they would know where the grave was?  
A. I have absolutely not given any such order.

36. Q. Didn't you, yourself, at the scene of the execution, order Yamada to shoot Smith?  
A. I absolutely did not.

37. Q. How long had Yamada been at the Gasupan Detachment at the time of the execution?  
A. I believe he was there about twelve or thirteen days before.

38. Q. And who was the officer in charge of the Gasupan Kempeitai Detachment?  
A. There was no officer.

39. Q. Aren't you a warrant officer?  
A. I am a warrant officer.

40. Q. Then what officer was in charge of the Kempeitai Detachment at Gasupan?  
A. Commanding officer of the First Kempeitai Detachment, Captain Nakamura.

41. Q. Who was the senior man at the Gasupan Kempeitai Detachment?

This question was objected to by the accused on the ground that it was repetitious.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. I was.

42. Q. Are you not a warrant officer?

A. I am a warrant officer.

43. Q. Were you not the warrant officer in charge of the Gasupan Kempeitai Detachment?

A. I did not command the Gasupan Detachment. I do not have authority to command. It was commanded by the commanding officer of the First Detachment, Captain Nakamura.

The accused did not desire to reexamine this witness.

The commission did not desire to examine this witness.

The witness made the following statement:

When I received the charges and specifications I was very surprised. I did not know any law and I did not know that this was going to be as big a trial as it is. I was so overwhelmed when I received the charges that it made me cry.

The witness resumed his status as an accused.

Yamada, Kiyoshi, an accused, was, at his own request, duly sworn as a witness in his own behalf.

Examined by the judge advocate:

1. Q. Are you an accused in this case?

A. Yes.

Examined by the accused:

2. Q. When did you enter the Japanese army?

A. 10 April 1940.

3. Q. Have you had duty on the Palau Islands?

A. Yes.

4. Q. During what periods of time did you serve there?

A. From December, 1943, to December, 1945, when I was demobilized.

5. Q. During December of 1944, to what unit were you attached?

A. South Sea Kempeitai, Palau Kempeitai Detachment.



6. Q. Do you know a person by the name of Charlie Smith?

A. Yes. Other persons called him by that name but I do not know whether he was or not.

7. Q. When did you know him?

A. I came to know him about the middle of December, 1944, when I went along with First Lieutenant Sano of headquarters to take Smith in custody for suspicion of spying.

8. Q. What did you do after you captured Smith?

A. By orders of First Lieutenant Sano I escorted Smith to the Gasupan Kempeitai Detachment and kept him there.

9. Q. What happened to Smith after that?

A. By orders of Captain Nakamura I shot him with a pistol.

10. Q. Please explain how it came about that you shot Smith?

A. Iwamoto and I went to Mizuho on patrol and then returned. The next day Captain Nakamura with one assistant Kempei came to the Gasupan Detachment. Captain Nakamura talked to Ajioke. I was in the same room working. Captain Nakamura said to me, "Yamada, you come, too." I followed him to the air raid shelter and he said to me, "Smith will be sent home." Therefore I had Smith get ready and made him follow Nakamura.

11. Q. Then what happened?

A. I thought that Smith was going to be sent home but from the road the group went toward the jungle. I felt queer and I thought and knew definitely for the first time that Smith was going to be executed. *JK*

12. Q. What happened then?

A. Captain Nakamura said to Warrant Officer Ajioke, "Where is the hole?" But the hole could not be found. Near Captain Nakamura there was a hole which looked like an air raid shelter so Captain Nakamura said, "It will be done here," and ordered me to bring Smith and make him sit down. I made Smith sit down near the hole.

13. Q. What happened then?

A. Captain Nakamura suddenly ordered, "Yamada, shoot!" My head was in a daze and I was confused. Then Captain Nakamura ordered as if to scold me, "What are you hesitating about? Hurry up and do it." *JK*

14. Q. Then what happened?

A. I was like a person in a dream and as I pointed the barrel of the pistol toward Smith, at that same time it went off.

The commission then, at 10:15 a.m., took a recess until 10:30 a.m., at which time it reconvened.

Present: All the members, the judge advocates, the accused, their counsel, and the interpreters.

Stewart R. Smith, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

Yamada, Kiyoshi, the witness under examination when the recess was taken, entered. He was warned that the oath previously taken was still binding, and continued his testimony.

(Direct examination continued.)

15. Q. The person who ordered you to shoot, was it only Nakamura?  
A. Yes.

16. Q. Was there anyone else who shot besides you?  
A. No. In the statement I submitted to the investigator I wrote that Captain Nakamura shot first but I was temporarily angry and I wrote this absolutely false statement. In regard to this, I was told by Captain Nakamura not to breathe a word of it. But when I met him at Sugamo he said that he had told everything of this incident. I was very angry. The reason I took the stand today is to correct this statement. By this statement I wrote I was bothered by my conscience because of this statement and have suffered ever since.

Cross-examined by the judge advocate:

17. Q. When did Nakamura tell you not to breathe a word of this?  
A. After the war.

18. Q. Was it before the 24th of June, 1947?  
A. Before.

19. Q. Then, when you wrote this statement on 24 June 1947 you were not telling the truth?

This question was objected to by the accused on the ground that it was repetitious.

The judge advocate replied.

The commission announced that the objection was not sustained.

A. Yes.

20. Q. And on the 9th of December, 1947, when you swore that everything in this statement was true, you were not telling the truth then, either, were you?

A. Yes.

21. Q. Were you telling the truth when you said that Ajioke didn't also tell you to shoot?

A. Yes.

22. Q. Are you now telling the truth then for the first time?

This question was objected to by the accused on the ground that it was argumentative and unfair to the witness.

The judge advocate withdrew the question.

23. Q. When, for the first time, did you learn that Smith was to be executed?

A. When Captain Nakamura came to the detachment I heard it.



24. Q. Tell us about that?

A. Captain Nakamura came to the detachment with one assistant Kempei. At that time he talked to Ajioka. I was in the same room. Captain Nakamura at that time said, "By orders of the commanding officer, Smith will be executed."

25. Q. And whom did Nakamura say this to?

A. Warrant Officer Ajioka.

26. Q. And on that day, where was Smith being kept confined?

A. In the air raid shelter.

27. Q. Who took Smith from the air raid shelter?

A. Captain Nakamura.

28. Q. Did Captain Nakamura go personally to the air raid shelter and bring Smith out?

A. The air raid shelter did not have any doors. Captain Nakamura told Smith to come out by waving his hands, and he came out.

29. Q. Were you with Captain Nakamura at this time?

A. Yes.

30. Q. Was Ajioka with you at this time?

A. Yes.

Reexamined by the accused:

31. Q. You testified that the statement you wrote before was not true. But isn't it the part where you stated that Captain Nakamura shot was not true and isn't it true that the rest is?

A. The place where I said that Captain Nakamura shot first is not true but all the rest is true.

Recross-examined by the judge advocate:

32. Q. Is it true that Nakamura told Ajioka to shoot?

A. When I wrote this statement my mind was not settled and I thought that it was thus. But in thinking it over quietly then I do not think such a thing happened.

33. Q. Is it true in the statement where you say that you don't know if the bullet hit Smith?

A. That is true.

34. Q. Is it true when you say in the statement that Captain Nakamura said to Warrant Officer Ajioka, "Thank you for your trouble"?

A. Yes.

The accused did not desire to further examine this witness.

The commission did not desire to examine this witness.

The witness said that he had nothing further to state.

The witness resumed his status as an accused.

The defense rested.

Commander Martin E. Carlson, a counsel for the accused, made a motion for directed acquittal in the case of the accused Ajioke, Misao, on the ground that there had been no evidence which could convict him of either Charge I of murder, or Charge II of neglect of duty.

The judge advocate replied.

The commission announced that the motion for<sup>a</sup> directed acquittal in the case of the accused Ajioke, Misao, was denied. JK

The accused requested that the commission adjourn until 9 a.m., Monday, December 22, 1947, to allow for the preparation of final arguments.

The commission announced that the request was granted.

The commission then, at 11 a.m., adjourned until 9 a.m., Monday, December 22, 1947.



SEVENTH DAY

United States Pacific Fleet,  
Commander Marianas,  
Guam, Marianas Islands.  
Monday, December 22, 1947.

The commission met at 9:45 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,  
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States  
Army,  
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United  
States Army,  
Major Andrew I. Lyman, U. S. Marine Corps,  
Lieutenant Commander John S. Cheredes, Medical Corps, U. S. Navy, members,  
and Lieutenant Commander Joseph A. Regan, U. S. Navy, and  
Lieutenant James P. Kenny, U. S. Navy, judge advocates.  
Stewart R. Smith, yeoman first class, U. S. Navy, reporter.  
The accused, their counsel, and the interpreters.

The record of proceedings of the sixth day of the trial was read and approved.

No witnesses not otherwise connected with the trial were present.

The accused, Ajioaka, Misao, read a written statement, in Japanese, in his defense, appended marked "T."

An interpreter read an English translation of the statement of the accused, Ajioaka, Misao, appended marked "U."

The accused, Yamada, Kiyoshi, read a written statement, in Japanese, in his defense, appended marked "V."

An interpreter read an English translation of the statement of the accused, Yamada, Kiyoshi, appended marked "W."

The commission then, at 10:30 a.m., took a recess until 10:45 a.m., at which time it reconvened.

Present: All the members, the judge advocates, the accused, their counsel, and the interpreters.

Stewart R. Smith, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

The judge advocate read his written opening argument, appended marked "X."

An interpreter read a Japanese translation of the judge advocate's opening argument.

The accused made a request for an adjournment until 9 a.m., Tuesday, December 23, 1947, in order to complete the preparation of final arguments.

The commission announced that the request was granted.

The commission then, at 11 a.m., adjourned until 9 a.m., tomorrow, Tuesday, December 23, 1947.



EIGHTH DAY

United States Pacific Fleet,  
Commander Marianas,  
Guam, Marianas Islands.  
Tuesday, December 23, 1947.

The commission met at 9 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,  
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States  
Army,  
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United  
States Army,  
Major Andrew I. Lyman, U. S. Marine Corps,  
Lieutenant Commander John S. Cheredes, Medical Corps, U. S. Navy, members,  
and Lieutenant Commander Joseph A. Regan, U. S. Navy, and  
Lieutenant James P. Kenny, U. S. Navy, judge advocates.  
Archie L. Haden, junior, yeoman first class, U. S. Navy, reporter.  
The accused, their counsel, and the interpreters.

The record of proceedings of the seventh day of the trial was read and  
approved.

No witnesses not otherwise connected with the trial were present.

Mr. Sadamu Sanagi, a counsel for the accused, read a written argument,  
in Japanese, appended marked "Y."

An interpreter read an English translation of Mr. Sanagi's argument,  
appended marked "Z."

Mr. Hideo Kuwata, a counsel for the accused, read a written argument in  
Japanese, appended marked "AA."

The commission then, at 10:10 a.m., took a recess until 10:30 a.m., at  
which time it reconvened.

Present: All the members, the judge advocates, the accused, their  
counsel and the interpreters.

Stewart R. Smith, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

An interpreter read an English translation of Mr. Kuwata's argument,  
appended marked "BB."

The commission then, at 11:15 a.m., took a recess until 2 p.m., at which  
time it reconvened.

Present: All the members, the judge advocates, the accused, their  
counsel, and the interpreters.

Archie L. Haden, junior, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

Commander Martin E. Carlson, a counsel for the accused, read a written argument, appended marked "CC."

The commission then, at 3 p.m., took a recess until 3:15 p.m., at which time it reconvened.

Present: All the members, the judge advocates, the accused, their counsel, and the interpreters.

Stewart R. Smith, yeoman first class, U. S. Navy, reporter.

No witnesses not otherwise connected with the trial were present.

The judge advocate read his written closing argument, appended marked "DD."

An interpreter read a Japanese translation of the judge advocate's closing argument.

The trial was finished.

The commission was cleared.

The judge advocate was recalled and directed to record the following findings:

As to the accused, Ajioaka, Misao:

The specification of the first charge proved in part, proved except the word "Sally", which word is not proved.

And that the accused, Ajioaka, Misao, is of the first charge guilty.

The first specification of the second charge not proved.

The second specification of the second charge not proved.

And that the accused, Ajioaka, Misao, is of the second charge not guilty; and the commission does therefore acquit the said Ajioaka, Misao, of the second charge.

As to the accused, Yamada, Kiyoshi:

The specification of the first charge proved in part, proved except the word "Sally", which word is not proved.

And that the accused, Yamada, Kiyoshi, is of the first charge guilty.

The commission was opened and all parties to the trial entered.



No witnesses not otherwise connected with the trial were present.

The commission announced its findings.

The commission then, at 4:35 p.m., adjourned until 9 a.m., tomorrow, Wednesday, December 24, 1947.

NINTH DAY

United States Pacific Fleet,  
Commander Marianas,  
Guam, Marianas Islands.  
Wednesday, December 24, 1947.

The commission met at 9 a.m.

Present:

Rear Admiral Arthur G. Robinson, U. S. Navy,  
Lieutenant Colonel Henry K. Roscoe, Coast Artillery Corps, United States  
Army,  
Lieutenant Colonel Victor J. Garbarino, Coast Artillery Corps, United  
States Army,  
Major Andrew I. Lyman, U. S. Marine Corps,  
Lieutenant Commander John S. Cheredes, Medical Corps, U. S. Navy, members,  
and Lieutenant Commander Joseph A. Regan, U. S. Navy, and  
Lieutenant James P. Kenny, U. S. Navy, judge advocates.  
Stewart R. Smith, yeoman first class, U. S. Navy, reporter.  
The accused, their counsel, and the interpreters.

The record of proceedings of the eighth day of the trial was read and  
approved.

No witnesses not otherwise connected with the trial were present.

Commander Martin E. Carlson, a counsel for the accused, made a motion  
in arrest of judgment on behalf of both accused on the ground that the evi-  
dence presented did not support the findings, on the ground of the matter of  
the jurisdiction of the commission, and on the ground of misjoinder of  
parties.

The judge advocate replied.

The commission announced that the motion was denied.

Commander Martin E. Carlson, a counsel for the accused, made the  
following statement:

We have no further evidence to introduce at this time in mitigation or  
extenuation. We do point out that the record already contains much evidence  
in mitigation in the form of testimony of witnesses and argument of defense  
counsel as to superior orders. If any petitions should be submitted in  
behalf of these accused at a later date, defense counsel will forward them  
to the convening and reviewing authorities.

The commission was cleared.



The judge advocate was recalled and directed to record the sentences of the commission as follows:

*The commission, therefore, sentences him, Ajioke, Moses, to be confined for a period of twenty-five (25) years.*

*The commission, therefore, sentences him, Yamado, Kiyoshi, to be confined for a period of twenty-five (25) years.*

*Arthur G. Robinson*  
Arthur G. Robinson,  
Rear Admiral, U. S. Navy, President.

*Henry K. Roscoe*  
Henry K. Roscoe,  
Lieutenant Colonel, Coast Artillery Corps, United States Army, Member.

*Victor J. Garbarino*  
Victor J. Garbarino,  
Lieutenant Colonel, Coast Artillery Corps, United States Army, Member.

*Andrew L. Lyman*  
Andrew L. Lyman,  
Major, U. S. Marine Corps, Member.

*John S. Cheredes*  
John S. Cheredes,  
Lieutenant Commander, Medical Corps, U. S. Navy, Member.

*Joseph A. Regan*  
Joseph A. Regan,  
Lieutenant Commander, U. S. Navy, Judge Advocate.

*James P. Kenny*  
James P. Kenny,  
Lieutenant, U. S. Navy, Judge Advocate.

The commission was opened. All parties to the trial entered.

The commission then read and pronounced the sentences to the accused.

The commission, having no more cases before it, adjourned to await the action of the convening authority.

*Arthur G. Robinson*

Arthur G. Robinson,  
Rear Admiral, U. S. Navy, President.

*Joseph A. Regan*

Joseph A. Regan,  
Lieutenant Commander, U. S. Navy, Judge Advocate.

*James P. Kenny*

James P. Kenny,  
Lieutenant, U. S. Navy, Judge Advocate.



公知、事實トテ採用ニ関スル異議 <sup>対 英</sup>

弁護人 唐澤高美

換事ハ次、諸異項目ニツイテ公知、事實トテ之ヲ  
執ラレンコトヲ要求シタ

弁護側ハ本件、行ハルタ昭和19年12月29日当時  
アメリカ合衆國ト日本帝國ト戦争状態ニツキトシテ  
事實及パラオ諸島ガマリアナ司全部、管理轄地  
域、一部デアルトシテ事實ニ対シ委員會ガ公知  
ノ事實トテ採用セラルルコトニハ異議ハナイ。

然レバ他、諸項目ニツイテハ次、理由ニヨリ異議ヲ申  
立テル

一、1945年7月26日、ポツダム宣言第10項  
ニツイテ

昭和19年12月29日頃停戦ニツキテ英人  
スミスヲ殺害シタコト本件ハ純然タル  
日本國內ニ於ケル事件デツテ所謂戦争  
犯罪デハナイ。従而戦争犯罪デナイ本件  
ニ対スルポツダム宣言第10項ハ明カニ  
無關係デアル。

二) 俘虜、待遇 = 同スル 1929年7月27日、ジュネハ條約及日本政府がスイス政府へ通じて俘虜及適用に得ル限は之を拘留セル民間人 = 對スル條約、規定を適用スルヲ承認シト云フ事實 = ツイテ。

本件、英人スミス (被害者タル) は、昭和19年12月29日當時日本軍隊 = ヲ俘虜トシ取扱ハレタリ。英事側は起訴狀 = 於テ俘虜トシテputハ主張シテ居ラリ。從而俘虜 = 置ザル英人スミスヲ殺害セル本件 = 俘虜、取扱ニ關スル規定ヲ適用セリタル英事側、主張ハ明ラカ = 不為ナル。所謂俘虜タル資格、交戦者及一定、従軍者 = 限リテ認めラレルモノデアル。本件英人スミス、如キ何等之等ニ關係ナキ者ハ、俘虜タル資格ガナリ。故ニ本規定ハ、本件ニ、無關係ナル事ニ於テ異議ヲ申立テ。

三) 1907年10月18日 Hague 條約 23條C = ツイテ。本規定ハ、敵が投降セル場合、規定デアルヲ英人スミス、如ク、パラオ諸島 = 永住ニテ居リ全然敵性ヲ有セザル者 = 對スル本件



＝ 31 規定ヲ適用セシムルハ 明ラカニ  
不當ナル事件ニ 無関係ナル故ニ  
異議ヲ申立ル。

#### 四 陸戦法規第四章ニツイテ

本規定ハ 非交戦者ヲモ俘虏ト認ムル場合、  
規定ナルハ 之ハ 交戦者カ 戦争、必要上  
特殊、場合ニ 認メラルモノナル。

例ハ 人民蜂起、属スル場合ニ 於テ  
人民ヲ煽動シ若クハ 之カ 指揮ニ 當ル  
ニ 通ル 有力ノ 地方民間人ヲ 陸防的  
措置トシテ 抑留スル場合ナル。

ハル 場合ニ 之等、者ヲ 戦争、必要上  
抑留スルハ 故ニ 之ヲ 俘虏トシ 取扱フテ  
可ト云フコトガ 屬スルヲ 得ル。 然レモ  
事件被害者 英人 スミスガ 果シテ 本事件當  
時カニ 状態ニ 於テ 抑留セラレタル  
ナルカ 否カハ 疑問ナル。

ハミナラス 本規定、如ク 或一部、國家ニ  
於テ 認メラルル 慣習ヲ以テ 事件被害  
等ニ 適用セシムルハ 斷ジテ 許セナシ  
従而 本規定、事件ニ 無関係ナルハ 故ニ 異議ヲ  
申立ラル。 (32)

Karasavak's objection

0027



OBJECTION TO JUDICIAL NOTICE  
DELIVERED BY KARASAWA, TAKAMI

The Judge Advocate requested the commission to take Judicial Notice of certain facts.

The defense counsel has no objection that the commission take judicial notice of the fact that a state of war existed between America and Japan at the time of the incident - December 1944, and that Babelthuap, Palau Islands is under the command of Commander Marianas.

But defense counsel objects to the others for the following reasons:

1. "Particularly paragraph 10 of the Potsdam Declaration of July 26, 1945." This incident which alleges that an Englishman, Smith, who was not a POW was murdered around 29 December 1944 is purely a domestic case; in other words, it is not a war crime. Therefore, Article 10 of the Potsdam Declaration is clearly irrelevant to this case which is not a war crime.

2. The Geneva POW Convention of July 27, 1929 and of the fact that Japan agreed through the Swiss Government to apply the provisions thereof to POW's under its control and as far as practicable to interned civilians.

An Englishman, Smith, the victim of this incident was not treated as a POW by the armed forces of Japan on about 27 December 1944. The Judge Advocate has not stressed that he was an POW in the charges. Therefore, it is clearly unjust to apply the clause concerning the treatment of POW to this incident which deals with the murder of an Englishman, Smith, who was not a prisoner. It is recognized that the qualification of a POW is that he engage in battle or be a specified camp-follower. A person who has no connection whatsoever, as the Englishman, Smith, in this incident, has none of the qualifications of a POW. Hence we object to this for the reason that this is clearly irrelevant to this case.

3. The Hague convention of October 18, 1907 especially Article 23(c). This clause is applicable only in the event the enemy surrenders. It is clearly unjust to apply this clause to this case which deals with the Englishman, Smith, who lived on Palau a good many years and who did not in any way engage in hostilities. Therefore, we object for the reason that this clause is irrelevant to this case.

Respectfully,

KARASAWA, Takami,  
Defense Counsel.

I certify the foregoing to be a true and complete translation of the original objection, to the best of my ability.

*Eugene E. Kerrick*  
EUGENE E. KERRICK,  
Lieutenant, U. S. Naval Reserve,  
Interpreter.

0029

OBJECTIONS TO THE REQUEST OF THE PROSECUTION FOR  
JUDICIAL NOTICE

By

Commander Martin E. Carlson, U. S. Naval Reserve

May it please the commission:

We object to the Commission taking judicial notice of the textbook, "Law of Land Warfare," Chapter IV, Prisoners of War, page 47, because judicial notice cannot be taken of such writings as are found in textbooks.

In CMO 267-1919, it was held that, "a court is not warranted in taking judicial notice of the existence of any essential elements unless they are so affirmatively and specifically set forth."

This rule is fully supported by the case of Pettibone v U.S. (148 U.S. 202) as follows: "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

CMO 36-1920 lays down the same rule and cites the same case, the case of Pettibone v U.S. 148 U.S. 202.

In CMO 5-1929 the following rule was published by the Judge Advocate General, "The judge advocate requested the court to take judicial notice of certain sections of Clark & Marshall's "Law of Crimes," but the record failed to show whether or not the court did in fact accede to such request.

While it is altogether proper for the judge advocate in his advice to the court or in his argument to call attention to and quote from standard textbooks, it is improper for him to ask the court to take judicial notice of such publications (Sec. 530, N.C.&B., 1923).

We object to the Commission taking notice of the fact that the Palau Islands are within the area of Commander Marianas area. We know of no judicial ruling which defines what is meant by the phrase Commander Marianas Area. It is immaterial and irrelevant. It is without definition.

Whether Palau Islands is within the area of Commander Marianas at this time is immaterial and irrelevant. What is important and to the point is whether it was within the Commander Marianas Area on December 29, 1944.

"0 (1)"

0030



What is more important however is what legal and judicial, and police powers did the United States of America or Commander Marianas have in the Palau Islands on December 29, 1944, because jurisdiction over crimes is not retroactive. The Constitution of the United States of America prohibits ex post facto laws..

To take judicial notice of these things so requested by the judge advocate is most prejudicial to the substantive rights of the accused.

For these reasons we object to the Commission taking judicial notice of these requests made by the judge advocate.

Respectfully,

*Martin Emilius Carlson*  
Martin Emilius Carlson  
Commander, U. S. Naval Reserve.

"0 (2)"

0031

OBJECTIONS TO INTRODUCTION OF DOCUMENTS IN EVIDENCE

By

Commander Martin E. Carlson, U.S.N.R.

May it please the Commission:

We refer the Commission to Section 2130 Authentication of documents page 570, Wigmore on Evidence, Volume 7:

"Most documents bear a signature or otherwise purport on their face to be of a certain person's authorship. Hence, a special necessity exists for separating the external evidence of authorship from the mere existence of the purporting document. A horse or coat contains upon itself no indication of ownership; when it is claimed that Doe wore it or rode it, all can appreciate that this element is missing and must be supplied by evidence. But a document purports in itself to indicate its authorship; and the perception that this element is nevertheless missing, and must still be supplied, is likely not to occur. There is a natural tendency to forget it. Thus it has constantly to be emphasized by the judicial requirement of evidence to that effect."

Wigmore could well have been sitting here because he continues:

"The original of a writing is usually presented to the tribunal 'in specie,' while other material objects are not required to be and seldom are brought into court (except such articles as the tools of a crime or the clothes of a victim); so that, in practice the most common opportunity for the operation of this aberrant tendency occurs for writings, visibly in existence and mutely suggesting that they are all that they purport to be. Thus the mental tendency is especially forcible, frequent, and misleading, where documents are involved.

For these two reasons, then, it has happened that the specific rules that have grown up concerning modes of authentication have come to relate to writings alone.

The general principal has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness (or execution) of it. In footnote 1 on page 570 there are many cases cited in support of these rules. I shall cite only a few: England 1810, Priel v Vanbatenberg, 2 Camp. 439 (the mere possession by def. of a receipt, in improved handwriting - here on a bill of exchange - not evidential.) U.S.: Federal: 1913 Oregon & Cal. R. Co. v. Grabissich, 9th C.C.A., 206 Federal 577; 1918, Mc Gowan v Armour, 8 C.C.A., 248 Fed. 676; 1928, Cook - O'Brien Const. Co. v. Crawford, 9th C.C.A. 26 Fed. 2d 574; Michigan: 1875, Mc Hugh v Brown, 33 Mich. 3 (note and mortgage not shown, executed, excluded).

"p (1)"

0032



For interesting cases of forged documents used to perpetrate a hoax and illustrating the importance of verifying authenticity, see the following: New York "Times", May 9, 1929, (forged complaint filed with the Interstate Commerce Commission to affect market prices); ibid April 13, 1924 (forged post-war diplomatic documents in Europe.)"

Wigmore continues by setting forth the opinion of Erskine in 1794, *Home Joek's Trial*, 25 How. St. Fr. 78.

Wigmore also sets forth the rule in the case of "1874 *Bronson, C.J.* in *Wilson v. Betts*, 4 Den. 201, 213; "In the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself. But when the signing becomes a matter of legal controversy, it must be established by proof."

And the rule in the case of: "1856, *Benning, J.*, in *Stemper v Griffin*, 20 Ga. 312, 320: "No writing can be received in evidence as a genuine writing until it has been proved to be a genuine one, and none as a forgery until it has been proved to be a forgery. A writing, of itself, is not evidence of the one thing, or of the other. A writing, of itself, is evidence of nothing, and therefore is not, unless accompanied by proof of some sort, admissible as evidence."

Since the judge advocate has not produced a witness to testify to the execution of this memorandum, we object to it being received into evidence.

This memorandum of itself is evidence of nothing and should not be admitted to prove this woman's husband was an Englishman.

In footnote 2, Section 2131, Wigmore, Ibid, the rules are laid down: "Note that in strictness the only kind of direct testimonial evidence to execution is that of a witness who saw the very act of writing."

The witness has not testified that she saw the memorandum signed. All she was able to state was the memorandum came from his brother but that was hearsay because she had never seen his brother.

Until there is evidence of the genuineness or execution of this memorandum, we object to it being received into evidence.

Respectfully,

*Martin Emilius Carlson*  
Martin Emilius Carlson  
Commander, U.S.N.R.

December 17, 1947.

"P (2)"

0033

PLEA IN ABATEMENT

Delivered by  
Commander Martin E. Carlson, U.S. Naval Reserve, Counsel for the Accused.

May it please the Commission:

Both of the accused hereby make this plea in abatement in order to bring to the attention of the Commission the fact that the affidavit of Ajioka, Misao and Yamada, Kiyoshi, introduced into evidence by the judge advocate to prove the controverted facts material to the issue, cannot be and affidavits are not admissible as to controverted facts material to the issue, that is records of court cannot be proved by affidavit.

We cite the following cases in support of our contention: Ala. Puckering vs Townsend, 118 Ala. 351, 23 S. 703; Ark. Western Union Tel. Co. vs Gillis, 89 Ark. 483, 117 SW 749, 131 Am. SR 115; Ga. Naples vs Hoggard, 58 Ga. 315; Ill. Murphy vs Schoch, 135 Ill. A. 550; Fankelstein vs Schilling, 135 Ill. A. 543; Austin State Bank vs Morrison, 133 Ill. A. 339; Hume etc. Mfg Co. vs Caldwell, 35 Ill. A. 492/aff 136 Ill. 163, 26 N.E. 599/; Quinn vs. Rawson 5 Ill. A. 130; Ind. Ohio etc., R. Co. vs. Levy, 134 Ind. 343, 32 N.E. 815; 34 N.E. 20; Kan. Johnston vs Johnson, 44 Kan 666, 24 P. 1098; Ky. May vs Williams, 109 Ky 682, 60 S.W. 525, 22 Ky. L. 1328; Phoenix Ins. Co. vs Lawrence, 4 Metc. 81 Am.D. 521; Newton vs. West, 3 Metc. 24; Talbot vs. Pierce, 14 B. Mon 158; Morton vs. Sanders, 2 JJ Marsh 192, 19 Am D. 128; Mo. Patterson vs Fagan, 38 Mo. 70; N. J. Staley vs. South Jersey Realty Co. (Sup) 90 A. 1042; Peer vs. Bloxham, 82 N.J.L. 288, 81 A. 659; Baldwin vs. F Flagg, 43 N.J. L 495; Cooper vs. Galbraith, 24 N.J. L 62; Pullen vs Pullen, 46 N.J. Eq. 318, 20 A. 393; Clutch vs. Clutch, 1 N.J. Eq. 474; N.Y. In re Eldridge, 82 N.Y. 161, 37 Am R. 558; Okl. Watkins vs. Geiser, 11 Okl. 302, 66 P. 332; Pa. Hoar vs. Mulvey, 1 Burn 145; Sturgeon vs. Faugh, 2 Yeates 476; Plankurson vs. Cave, 2 Yeates 370; Lilly vs. Kitzmiller, 1 Yeates 28; S.C. McBride vs. Floyd, 188 C.L. 209; Texas, Henke vs. Keller 50 Tex Co. L. 533, 110 S.W. 783; Wash. Graham vs. Smart, 42 Wash 205, 84 P. 824; W.Va. Herold vs. Crag 59 W.Va. 353, 53 S.E. 466; Peterson vs. Ankrom, 25 W.Va. 56; Tennant vs. Divine, 24 W.Va. 387; Ind. Kellog vs. Sutherland, 38 Ind. 154; Pa. Smith vs. Weaver, 41 Pa. Super 253, 256.

The judge advocate may correct this procedure from bringing into evidence affidavits to prove the records of the court or this Commission that is to prove the controverted facts material to the issue.

All of the accused pray that these affidavits of Ajioka and Yamada be stricken from the record and prays of judgment of the charges and specifications and prays that the charges and specifications be quashed.

Respectfully,

*Martin E. Carlson*  
Martin E. Carlson,  
Commander, USNR.

"Q"

0034



PLEA IN ABATEMENT

Delivered by Commander Martin E. Carlson, U. S. Naval Reserve, Counsel for the Accused.

May it please the commission:

The accused, Yamada, Kiyoshi, makes this plea in abatement on the ground of misjoinder of parties. We bring to the attention of the Commission the antagonistic defenses of the accused Yamada and Ajioka.

The accused Ajioka, has made a statement implicating the codefendant Yamada and the prosecution has offered this statement of Ajioka as evidence in this present trial.

In Wharton's Criminal Procedure volume I, page 411, the rule is laid down: "Where the defense of joint defendants are antagonistic, it is proper to grant a severance. And this is eminently the case where one joint defendant has made a confession implicating both and which the prosecution intends to offer on trial." Citing Com vs. James, 99 Mass. 438. The prosecution has offered the statement of Ajioka into evidence.

The accused, Yamada, therefore prays that this commission grant him a severance at this time from the accused Ajioka.

Yamada objects to trial in joinder with the accused, Ajioka.

The accused Yamada prays that the charges and specifications be quashed as against him.

Respectfully,

*Martin E. Carlson*  
Martin E. Carlson,  
Commander, USNR,

0035

REQUEST FOR JUDICIAL NOTICE

By

Commander Martin E. Carlson, USNR.  
Counsel for the Accused

The defense respectfully requests that the commission take judicial notice of:

1. Treaty of Versailles, June 28, 1919, particularly Article 119, which reads as follows:

"Germany renounces in favor of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions."

and Article 22, that "Under the Treaty of Versailles, 1919, the inhabitants of several areas were allowed to choose by vote to what state the territory should belong and thereafter to choose their allegiance usually involving residence in the territory of their choice." (See Articles 85 and 113 of the Treaty of Versailles.)

2. The England Law Digest revised for 1941 edition by Messrs. William Charles Crocker, Solicitors of the Supreme Court of Judicature, London, E., C. 4 in Martindale-Hubbell Law Directory, particularly the subject Aliens: and

The British Nationality and Status of Aliens Act 1914, particularly that part which defines an alien, "As any person who does not come within the definition of a British subject born within His Majesty's Dominions and Allegiance, or (5) to whom a certificate of naturalization has been duly granted."

Marriage Laws - British Empire

Laws pertaining to British nationality and

"The Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose and satisfies the Secretary of State: (a) That he has either resided in his Majesty's Dominions for a period of not less than five years in the manner set out below, or been in the service of the Crown for not less than five years within the last eight years before the application (b) that he is of good character and has an adequate knowledge of the English language and (c) that he intends if his application is granted either to reside in his Majesty's Dominions or to enter or continue in the services of the Crown. The residence required by (a) is residence in the United Kingdom for not less than one year immediately preceding the application and previous residence either in the United Kingdom or in some other part of His Majesty's Dominions for a period of four years within the last eight years before the application."

And that a person who becomes a British subject by naturalization is subject to all the obligations, duties, and liabilities to which a natural born British subject is entitled or subject and as from the date of his

"S (1)"

0036



naturalization has to all intents and purposes the status of a natural born British subject.

The wife of a British subject is a British subject and the wife of an alien although prior to her marriage a British subject becomes by her marriage an alien.

The Secretary of State may revoke a certificate of naturalization if it has been obtained by false representation or fraud.

3. Law Reform (Married Women and Tortfeasors) Act, 1935, which became operative on August 2, 1935 as found in Martindale-Hubbell, Ibid under Husband and Wife.

4. Marriage laws of the British Empire, particularly as set forth in Martindale-Hubbell, Ibid under subject Marriage which reads in part as follows:

"Marriage may be celebrated in one of the following ways: (1) by special license (2) by common license (3) by publication of banns (4) by certificate of the Superintendent Registrar, either (a) with or (b) without license.

If either party to a marriage has been previously divorced, a certified copy of the decree absolute must be produced at the ceremony.

Prohibited Marriages and Annulment - Marriage is null and void ab initio if at the time of the ceremony any of the following disabilities existed (1) existing prior marriage and also (7) where the formalities were defective.

5. The American Banana Co. v United Fruit Co. (1909) 213 U.S. 347, 29 S. Ct. 511, 53 L. Ed. 826 16 Am. Cas. 1047, which stated the accepted principle *hec loci, lex fori*, "the general and almost universal rule is that the character of an act as unlawful must be determined wholly by the law of the country where the act is done."

(See Wilson on International Law, Hornbook Series, Third Edition Jurisdiction over Person-Nationals, Section 48).

6. The treaty relating to their Insular Possessions and Dominions in the Region of the Pacific Ocean by the United States, British Empire, France, and Japan. (See Wilson on International Law, Hornbook Series, Third Edition, Treaties and other Agreements, Sec. 82, pages 216 and 217 and 43 U.S. Stat. 1646.

Respectfully,

*Martin E. Carlson*  
MARTIN E. CARLSON  
Commander, U.S. Naval Reserve  
Counsel for the Accused.

"S (2)"

0037

# 陳述書

陸軍省資料 米軍 捕

私、私自身、爲「護人」トシ「護人」ニシタリ、  
スガ、尚茲「若干補足的」自身、陳述「サセ」戴キ  
度ト存ジマス

英人「思ハル」スミス「ト」言フ人「射」ト言フ命令  
ニ「反対」シタ私、心境「就」テ申ヒマス

昭和十九年九月米軍「ガ」バ「ン」島「上陸」シテ  
以來「バベル」ダフ「島」対スル「爆撃」熾烈「ヲ」

極メ「マ」シタ殊「カ」バ「ン」附近「島」中央「在」  
リ「定」態「最」モ「猛烈」ニ「テ」シタ 昭和十九年十

一月「定」態「隊」本部「及」第一「隊」ハ「カ」バ  
ン「ニ」發ル「ガ」バ「ン」島「師團司令部」ト共

「カ」バ「ン」島「瑞」島「シヤ」ダ「ル」内「移轉」シ  
テ以來「カ」バ「ン」方面「対スル」定態「依然」

激シ「カ」バ「ン」島「毎日」何「十回」ト「ナク」ハ「定」  
態「退避」シテ「生命」危険「震」テ「居」タ「リ」



アリス 残留員にホシノ僅カノ病人バカデシタ  
レバガズン、ガ弱病バ、シヤグル、ヨリ健康ナ  
所ダシタカラデス  
私が捕来ナ為害世隊ガガズン、セフ弱病バ、移  
動シタヤ「ガズン」ニ残留スルフトナリ、其處、先住  
者ニナタタ、運命、神、ヨリサテアシタカモ知ラセ  
残留者、合意隊、テ、ナク唯病人、集リ、過ぎセ  
ンデシタ 吾々ハ、少シシカ役ニ立タイデ、吾々、合隊  
長ナ付中尉、時々手傳、為健康ナ人ヲ送、タ  
程デアリス

昭和十一年二月マデ吾々ガズン、ニ残留シタ病人、中村  
中尉、指揮スル第一連兵分隊、直接指揮下ニ在  
リ、且同分隊、一部ガデアリス

運命、イタラカ其、時害世隊、調直中、三人  
人ヲ安全ニ收容スル為、指示ヲ受テ、吾々、人々  
ヲ引取リスシタ、私、人々言ハシタ事以外、人々  
ガ誰デアルカ知ラセシタ、私、人々以前、人々  
達ヲ見タコトガアリス、人々セ、ヤ、ドイツ人ヲト  
聞キマシタガ、私、人々分リスシタ

モ人々、英國人ト言ハシガ私ニ参リセシタ  
何故ナリ彼、土人ノ様ニ見エタカラス私、彼一  
比、爲住ニデタト聞キタ様ニ思ヒマス未定ナ  
ガタガ御聞ギニナツタ通リ此、貴國、女ト結  
婚シタト言ヒテサマス。私、彼ニ、譯シ、子供居  
ルト田舎ニマス。彼、英國人デアルカドカ、私、知リ  
マス。が彼、妻、英國人デナイト知リマス。  
ソ、當時我々、ホニ體ニナルト英人モ他、人モ  
我々ト一語ニ付ホニ塚内ニ退避シ、驚多、動、  
様ニ一個所ニ集リテ、<sup>ニ</sup>「<sup>ニ</sup>」ト抱キ合ヒテ  
前ニ、自、死、危險ニ處テ居タデ下リ、戰時  
於テ、骨肉ヲ分ケタ親子デサエ死ヌ時、堪  
シ、思、<sup>ニ</sup>「<sup>ニ</sup>」ガ當リ前デス。然、我々防、<sup>ニ</sup>「<sup>ニ</sup>」  
退避シタ者、生死ヲ一ニシテ、イデ、<sup>ニ</sup>「<sup>ニ</sup>」上官  
下官、聞、<sup>ニ</sup>「<sup>ニ</sup>」モ日ナキ人、外國人、主、<sup>ニ</sup>「<sup>ニ</sup>」觀念  
アリ、<sup>ニ</sup>「<sup>ニ</sup>」唯同ジ様ニ死フ。思、<sup>ニ</sup>「<sup>ニ</sup>」人間、<sup>ニ</sup>「<sup>ニ</sup>」  
相扶、<sup>ニ</sup>「<sup>ニ</sup>」相勵、<sup>ニ</sup>「<sup>ニ</sup>」合フ、<sup>ニ</sup>「<sup>ニ</sup>」人類、<sup>ニ</sup>「<sup>ニ</sup>」愛、<sup>ニ</sup>「<sup>ニ</sup>」結、<sup>ニ</sup>「<sup>ニ</sup>」付、<sup>ニ</sup>「<sup>ニ</sup>」  
ラレ、<sup>ニ</sup>「<sup>ニ</sup>」親子、<sup>ニ</sup>「<sup>ニ</sup>」兄弟、<sup>ニ</sup>「<sup>ニ</sup>」以上、<sup>ニ</sup>「<sup>ニ</sup>」親、<sup>ニ</sup>「<sup>ニ</sup>」味、<sup>ニ</sup>「<sup>ニ</sup>」感、<sup>ニ</sup>「<sup>ニ</sup>」シ、<sup>ニ</sup>「<sup>ニ</sup>」イ、<sup>ニ</sup>「<sup>ニ</sup>」タ、<sup>ニ</sup>「<sup>ニ</sup>」デ、<sup>ニ</sup>「<sup>ニ</sup>」



マス、吾々、若シタコトハ唯オミシニ安全デア  
レカシト思フコトダケデシタ 此、氣持、激烈ナ  
戦斗ヲ経験サレタ事人ニアリ、女見各位、各々  
御諒解下サル所ト存ジマス。  
臨時、雖モ私、死、運命ヲ蒙ル、一省、所望  
蒙、中デ神、祈リ居リマス  
又人「スミス」、抑留中ニ私、彼ニ対シ、今中デ  
ミタ事、全ク人権の觀念ヲ離シタ人類愛  
氣持ヲ校シ、女來ニタケ居居反々事、  
面倒ニ見サセマス、從ニ處刑、満日、私、中  
村大尉カラ「スミス」、處刑、問ハサタ時、大  
シ、可哀想デス、伏見、シヤ、辭、行、マセカ  
ト哀願、改メシタ、然、中村、准、ミス、  
處刑、サルダト私、言、タダケデタ、處刑、現  
場、私、が、處刑、ニ、参加、シ、カ、タ、コト、モ、全ク、私  
に、蒙、中、デ、体験、シ、タ、人、類、愛、氣、持、カラ、ス  
ミス、ヲ、校、ス、ノ、ニ、心、ビ、カ、シ、タ、カラ、デア、リス、然、レ、ニ  
モ、拘、ス、私、が、微、力、ニ、シ、テ、ス、ミス、ノ、命、ヲ、助、ケ、ル

トノ由來ナカタコト リ今同發令ニ思ヒ長傳  
情達ヘナイ次第デアリヌ

貴方ガタノ事件ニ就キ 諸言ヲ聞キテ、中村  
宮崎、命令ヲ自行スル爲、命令ヲ受スル爲ニ  
現場ニ居タリト 所又山田モソコ外ニテ、ナカ  
トノ良ヲ解リト思ヒヌ

山田ハ中村ニ可成相違シ、彼モ亦「スミス」射  
ツ、ガ嫌デ、ソコ 射「ヨロ」ヲメケル、

中村ニ一發、彈丸ガ発射サレ、中村、倒イタ、  
一發、銃聲ダデ、スミ「ス」ニ「ヨロ」メ、

落タレタ 中村ニ其處ニ居タ人達ニ「エ」カ  
ツセル、極ニ急シ、ソコ細テ「ス」リ、

スミス「ス」ガ射ヌタ時、吾「ス」ニ三人共現場ニ居  
タ、

私ハ「アメリカ」人「ヤ」方ガ命「ス」セ、ソコ「オ」グデ、

中村ガ私ニ「自」日書「署名」セタ「時間」ニ

カリ後、檢事ガ私ニ起訴状ヲ持テ來ヌ

ソコガ私ニ「自」日署名「ス」セ、私ハ「署名」

ガ「オ」ラ「イ」カラ「オ」グデ、中村、爲「署名」スベキ



デ、カクダ、デス、シ、デ、檢事、カ、シ、ヨリ、更ニ、最  
英文ヲ持ツテ来テ、署名シ、ロト、云ツタ、時、私ハ  
斷リ、シ、タ、私ハ、檢事ニ、ドウシ、テ、中村、ガ、裁判、サ、ナイ  
ハ、カ、ト、聞キ、ミ、シ、タ、ガ、檢事、ハ、シ、シ、ニ、答、ヘ、シ、マ、セ、  
デ、シ、タ、後、ニ、ナ、リ、テ、私ハ、中村、ガ、私ト、山田、ニ、對、シ、  
證言、シ、ル、證人、ト、言フ、事、ヲ、知、リ、シ、タ、ス、ミ、ニ、  
ト、言フ、人、ヲ、射、ツ、ト、言フ、テ、裁判、サ、ル、様、ニ、ナ、リ、  
ハ、私ト、山田、運命、ナ、リ、

ス、ミ、ス、イ、コ、ト、ヲ、英人、ト、人、ニ、言、フ、テ、私ハ、彼、人  
ニ、見、エ、ミ、

假令、彼、誰、デ、ア、リ、ト、私ハ、彼、處、ニ、居、シ、タ、時、  
ハ、所、定、之、家、中、ヲ、尋、ル、處、モ、ナ、ク、現、シ、臥、テ、居、タ  
ス、ミ、ニ、オ、モ、リ、同情、シ、合、シ、テ、居、シ、タ、私ハ、シ、時  
キ、リ、スト、最、神、ノ、大、ス、ク、リ、ス、セ、デ、ア、リ、マ、セ、デ、  
シ、タ、然、レ、モ、田、主、人、デ、アル、私、デ、サ、エ、此、ハ、ス、ミ、ニ、  
ト、言、フ、人、ニ、同情、シ、テ、居、リ、ス、デ、ハ、何、故、ニ、ミ、ス、  
ッ、助、ケ、ナ、カ、リ、タ、ト、責、メ、ガ、タ、ハ、何、故、ニ、ミ、ス、  
ウ、

當時、時、中、佐、ガ、處、刑、ス、ル、コ、ト、ニ、米  
シ、タ、ト、中村、ガ、證言、シ、ル、人、ヲ、一、准、尉、ニ、過、ギ、サ、イ、  
私、ガ、助、ケ、ル、コ、ト、ガ、出、来、ル、ト、責、メ、ガ、タ、ハ、ナ、リ、

當ニ皇國目ニ對シ、<sup>ニ</sup>カ 中村、宣旨ニ反  
對出来ナカッタ證言ニシタ中村、自來  
反對出来ナカッタヤ。私が反對シタ  
トハキリ言ヒシタ中村、<sup>ニ</sup>准尉ニ過ギナイ  
私が昭和十一年十一月、<sup>ニ</sup>ガニ、<sup>ニ</sup>金邊隊  
指揮官タトナエ證言ニシタ、デス。

コナコト、アリヤンヤ本部が移動シタトキ  
々が<sup>ニ</sup>准尉ニ過ギナイ、<sup>ニ</sup>過ギナイト他、證人  
達<sup>ニ</sup>證言ニシタ<sup>ニ</sup>オハシ<sup>ニ</sup>ナカッタヤ。

山田、私、中村、指揮下ニ下ツタ、デス。

私、アメリカ人理解出来ヌト<sup>ニ</sup>刑<sup>ニ</sup>求<sup>ニ</sup>テ  
シタ。日、中、人、中ニ<sup>ニ</sup>理解出来ヌ人モ  
アリ。

昔亦違、日本人が全部ヲ殺  
トオ考ヘニナリシ、私、人殺シ、罪ヲ裁  
判ス、<sup>ニ</sup>デヤ、<sup>ニ</sup>日、私、<sup>ニ</sup>犯<sup>ニ</sup>事、<sup>ニ</sup>アリヤン  
シタ、<sup>ニ</sup>カラ、<sup>ニ</sup>私、<sup>ニ</sup>故<sup>ニ</sup>思、<sup>ニ</sup>處<sup>ニ</sup>刑<sup>ニ</sup>カ、<sup>ニ</sup>ナカ  
デス。

私、一度、人殺シ、<sup>ニ</sup>ナカッタ、<sup>ニ</sup>一度、<sup>ニ</sup>コトヲ  
殺ス、<sup>ニ</sup>コト、<sup>ニ</sup>ナ、<sup>ニ</sup>具、<sup>ニ</sup>自、<sup>ニ</sup>デス。



ソノ反對ニコレハ妙ナ話デスが殺人デ起訴サレタ私ハ  
二度モ人命ヲ救フ療養員サレタトカアルハス  
私ハ男デス然レド概事ガ起訴状ヲ持ッテ来テ君  
ハ裁判ニミタスベナラト云ツタキトモ我儘出末  
マセシタ 一 生ノ間今モコレイタ事ガナニ  
ソノ時ハカリハ我慢出末ズ泣イテアツシタ概事ガ  
行ツテハ毎々彼私ハ氣ガセイ／＼シタ  
私ハ自分一人デ非ハムコトガ出来タカデス  
ソレカラ「カルシ」中佐ト鍛田サンガ来テ君ハ公サ  
ナ裁判ヲ受ケルダロウト云来レテツシタ 彼等ハ  
私ハ辯護人デ私ハ自分言ヒ度イコトヲ言フ機  
會ガアルダロウト云ヒシタ  
今私ハ法廷ニミッタ居スモ貴方ガタ「他ニ言ヒ  
度イコトガアルカ」ト私ニ言ヒシタ 若シ貴方ガタ  
ガ私ノ言フコトヲ聞イテ下サルハナラ私ハアト少シ  
言ヒ度イコトガアリマス  
私ハソノ日殺人ヲ犯シタコトナク又私ハ山田射  
ツノヲ止メルコトガ出来ナカッタコトヲドウカ理解  
シテ下サイ 山田ハソウ言ヒシタ 山田ハ射ツノ

が嫌<sup>ダッタ</sup>ミヌ中村が命令<sup>ミタデ</sup>只射<sup>ミタダ</sup>ミヌ

後私軍隊生活ニシテ令サシ貴方がタニ知<sup>ミ</sup>ミ哉  
オ度イコトガアリヌ

私陸軍在職中次々三回褒賞ヲ受ケミタ  
之ニ關スル公武記録ニ取早<sup>ミ</sup>キ女来<sup>ミ</sup>セシ  
テ茲テ口頭テ申<sup>ミ</sup>セヌ

(イ) 昭和十五年夏京都市伏見區觀月橋下流  
宇治川畔ニ於テ洗濯中、先母が足<sup>ミ</sup>ニミテ急流  
ニテ流サレテ現認同所、約二百米下流ニテ  
河中ニ飛<sup>ミ</sup>ニ其先母、生命ヲ救<sup>ミ</sup>ルニシタ  
ソコテ私當時、隊長新見大佐ヨリ賞状  
及金一吋(十圓)ヲ受<sup>ミ</sup>テシタ

(ロ) 昭和十五年七月京都市伏見區御堂河原ニシテ  
野島ニシテ縣隊將校一名兼任、其意母  
ヲ絞殺<sup>ミ</sup>シタミ聞キ現場ニ参<sup>ミ</sup>テ同行シ同僚ト共  
ニ人工呼吸<sup>ミ</sup>ニシテ先母ヲ蘇生<sup>ミ</sup>セシメシタ  
ソコ事<sup>ミ</sup>タ當時、京都隊長中井大佐ヨリ  
金一吋(三圓)及賞詞ヲ受<sup>ミ</sup>テシタ



(ハ) 秋高御宝璽此際伏見宮に在りて、八月間御養  
 子に与へ玉ふ事、長期同分家ニ事終る事と言  
 へば、御事、通例アリニセシ。情、真面目、閑気  
 長々共ニ三年テ交代シ、各宝璽此際ヲ轉々  
 トスルモノアリニス。此、此、内務省此際ニ  
 眞面目ニ服従致シ、之、十三代分家長  
 ニハ、此、此、事、十三代分家長西村サハ  
 ミ、宝璽司令官格閣、陰謀者サ、賞杯一  
 銀杯一箇ヲ受領致シ、之、

家庭状況: 既婚 4人

私、家庭ニ妻（三十一歳）長男（四歳）が居リて  
私、後、自叙、百姓ノ子ト居リて、父が元来、何ノ財  
産モアリセザンデ、私が居リテ、タラシキ、来、に、収、入、が  
ナク、家、に、依、非、法、中、ニ、困、リ、居、リ、テ、  
最近、健康ヲ害シ、母、を、所、ニ、就、ク、状、況、デ、  
アリマス。

要員各位が御座います。御取計を賜

ハシコトヲ狼狽<sup>ハシ</sup>スル次第<sup>ハシ</sup>アリマス  
私<sup>ハシ</sup>年<sup>ハシ</sup>私<sup>ハシ</sup>信<sup>ハシ</sup>下<sup>ハシ</sup>サイ  
私<sup>ハシ</sup>ソノ日<sup>ハシ</sup>決<sup>ハシ</sup>テ殺人<sup>ハシ</sup>罪<sup>ハシ</sup>ヲ犯<sup>ハシ</sup>スセシテ

敬 白

昭和二十二年十一月二十二日

味 長 操



STATEMENT OF AJIOKA, MISAO, FORMER WARRANT OFFICER, IJA

Although I took the stand and testified in my own behalf, I would like to make this supplementary personal declaration.

1. My feelings when I objected to the order to shoot a person who was supposed to be an Englishman, Smith by name.

In September 1944, the American forces landed on Pelelieu, and their bombings over Babelthup intensified after that. Especially, Gasupan suffered under their most furious air raids, for it was located in the middle of that island. In November, 1944, headquarters and the First Detachment or Company of the Kempeitai, together with division headquarters, moved from Gasupan to the jungle of Shisuizan, because it was dangerous to remain there. Yet the air raids were still intense over Gasupan and those of us who remained there had to take shelter many, many times in the air raid shelter and shuddered in the face of the danger to our lives. Only a few sick persons remained, because Gasupan was a healthier place than the jungle of Shisuizan.

It must have been Fate that decreed that I should be too sick to be moved when the Kempeitai moved from Gasupan to Shisuizan and thus was the senior one left at Gasupan. Those of us who were left were not a detachment but a group of sick people. We were of little use so Lieutenant Nakamura, our company commander, had to send a healthy person to help us out from time to time.

Until February, 1945, we sick persons and whoever else might be at Gasupan were not a detachment but we were under the direct command and a part of the First M.P. Company commanded by First Lieutenant Nakamura.

Fate too, decreed that at this time the Kempeitai was instructed and turned over for safe keeping, pending investigation, three persons. I had never seen these three persons before. I didn't know who they were except for what I had been told. I was told that the couple, a man and woman, were Germans. I don't know.

The third person they said was an Englishman. I don't know because he looked like a native to me. I think they told me he had lived all his life in these islands. As you have heard in court, he was supposed to have been married to a native woman. I believe they had many children, all natives. If he were English, I really don't know, but I do know his wife was not English.

Every time we were bombed, this Englishman and the two Germans took shelter from the raids with us. We huddled together like frightened animals and held each other tightly and trembled because of danger of approaching death. In time of war, it is usual that even parents and their children will often die at different times and different places. But we, who were in the same air raid shelter, were sharing our lives and deaths. We never made any discrimination between the Japanese and foreigners. We helped and encouraged each other as human beings, all afraid of death, and, being united by this great love of humanity, we felt drawn close together as if we had been in blood relations. Our only thought was for our mutual safety. You members of the commission who are military men and who have experienced many furious battles will understand this feeling of ours. Every moment we expected that death would be our fate as we prayed together in the air raid shelter.

"U (1)"

0051

While the Englishman, Smith, was in custody, I treated him without any racial discrimination and with love of humanity as I stated before, and looked after his living conditions and food as best as I could. Therefore, when I heard of the execution from Lieutenant Nakamura on that day, I said, "This is a pity. Can you release him?" All that Nakamura said to me was, "He is to be executed." But I did not take part in the execution. This is because I could not bear to kill Smith because of my feeling of love of humanity which I had experienced in that air raid shelter. In spite of that I was powerless. I feel very regretful that I could not save Smith's life, and now I can do nothing but express my sorrow by going into mourning.

You have heard the testimony of what happened. You can understand that with Nakamura there to order and carry out the orders of Colonel Miyazaki there was no way out for me and for Yamada.

Poor Yamada! He too, did not want to shoot Smith and he too, tried to avoid it.

Suddenly a shot was fired. One shot is all I heard. Smith tumbled into a hole. Nakamura ordered persons to shovel dirt over him and it was all over.

I can not understand American ways because there were three of us there when Smith was shot. So when the judge advocate brought the charges and specifications to me a couple of hours after Commander Ogden had had me sign an affidavit, I refused to sign for them. I shouldn't have wanted to sign for Commander Ogden because I did not understand English and so when the judge advocates came again with more English for me to sign I refused.

I asked the judge advocates to explain it to me but they could not explain why Nakamura was not being tried for this. Later I found out and I heard him testify against me and Yamada. So it is our fate, my fate and Yamada's fate, to be tried for the shooting of the person who was said to be Smith. They said he was English but he looked like a native to me.

Whoever he was, I had learned to love him and we who had been through days of American air raids and had cowered afraid and helpless in the air raid shelter felt a sympathy with each other. I wasn't a Christian then because I had not heard about your Christian God, but even I, a Japanese, felt pity for this person Smith. Why didn't I save him then, you ask? Are you really serious and believe that it was possible for me, a warrant officer, to save a man whom Nakamura testified Colonel Miyazaki had decided to kill? You heard Nakamura say he could not resist Miyazaki. Well, if he couldn't resist, he made sure I didn't resist. Nakamura has even testified that I, a mere warrant officer, was in command of the Gasupan Detachment in December, 1944. There was no such thing. You have heard other witnesses testify we were only left there at Gasupan when headquarters moved. Both Yamada and I were under the command of Nakamura.

I have said that I do not understand Americans but I also do not understand some Japanese.

You may think all Japanese killed. Is that why I am being tried for murder?

I had no criminal intent in my heart that day. That is why I intentionally didn't participate in the incident.

"U (2)"

0052



It is true I have never been praised because I never have killed another person. Instead, strange as it may seem to you, I who am charged with murder have been commended twice for saving lives.

I am a man but when the judge advocates came and served me with the charges and told me I would have to stand trial for murder, I could not stand it. I couldn't help it. I was glad when the judge advocates left, so I could be alone with my grief.

When Commander Carlson and Mr. Kuwata came to see me they assured me I would have a fair trial; they would act in my defense and I would get a chance to tell my story.

I have now stood trial. You asked me if there was more to be said. There are a few things more if you will listen further to what I have to say because I want you to understand I didn't commit murder that day and I couldn't stop Yamada from shooting. He told you that. Yamada was reluctant to shoot. He only shot because Nakamura ordered him to do so.

But I want you to know more about my army life.

2. While I was serving in the army I received the following three commendations. Since the official records concerning these are now unavailable, I would like to state them here.

(a) In the summer of 1936, an old woman was washing her clothing at the bank of the river Uji, a little down from the Kangetsu Bridge, Fushimi-ku, in Kyoto. While she was doing so, her foot slipped and she fell into the violent stream. As I witnessed it, I jumped into the stream about two hundred meters down from the spot, and saved her life. For that reason I received a letter of commendation and money of praise (ten yen) from Colonel Niimi who was my commanding officer at that time.

(b) In July 1940, at Ijiki-cho, Fushimi-ku, in Kyoto, an officer of the 22nd Artillery Regiment went mad and strangled his mother. I hurried to the spot with my comrades and after practicing artificial respiration, I revived the old woman. I received a commendation and money of praise (thirty yen) from Colonel Nakai, who was my commanding officer at that time in Kyoto.

(c) I served in the Fushimi Kempei Company of the Kyoto Kempeitai for eight years. It is the custom of Kempeitai that Kempei personnel do not remain in the same company for a long time, but only two or three years at the longest, because he is apt to be swayed by private circumstances. Since I served honestly, supervising the army life of the personnel, I could have duty for a long time in the same unit under thirteen commanding officers. When we had an inspection by the provost marshal, my twelfth commanding officer, Major Nishimura, reported this and I received a cup of commendation (a silver cup).

3. Concerning my family.

My family consists of my wife (thirty-one years old) and a son (four years old). After my demobilization, I engaged in agriculture. Since I have no property, my family has been very hard up without any income after I left home. Besides my wife ruined her health lately and is apt to be in bed.

"U (3)"

0053




I beg with all my heart that you members of the commission have benevolent consideration for me. I pray you do believe me. I did not commit murder that day.

Respectfully,

/s/ AJIOKA, Misao.

I certify the foregoing statement, consisting of three and one-quarter (3 $\frac{1}{4}$ ) typewritten pages, to be a true and complete translation of the original document in Japanese, to the best of my ability.

  
EUGENE E. KERRICK  
Lieutenant, U. S. Naval Reserve,  
Interpreter.

"U (4)"

0054

## 陳 述 書

元陸軍憲兵軍曹 山 田 清

私は法廷で申し上げました以外に私の心遣いと身上とに就て申し上げたいと思ひます。

- 一、私が東京で提出した陳述書中には幾つかの不確実なことを書きかざるを得ませんでした。中村大尉が最初にスミスを射ったと陳述書に書きましたが其の後冷静に考へて見ますと私はカトリック信徒として文を書いたことは天主の十誡に叛き誠に申譯なく思ひ深く後悔致して居ります。文れに対して現在私は日夜神様に懺悔のお祈りを捧げて居ります。私の書いたことが中村大尉に大変な御迷惑を掛けやせぬかと思ひますと私の胸は苦悶の念で一杯であります。
- 二、中村大尉からスミスを射つと言はれたとき気が遠くなった様な心地がして躊躇したのですが何をぐづくしてゐるかと思はれて同章にて命令の終に射撃したのであります。スミスとは同じ防空壕の中で爆撃を避ける爲に一日何回となく抱き合ったり交し、糧

食を分け合つて食べた間柄であります。  
私は彼に対して深き同情を寄せ、こゝろす  
れ憎しみは少しも持つては居りませんでした。  
私はスミスを殺すと云ふ考へは最後まで持  
つてゐませんでした。上官から命ぜられ催さ  
れて全く機械的に射つたに過ぎません。  
私は殺人罪を犯したとは思ひません。

三、私は事件の爲にスミスを殺す意思は矢頭な  
かつたことを神に誓つて申し上げます。私の苦  
しい立場を御理解下さい。私は味岡が一介  
の准尉に過ぎなかつたので一切の命令を與へ  
た中村大尉と一緒に歩いて居りました。  
突然私共は立止りました。大急ぎで處刑  
を了へようと考へた中村大尉は私の方を向  
いて「お前射して」と叫びました。私は直ぐ  
には射ちませんでした。私はそれ迄に人を殺すこと  
を命ぜられたことはありません。特に米軍の爆  
撃から身を護うとして狭い防空壕の中で  
ごちやくに生活した爲に知る様になつた人  
を殺すように命ぜられたことはありません。  
然し脱れる術はありませんでしたから私は  
何とか射つ眞似をせねばなりませんでした。  
私のピストルは詰りました。其の時突然……



私のピストルは發しました。

私はスミスを殺したでありませうか。私はそれを  
知りません。何故ならばスミスが穴の中に落ちて  
倒れるや中村大尉は直ちに附近におた人々に  
スミスの上にジャベルで土を掛ける様に命じた  
からであります。それを止める様なことが私に  
出来たでありませうか。何も出来ません。誰か  
がスミスを殺さうと思ひ、や—それが今行  
なされたのです。哀れな死に、師に戦いて、た  
一軍曹たる私は人を射ちました。

そして死んだか生きてゐるかも確かめられずに  
彼は埋葬せられたのであります。

私はキリスト教徒であると申しました。若貴男  
方米國人がカソリック殊にカソリック教に改  
宗した日本人に付て知つて居られるならば貴男  
方は私が自命の意志で而も殺害の意圖を以  
て他人を射撃するやうなことは決—てしないと云  
ひ、ことを御理解下さるでせう。私は今や—當日  
も亦非常にカソリック教の影響を受けて  
居りましたのでスミスが殺された様な状況の  
下に於て人を殺すことを欲しませんでした。  
スミスが私の弾丸で死んだとは私には到底思へ

ません。誰でも弾丸の傷で直ちに死ぬものではありません。私はスミスを殺したのは私の弾丸でな  
いことを祈って居ります。私は決して殺人犯  
ではありません。何故中村大尉は暫く待つて  
スミスの様子を見なかったでせうか。假令私の  
弾丸がスミスに射つたにしても、何故中村は  
スミスを助けなかったでせうか。

戦争は恐い、ものです。殊に其の日は恐い、  
ものでした。私は其の日以来一日として心の安き  
日とてはありませんでした。私は其の事件に於て  
心にもな、役割を演じました。然し何故私の  
弾丸は其の的を外れなかったでせうか。私は当  
日運命と中村大尉との<sup>対峙</sup>場になつてゐたに違  
ひありません。中村は私に射つことを命じたが  
私は躊躇したと証言しました。私の当時の態度  
は躊躇した<sup>底</sup>のもではありません。私はそれに  
反対でありました。私が無理にさうさせられな  
かつたら私は決してピストルを發射しなかつた  
であります。何故ピストルは斯くも突然に  
發射したのでせうか。私は軍曹ではありませんが  
私のピストルの中に一發の実弾すら入れて置く  
ことを許されてゐませんでした。若し私が其の日

ピストルを携帯することゝ許されなかつたなら  
ば多分私は射つことを強要されなかつたでせ  
う然し貴男方はお前は射った、ヤーツミスは  
死んだのだ。だから正義は実現されねばなら  
ぬとおつしやられるでせう。然し乍ら中村大尉  
は私に不利益な証言をしそして哀れな私  
が当日爲した行爲の爲に罰せられると云ふこと  
が果して正義でありませうか。私は私の爲し  
たことの爲に中村大尉を処罰して呉れとは申し  
ません。私のしたことは總べて強制されてやつた  
ことです。然し私は一個の人格でありますから  
罰せられるに違ひないと思ひます。然し私は  
貴男方が私のしもしないことや強制されて  
したことで私を罰しな、様々に祈つて居ります  
殺人罪を犯してもおな、私を殺人罪で罰  
する様なことはなされなで下さい。

四、私は復員して再び市民となつて以来家庭の生活苦  
の爲「ホスター張り」雑誌社の記者、寄の職  
業に従事して家族六人（父、妻、弟三名妹一  
名を養つて参りました。その餘暇を利用して  
戦災孤児事業を計画し友人と共に「日本  
國民淨化聯盟」を組織し大阪千里山戦



火葬場収容所に毎週一回日曜日に訪問に行きました。私の家庭は余り豊かではありません。私と弟との僅かばかりの収入で細々と生活して居りましたが、私の居らぬ現在では益々苦しい生活を續けていること、思います。父は神経痛を病んで居り、母は戦火で死にました。現在は二十三才の弟が一人で働いて家計を支えてゐるのであります。

五、私は中等学校のとき、学業を怠けましたので、学業の成績は余り良くはありませんでした。友人の紹介で知ったカソリックの牧師さんに非道を諷されましてから私は教會に行く様になりました。私はカソリックの教である「信望愛」の三徳を座右の銘として現在迄生きて来ました。今後ともより一層信仰心を厚くし、天主の聖寵に依り正しく清く生き度いと決心して居ります。

貴男方は如何に悲しいことが当日私の身の上で起ったか御理解出来ませうか。「地上に平和あれと天使は歌ひます」然し地上に平和はなくそこには殺し、戦があり爆撃があります。

した。そして昭和十九年のクリスマスの日にパラオ諸島ベベルタツブ島に於て人々は爆撃軍の爲に死にました。そしてスミスと云ふ人は司令官が命令したが故に殺されねばなりませんでしたが、私はそれをはつきりと思ひ出す暇はありませんでした。そして假令其の余赦があつたにしても私は其の理由を理解することは出来なかつたであります。それは理性を失はせたのであります。中村大尉でさへ何故スミスが殺されねばならなかつたか其の理由を十分に述べることは出来ませんでした。私には彼を殺すべき理由は何もありません。又私は彼を殺さなかつたであります。私は何の意思もありませんでした。私は命令の終に大急ぎで打つただけであります。戦争は一九四五年八月に終つたと考へられてゐます。貴男方は私に取つても戦争が終つたとお考へですか。いえ、何故ならば私の良心は常に私の答へることの出来ない問を私に訊ねてゐるからです。其の問とは「自命はスミスを殺したのか」と云ふことです。

私は中村大尉が証言したとき、彼は少くも  
スミスがどうして死んだか位は証言出来るもの  
と期待してゐました。然し彼は自分は唯  
スミスの身体を見てそれから附近にゐた人  
に其の上にシヤベルで砂を掛ける様に命じ  
ただけだと言ひました。私の良心は私がスミス  
を殺したことに付て私を責め續けてゐます  
そして私は私のしたことを後悔して居ります。  
然しどう私の良心は唯一点に付てだけは  
はつきりしてゐます。それは私が起訴されて  
ゐる様な殺人罪に付て有罪でない、と云ふ  
ことであります。貴田方は此の裁判中述  
べられた色々なことを辛抱強く聴かれました  
た貴田方は私が当日殺人罪を犯さなかつ  
たことを知つてゐるに違ひありません。

六、私の家庭は現在全員がカソリック教会に  
行つて居ります。父はスミスさんの霊をお祭して  
朝夕懺悔の祈りを捧げてゐます。牧師さん  
も会員の皆様もスミスさんの霊に懺悔の  
祈りを捧げていて下さるさうです。私は勿  
論、妻もお祈りしてお許しを祈つています。



私は一生天主に仕へてスミスさんの聖に懺悔の祈りを捧げる生活をして行きます。牧師さんは私の爲に教會の信者の人々を代表して總司令部へ嘆願書を出して下さったそうです。

尤も私はその嘆願書を見て居りませんか。以上申し上げました様なのが私の心境及び身上であります。何れも事情御諒察下さいまして御寛容下さいます様伏してお願ひ申し上げます。

昭和三十三年十二月二十二日

小田 清

STATEMENT OF YAMADA, KIYOSHI, FORMER SERGEANT, IJA

I would like to state concerning my merits and my state of mind other than what I testified in this court.

1. In the statement which I submitted in Tokyo I was forced to write some uncertain things. I also made a statement that Captain Nakamura shot Smith first. In thinking over this quietly at present, I, a Catholic believer, regret very much in that I disobeyed the ten commandments of Christ by writing this. At present I offer prayer night and day to God with penitential feelings, and my heart is full of pain if I have wronged Captain Nakamura.

2. When I was ordered by Captain Nakamura to shoot Smith, I felt as if I was going to faint and hesitated, but as I was scolded, "What are you hesitating for?" I hurriedly did as I was told and suddenly shot.

Many times a day Smith and I would huddle together in the air raid shelter to shelter ourselves from the bombings, and we would divide what little food we had among ourselves and eat it together. As our relationship was thus, I had a strong sense of sympathy for him and I never had any hatred toward him. Until the last I never had a mind to kill this man Smith, but because of superior orders and the fact that it was demanded that I do this because of the scolding I received, I only acted as an instrument. I know I didn't commit murder.

3. I swear I had no intent to kill Smith that day. Try to understand my awful predicament. Here I was walking along with an officer, Nakamura, who gave all the orders because Ajioke was only a warrant officer. Suddenly we stopped and Nakamura was in such a hurry to have it over with that he turned on me and shouted, "You shoot." I didn't shoot right away. I had never before been ordered to kill a person, especially a person I had come to know as we huddled together in the air raid shelter trying to protect ourselves from American bombs.

But there was no way out for me so I had to make a pretense anyway. My pistol jammed. Then suddenly my pistol fired. Had I killed Smith?

I shall never know because Nakamura immediately ordered persons to shovel dirt over Smith as he lay where he had fallen into a hole. What could I do to stop him? Nothing! Someone wanted to have Smith killed and here was a way out. I, a poor frightened sergeant, had shot a person and without examining him he was being buried without ascertaining whether he was dead or alive.

I have said I am a Catholic. If you Americans know about Catholics and particularly about Japanese who have been converted to Catholicism, you will know I would never shoot down another man of my own will and with intent to murder. I am too much and was that day also too much affected by my Catholic religion even to want to kill another person under the circumstances under which Smith was done away with.

I cannot believe that Smith died from my one bullet. No person will die, even from a bullet wound, immediately. I pray that it was not my bullet that killed Smith. I am not a murderer.

Why didn't Nakamura wait and see? Why didn't he save Smith even if my bullet had struck Smith?

"W (1)"

0066

War is horrible! Especially was it horrible that day!

I have never been at ease since that day. I had an unwilling part in the incident. But why didn't my bullet miss its mark?

I must have been a pawn of both Fate and of Nakamura that day. Nakamura testified he ordered me to do it and I was reluctant. I was much more than just reluctant. I was against it and wouldn't have even fired my pistol except I was forced to do so. Why did it go off so suddenly? I was a sergeant but I wasn't permitted to even carry a clip of live ammunition in my pistol. If I had not been permitted even to carry a pistol that day maybe I wouldn't have been forced to shoot.

But you say that I did shoot and Smith is dead and justice must be done. But is it justice that Nakamura witness against me, and I, a helpless person, be punished for the deed that was done that day? I am not asking that Nakamura be punished for what I did. Whatever I did I was forced to do, but I am a person and I must be punished, I suppose. I pray you, however, do not punish me for what I did not do or what I was forced to do. Do not punish me for murder when I did not commit murder.

4. After I was demobilized and became a civilian once again, as my family was having a hard time, I worked as a reporter for a magazine company and also went around placing posters on billboards to support my family of six (father, wife, three brothers and one sister).

Utilizing the time I was not working, together with a friend of mine, we planned to help the war orphans by establishing a "Japanese People Purification Association" and once every week (Sunday) we went to the Osaka Senriyama War Orphanage to console them.

My family is not well off. With the little income my brother and I received, we made our living as best we could, but now as I am away, I believe they are having a more difficult time. My father is suffering with neuralgia, and my mother died in a bombing.

At present my younger brother (age twenty-three) is the only one who is working.

5. While I was going to high school, I did not work hard at my studies and as a result my scholastic records were not as good as they should have been. At this time a Catholic priest whom my friend knew counselled me to do better and I started to go to a Catholic church. I have lived until today, trying to keep the three virtues, faith, hope, and charity, which are the teachings of Catholicism which is my motto. From that day forward I made up my mind to strengthen my belief and with the holy grace of God live honestly and purely.

Can you understand what a terrible thing happened to my way of life that day?

"Peace on earth, the herald angels sing."

But there was no peace on earth; there was bitter war; there were bombings and men died as a result of the bombings that Christmas of 1944 at Babelthuap and the Palau Islands.

"W (2)"

0067



And a man who was said to be Smith had to be killed because the commanding officer ordered it. I didn't have any time to think it out clearly and if I had had time I wouldn't have been able to arrive at a reason for it. It didn't make sense.

Even Nakamura couldn't give a good reason why Smith should be killed. I had no reason to kill him and I never would have killed him. I had no intent.

I only shot, hurriedly, and under orders.

The war was supposed to be over in August, 1945.

Do you suppose it was over for me? No, because my conscience has always been asking me the question whose answer I have never known. Did I kill Smith? I know I shot him, but did I kill him?

I had hoped that when Nakamura testified he would at least have been able to say how Smith died, but he said he only looked at the body and then ordered men to shovel dirt on it.

My conscience keeps accusing me that I killed Smith and so I have repented of what I did.

My conscience is clear, however, on one thing above all. I am not guilty of murder as I am charged.

You have listened patiently to all that has been said during this trial. You must know that I did not commit murder that day.

6. At present all the members of my family are going to the Catholic church. My father, in consideration of the soul of Mr. Smith, offers prayers of penitence morning and night. I hear that the priest and all the members of the church are offering prayers of penitence to console the soul of Mr. Smith. My wife, and of course I, too, are praying for forgiveness. I will serve God all my life and lead my life by offering prayers of penitence to the soul of Mr. Smith. It is said that the priest representing all the members of his church has submitted a petition to General Headquarters for me. I have not seen any such petition yet.

My merit and state of mind is as I have stated above. I beg of you to consider the circumstances and I pray from the bottom of my heart for leniency.

22 December 1947.

/s/ YAMADA, Kiyoshi.

I certify the foregoing statement, consisting of three (3) typewritten pages, to be a true and complete translation of the original document in Japanese, to the best of my ability.

*Eugene E. Kerrick*  
EUGENE E. KERRICK  
Lieutenant, U. S. Naval Reserve,  
Interpreter.

"W (3)"

0068

OPENING ARGUMENT FOR THE PROSECUTION

By

Lieutenant James P. Kenny, U.S. Navy

The prosecution has charged, in the specification under Charge I, that the accused Ajioke and Yamada murdered Charlie Smith, alias James Sally, an English National, on Esbelthup Island, in December of 1944.

Naval Courts and Boards, Section 53, defines murder as: "The unlawful killing of a human being with malice aforethought." No evidence has been submitted in the course of this trial to indicate that there was any legal justification for the killing of Charlie Smith. Since there was no legal justification, the killing was unlawful. The term "malice aforethought" means merely that at the time of the killing there existed the intention to kill. Both Ajioke and Yamada took the stand and in the course of their testimony admitted that they knew before they left the Gasupen Kempeitai Detachment with the prisoner Smith that the purpose of the trip was the execution of Smith. That knowledge made all their future acts in connection with the killing intentional.

The evidence proves beyond any reasonable doubt that both Ajioke and Yamada were principals in the killing of Smith. Yamada fired the fatal shot. Ajioke urged him to fire the shot.

Bouvier's Law Dictionary, Vol. 2, states, "All who are present, either actually or constructively, at the place of a crime, and are either aiding, abetting, assisting, or advising its commission, or are present for such purpose, are principals in the crime." (citing U.S. v Boyd, 45 Fed 851). Ajioke was actually present at the scene of this crime. At the scene he advised its commission by urging Yamada to "Do it. Do it."

However, even if Ajioke had not been present at the scene, he would have been an accessory before the fact and therefore liable as a principal. The evidence establishes the fact that Ajioke was the officer-in-charge of the Gasupen Detachment and that the victim, Smith, was confined there just prior to his execution. By releasing or permitting the release of Smith from safe confinement with the knowledge that the purpose of his release was to execute him, Ajioke thereby aided and abetted in the subsequent murder. Furthermore, Ajioke could in no way be considered a mere spectator at the scene of that murder. As the officer-in-charge of the Gasupen Detachment, charged with the custody of a non-combatant prisoner of war, he had a duty to protect Charlie Smith and being present at the scene and failing to do so, he became guilty of murder.

In two specifications under Charge II the accused Ajioke is charged with a violation of the Law and Customs of War in that he failed in his duty as officer-in-charge of the Gasupen Detachment to protect a prisoner of war in that he permitted his killing and a failure to control one subject to his control, namely Yamada, in that he permitted Yamada to kill

"X (1)"

0069



the prisoner. The evidence establishes that Ajioaka was the officer-in-charge of the Gasupen Detachment and that at the time of the incident Yamada was a member of this detachment. In reviewing the case of the late General Yamashita, the Supreme Court of the United States has stated: "It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders of their commanders would almost certainly result in violations which it is the purpose of the law to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." (Matter of Yamashita, 14 U.S.L. Weekly, Feb. 4, 1946). The question would appear to be whether Ajioaka was a commander who was to some extent responsible for his subordinates. The defense in the presentation of its case would seem to argue that Ajioaka was not even a commander because he was only a warrant officer. The Supreme Court made no distinction as to the rank of the commander. The fact is that Ajioaka did assume command of the Gasupen Detachment and he could not have had command without shouldering the responsibilities of command. One of those responsibilities was the protection of prisoners of war, including enemy aliens. Ajioaka's government had formally recognized its obligation in this matter through the Swiss Government. Another responsibility was to control the operations of his subordinates. Those responsibilities rested upon the shoulders of Ajioaka at the scene of the execution of Smith. The presence of Nakamura at the scene did not relieve him of those responsibilities. Ajioaka could not shift his responsibility to Nakamura even if Nakamura was, as claimed, his superior officer. Ajioaka did not protect the prisoner Smith but on the contrary urged his executioner on. He did not control his subordinate, the accused Yamada, but encouraged him by his presence and his words. He is guilty under Charge II.

It is not my intention to reargue the question of the jurisdiction of this Commission to try members of the Japanese Armed Forces for a crime committed against a resident of the Palau Islands, who happened to be an English National. The precept specifically established jurisdiction.

The prosecution contends that all the allegations of the three specifications have been proved with one exception. This exception is in the last name of the alleged alias of Charlie Smith, namely, the word "Sally", which has not been proved and should be so found by this Commission. We do not and have not contended that these two accused acted on their own. Prosecution witnesses have testified that the killing of Charlie Smith was done on the orders of superiors of these two accused. However, we do point out that superior orders are no defense. The Commission, if it sees fit, can exercise leniency when the time for sentence arrives.



We do not quarrel with the moral right or wrong of this act with reference to the consciences of these accused. War is a dirty business and certain laws have been made to protect those who have laid down their arms and those who are non-belligerents. To allow one to hide behind a defense of superior orders would make a farce of those laws. These two accused have admitted that when the order for the execution of Smith was first received, they recognized that it was a wrongful act. For the carrying out of that unlawful order they must be punished.

Respectfully,

*James P. Kenny*

JAMES P. KENNY  
Lieutenant, U. S. Navy

"X (5)"

0071

味岡操及山田清=対スル最終辯論

十二月十三日 辯護人 佐々 義

委員長並=委員各位

本辯護人、茲=本事件、被告味岡操及山田清、爲=辯護セトスルニテ  
アリマスガ、辯護、便宜上、私ハ第一起訴=就テ、ニ辯論シ、第二起訴=就テハ、  
鉢田辯護人=辯論ヲ譲ルコトト致度ト存ジマス。

本事件、第一起訴ハ、謀殺テアリ、罪狀項目、要矣、被告味岡操及山田  
清、兩名ガ、パラオ憲兵隊=勤務中、1944年12月29日頃、バブルタツア島=於テ  
意思的=、違法的=、企圖ト悪意トヲ以テ、正当ノ理由ニテ、全時全所=於テ、  
日本軍=抑留セラル店リ、武装ヲシテ居ラヌ英人キヤリスミス、別名、ギエ=ムス、サリ  
ヲ襲撃シ、斧鋌ニ殺シ、殺セリ、之、戦争法規及慣習=違反シテ居ルト云フ  
ノアリマス。

本辯護人、本軍事委員会=提示セリ、諸證據=依ツテ

(一) 主眼ナル特戒及場所=於テ、キヤリスミスガ、日本、武装シテ軍隊  
=依ツテ殺害セラルコト

(二) 被告味岡操及山田清ガ此、殺害、現場=居リ、又山田ガ被害者

ヲピストルニ射テ復、死ニ、原因ヲ作ツ事  
此ニ項ニ就テ之ヲ否定スルモノデハアリマセン。然レテ本辯護人ハ茲ニ  
 (一) 被害者キヤリ・スミスガ果シテ英人ナリヤ否ヤ  
 (二) 被告味岡及山田ガ尚疑ケル如ク意識的ニ、違法的ニ、企圖シ、謀  
 謀要意ヲ有シ居タルヤ否ヤ。從テ之戰死法規慣習違反ニ該当スルヤ。  
 此ノ二件ニ就テハ疑問、余地アリ。檢事側ガ正當ナル疑ヲ起シ、之ヲ立  
 證シ得カワコトヲ主張セシムルモノデアリマス。

又、本辯護人ハ上記ノ二事ニ就テ論ズル前ニ、本事件、第一起訴及  
 第二起訴ニ共通シテ居リ、極メテ重要ナル點、即チ中村數夫中尉ト、被告味  
 岡トノ指揮關係及ガスパン分遣隊長、地位ヲ權限ヲ闡明シ度イト  
 考ヘマス。

檢事側証人申村ハ、本事件當時彼ガ被告味岡、直屬上官デアツコト  
 ヲ否定シ、又ガスパンニ殘留シタ部隊ガ正規、分遣隊デナカッタコト及彼ガ第  
 一分隊長ノ職ニ在ッタ事ニ就テ極メテ曖昧ナ證言ヲシマシ。然レテ、彼ノ  
 證言ハ爾余、總ベテ、證人ノ證言ニ依ツテ信ズベカラサルモノデアルコトヲ明  
 瞭ニサシテアリマス。

即チ、証人佐野ハ再直接訊問及再反対訊問ニ於テ、本事件當時ガスパン



分遣隊が第一分隊ノ下デアリ、第一分隊長ガ中村デアリコトヲ証言シテ居マス  
更ニ佐野ハ委員ノ質問ニ答ヘテ「ガスパン分遣隊ハ正規ノ分遣隊デハ  
ナカツタ。宮崎隊長ガ只、ガスパン分遣隊ト呼稱シ、ソコニ人員ヲ派遣シ  
テ勤務セシメテアル、ソレデモ第一分隊ヨリ派遣セラルモデアル」ト証  
言シマシタ。

証人岩本ハ再反対質問ニ於テ中村ガ第一分隊長デアリ、其ノ下ニガス  
パン分遣隊ガ置カレタコトヲ証言シ、又証人中川ハ直接質問ニ於テ  
ガスパン分遣隊ハ分遣隊ト呼バレテ居タガ、實際ニハ何モ仕事ガナカツタ  
ソレデ、全部ノ病人ガ其處ニ送ラレタト証言シテ居リマス、又被告味岡  
ハ極メテ明確ニ被告ト中村トノ指揮関係、即チ事件當時ニ於ケルガス  
パン残留部隊ノ任務、其ノ失任者ノ地位権限ヲ証言シテアリマス。

中村、否定セルニ拘ラス、次ノ事項ハ何等ノ疑ナク立證セラル譯デアリマス。  
即チ、中村ガ所謂ガスパン分遣隊、直屬上官デアリテ、味岡及山田ハ其ノ部  
下デアリタコト、即チ、ガスパン分遣隊ハ俗ニハ様ニ呼バレテ居タガ、事件當時ハ  
未ダ正規ノ分遣隊デハ無ク、從テ准尉デアリタ味岡ハ失任者ニ過ギズ、指揮  
官トシテ資格権限ヲ有シタコトヲ事デアリマス。尚檢察官、Opening Statement  
for the Prosecution、中ニ、味岡ヲ "the officer in charge of the Gasupan  
Detachment" 或ハ "the Commanding officer of the Gasupan Detachment" ト呼ビ

テ居リマスガ、味岡ガ斯カル資格ヲ有ツテ居ヲトカツタコトハ、前述、諸證言ニヨリテ立證サシ譯デアリマス

サテ、本辯護人ハ辯護、主要ニ二項目ニ就テ辯論ヲ進メ度ト存ジマス

第一、本事件、被害者スミスガ英國人ナリヤ否ヤニ就テ、

檢事ハスミスノ身デアルト稱スル Rita Borgia Smith ト云フ原住長婦人ニ依ツテスミスガ英國人デアルコトヲ立證セリトシテアリマス。然レバ、彼女ハ之ヲ立證スル爲ニ Exhibit I. スミスノ寫眞、Exhibit II 上海稅關ニ勤務スル彼ノ弟ノ調製シテ證明書ヲ證據書類トシテ提示シタ以外ニハ口頭ニ證言ヲ爲シテ過ギマセン。

彼女ハ 1923 年 パリニ於テ スミスト結婚シタト証言シタガ、二十年以上ニ夫婦生活ヲ行ツテ居リテ之ヲ立證スル何等ノ證據書類ヲ提示出来ナカツ。辯護人、質問ニ對シ彼女ハ結婚證明書ヲ所持シテ居ルト答ヘタガ之ヲ提示スルコトヲ計カワタデアル。彼女、提示シタ寫眞、主ニ之ガ スミスデアルコトハ他ノ証人ニ依ツテ identify ヲサレタガ、彼ト彼女トガ夫婦デアルコトハ証言セテ居マセン。單獨ニ撮シタ一人ノ男性ノ寫眞一枚、ミヲ以テ如何ニシテ之ガ彼女ノ夫ナリト立證スルコトガ出来ルデアリセリカ。



次ニ、スミスガ英國人デアルヲ立證スル證據書類ハ Exhibit II、證明書以外ニ提示セラルカッタデアル。スミスハ香港ニ生レ、日本委任統治領ニ永年居住シ且原住民婦人ト結婚シト稱スル複雑ナ経歴ヲ有スルヲ示シ、其ノ向ニ、必ズ法律上又ハ公式ニ国籍ヲ記載シテ書類ガ調製セラレバトヲカツ答デアル。然ルニ斯カル書類ガ一モ提出サレズ、上海ニ於テ兄弟ト稱スル者ニ依ツテ作ラレタ證明書ノミガ提示セラルデアル。右證明書ハ 1926 年ニ調製セラルデアル共、后二十年ニ日本委任統治領ニ居住シ、スミスガ国籍ノ変更ヲ行ハナカッタト云フコトヲ誰ガ保証シ得ラレマセウカ。

日本人側証人ハ、スミスヲ英人ナリト云ヒマシタガ何モ hearsay デ、アツテ事件当時彼ノ国籍ヲ確認シモノハ一人モ居ラズ、法律的・何等ノ價值ナシ証言デアル。

之ヲ要スルニ、本委員会ニ提示セラル如何ナル證據モ、スミスガ事件当時英國人デアルヲ正当ニ疑フ趣、ヲ立証スルコトハ出来ナカッタデアル。

第二ニ、被告ノ行爲ガ意思的・違法的・企圖ト豫謀惡意トアリテ爲ラレタデアル。戦争法規及慣習違反ニ該当スルヤ否ヤニ就テ論ニ度ト思ヒマス。先づ最初ニ戦争犯罪、戦争法規及慣習違反、此ニ上官ノ命令ニ依ツテ行



ツタ部下、戦争犯罪=関スル OPPENHEIM'S INTERNATIONAL LAW 6th Ed.  
Rev. Vol II Punishment of War Crime, 項ヲ引用ニ度ト思ヒマス

全書、手 252 = 〃 四種類、戦争犯罪ヲ畧ゲ共、第一 = 「武装サレタル軍  
隊=依ツテ犯サレタル、戦争=関ニ認知サレタル法規、違反、ガ戦争犯罪ヲ成  
ト云フヲ掲ゲテ居リマス

次 = 手 253 = The Plea of Superior Order, 項 = 次、如ク述ベテ居マス。  
"The fact that a rule of warfare has been violated in pursuance of  
an order of the belligerent Government or of an individual bellige-  
rent commander does not deprive the act in question of its character  
as a war crime; neither does it, in principle, confer upon the  
perpetrator immunity from punishment by the injured belligerent.  
..... Undoubtedly, a Court confronted with the plea of superior orders  
adduced in justification of a war crime is bound to take into consi-  
deration the fact that the obedience to military orders, not obviously  
unlawful, is the duty of every members of the armed forces and that  
the latter cannot, in condition of war discipline, be expected to  
weigh scrupulously the legal merit of the order received; .....  
Such circumstances are probably in themselves sufficient to divest

0077

the act of the stigma of a war crime."

即ち OPPENHEIM = 依い。下級者が上官、命令。依つて罪ヲ犯シ場合、下級者が甚、罪カ免ル。上官、命令甚、物が合法的デアルヲ要件トシテ居テ、下級者が命令ヲ受テ際ニ、戦場軍紀、下ニ於テ、甚、法的理非ヲ如何ニ慎重ニ考量シ得タカト云フオガ考慮、要件デアリマス。

本辯護人、井上師団長又、宮崎憲兵隊長ノ答ニシテ スミス處刑、命令ガ合法的デアルカ否カニ就テハ、何事モ立証スル證據ヲ有シテ居リマセ、從テ井上又、宮崎、命令ガ合法的デアルト取テ主張スルモノデハアリマセ。假ニ是等最高權威、命令ガ非合法的デアルトシテモ、問題ハ、被告等ガ戦場軍紀、状況下ニ於テ之ヲ如何ニ慎重ニ考量シ得タカニ存スルデアリマス。

以下報告等ガ受領シタル命令ヲ、当時如何ニ之ヲ考量シ得タルヤニ就テ諸證據ニ依ツテ検討シ度ト思ヒマス。

(1) 最初ニ、味岡ガスミス、処刑サレルヲ何時知ツタカヲ検討シテ見ユ。

檢事側証人、中村ハ「英人ガ処刑サレルヲハ、之ガ爲、穴ヲ堀ル様ニト云フヲ彼ガガスパン分遣隊ニ赴ク前ニ、全隊ニ電話ヲ掛ケタガ甚、電話、相手ガ味岡デナカッタヲ肯定シテ居マス。又、穴堀リニ從事シテ中川ハ、甚、命令ヲ味岡ガ受テテ証言シタガ穴堀リ、目的ハ全然異ツモノデアルヲ明言シマシ。味岡ハ、中村ガ電話ヲ掛ケタ際ニ、不在デアッタ。中川カ穴ヲ堀ツ報告ヲ受



又、スミス、處刑ハ中村が來隊シテ始メテ知ツ事ヲ証言シマシ。以上各証人ノ陳述ニ若干、喰違アルガ、中川及味岡、證言ニ依ツテ味岡ハ中村、來隊スル迄スミス、處刑ヲ知ラナかつたハ充分ニ首肯サレルガアリマス。被告山田ニ就テハ、彼ガ中村、來隊前、スミス處刑ヲ知ラ居外認めテ證據ハ何モアリマセン。

(4) 次ニ被告等ガ中村ヲスミス處刑、命令ヲ聞イタ時、其、場ニ於テ直ニ此命令、非合法的ナルコトヲ了解シ得タカ否カニ就テ檢討シ度ト思ヒ、本委員會ニ提示セラル證據即チ

(1) 事件當時被告等ハ何モ下級ノ人負テアツテ味岡ハ准尉、山田ハ下士官デアリ。

(2) 被告等、勤務シガスパンハ憲兵隊本部トハ相當距離隔テ居リ又全地ニ於テ彼等、主ナル任務ハ残ツ建物の糧食、保管並ニ病氣、療養デアリ。

(3) ガスパン分遣隊ハスミスヲ收容シタガ之ハ偶々憲兵隊本部ニ收容力無ク、ガスパンニ余裕ガアツタ爲ニ一時本部ニ代ツテ居テ提供シタル過ギナシ。スミスヲガスパンニ收容スルコトニ或ハ他ニ連出ス事モ全然本部ノ權限デアリ。

(4) 被告等ハスミスガスパイ嫌疑ヲ逮捕サシ事ヲ承知シテ居タ。

(5) 中村ハ被告等ニスミス處刑ノ理由ヲ述べナかつ。

是等、證據ニ依リテ被告等ハスミスガ如何ナル理由ニ依リ又如何ナル手續ニ依ツテ死刑ヲ決定セ、命令カツカテ知リ得ル地位ニ無かつたハ明瞭デアリマス。



又之ヲ知ラセト認ムベキ何等、証據ヲ舉ゲルヲ居マセシ。從テ中村カラ命令ヲ受  
ク時、直ニ其、命令、合法、非合法性ヲ了解シ得ル狀況ニカツタトハ明瞭デアリマス。  
一オ、於テ、被告等ハ、スミス、處刑ヲ嫌ハツコトヲ舉証セリテ居リマス。即チ、嫌ハツ  
理由カ命令、非合法性ヲ知ツテ居タカラテハ、イカト云フ疑問ガ生ジマス。檢事ガ其  
Opening Argumentニ於テ、被告ハ、スミス處刑、命令ヲ受取ツタ時、夫レガ思ハコトヲ  
ルコトヲ認メテ居タト自認シテ旨述ビテ居ルハ、此、實ヲ指シテ居ルデアリマス。  
然レバ、此、疑問ハ、次、事項ニ依ツテ直ニ解消スルモデアリマス。

即チ被告等、証言及陳述書ニ依リ、被告等ガスミス、處刑ヲ嫌ハツ  
理由ハ、危険ハ爆薬下ニ、数日間、全ク防空壕内ニ生死ヲ共にシコトニ依リ、  
相互ニ人間愛ヲ感じ之ガ爲メ、彼、處刑ヲ可哀ケラ思フカラテアルト述ビ  
居リマス。之ハ、極メテ自然ナ人間ノ情デアリマス。彼等ガ斯カル理由ニ依ツテ  
處刑ヲ嫌ハツコトハ、彼等ガ命令、非合法性ヲ承知シテ居タカラテアルト云フ  
結論ハ、全然ナラナイデアリマス。

(11) 次ニ被告等ガスミス、處刑命令ヲ受テカラ、又、刑迄、間ニ其、命令、  
法的理非ヲ慎重ニ考量シ得ルカ否カニ就テ檢討シ度ト思ヒマス。

被告等ガスミス處刑ヲ知ツタ當時ノ一般情況ハ如何デアルデアルカ。  
即チ當時ハ米軍ガバベルタフ島ニ隣接シテ島ヲ占領シテ居リ、日本軍ハ連日熾  
烈ニ爆薬ヲ受テ居タデアリマス。此、狀況下ニ於テ、スミスハスパイ嫌疑ヲ逮捕サ

ホウデアリマス。スパイ嫌疑者ハ最高權威ニ依リテ死刑ニ處セラレトテ聞カサレ  
場合ニ直感ニ依リテ處刑ノ原因ガスパイニ在リト判断シ處刑命令ノ合法性ニ  
疑問ヲ持タヌト云フコトハ誰シモ有リ得ルコトデハアリマスマイカ。殊ニ下級者デモ、上級  
權威者ノ離レテ所ニ在リテ命令決定ノ経緯ヲ全然知ラヌ被告等ノ立場ニ於テハ最  
モ有リ得ベキコトデハアリマスマイカ。

更ニ当日ハ上官ヨリ中村ガ宮崎カラ彼自身死刑執行監督ノ命ヲ受テ突然ガス  
パンニ赴キ自ラ其ノ執行ヲ監督シテアリマス。又被告ノ味岡ガ中村ニ「スミスハ可  
哀サウト老人デス。家ニ帰シテヤツテ下サイ」ト述べタ時ニ中村ハ「夫ハ上官ノ命令ヲ  
ト答ヘタコトヲ證言シテ居マス。又中村カラ夫ハ汝ノ知ツタコトデハナイト云ハレタ爲  
ニ是以上中村ニ何モ云フコトガ出来ナカッタ旨ヲ陳述中ニ述べテ居マス。

更ニ茲ニ興味フルコトハ中村ガスミスヲガスパン分遣隊カラ連れ出ス時ニ彼  
スミスヲ家ニ帰シテヤルト述べタコトデアリマス。之ガ爲ニ被告等ハ死刑ノ現場ニ  
到着スル迄ハスミスノ處刑ヲ判ツカリ信ジラレナカッタデアリマス。檢事ハ其ノ  
Opening Argumentニ於テ被告等ハスミスヲ連れテガスパン分遣隊ヲ出奔スル目的  
ガ彼ノ處刑デアルコトヲ知テ居テ自認シタト述べマシタガ之ニ對シテハ次ノ如キ反  
證ガ舉ゲラレマス。即チ山田ノ直接訊問ニ於テ次ノ如ク證言シテ居リマス

"Nakamura said to me, 'Smith will be sent home,' therefore I had Smith  
get ready. I thought that Smith was going to be sent home, but from the



road the group went toward the jungle. I felt queer and I thought and knew definitely for the first time that Smith was going to be executed."

是、事實、検事側証人の中村、直接訊問=対し回答=依つて確證せし居ります。即ち彼は "Commanding Officer Nakamura came over and said that Smith was going to be sent home. Nakamura said to me at the galley," と述べて居ります。

即ち、中村がスミス死刑、命令ヲ奉へてから、處刑執行迄、尚、短時間ヲ要ス。其、間、上述、如く、報告等ヲ以て命令、合法性ヲ確メル措置ヲ執リ、得せしむべき各種、状況ガアツタリデス。当時、状況=於て之ヲ彼等=期待スル外、余り=無理+事柄ト謂ハネバナシ。

検事、Opening Argument = 於て味岡、山田 = 射つて催促シ旨述べ居ります。之、恐らく中村、証言 = 據つて思ハれますが、中村、証言中 = 信頼、出来ス。其、間、指摘シ通テス。之、反ニ味岡又山田共、彼等ガ巢鴨テ爲シ宣明書中 = 於て、又本法庭テ爲シ証言中 = 於て、斯カル事實ヲ全然認メ居ナシ、デス。即ち味岡又山田 = 射つて催促シ事實、確證セシ居ナシ、デス。



以上論述の所ヲ綜合スル。本事件。於此被告等、行爲、OPPENHEIM、  
「that the latter cannot, in condition of war discipline, be expected to weigh  
scrupulously the legal merit of the order received」、場合=該當シ。  
「Such circumstances are probably in themselves sufficient to divest the  
act of the stigma of a war crime」、依リ、味岡、山田共。War crime 即チ  
violation of recognized rules regarding warfare、罪。尚ハルモ、證據が  
明瞭。トツタ信ズルデアリマス。

然レバ、檢事側ハ、假令上官、命令デアツ=セヨ、山田ガ、スミスヲ射ツコトハ  
malice aforethought = 是ノ行爲ナル=依リ、罰セラルベキデアルト主張セラルカモ知レセヌ。  
夫レ故、以下若干之=對シテ、辯論ヲ附加シ度ト思ヒマス。

中村ハ、彼ガ山田=射テト命ジタ際、山田ハ、嫌+顔ヲシテヤリ度クナイ様+態  
度ヲ示シ旨ヲ証言シマシ。又山田ハ、射テト命ゼラレタ際、頭ガ茫然トシ、混乱シ。  
ソコデ、中村ガ恰モ自分ヲ叱ル様=何ヲシテ居ルカ早クヤレト自分=命ジタ。自分ハ、夢中  
デアツ旨ヲ證言シマシ。又彼、彼、宣誓書=於テ、此時上官、命令=從ハナレハ  
嚴罰=受セラルコトヲ恐レテ興奮シト述ベテ居リマス。是等錯雜シテ諸状況=  
依ツテ山田ガ受令後、ピストルヲ奔射スル迄、間、一時的=相当程度、精神興奮  
状態=アリ、平静+判斷力ヲ失フ=至ツテ居タコトハ、何人モ疑ヲ持マナイ所デアリマス。  
斯ル状態=在ツタ山田、行爲ヲ malice aforethought = 依ルモ、デアルト断定スルコト

「余」=苛酷にアリマスヨカ。

Wharton's CRIMINAL LAW Vol I §419 = "Murder, as defined at common law, is where a person of sound memory and discretion unlawfully and feloniously kills-----" ト論じテ居リマス。

山田、発射。一時的。健全に判断力ヲ有セス。理性的。無カトナリ。彼ノ行為ヲ抑制スルモ、お來ナキ状態ニ於テ爲サル行為デアリテ罪カラ免除サルベキ特權ヲ有スルテ居ルモト云フベキデアリマス。

ソレト論述シマシ所ヲ、總括シテ本竊護人、結論ヲ申ヒテ度ト思ヒマス。

本事件ニ於テ味岡又山田ガミス殺刑ノ現場ニ立會ヒ。又山田ガピストヲ射テミスノ死因ヲ作ツタ行為。外觀上カラスバ Murder = 同疑サレテ充分ナル根拠ニアルデアリマセウ。然レテ、本件ハ單ニ Murderト異リ、罪狀項目ニミル通。戦争法規又慣習違反ト云フ廉ニ依リ同疑サレテ居ルデアリマス。ナリ。戦時ニ於テ下級者カ上官ノ命ニ依ツテ犯シテ罪ニ對シテハ責任ヲ問ハナイト云フ意見。米國ニ於テモ行ハルテ居ルデアリマス。

Wharton's CRIMINAL LAW Vol I §376, footnote = ハ次ノ意見カ掲ゲテアリマス。  
"In war time, orders of superior officers must be obeyed, and such



order relieves the inferior executing the same from liability to prosecution and punishment, if the act be criminal."

即ち、戦時と冷静な平和時代とを特ニ区別シテ考慮シ、戦時ニ於テハ上官ノ命令ニ従ツテ犯シ下級者ノ罪ハ、問責セザイト云フ意見デアリマス、然レモ本辯護人ハ此ノ意見ヲ無條件ニ支持シ之ニ依ツテ被告等、無罪ヲ主張スルモノデハアリマセン。戦時ニ於テ下級者ノ犯罪ハ平和時代トハ非常ニ異ナル觀点カヲ考慮セザレバト又事ヲ強調スル為ニ本意見ヲ披露スル次第デアリマス。

本辯護人ハ第一ニ、被害者スミスガ英國人デアルニ関シ多大ノ疑問、其ノ點ヲ述ベタリ。第二ニ、國際的ニ最高權威デアル OPPENHEIMノ所論ニ立脚シテ被告ノ行為ヲ詳細ニ検討ヲ致シテアリマス。其ノ結果ニ基キ之ガ戦争犯罪即チ戦争法規ニ慣習違反ノ罪ニ問ハルベキモノデアルヲ主張スルモノデアリマス。

換言スレバ、本委員会ニ提示セラル諸證據ニ依リテ被告ノ行為ハ上官ノ命令ニ基キテアリ而シテ OPPENHEIMノ所謂「受テ命令」ノ法的理非ヲ慎重ニ評量スルヲ彼等ニ期待シ得タリ狀況、下ニ行ハルモノト認メ得ベキモノデアリマスルガ故ニ。被告等ノ行為ハ戦争犯罪ノ汚名ヲ冠スルコトハ不可能ナリト信ジマス。要之、檢事ハ被告等ヲ尚疑フ第一起訴又



其、罪状項目ニ付テ無罪アリ即特釋放カレト信ジマス

最后ニ、被告等、人格ニ就テ一言致シ度ト思ヒマス。

公式書類カ入手出来ナイ為ニ、證據トシテ提出出来ナイコトガ甚ク  
残念デアリマスガ即聴取ノ通、被告等、陳述ニ於テ次ノ通述イテ居マス  
即チ、味岡ハ先婦人、命ヲ救フノ爲ニ、依リニ回、勤務優秀ニ依リ一回、  
表彰セラル。山田ハ隊内最優秀者トシテ一回表彰サレタコトヲ述ベテ居マス。

是ニ依リ、被告等、人格ニ對シテ充分ナル即効處ヲ拂ツテ戴キ度イ  
コトヲ申上げ、次第デアリマス。

委員各位ハ最高標準ノ正義ヲ適用シテ即審議アラレタコトヲ  
冀メ、次第デアリマス。

(終)

ARGUMENT FOR THE DEFENSE IN BEHALF OF THE ACCUSED AJIOKA, MISAO AND YAMADA, KIYOSHI DELIVERED BY MR. SANAGI, SADAMU, COUNSEL FOR THE ACCUSED.

May it please the Commission:

I would like to deliver this argument in behalf of the accused Ajioka, Misao and Yamada, Kiyoshi in this case. For convenience' sake, I shall argue about Charge I, and Mr. Kuwata about Charge II,

The alleged crime in the specification of Charge I in this case is murder. The specification reads: "Ajioka, Misao and Yamada, Kiyoshi, while serving at the Japanese military installations on Palau Islands, did, on or about 29 December 1944, at Babelthup Island, Palau Islands, willfully, feloniously, with premeditation and malice aforethought, and without justifiable cause, assault, strike, kill and cause to be killed, one Charlie Smith, alias James Sally, an unarmed British national, then and there held captive by the armed forces of Japan, this in violation of the law and customs of war."

I do not intend to deny the following fact which was proved by the evidence introduced before this military commission, namely:

- (1) That Charlie Smith was killed by the armed forces of Japan at the alleged time and in the alleged place.
- (2) That the accused Ajioka and Yamada were at the scene of the execution and that Yamada shot the victim with a pistol and caused him to die.

However, as to the facts

- (1) That the victim, Charlie Smith was a British national,
- (2) That the accused Ajioka and Yamada acted willfully, feloniously, with premeditation and malice aforethought as they are so alleged, and that their acts are in violation of the law and customs of war,

there are doubts, and I maintain that the Judge Advocate did not prove these alleged facts beyond reasonable doubt.

Before arguing about the preceding two points, I would like to make clear the chain of command between 1st Lieutenant Nakamura, Kasuo and the accused Ajioka and the position and authority of the person in charge of the Gasupan Military Police Detachment which have a connection with both Charge I and II and are very important issues in this case.

Nakamura who took the stand as a prosecution's witness denied the fact that he was the direct superior of the accused Ajioka. He also gave very vague testimony about the fact that the group which remained at Gasupan was not a regular detachment and that he was the commanding officer of the First Detachment or Company. However, the testimony of the other witnesses disclosed that his testimony was unreliable.

Witness Sano, upon re-examination and re-cross examination testified that at the time of the incident the Gasupan Detachment was under the command of the First Detachment or Company and that the commanding officer of the First Detachment or Company was Nakamura. He also answered to the question of the commission:

"The Gasupan Detachment was not a regular detachment in the sense which it usually used. Commanding Officer Miyasaki just called it the Gasupan Detachment and had sent personnel there to work there, and this is a detachment which is sent out from the First Detachment or Company."

"2 (1)"

0089



The witness IWAMOTO, when he was recross-examined, testified:  
"Nakamura is the commanding officer of the First Detachment or Company and under this the Gasupan Detachment was established."

Witness Nakagawa testified on cross-examination:  
"The Gasupan Detachment was called a detachment but actually there was no work so all sick persons were sent there."

The accused Ajioka, also, very clearly testified about the relation of command between him and Nakamura, the duty of the group which remained at Gasupan at the time of the incident and the position and authority of the senior member of that party.

Despite the denial of Nakamura the following facts have been proved beyond reasonable doubt:

That Nakamura was the direct superior of the so-called Gasupan Detachment; that Ajioka and Yamada were his subordinates; that although the Gasupan Detachment was called a detachment it was not a regular detachment at the time of the incident; that Ajioka who was a warrant officer was nothing but a senior member of the detachment; that he had no capacity or authority as a commanding officer.

The Judge Advocate said in the Opening Statement for the Prosecution that Ajioka was "the officer in charge of the Gasupan Military Police Detachment" or "the commanding officer of the Gasupan Detachment," but the testimony referred to above corroborate the fact that Ajioka was not qualified to be in such positions.

Now, I would like to refer to the two points which are important issues for the defense.

First: Was Smith, the victim of this case a British national? The prosecution tried to prove that Smith was a British national by a native woman witness, Rita Borgia Smith, who called herself the wife of the victim, Smith. The evidence she gave in this court was nothing but some oral testimony except for the picture of Smith (Exhibit 1) and a certificate prepared by Smith's brother who was working at the custom house of Shanghai (Exhibit 2.)

She testified that she married Smith on Palau in 1923, but she could not offer any document to prove that they were husband and wife for more than 20 years. To questions of the defense she answered that she had a certificate of marriage, but she did not show that certificate. The other witnesses identified Smith in her picture, but some of them testified that she and Smith were a couple. How can she prove that Smith was her husband with only a picture of a man taken alone?

As to his nationality, no other documental evidence than Exhibit 2 was introduced to prove that Smith was a British national.

Smith was born in Hongkong, lived in the Japanese mandate for many years and married a native woman. Since he had such a complicated history, a document which legally or officially identifies his nationality should have been prepared during these many years. However, such a document was not introduced, and instead of that a certificate prepared in Shanghai by his so-called brother was offered as evidence. This certificate was made in 1926. But how can anyone guarantee that he did not change his nationality while he was living in the Japanese mandate for almost 20 years?

"2 (2)"

0090

Japanese witnesses testified that Smith was an Englishman. But this testimony is all hearsay, and no one was convinced of his nationality at the time of this incident. So this testimony is all legally worthless.

I conclude that any evidence introduced before this military commission does not prove beyond reasonable doubt that Smith was a British subject at the time of this incident.

Secondly, I would like to argue as to whether the accused committed the act wilfully, feloniously, with premeditation and malice aforethought, and whether their act violates the law and customs of war.

In the first place, I would like to quote "Punishment of war crimes" (Oppenheim International Law 6th ed., rev. vol. II) which refers to the violation of the law and customs of war and the war crimes of a subordinate who acted in accordance with orders of his superior.

Section 252 of that book enumerates four kinds of war crimes and states: "(1) Violation of recognized rules regarding warfare committed by members of the armed forces" is a war crime.

It also states in Section 253, the plea of superior orders, as follows: "The fact that a rule of warfare has been violated in pursuance of an order of the belligerent government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. ...Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that the obedience of military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in condition of war discipline, be expected to weigh scrupulously the legal merit of the order received; ...Such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime."

According to Oppenheim, when a subordinate committed a crime in accordance with his superior orders, the lawfulness of the superior orders itself is not necessary condition to exempt him from guilt. It should be taken into consideration as to how scrupulously the subordinate could have weighed the legal merit of the orders under the discipline when he received them.

I have no evidence to prove whether or not the orders for the execution of Smith were issued by Division Commander Inoue or Kempeitai Commanding Officer Miyazaki were lawful. So I do not intend to insist that the orders of Inoue or Miyazaki were lawful. The question is how scrupulously these accused could have weighed the orders under was discipline even if these orders issued by the highest authority were unlawful.

Now let us examine, according to evidence, how much these accused could have weighed the orders they received at that time.

(a) When did Ajioke know that Smith was to be executed? Prosecution's witness Nakamura testified that before he went to the Gasupan detachment he telephoned to the detachment as follows: "The Englishman is to be executed. To carry this out, dig a hole." But he affirms that the person who answered this telephone was not Ajioke. Prosecution's witness Nakagawa testified that he received the order to dig a hole from Ajioke, but he also confirmed that the purpose of digging the hole was not to prepare a grave. Ajioke testified

"2 (3)"



that he was not at the detachment when Nakamura phoned, that he received a report from Nakagawa that a hole was dug and that he knew about the execution of Smith for the first time when Nakamura arrived at his detachment. Although there is a little inconsistency in this testimony, we can fully understand through the testimony of Nakagawa and Ajioke that Ajioke did not know about the execution of Smith before Nakamura came to his detachment. The evidence does not show that Yamada knew the execution of Smith before Nakamura came.

(b) Then, when these accused heard the orders of execution from Nakamura, could they understand the unlawfulness of the orders then and there? The commission heard the following evidence, namely:

(1) At the time of the incident both of the accused were low ranking; Ajioke was a warrant officer and Yamada was a non-commissioned officer.

(2) Gasupan where these accused were serving was a considerable distance from the Kempeitai headquarters and their main duties at Gasupan were to take charge of the remaining houses and provisions and to recuperate.

(3) The Gasupan Detachment had Smith in custody, but this was because the Kempeitai Headquarters had no accommodation for him so the detachment in place of headquarters only offered him a place to live. It was entirely within the power of the headquarters to keep Smith at Gasupan or to take him out to any other place.

(4) These accused knew that Smith was arrested because he was suspected as a spy.

(5) Nakamura did not tell these accused why Smith was to be executed. According to this evidence, it is clear that these accused were unable to know why and how the decision to execute Smith was made and how it came about that he was ordered to be executed. There was no evidence to show that these accused were informed about these matters. Therefore, it is clear that they were not in such a position as to be able to understand immediately whether or not this order was unlawful.

On the other hand the evidence showed that these accused did not like to execute Smith. Then the question might arise as to whether the reason they disliked the idea of the execution was that they knew the unlawfulness of the order. Probably the judge advocate in his opening argument pointed out this fact when he stated that when the two accused received the orders to execute Smith, they acknowledged the fact that they recognized this was wrong. But the following fact will prove that they did not know its unlawfulness.

In the testimony and the statement of the accused Ajioke, he states that he disliked the idea of the execution because he felt love as a human being toward Smith through having shared life in the same air raid shelter for several days under intense air raids and it was pitiful that he was to be executed.

This is a natural feeling as a human being. Just because they were reluctant to do the execution does not lead to the conclusion that they were cognizant of its unlawfulness.

(c) Next, could the accused have scrupulously weighed the legal merit of the order for the execution from the time they received the order till the time the execution was completed? Let us think how the battle conditions on Palau were when the accused knew that Smith was to be executed. At that time the American forces had occupied a neighboring island near Babelthrap and the Japanese forces were at the mercy of their furious air raids every day. Under such circumstances, Smith was arrested as a spy suspect. When they are told

that the spy suspect was sentenced to death by superior authority, isn't it possible that they judged by instinct that the execution was decided upon because of his spying and that they did not wonder if the order of the execution was unlawful? In particular these accused were low ranking. They lived apart from their superiors. They did not know the circumstances under which the execution was decided, so it is most possible for these accused who were in such a position.

Besides, on that day, Nakamura, their superior, was ordered by Miyazaki to supervise the execution, suddenly went to Gasupan and supervised the execution by himself. When the accused Ajioke said to Nakamura, "As he is a pitiful old man please let him return to his home", Nakamura answered, "This is the order of the commanding officer," Ajioke so testified. Ajioke said in his statement that he could not say anything more to Nakamura because Nakamura said to him "It is none of your business."

Furthermore, an interesting fact is that just before Nakamura took Smith away from Gasupan detachment he stated that he was taking Smith back home. Therefore, the accused did not believe that Smith would be executed until they arrived at the scene of the execution. The Judge Advocate in his opening argument stated that the accused acknowledged the fact that they knew the object of leaving the Gasupan detachment with Smith was his execution, but opposed to this the following counter-evidence was produced. Namely, Yamada testified as follows in direct-examination: "Nakamura said to me, 'Smith will be sent home', therefore, I had Smith get ready. I thought that Smith was going to be sent home, but from the road the group went toward the jungle. I felt queer and I thought and knew definitely for the first time that Smith was going to be executed."

This fact has been corroborated by prosecution witness Nakagawa in his answer to the question in the direct examination. Namely, he testified: "Commanding Officer Nakamura came over and said that Smith was going to be sent home. Nakamura said this to me at the galley."

In summing up, not only was the period between the time Nakamura relayed the orders of the execution of Smith to the time when the execution took place short, but during this time as stated above there were various circumstances which did not give the accused a chance to take any step to verify the legality of this order. Under the circumstances of that day it must be said that it is too much to hope this of them.

The Judge Advocate in his opening argument stated that Ajioke encouraged Yamada to shoot. I presume this was based upon the testimony of Nakamura, but as I pointed out before, there are points upon which we cannot rely in Nakamura's testimony. Contrary to this Ajioke and Yamada have not acknowledged this fact in their confessions written in Sugamo or in their testimony given in this court. In other words, the fact that Ajioke encouraged Yamada to shoot has not been proved.

In conclusion: The act of the accused in this case falls under Oppenheim's statement that that latter cannot, in condition of war discipline, be expected to weigh scrupulously the legal merit of the order received." Since "such circumstances are probably in themselves sufficient to divest the act of the stigma of a war crime", it is clear that both the accused Ajioke and Yamada should not be charged with "a war crime", namely, "violation of recognized rules regarding warfare."

However, the judge advocate might hold that Yamada should be punished because he shot Smith with malice aforethought even if he was ordered to do so by his superior. So I would like to argue as to this matter.



Nakamura testified that when he ordered Yamada to shoot "Yamada made a face as if he did not want to do it and acted as if he wanted not to do it." Yamada testified that when he was ordered to shoot, "My head was in a daze and I was confused. Then Captain Nakamura ordered as if to scold me 'What are you hesitating about. Hurry up and do it.' I was like a person in a dream." He also stated in his affidavit that he was afraid he might be punished unless he obeyed the superior order at that time and that he was excited. No one will doubt that under such complicated circumstances Yamada after he received the order till he shot his pistol, was temporarily in a state of considerable mental agitation and lost his presence of mind. Isn't it cruel to determine that Yamada who was in such condition acted with malice aforethought?

Section 419, Wharton's Criminal Law, Vol. I, reads: "Murder, as defined at common law, is where a person of sound memory and discretion unlawfully and feloniously kills ..."

Yamada shot when he temporarily lost his presence of mind and was incapable of reasoning and unable to control his actions. Therefore, he should be entitled to an acquittal.

I would like to sum up and conclude my argument. In this incident, Ajioke and Yamada were at the scene of execution of Smith, and Yamada shot him with a pistol and caused his death. So, in outside appearance, might provide considerable ground for the charge of murder. However, this is different from simple murder, and the accused are alleged to have violated the law and customs of war as they are in the specification.

In the United States, it is advocated that a subordinate is not responsible for his crime which he committed in time of war in accordance with the order of his superior. In the foot-note, Section 376, Wharton's Criminal Law, Vol. I, reads: "In war time, orders of superior officers must be obeyed, and such order relieves the inferior executing the same from liability to prosecution and punishment, if the act be criminal." This paragraph sets forth a clear distinction between time of war and peace, and states that a crime of an inferior in accordance with superior orders in war time will not be prosecuted. I do not intend to sustain this opinion unconditionally to cover the acquittal of the accused. I referred to this paragraph because I would like to stress that a crime of an inferior in time of war should be taken into consideration from a different point of view from that in peace time.

I have stated first that it is doubtful whether or not Smith was a British national. Next I have examined the acts of the accused in detail according to the theory of Oppenheim, the highest authority of the international law. Now I maintain that the accused should not be charged with violation of the law and customs of war.

In other words, according to the evidence introduced before the commission, Ajioke and Yamada acted in accordance with the orders of their superior, under such a condition as to be unable to be expected to weigh the legal merit of the orders they received, as Oppenheim says. Therefore, I believe it is impossible to name the acts of the accused a war crime. The Judge Advocate could not prove the alleged crime of Charge I and its specification beyond reasonable doubt. I hold that both the accused Ajioke and Yamada are to the alleged specification and charge not guilty and that they should be acquitted.

#2 (6)#

0094

Finally, I would like to state just a few words concerning the character of the accused. As the official documents cannot be obtained, I regret very much that it cannot be submitted as evidence, but as you have heard, the accused have stated as follows in their statements:

Ajioha has twice, by saving the life of an old lady and once by his excellent service received official commendations, and Yamada has received official recognition by being an exemplary soldier of his whole unit.

Because of this I ask that deepest consideration be taken of the character of these two accused.

Gentlemen of the Commission, we ask that you will apply the highest standard of justice.

Respectfully,

Sanagi, Sadamu.

I certify the foregoing to be a true and complete translation of the original argument, to the best of my ability.

*Eugene E. Kerrick, Jr.*  
EUGENE E. KERRICK, Junior,  
Lieutenant, U. S. Naval Reserve,  
Interpreter.

"2 (7)"

0095



味岡操及び山田清事件の弁論

昭和二十二年十二月二十三日

弁護人 鎌田日出夫

第一部 管轄権に就て

本弁護人は同僚佐藤弁護人の第一起訴殺人に因する弁論の後を受けて被告味岡に対する第二起訴戦争の法規違反に付て弁論せんとするものであるが、第二起訴中の各罪状項目に付て弁論するに先き本軍事委員会の本件に対する管轄権の有無に付て論議したいと思ふ。此の點に付ては既に管轄権に因する抗弁に於て論議し、而して其の抗弁は却下を裁定されたのであるが、*Naval courts & Boards § 405* にも "This plea (plea to the jurisdiction) should regularly be made prior to pleading the general issue, but a lack of jurisdiction is a fatal defect, the plea may be made at any time." と規定されてゐる様に管轄の抗弁は訴訟手続の如何なる段階に於ても爲され得べきものであるから、茲に再び此の問題を更に詳述して、本委員会に御再考を願ふ次第である。

本弁護人は本件被害者 *Charlie Smith* 別名 *James Lally* なる者は俘虜若しくは俘虜の待遇を受け得べきものではない。又本件犯罪の行はれたる時其の犯罪の場所は日本の領土の一部であつた。随て本件は戦争犯罪ではなくて、通常の殺人罪なるに過ぎないから、本件は本軍事委員会の管轄に属しないと主張するものである。

联合国が停戦協定成立後に於て日本の戦争犯罪人も處罰し得べき基本法はポツダム宣言オ十條である。即ち同條には「吾等、俘虜の虐待せる者を含む一切の戦争犯罪人=對シテハ嚴重ナル處罰ヲ加ヘランベシ」と規定されてゐるが、戦争犯罪人とは畢竟戦争犯罪を犯した者謂に外ならない。然らば戦争犯罪とは何であるか。ポツダム宣言に基き联合国最高司令官の制定公布した極東國際軍事裁判所條例オ五條は同裁判所の管轄に属する犯罪を列挙してゐる。而して本委員会の審理し得べき戦争犯罪も亦右極東國際裁判所條例オ五條掲記の犯罪を同一でなければならぬ。何と云ふかは、極東國際軍事裁判所設置に關する联合国最高司令官の特別宣言にも記されてゐる様に、1945年9月2日日本東京湾に於て調印された日本の降伏文書に依つて、日本国家を統治する天皇と日本政府の權限は、降伏條件の遂行のために適否を認める手段を採る權限を付与せられた联合国最高司令官の權カ下に置かれるに至り又



米英蘇三國は1945年12月26日モスコウ會議に於て日本による降伏條件の履行について考案した上中華民国の同意をも得て、最高司令官が降伏條件を実施する爲に一切の命令を発すべきことを合意したものであるから日本の降伏條件実施に因しては联合国最高司令官 *General Douglas MacArthur* が最高の権限を有すること疑を容れざる余地はない。而して日本の降伏條件実施とは日本政府及び日本国民をしてポツダム宣言に掲げられた各條項を実現せしめることである。而して戦争犯罪人の處罰はポツダム宣言中の最も重要な條項の一つであり日本の降伏條件の実施である。これは日本の降伏條件の実施につき最高の権限を有する联合国最高司令官の制定公布した極東國際軍事裁判所設立に関する特別宣言及び之に附屬する極東國際軍事裁判所條例は日本の戦争犯罪人處罰に関する限りポツダム宣言に次ぐ根本法規である。固より極東國際軍事裁判所條例は主として一定の地理的地域に關係しない一般的主要な戦争犯罪人即ち平和に対する罪や人道に対する罪を犯した犯罪人を處罰する爲の手續を定めたものであつて、一定の地理的地域に關係する通例の戦争犯罪人の處罰に付ては、夫々其の地域を管轄する國際、國內または占領地法廷、委員會、其の他の裁判所が裁判權を行ひ得るのである(同特別宣言才三條參照)。本軍事

委員会も亦此の種の委員会であること疑を容れない。一定の地理的地域に關係する通例の戦争犯罪の裁判を夫々其の地域を管轄する國際國內または占領地の法廷委員会其の他の裁判所の管轄に委ねる以上證據や手続に關する法規に付ては、當該地域の裁判所が最も便宜とする證據や手続法を用ひ得べきこと理の當然である。現に本委員会によられた命令書第五項には "*The proceedings of the military commission will be governed by the provisions of Naval Courts & Boards, ... and may use such rules of evidence and procedure, issued and promulgated by the Supreme Commander for the Allied Powers, as are necessary to obtain justice.*" を規定されてゐるのである。

然し此の本委員会が適用すべき実体法規に關しては、それは飽くまで普く承認された國際法に國際慣習でなければならぬ。何と云へば日本國民が米國の軍事委員会の裁判權に服するのは彼等が戦争犯罪を犯した戦争犯罪人なるが故であつて、殊に休戦後戦争犯罪人として裁判されるのは、日本が降伏に際し其の中に戦争犯罪人を處罰すべき旨の條項を包含するポツダム宣言を受諾した結果に外ならない。何と云へば、従来の國際法に於ては、交戦中交戦國の一方が



其の軍事的利益を擁護する爲に、それを侵害する様な行爲を爲した敵国人、中立国人を其の戦争犯罪人として處罰し得るに過ぎなかつた。それは能く近き戦時状態の継続中に限られ、其の終結後戦争犯罪人を處罰した前例はなかつたからである。即ち休戦協定成立後日本人が戦争犯罪人として国際又は外国法廷委員会等の裁判に服する事は全くポツダム宣言に基くものであつて、同宣言の實施に關しては General Douglas MacArthur が最高の責任を有するから其の制定公布した極東國際軍事裁判所條例は其の中の實際規定に關する限り戦争犯罪裁判の最高法規であるを謂はねばならぬ。而して同條例才五條は「人の犯罪に關する管轄」と題されてゐるけれども、其の實質は戦争犯罪の何者たるや即ち戦争犯罪の構成要件を定めた實際法規に外ならぬ。換言すれば、それは極東國際軍事裁判所の事物管轄の側面から戦争犯罪の範囲内容を定めたるものなのである。前述の如き今次戦争犯罪の特殊性と日本の占領に關する General Douglas MacArthur の地位を以て鑑み、本軍事委員会の審理し得べき戦争犯罪の内容も亦同條例才五條所定のもの、殊にその才二項をも同一のものでなければならぬ。若しさうでなくして本軍事委員会の如き地方的裁判所(戦争犯罪裁判所の意義に於て)に於て同條例才五條才二項所定の

犯罪以外の犯罪をも處罰し得べきものとせば、其所で裁判されし被告は  
同じ日本の戦争犯罪人であり、国際軍事裁判所で裁かれた被告も  
も不利を受けることとなり、その不公平なることを論を俟たぬからである。  
而して同條オニ項は「通例の戦争犯罪即ち戦争の法規または慣習の  
違反」と規定してゐる。此の規定は極めて簡單であつて、單に基本原則  
を掲げたに過ぎないが、此の規定の解釈上参考となるのは、主として独  
逸の戦争犯罪人の裁判に關する「国際軍事裁判所條例」である。  
同條例六條オニ項には「戦時犯罪は、戦争の法規や慣例の違反で  
ある。此の違反は、占領地の、または占領地にゐる一般人民に対して行はれた  
殺害、虐待、奴隷労働やその他の目的のための強制的移動、捕虜を公海  
上の人民の殺害、虐待、人質の殺害、公私財産の掠奪、都市町村の恣意  
的な破壊、軍事的必要によつて正當化されない荒廢を含む。これ  
之に限るのではない」と規定されてゐる。此の規定に依つて明らかになく、  
戦時犯罪とは俘虜に対するものを除き、占領地或は公海上に於て行  
はれた犯罪である。此の規定には「これに限るのではない」とある  
但書は付いてゐるが、之は犯罪行為の種類を茲に掲げたものに  
限定するのではないと云ふ意味であつて、一國の領土内にゐる一般  
人民に対して行はれた殺害等、これも戦争犯罪の觀念中に包含せらる。



る趣旨ではない。然らば「占領地の占領地に在る」(か「公海上」に於て)か  
云ふ言葉は全く無意義なるからである。勿論此の趣旨規定は独逸の戦争  
犯罪人を裁判する爲に制定されたものであるが、聯合國が戦争犯罪の裁  
判に付て、独逸に対してよりも一層苛酷な條件を日本に課するものは到底  
考へられないから、日本の戦争犯罪人裁判の爲の極東國際軍事裁判所  
條例の五條の二項をも全く之と同一に解釈されて然るべきものと信  
ずる。右二つの條例の対等條項が全く同一に解釈せらるべき所を  
論証する爲に、どうして國際軍事裁判所條例の六條の二項の様な  
規定が出来んか、其の経緯を顧みよう。1942年8月末國大統領  
Franklin Roosevelt はやがて来る勝利の日にはヨーロッパ及び  
アジアに於ける侵略者の蛮行に關する調査に基いて、これから戦争  
犯罪人は實際に犯罪行為の行はれた國の裁判所で必らず裁判さ  
れるであらうと云ふ趣旨の聲明を發し、又1943年10月のモスコフ  
相會議の結果として發表された「セツトラー一派の蛮行の責任に  
關する宣言」中にはドイツとの間に休戦が提議された場合にドイツ  
軍の占領した諸國で行はれた暴虐行為と戦争法規違反について  
責任を有するドイツ軍人、ナチス黨員等は、これらの行為の行はれた國に  
送られ、其の國の法によつて裁判され、かつ處罰されるべきである云ふ

趣旨が表明されてゐる。是等の聲明や宣言に依つて明らかである様に  
联合国は休戦後處罰すべき通例の戦争犯罪を専ら占領地に於て  
行はれたものに限定してゐたのである。

扱て本件犯罪の行はれたと云ふ昭和十九年十二月二十九日當時本件  
犯罪の行はれたと云ふパラオ諸島バベルタツカ島が米軍の占領地で  
はなくて、日本の領土の一部であつたことは顯着な事實である。而して  
本件の被害者 *Charlie Smith* 別名 *James Sally* は日本軍に捕獲  
された俘虜ではない。檢事であり、本件起訴狀に於て彼が俘虜であつた  
とは主張してゐないのである。

尤も檢事は *Charlie Smith* は俘虜ではないけれども、日本は  
其の管理下に在る俘虜及び出来れば抑留された一般人に対して  
1927年7月27日の「俘虜の待遇に關する露蘇條約」の規定を適用  
すべき旨瑞西政府を通じて承諾したから、*Charlie Smith* を抑留  
した以上は之に俘虜に対する同一の待遇をよぶべきであるを主  
張するであらう。然し乍ら俘虜とは何であるか。俘虜となるべきものの  
範囲はヘーグ陸戰條規その他一般に承認された國際法に明定  
されて居る。又1914年の米國 *Rules of Land Warfare* の第四章の  
第1條乃至第49條にも詳細に規定されてゐるので、今茲に枚舉する



これを避けるが要之に俘虜とは交戦国の一才が之を自由に放置するに  
於ては敵軍の兵力を増加し、敵軍を利用することになるべきが故に交戦権の  
作用を以て其の自由に一定の制限を加へ得べき敵国人である。即ち俘虜の  
基本觀念は專ら軍事的理由に因り自由を奪はれる敵国人である。随て  
戦争中交戦国の領土内に在る敵国私人にして抑留せられた者を俘虜として  
取扱ふにしても、それは全く軍事上の理由に基いて抑留せられたもののみに  
限らるべきである。犯罪捜査の爲に抑留せられたものをも包含するものでは  
ない。何となれば、俘虜は其の生命、身体、名誉、財産等を保障せられ、而  
敵国の軍事的利益を計るが如き行爲を爲すことは絶対に許されな  
いからである。中件被逮者 *Charlie Smith* は南洋憲兵隊ガスパン  
分駐所に抑留せられたことは事實であるが、証人佐野義一の証言に  
依れば、其の理由は當時頻繁に米艦に米軍飛行機に信号を  
送つて日本軍の情報を提供する等の间谍行爲があつたと云ふ嫌疑  
で抑留せられたのである。间谍行爲は現今如何なる國の刑法に於ても  
犯罪とせられるであらう。現に日本刑法典にも

第八十五條 敵国ノ爲メニ间谍ヲ爲シ又ハ敵国ノ间谍ヲ幫助シ  
タル者ハ死刑又ハ無期若クハ五年以上ノ懲役ニ處ス

軍事上ノ機密ヲ敵国ニ漏泄シタル者亦同シ

第八十六條 前五條ニ記載シタル以外ノ方法ヲ以テ敵国ニ軍事上ノ  
利益ヲ与ヘ又ハ帝國ノ軍事上ノ利益ヲ害シタル者ハ二年以上ノ有期  
懲役ニ處ス

第八十七條 前六條ノ未遂罪ハ之ヲ罰ス

第八十八條 第八十一條乃至第八十六條ニ記載シタル罪ノ豫備又ハ  
陰謀ヲ爲シタル者ハ一年以上十年以下ノ懲役ニ處ス

ニ規定されてゐる。叙上ノ規定は新憲法施行後は其ノ効力を停止されて居る。改正刑法に於ては削除される筈であるが、本件當時は有効であり、隨て同謀行為は犯罪とされてゐたのである。*Charlie Smith* が果して同謀行為を爲したか否かは明瞭ではない。然し兎に角彼は同謀罪の容疑者として其ノ取調の爲にガスパン憲兵分駐所に抑留されたのである。されば假令日本が瑞西政府を通じて抑留した民間人にも出來る限り俘虜と同一の待遇をよへることに同意したとしても、軍事上の目的以外の犯罪捜査の目的を以て抑留した者に対して其ノ待遇をよへる義務はないのである。假令彼が憲兵分駐所に移された以前軟禁されて居り、之に対して俘虜と同一の待遇をよふべきものであつたとしても犯罪捜査の對象となると同時に、彼は俘虜たる待遇を停止せられ、之を享受し得ないのである。斯様に *Charlie Smith* は俘虜でもなく、又俘虜と同様の待遇を受け得べきものでもない。隨て彼に対して殺害行為が加へられんとしても、それが日本領土の一部で行はれた限りに於ては、<sup>その</sup>國際軍事裁判所條例第六條第一項及隨て極東國際軍事裁判所條例第五條第一項に所謂戦争



犯罪即ち戦争の法規並に慣習に對する違反ではない。即ち本軍事委員會の裁判に得べき戦争犯罪ではないのである。

1914年の米國 *Rules of Land Warfare* 第七十一條には "crimes committed before capture - A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own army." とある規定がある。此の規定に表明される原則の適用については、犯罪の行はれた土地が捕獲國の領土であるか、俘虜の所屬國の領土であるかを問はないとするのが米國の實際の取扱振である。されば検査は此の規定に依據して假令 *Charlie Smith* が俘虜若しくは俘虜の待遇を受くべきものでなく、又本件犯罪が日本領土内で行はれたとしても、矢張被告等は彼を殺害したことに對して責任を免れないと主張するかも知れない。然し此の規定は專ら米軍が戦争を為すに當り遵守すべきものであつて、被告等の如き日本人に適用されるものではない。又此の規定に表はれた原則は專ら米國の採用する所であつて、國際社会に普く承認された法規や慣習ではない。加之此の陸戦法規第366條には "*Shall not*

of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall." とある規定があるが此の規定は絶対に中. 軍事委員会  
の裁判に適用されたことではない。此の規定はその後 G. J. Marshall  
Chief of Staff に依り改定され "Individuals and organization who violate accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to orders of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The persons giving such orders may also be punished." となったのであるが此の改定規定  
すら中. 軍事委員会に適用されないので専ら極東軍事裁判所



條例第六條の "Responsibility of accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such ~~accused~~ from responsibility circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires." と云ふ規定のみが適用されてゐるものである。陸戦法規中被告の処罰に有利な規定は之を適用するが不利な規定は之を適用しないと云ふ種の偏頗な態では到底正義は之を實現し得るものでない。故に1914年陸戦法規第71條の規定は本件に適用すべきであらざるものである。

要之俘虜ではなく又俘虜の待遇を受くべきものでない Charlie Smith に対する特日本領土であつたパラオ諸島バベルダフ・島に於て行はれた殺害行為は通常の殺人罪であつて、決して戦争犯罪ではないものであるから、之が處罰は純然たる日本の国内事項であつて、國際法に干渉すべき限りではない。故に本件は本軍事委員會の管轄に属しないものと確信するものである。

然し乍ら本軍事委員會に対する命令書第三項には "It (The military commission) shall have jurisdiction over all Japanese nationals and others ... charged with

offenses committed against United States Nationals...  
and white persons whose nationality has not prior to  
ordering of the trial been established to the satisfac-  
tion of the convening authority."と規定されてを。又検  
事は慎重にも本件に対する本軍事委員会の管轄権に関し Judge  
Advocate General に請訓し、其の結果肯定的な回答あり。  
此の回答は既に本法廷に提出された。されば今や本件に対する  
本軍事委員会の管轄権を争ふことは無意味であるかも知れない。  
然し本弁護人は本件の弁護人として否一個の法律家としての立場から  
自己の抱懐する法律的見解乃至所信を披瀝して本委員会より再考  
を促すと共に、本委員会のみならず覆審当局に本弁護人の見解を御理  
解願ふ為に自分の理解する所に従つて法律を論じ且提示した次第  
である。

若し検事が味岡と山下大將との類似性を指出して争うならば、  
山下事件は Rutledge 判事と Murphy 判事を去ふ二人の有名な法  
律家が反対意見を表明してゐるから、殊更に於て善く認められた  
判例とは謂ひ得ないを答へない。是等二人の反対意見こそは  
より主派な法であり、恐らくは明日を支配する法律になるであらう。



次に *Charlie Smith* が果して英人なりや否やに付て法律的地から  
若し述べて見ない。 *Charlie Smith* が英人であることを主証する爲に  
檢事の提出した証據は彼の妻と稱する *Rita Borgia Smith* の証言と  
彼女の提出した *Memorandum* とであるが、此の証明書は上海の税関  
に勤務する *Charlie Smith* の弟 *Peter Smith* と云ふ者の書いた私文  
書であつて、何等權威あるものでない。 *Rita Borgia Smith* は  
*Charlie Smith* と結婚し、彼の妻であることを証言したが彼等の結婚  
を証明する公文書を提出することは出来なかつた。彼女は教師 *harino*  
と主宰の下に敎会で結婚式を挙げたと証言したが斯かる結婚の  
方式は日本の法律の認むる所ではない。

日本の國際私法に依れば、結婚の方式は婚姻舉行地の法律に  
依ると規定されておる。而して民法第百七十五條には「婚姻は之を  
戸籍吏に届出づるに因りて其の効力を生ず。前項の届出は当事者双方  
及び成年の証人二人以上より口頭にて又は署名したる書面を以て之を  
爲すことを要す」と規定されてゐる。 *Rita Borgia Smith* の証言に  
依れば、彼女と *Charlie Smith* とは1923年3月バベルタフツ島に  
於て結婚した。當時同島は日本の領土であつて、曩に引用した日本の

法律は其所に施行されてゐたのである。随て彼等は其の婚姻を戸籍吏に届出でねばならなかつたのである。然るに届出でねば其の証據はない。随て彼等は乍ら Smith が死した 1945 年 12 月迄一を正式に結婚したことをないものであるから Rita Borgia Smith は Charlie Smith の妻ではない。随て彼女は Charlie Smith の pedigree に關して証言する資格はないのである。故に Rita Borgia Smith の証言中 Charlie Smith の身上に關する部分は証據能力はないのである。随て検事は Smith が英國人なることを正當の疑を越えて立証し得なかつたものを謂はねばならぬ。

## 第二部 オニ起訴オニ罪状項目に就て

オニ起訴オニ罪状項目に於て被告味岡操はガスパン憲兵分遣隊長として勤務中彼の取締監督下に在った相被告山田清の英人 Charlie Smith 別名 James Sally に対する不法殺害を抑制せしむに許可したことがガスパン憲兵分遣隊長としての職務怠慢であるとして戦争の法規に慣習違反に同擬されてゐる。

然れども先づ味岡はガスパン憲兵分遣隊長ではなかつたのである。パラオ諸島バベルタップ島ガスパンに在った南洋憲兵隊本部は昭和十



九年十一月末或は十二月初頃 同島瑪瑙山に移転したが、残りの建物や食糧等をガスパンに残さねばならなかったため、之を管理する爲に當時病気で活動し得ない状態に在った味岡以下三、四名の者をガスパンに残留せしめたのである。即ち被告等の任務は全くガスパンに在った建物や食糧等の保管に在ったのであつて、彼等はガスパン憲兵分遣隊の呼ばれてゐたが、それは單に便宜上の呼称であつて、正式の名稱ではなかつた。正式にガスパン憲兵分遣隊が設置されたのは昭和二十年二月頃であつて、此の事件が起つた昭和十九年十二月二十九日當時は未だ正式の分遣隊は設置されてゐなかつたのである。随て味岡は本件発生當時はガスパン憲兵分遣隊長ではなかつたのである。検事側は味岡がガスパン憲兵分遣隊長であることを主張し得なかつた。之を証する爲の検事側の証人 中村敦雄は只管指揮官としての責任を回避することのみ努めてゐて、其の証言は信憑性に乏しい。

次に相被告 山田清は味岡の取締及監督下に在つたのではない。ガスパン憲兵分遣隊長に在らざる味岡が彼自身の部下を持つ筈はない。却て検事側証人 佐野義一の証言に依れば、味岡も山田も陸軍憲兵中尉 中村敦雄を長とする南洋憲兵隊第一分隊に属し、中村の指揮監督を受けてゐたのである。即ち中村の部下たる地位に於ては味岡は

山田と同等である。偶々味岡は准尉、山田は軍曹であつたから階級上の上官に過ぎない。要之ガスパン残留隊の性格は之をより明確に述べば中村が率ゐる南洋憲兵隊オ一分隊の一部が残存建築物管理を任務としてガスパンに於て勤務してゐたと云ふに過ぎないのである。

次に味岡には山田清の英人 *Charlie Smith* に対する不法殺害を抑制すべき法律上の義務はなかつたのである。法律上の義務と道徳上の義務とを混同してはならぬ。味岡は彼の道徳上の義務を遂行しようと思つたのである。ガスパン残留員が正式の憲兵分遣隊ではなく随て中村分隊から独立したものであると云つても中村は平素瑞山（山）の本部に在つてガスパン残留員を直接監督することは出来なかつた状況であつたから、建築物の保存と云ふ様なガスパンに於ける日常の仕事に関しては味岡はガスパン残留員中の最失任者として相被告山田等を事實上指揮監督してゐたであらう。然し斯様な通常の任務に關してさへも中村の意思に従ふべきことを云ふ迄もない所である。之を *Charlie Smith* に付て云へば彼に宿舍を提供し食料をよめて之を養ふことが彼等に与へられた命令である。然し *Charlie Smith* の処刑は是等とは全く其の性質を異にするのであつて中村が宮崎隊長から命ぜられたのである。検事側証人 中村教雄の証言に依る



集團司令官井上中將から死刑の宣告を受けた *Charlie Smith* の死刑の執行を命ぜられた南洋憲兵隊長宮崎大佐は、第一分隊長中村中尉に *Smith* の処刑を実施すべきことを命じたのである。中村は更に宮崎は総べてを残留員に任せることなく、中村自身がガスパンに赴き直接処刑を監督する様中村に命じたと証言した。そこで中村は補助憲兵一名を率ゐ、ガスパンに赴き、味方山田等と共に *Smith* を運出した。途中山田は *Smith* を彼の家へ連れて行くのかと思つた。然し事實はさうではなかつた。中村は *Smith* を其の家へではなく、密林に通ずる道へ連れて行つた。山田は間違ひではないかと思つた。然し骰子は既に投げられたのであり、中村が一切を指揮した。中村は今や彼が避けることを出来なかつたと証言した所々宮崎の命令を実行しようとしたのである。一行は通端にある穴の所へ来た。中村は之でよいと云つた。之が處刑の現場である。そこは監督者中村が *Smith* を射殺する為に通く場所である。中村は山田に射てと命じた。彼は其の様子に証言した。彼は亦山田が射つことを躊躇したと証言した。中村が此の証言に依つても明らかにした様に *Smith* の処刑は宮崎隊長から中村を今して山田に与へられた特別の命令に基づいて行はれたものであつて、決してガスパンの残留隊員に命ぜられ、そこで実行されたものではない。

殺害は密林の通端に行はれた。中村は監督し且つ命令した。池の何人にもそれに関してどうすることも出来なかつた。味岡と山田は躊躇した。然し法律的には彼等は処刑をどうすることも出来なかつたのである。此の事に於て既に味岡には山田の Smith 殺害を抑制すべき法律上の義務はないのである。彼は又 Smith を助けたいと云ふ希望を実現することすら出来なかつたのである。

加之本件処刑に于て最失任者は宮崎であり、処刑の現場に於ける最失任者は中村である。殊に中村は被告味岡、山田等の分隊長であつて、身分上、職務上の監督権を持つてゐるのである。これは宮崎の Smith 処刑の命令が違法であるとしても、之を阻止すべき責任者は中村でなければならぬ。斯かる責任を有する中村が処刑の現場に於て直接山田に命じて射殺せしめさせた場合に、同じく中村の部下の一員に過ぎない味岡には山田の行爲を阻止すべき法律上の義務はないのである。檢察は此の事に付き何等の義務をも負ふことなく、只管山下事件の先例に依存してゐるのである。故に山田の処刑執行が假令違法であつたとしてもそれが味岡の直屬上官たる中村の指揮監督の下に行はれたものである以上被告味岡は之を抑制しなかつたことに於て職務怠慢に同はれる理由はないのである。



である。

本罪状項目には味岡が山田に *Smith* を殺すことを許可したと書かれてゐる。凡そ許可とは上官の要求に対する上官の承認を意味するものであるが、本件に於ては山田が味岡に *Smith* を殺させて苦水を出したと云ふ事實は立証されて居る。従つて味岡が山田の原由を承諾したと云ふ事實も全く認められるのである。檢事は味岡の山田の行爲を抑制すべき法律上の義務に付き何等立証することをなく、專ら山下事件の先例に依存するのみである。

故に被告味岡は第二起訴第一罪状項目に於ては無罪である。

### 第三部 第二起訴第二罪状項目に就て

第二起訴第二罪状項目に於て被告味岡はガスパン憲兵分遣隊長として勤務中同隊に抑留されてゐた英國人 *Charlie Smith* 別名 *James Sally* なる者を保護することゝ彼の権限内のことであり、當時の状況下適切な處置であり、且又彼の職責であつたにも拘らず、日本軍の人々が同人を殺すことを許可したことはガスパン憲兵分遣隊長としての職務怠慢であるとして戦争の法規に慣習違反の責任を問はれてゐる。

然し乍ら曩に起訴及罪状項目に対する異議に於ても指摘は極

第一起訴の殺人と本罪状項目の戦争の法規に慣習違反とは全く同一の事実に対して作為と不作為との両方面から起訴したものであつて、明らかに二重起訴である。即ち殺人罪を構成する行為は通常作為であり、本件の殺人罪も亦 *charlie smith* をピストルで射殺したと云ふ作為である。之に反して保護義務違反は法律上の保護義務あるものが、其の義務を全うしなかつたと云ふ不作為に依つて成するものである。而して同一の事実に関する限り作為は不作為より遠怯性の程を遙かに大である。故に例へば人の死と云ふ様を一個の結果を作為の方面から眺めるときに保護義務違反と云ふ別個殺人罪が成立し、又之を不作為の側から眺めるときに保護義務違反と云ふ別個犯罪が成立するときに於ても後者は当然前者に包含され吸収されるのである。例へば母親が幼児の咽喉を絞めて之を殺したと云ふ事実を作為の側から眺めれば殺人罪が成立するし、不作為の側から見れば親として子の保護義務を全うしなかつた即ち保護義務違反とも言ひ得るのであらう。然し此の場合刑法の理論は二個の犯罪の成立を認めないものである。其の母親は必ず殺人の一罪に付てのみ有罪である。日本刑法に次の様な規定がある。即ち第三十章 遺棄、罪

第二百十七條 老幼、不具者又は病者ヲ保護ス可キ責任アル者



之ヲ遺棄シ又ハ其ノ生存ニ必要ナル保護ヲ爲サザルトキハ三月以上五年以下ノ懲役ニ處ス。

第百十八條 老若、幼若、不具者又ハ病病ノ爲扶助ヲ要スベキ者ヲ遺棄シタル者ハ一年以下ノ懲役ニ處ス。

第百十九條 前二條ノ罪ヲ犯シ因テ人ノ死傷ニ致シタル者ハ傷害ノ罪ニ比較シ重キニ從テ處断ス。

第百十七條又は第百十八條所定ノ保護義務者が最初より要保護者を殺害する意思を以て之を遺棄し或ハ生存ニ必要ナル保護ヲ爲さなかつた場合には、第百十九條或ハ第百條ノ殺人罪と第百十九條ノ遺棄罪に因リ致死罪との兩罪が成立するのではない、後者は全く前者に吸収されて、専ら殺人罪のみが成立するものである。之は殆ど凡ての學者及び大審院判例に一致して認める處である（大正四年二月十日大審院判例、元東京帝國大學教授法学博士小野清一郎著刑法講義514頁、東北帝國大學教授木村竜二刑法各論53頁參照）。之畢竟作爲ノ違法性か不作爲のそれより大なるか爲である。米國の刑法も此の理を知らぬのではない。現に *Naval Courts & Boards § 19 Duplication of charges* の項にも "Where the offenses fall apparently equally within the scope of two or more" 23

articles of the ~~Articles~~<sup>for</sup> the Government of the Navy, or where the legal character of the offense cannot be precisely known or defined until developed by the proof, it is quite proper to specify the offense under two or more charges; but there is, of course, no reason for doing this, if one charge is lesser than and included in the other. In such a case, the specification should be laid under the more serious charge."と規定されてゐる。のである。

本件で一匙訴殺人と二匙訴~~二~~罪状項目の保護義務違反との関係の如きは正に "The law permits as many charges to be preferred as may be necessary to provide for every possible contingency in the evidence." とこの原則に付する前記例外に該当する典型的な事例であると思ふ。然るに検事は此の原則を主張して両起訴を維持せんと努め其の結果 "in due form and technically correct" と裁定された。然し両起訴維持の理由が "to provide for every possible contingency in the evidence." である以上。



才一起新の殺人罪が有罪を認定すれば、前叙の法理に照し此の  
罪状項目は當然無罪たるべきものである。

これは本罪状項目に就いては更に議論を果ねる筈もない様であるが、一有  
罪を認定するに必要を慮って以下詳しく述べて議論に見たいと思ふ。

味岡が自己の管理下にゐるガスパンに於ける憲兵隊の營造物中に *Charlie Smith* を保管してゐたことは果に争ふべからざる事實であらうか。否寧ろ *Charlie Smith* は他に適当な場所がなかつたからガスパンに置かれて  
ゐたのである。宮崎や中村は *Smith* がガスパンに居る内もずっと *Smith* を支配してゐたのである。然らば味岡は如何に *Smith* を保管するに至つた  
のであらうか。此の點につき検事側証人佐野義一は、彼は宮崎隊長より  
がラスマオの島民の逃亡の實状を調査すると共に、そこにゐる英人及び  
独逸人夫婦を逮捕してガスパン憲兵分遣隊に抑留する様命ぜられた  
ので、被告山田を伴ひがラスマオに至り英人 *Charlie Smith* 及び独逸人  
夫婦を捕へ、之をトラックに載せ山田をしてガスパン憲兵分遣隊に引渡  
して保管せしめたと証言してゐる。佐野の此の証言に依れば、*Smith* は  
宮崎隊長の命令に依つてガスパンにゐたのである。それ故に中村が  
*Smith* 保護の義務を負ふのは寧ろ宮崎隊長に対してである。味岡は  
ガスパン憲兵分遣隊長ではなかつた。彼は証人台に立つて、彼の地位が

如何なるものであるかを説明しようとした。彼の説明が成功したか否かは  
第三起訴中の二つの罪状項目に対する有罪無罪の判決に依って決定  
されるであらう。

苟くも味岡がガスパン残留員中の最先任者たる以上彼は中村分隊  
長に対して Smith を安全に保護すべき義務を負うてゐるであらう。随て  
外部から侵入した第三者或は他のガスパン残留員等が中村の不在中  
Smith に対して暴行を加へ、之を殺傷したと云ふ様な事件が起つた  
と假定すれば、味岡は中村に対して責任を負はねばならぬ。此の場合  
に於ては中村が其の指揮するガスパンに居らぬ間には Smith に対して何事  
も起らなかつた。却て Smith の身上に問題が起つたのは中村がガスパンを  
訪れた時に於てである。然らば味岡に於て職務怠慢が何所にあらうか。  
否、味岡は中村がガスパンに居らぬ間は Smith を安全に保護すべき彼の  
任務を完全に果したであらう。中村がガスパンに到着したとき、彼は Smith  
が無事であることを知つた。其の時以後 Smith を保護することは士官たる  
中村の責任である。彼は裁判には付せられなかつた。然し責任あるのは彼で  
ある。

最も外部の侵入者やガスパン残留員の Smith に対する暴行を假想して  
味岡の責任を論じたが、本件は此の設例の場合とは著しく其の趣を異に



検事側証人 中村敦夫は

にゐる。宮崎隊長から中村は直ちにガスパン憲兵分遣隊に行つて Smith を  
処刑させることを命ぜられた。彼は又分遣隊に全部を委ねることなくお前  
現場へ行つて直接指導せよと命ぜられたので、ガスパン分遣隊に行き、味岡  
山田等と共に Smith を伴つて処刑の現場に到り、そこで中村自ら山田に  
射てと命じて Smith を射殺せしめたと証言してゐる。即ち中村の証言に依れば  
Smith の処刑（それは殺人罪を構成するかも知れないが）は宮崎隊長の  
命令を受けた中村の直接指揮の下に実施されたものである。されば、味岡は  
処刑の現場迄行ったにしても、Smith を分遣隊から連れ出したとき既に  
Smith 保管の責任を解除されてゐるのである。味岡の Smith 保護の義務  
も亦中村が Smith を連出したときに終了したのである。換言すれば、宮崎隊長  
は中村や佐野を通じて一旦味岡に Smith の保管を命じた。而して味岡は  
之を実行した。然し中村を介して Smith の処刑を命ずることに依り、味岡に  
対し Smith の保管責任を解除し、保護義務を免除し、今や中村が責任を  
負ふに至つたを考へざるを得ない。何と云へば、処刑或は殺害と保護とは  
全く矛盾する觀念であつて、到底同一人に対して同時に両立し得るものでは  
ないからである。本罪状項目に記載されてゐる様に味岡が日本軍の人々  
が Smith を殺害するのを許可したと云ふ事實は全くありも無いし、  
又主張されても居らない。中村が山田に Smith を射つことを命じた

とて味方は Smith 保護の義務を全うしなかつたと強ひて言ふにしても、彼は唯処刑の現場にゐたと云ふだけのことである。其の時に於ては彼の Smith を保護すべき義務は既に終了してゐるから、准尉であり、且中村の命令に服すべき立場にゐる彼が処刑の現場にゐたと云ふ事實から Smith 保護義務違反の責任が発生する謂は全くないのである。

准尉に過ぎない味方は法律上の義務を負ひ得ない。如何なる軍隊も如何なる国際的な陸戦法規も、本件に於ては偶、味方の上官であるが、凡そ上官の命令に干渉すべき法律上の義務を下官に課しては居らないのである。委員各位は皆軍人であられるから、各位の軍隊に於て司令官とは如何なるものであるかをよく御承知であらう。司令官の命令に服従すべき准士官は、上官や司令官が指揮してゐるべきに、法律上上官や司令官に干渉することは出来ないものである。其の面前で上官が軍曹に殺す標命した人を准士官が保護すべきだ、と云ふことは日本の軍隊に於ては勿論認められてゐない。又米国の軍隊にもないであらう。これは味方は才二起訴才二罪状項目に付ては無罪である（確信する）（終）

鉄田日出史



ARGUMENT FOR THE DEFENSE IN THE CASE OF AJIOKA, MISAO AND YAMADA, KIYOSHI.  
DELIVERED BY DEFENSE COUNSEL KIWATA, HIDEO.

Part I

On the Jurisdiction

Following my colleague, Mr. Sanagi's argument on Charge I, Murder, I would like to make this argument on Charge II in which AJIOKA, Misao is charged with violation of the law and customs of war. Prior to making argument covering each specification of Charge II, I would like to discuss whether or not this Military Commission has jurisdiction to try this case. I have already discussed this matter in my plea to the jurisdiction, which was denied. However, as Section 405 of Naval Courts and Boards provides: "This plea (plea to the jurisdiction) should regularly be made prior to pleading the general issue, but as lack of jurisdiction is a fatal defect, the plea may be made at any time." the plea to the jurisdiction may be made at any stage of the procedure. Therefore, I shall further enter into this problem here, and call it to your attention again.

I hold that the alleged victim of this case, namely, Charlie Smith, alias James Sally, is neither a prisoner of war nor a person who should be treated as a prisoner of war, that the place where the crime was committed was a part of the sovereign territory of Japan at the time of the commission of the alleged crime, that this alleged crime is not a war crime but a common murder and therefore that this case does not come under the jurisdiction of this Military Commission.

The basic rule for punishing war criminals after the Instrument of Surrender was signed is paragraph 10 of Potsdam Declaration which reads: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." War criminals are persons who committed war crimes. Then what are war crimes? Article 5, Charter of the International Military Tribunal for the Far East issued and promulgated in accordance with the Potsdam Declaration by the Supreme Commander for the Allied Powers enumerates the crimes which come under the jurisdiction of the Tribunal. Then the war crimes which can be tried by this military commission should be the same as provided in the article. Because, as it is stated in the Special Proclamation of the Supreme Commander for the Allied Powers concerning the establishment of an International Military Tribunal for the Far East, by the Instrument of Surrender of Japan executed at Tokyo Bay on the 2nd of September 1945, the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers who is authorized to take such steps as he deems proper to effectuate the terms of surrender, and the Governments of the United States, Great Britain and Russia at the Moscow Conference, 26th December 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all Orders for the implementation of the Terms of Surrender, and therefore it is needless to say that General Douglas MacArthur, the Supreme Commander for the Allied Powers, has the highest authority for the effectuation of the Terms of Surrender by Japan. The effectuation of the Terms of Surrender by Japan means to have the Japanese Government and the Japanese People realize each provision of the Potsdam Declaration. And the punishment of war criminals is one of the

"BB (1)"

0128

most important articles of the declaration and is the effectuation of the Terms of Surrender. Therefore, the Special Proclamation concerning the establishment of an International Military Tribunal for the Far East and the Charter of the International Military Tribunal for the Far East attached thereto, are, so far as they concern the punishment of Japanese war criminals, the basic rules which come next to Potsdam Declaration. Of course, the Charter of the International Tribunal for the Far East provides the procedure for the trial of principal war criminals whose crimes are those against peace and/or those against humanity, which are not connected with any particular geographic area, and, over the conventional war crimes connected with a lone particular geographic area, over which international, national or occupation courts, commissions or other tribunals established or to be established in such states as have jurisdiction over the places of the crimes may exercise jurisdiction. It goes without saying that this military commission is one of this kind. So long as the trial of conventional war crimes which have connection with particular geographic areas are assigned to such courts, commissions or other tribunals, it is quite reasonable that these courts, commissions or other tribunals may use such rules of evidence and procedure as they deem convenient. As a matter of fact, Paragraph 5 of the Precept for this military commission provides: "The proceedings of the military commission will be governed by the provisions of Naval Courts and Boards...and may use such rules of evidence and procedure, issued and promulgated by the Supreme Commander for the Allied Powers, as are necessary to obtain justice." However, the substantive (real) law to be applied by this commission should be the international laws and customs which are universally accepted because the reason why some Japanese nationals are made subject to the jurisdiction of an American Military Commission is that they are war criminals who committed war crimes and especially because the reason why they should be tried after the armistice is that Japan at her surrender accepted the Potsdam Declaration which includes the provision that war criminals should be sternly punished. According to the International Law before World War II, a belligerent could only punish as war criminals such enemy or neutral nationals as committed acts infringing on her military interests in order to protect them, and moreover this kind of punishment could be enforced only during the existence of a state of war. There was no precedent that a war criminal was punished after the end of war. It originates, therefore, in the Potsdam Declaration that some Japanese are being tried after the armistice in international or national courts or commissions. And since General Douglas MacArthur has full responsibility for the effectuation of the Potsdam Declaration, the Charter of the International Military Tribunal for the Far East issued and promulgated by him is the highest rule for the trial of war crimes the substantive (real) provisions thereof are concerned. Although Article 5 of the charter is titled "Jurisdiction over persons and offenses", this Article is really a substantive (real) law which provides what the war crimes are and what are necessary conditions to constitute war crimes. In other words, it defines the scope and substance of the war crimes under the heading of the jurisdiction of the Tribunal over offenses. In view of the special character of the latest war crimes which I have mentioned above and of the position of General Douglas MacArthur concerning the occupation of Japan, the substance of the war crimes to be tried by this military commission should be the same as provided in Article 5 of the charter, particularly paragraph 2b thereof. If there is anything substantially different between the two, and if such a local court (in the sense of a war crimes tribunal) as this military commission can punish other crimes than those provided in paragraph 2, Article 5 of the charter, the defendants who are tried by this commission, although they are likewise Japanese war criminals, must be placed in much more unfavorable position than those who are tried at the International Tribunal. Needless to say, this is prejudicial to the defendants.

"BB (2)"

0129



Paragraph 2b of the Article provides: "Conventional war crimes: Namely, violations of the laws and customs of war". This provision is very simple and only sets forth the fundamental rule. For the interpretation of this provision, the Charter of the International Military Tribunal concerning the trial of German war criminals will serve as a reference. Paragraph 2b, Article 6 of the charter provides: "War crimes. Namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of, or in, occupied territory, murder, ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity." As you will fully understand by this stipulation, war crimes are crimes committed in occupied territories or on the seas except those against prisoners of war. Although this article provides, "but not be limited to", this phrase only means that acts constituting war crimes are not limited to such as referred in this paragraph, and does not mean that murder of a civilian population in the domain of the prisoner's state is included in the category of a war crime. Otherwise, such terms as "of, or in, occupied territory" and "on the seas" in the provision will come to be entirely meaningless. Of course, this is a provision for German war criminals, but we hold that Article 5b of Charter of International Military Tribunal for the Far East should be interpreted in the same way as this provision, for the Allied Forces should not force more severe conditions on Japan than those they forced on Germany in the trial of war crimes. The corresponding articles of the two charters should be interpreted in just the same way. In order to prove this, I would like to look back to the circumstances under which such a provision as Paragraph 2b, Article 6 of the Charter of the International Military Tribunal was established. In August 1942, Franklin Delano Roosevelt, the President of the United States, made an announcement to the effect that, in the coming day of victory, the war criminals would surely be tried in the courts of the countries where they had committed crimes according to the investigations of their atrocities committed by the aggressors in both Europe and Asia. Also in the Declaration concerning the responsibility of Hitler and members of his party for their atrocities issued as the result of Foreign Ministers Conference in Moscow in October 1943 it is stated to the following effect that when an armistice is proposed between Germany and the Allied Powers, German militarists and members of the Nazi who are responsible for the atrocities and violations of the laws of war committed in the countries under the occupation of the German forces will be sent to these countries to be tried and punished according to the laws of these countries. As it is evident from the announcement and declaration, the Allied Powers limited the conventional war crimes to be punished after the armistice to those which had been committed in the occupied territories.

It is clear that, on or about 29 December 1944, at the time when the crime in this case is alleged to have been committed, Babelthuap Island, Palau Islands, was not an occupied territory of the American forces but a part of the domain of the Japanese Empire. The alleged victim of this case, Charlie Smith, alias James Selly, was not a prisoner of war held captive by the Japanese forces. Even the Judge Advocate himself does not allege in the charges and specifications that he was a prisoner of war.

The Judge Advocate holds, however, that Charlie Smith should be treated as a prisoner of war and even better so far as he was interned because Japan agreed through the Swiss Government to apply the provision of the Geneva Prisoner of War Convention of July 27, 1927 to prisoners of war under its control and also as far as practicable to interned civilians. But what is a prisoner of war? A prisoner of war is clearly defined in the Hague Convention or the other universally accepted international laws. Articles 45-49 incl.,

"BB (3)"

0130

Chapter 4 of the American Rule of Land Warfare published in 1914 also defines it in detail. I won't refer to these numerous provisions. But, at any rate, it can be safely said that prisoner of war is an enemy person whose liberty may be restricted by a belligerent, because if the belligerent leaves him free it will increase the military power of the enemy and give advantage to the enemy. That is to say, the fundamental conception of a prisoner of war is an enemy person who is deprived of his liberty for strategic reasons. So an enemy civilian internee in the territory of a belligerent in time of war will not be treated as a prisoner of war unless he is interned for strategic reasons. A civilian who is interned for the investigation of a crime is not to be treated as a prisoner of war whatsoever. A prisoner of war is protected as far as life, body, honor, property, etc., and strictly prohibited from doing such an act as tends to give strategic benefit to the enemy. It is true that the victim of this case, namely, Charlie Smith, alias James Sally, was detained in the Gasupan Detachment of the South Seas Kempetai. But Witness Sano testified that Smith was detained because he was suspected of having committed an act of spying, namely offering intelligence on the Japanese forces by signal to American planes which then attacked the island in rapid succession. An act of spying will be deemed as a crime in the criminal law of any country of today. In fact, the Criminal Code of Japan provides:

- 9 Article 85. - Every person who has acted as a spy for an enemy power, or has aided a spy of an enemy power shall be condemned to death or punished with penal servitude for life or not less than five years. The same (punishment) applies to every person who has disclosed a military (or naval) secret to an enemy power.

Article 86. - Every person who by methods other than those of the preceding five articles has given an enemy power any advantage or has injured the interests of the Empire shall be punished with limited penal servitude for not less than two years.

Article 87. - Attempts of the crimes of the preceding six Articles shall be punished.

Article 88. - Every person who has made preparations or has plotted for any of the crimes specified in Articles 81 to 86 shall be punished with penal servitude for not less than one year not more than 10 years.

These provisions lost their effect after the promulgation of the New Constitution of Japan and are to be stricken out from the revised criminal code. Yet they were effective at the time of this incident, and therefore the act of spying was deemed a crime. It is not clear whether or not Charlie Smith committed the act of spying, but, at any rate, he was being detained at the Gasupan M.P. Detachment to be investigated as a spy suspect. Therefore, although Japan agreed through the Swiss Government to treat civilian internees as favorably as prisoners of war as far as practicable, she has no duty to treat as a prisoner of war a person detained, not for a strategic reason but for the investigation of a crime. Even if he was kept in custody and was treated as a prisoner of war before he was sent to the M.P. detachment, after he became an object of investigation, he could no longer enjoy treatment like that accorded a prisoner of war. As I have mentioned, Charlie Smith was neither a prisoner of war nor a person who should be treated as a prisoner of war. So, if Smith were killed because he was a spy, it is not a conventional war crime, namely violation of the laws and customs of war, stipulated in paragraph 2b, Article 6 of the Charter of the International Military Tribunal and paragraph 2b, Article 5 of the Charter of the International Military Tribunal for the Far East, so long as Smith was killed within the sovereign territory of Japan. In other words, this is not a war crime which may be tried by this commission.

"BB (4)"



Article 71 of American "Rules of Land Warfare, 1914" provides: "Crimes committed before capture - A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own army." As to the application of the principle shown in this provision, American practice makes no territorial distinction; that is, it is immaterial whether the territory in which the crime was committed was under the sovereignty of the captor's or of the prisoner's state. The Judge Advocate, by relying upon this provision, may hold that the accused is still responsible for murder of Charlie Smith, though Smith was not a person who should be treated as a prisoner of war, and though this crime was committed within the sovereign territory of Japan. But this provision is one which should be observed only by the personnel of the American forces in the time of war and is not applicable to Japanese such as the accused of this case. The principle shown in this provision is only applied by the United States, and it is neither the law or custom which is universally recognized in international society.

Besides, Article 366 of Rules of Land Warfare provides: "Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall." It is said that this provision was revised by G. C. Marshall, Chief of Staff, and became as follows: "Individuals and organizations who violate accepted laws and customs of war may be punished, therefore. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished." This provision does not apply to this commission, but does apply instead to Article 6, Charter of the International Military Tribunal for the Far East which reads: "Responsibility of the Accused. Neither the official position, at any time, of the accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires." If the provisions which are favorable for the punishment of the accused apply while unfavorable ones do not, how can justice be realized. Therefore, I hold that Article 71, Rules of Land Warfare, 1914, should not be applied in this case.

In short, the killing of Charlie Smith who was neither a prisoner of war nor a person who should be treated as a prisoner of war on Babelthup Island, Palau Islands which was a part of the Japanese territory is not a war crime but a common garden variety homicide. Therefore, its punishment is entirely a domestic affair of Japan, and the international law can not interfere with this problem. I believe, therefore, that this case does not come under the jurisdiction of this military commission.

However, paragraph 3 for this military commission provides: "It (the military commission) shall have jurisdiction over all Japanese nationals and others ... charged with offenses committed against United States nationals ... and white persons whose nationality has not prior to ordering of the trial been established to the satisfaction of the convening authority." And the Judge Advocate was prudent enough to ask for the instruction of the Judge Advocate General as to what jurisdiction this commission has over this case, and received a reply in the affirmative which has already been introduced in this court. Therefore, it might be any longer meaningless to argue whether

"BB (5)"

0132

or not this commission has jurisdiction to try this case. However, I would like to call your attention by showing my legal views and beliefs which I hold as a defense counsel in this case and as a lawyer, and also to argue and set forth the law as I understand it in order that not only this commission but also the reviewing authorities understand my point of view. If the judge advocate brings out the resemblance between Ajioka and Yamashita, then I would like to say the Yamashita case isn't universal law in U.S. because two famous lawyers, Mr. Justice Rutledge and Mr. Justice Murphy dissented. Maybe their dissent is better law and will be prevailing law tomorrow.

Next I will try to make some legal arguments as to whether Charlie Smith was a British National or not. In order to prove that Charlie Smith was a British national, the Judge Advocate produced as evidence the testimony of a woman named Rita Borgia Smith who claimed in the court room to be Charlie Smith's wife, and a certificate presented by the witness. The certificate is a private document said to be written and signed by a man named Peter Smith who was said to be a brother of Charlie Smith and lived in the Customs House in Shanghai. Nothing authentic can be found in it, and much weight must not be given to it as the evidence of Charlie Smith's status. No one testified as to its execution. Rita Borgia Smith testified that she had been married to Charlie Smith and she was his wife, but she failed to produce any certificate tending to prove their marriage to have been legally recognized. She also testified that Charlie Smith and she held a marriage ceremony under the administration of a priest by name of Marino. Such a way of marriage, however, is not legally recognized according to the Japanese law.

It is provided in the international civil law of Japan that the formula of marriage must be in complete accordance with the law of the place where the marriage takes place, and Article 775 of the Japanese Civil Code provides to the effect that marriage is legally recognized only when it is notified to the census officer and the notification must be made either verbally or with a signed document by the parties concerned and two or more witnesses.

According to the testimony of Rita Borgia Smith, she married Charlie Smith on March, 1923 at Babelthup Island. Babelthup Island constituted a part of the sovereign territory of Japan in March, 1923, and the Japanese laws cited above were in force there at that time. Therefore, they must have notified their marriage to the census officer, but there is no evidence to prove the notification. In short, they had never married legally by December, 1944 when Charlie Smith died, and Rita Borgia Smith cannot claim legally to be Charlie Smith's wife. Therefore, she is an incompetent witness to testify to the pedigree of Charlie Smith, and so that portion of her testimony which concerns her relationship with and the nationality of Charlie Smith is inadmissible as evidence. It may fairly be said, therefore, that the judge advocate failed to prove beyond reasonable doubt that Charlie Smith was a British National. British nationality cannot be proved by a scrap of paper.

## Part II

### On Specification 1 of Charge II

In specification 1 of Charge II, the accused, Ajioka, Misao is alleged to have violated the law and customs of war in that, while he was serving in charge of the Gasupan Military Police Detachment, he disregarded and failed to discharge his duty to control the co-defendant Yamada who was then subject to his control and supervision by permitting him to kill unlawfully a British national, Charlie Smith, alias James Sally.

"BB (6)"



In the first place, however, Ajioka was not in charge of the Gasupan Military Police detachment. At the end of November or the beginning of December, 1944, the headquarters of the South Seas Kempetai which then stationed at Gasupan, Babelthoap Island, Palau Islands, moved to Shisui-Zan which was located on the same island. When they moved, they had to leave some buildings and much provisions at Gasupan, so it was decided that Ajioka and the other three or four persons who had been sick and could do little work, were to be left at Gasupan to take charge of these buildings and provisions. So the duty of these persons left at Gasupan was only to take charge of the buildings and provisions. Although they were called the Gasupan M.P. Detachment, this name was given only for convenience' sake and was not an official one. It was around February 1945 that the Gasupan M.P. Detachment was officially established, and around 29 December 1944, at the time when this incident occurred, there was no official detachment at Gasupan. Therefore, Ajioka was not in charge of the Gasupan M.P. Detachment at the time of the incident. The prosecution could not and did not prove that the Gasupan party was the M.P. Detachment. Nakamura was only trying to avoid his own responsibility as commanding officer.

Next, codefendant Yamada was not subject to the control and supervision of Ajioka. Since Ajioka was not in charge of the Gasupan M.P. Detachment, he could not have his own subordinates. According to the testimony of prosecution witness Sano, Giichi, both Ajioka and Yamada were then attached to the 1st Military Police Company of the South Seas Kempetai commanded by Nakamura, Kazuo, M.P. 1st Lt. of the Army, and were under control and supervision of the said Nakamura. Both Ajioka and Yamada were parallel in regard to their position in that they were subordinates of Nakamura. Accidentally, Ajioka was a warrant officer while Yamada was a sergeant, so Ajioka was only senior to Yamada in rank. In short, the exact nature of the Gasupan remaining party is nothing but a part of 1st Company of the South Seas Kempetai commanded by Nakamura, whose duty was to take charge of the remaining installations at Gasupan.

Next, Ajioka had no legal duty to control Yamada's unlawful killing of an Englishman, Charlie Smith. Let us not confuse his legal duty with his moral duty. He tried to carry out his moral duty. Although the remaining party at Gasupan was not an officially established detachment and it was not independent from the Nakamura Company, Nakamura used to stay at the headquarters of Shisui-Zan and was not in such a position as directly to supervise these remaining persons. So the accused Ajioka, as the senior member of the party, would actually be supervising co-defendant Yamada and other remaining persons in the daily routine at Gasupan of maintaining buildings, but even that duty was subject to Nakamura's wishes. To offer dwelling and food to Charlie Smith was what they were ordered to do. The execution of Charlie Smith was an entirely different character. Nakamura was ordered to do this by Miyazaki. According to the testimony of prosecution witness Nakamura, Charlie Smith was sentenced to death by Lt. General Inoue, the commanding general of the division, who then ordered the execution of death sentence to Colonel Miyazaki, the commanding officer of the South Seas Kempetai. Colonel Miyazaki, having received the orders, ordered First Company commander, Lt. Nakamura to execute Smith. That Miyazaki told Nakamura is subject to verification and the prosecution did not verify his testimony in this matter. Nakamura said Miyazaki also ordered him not to leave it to the Gasupan party, but ordered Nakamura himself to be present at the scene and supervise the execution. Listen to his testimony as he tries to avoid his own responsibility. Then Nakamura went to Gasupan with an assistant Kempei, and started out with Smith together with Ajioka, Yamada and a few others.

"BB (7)"

0134

Along the road Yamada thought they were taking Smith home. But no! Nakamura takes the jungle road instead. Yamada knows there is something wrong. The die has been cast however. Lt. Nakamura is in charge of everything. He is now carrying out Miyazaki's orders which he testified he couldn't avoid. Nakamura is not only supervising but he is actually directing.

They come to a hole alongside the road. Nakamura says this will do. This is to be the scene of the execution. Here at the spot that supervisor Nakamura picked out Smith is to be shot. Nakamura orders Yamada to shoot. He testified to that effect. He also testified Yamada was reluctant to shoot. As you will fully understand by this testimony of Nakamura, the execution of Smith was performed according to the specific orders given by commanding officer Miyazaki and relayed by Nakamura to Yamada. This killing was not performed at the Gasupan unit detachment whatsoever. The killing was performed along the jungle road. Nakamura was supervising and also ordering. No one else could do anything about it. Both Yamada and Ajioka were reluctant, but legally they could do nothing.

Such being the fact, Ajioka had no legal duty to control Yamada in his killing of Smith nor could he even carry out his desire to save Smith. Besides, the highest ranking officer participating in this execution was Miyazaki, and the senior officer at the scene of the execution was Nakamura. Especially Nakamura was the commanding officer of the accused Ajioka and Yamada, and had authority to control these two persons both in their personal affairs and in their official duties. Therefore, even if the orders to execute Smith issued by Miyazaki was unlawful, it should be Nakamura who was solely responsible to stop the execution. In case Nakamura with such a responsibility went to the scene and ordered Yamada to shoot, Ajioka who was nothing but a subordinate of Nakamura had no legal duty to stop Yamada's shooting. I am convinced that he had no such duty. The prosecution have shown no duty. They rely only on the Yamashita case. Therefore, even if the execution were unlawful, as it was performed under the direct command and supervision of Nakamura, the direct superior of Ajioka, there is no reason for Ajioka to be charged with neglect of duty in that he failed to control Yamada.

In this specification, it is alleged that Ajioka permitted Yamada to kill Smith. Generally speaking, "to permit" means the granting of permission from a superior to the request of his subordinate. Evidence did not show that Yamada made a request to Ajioka that he wanted to kill Smith, nor is there any fact that Ajioka permitted Yamada such a request as this. Therefore, I hold that the accused Ajioka is as to Specification 1 of Charge II not guilty. The prosecution have not proved this. They have relied entirely on the Yamashita case.

### Part III

#### On Specification 2 of Charge II

In Specification 2 of Charge II, the accused Ajioka is charged with violation of the law and customs of war in that, while he was serving in charge of the Gasupan M.P. detachment, he disregarded and failed to discharge his duty to take such measures as were within his power and appropriate in the circumstances to protect Charlie Smith, alias James Sally, a British national, as it was his duty to do, by permitting the unlawful killing of the said person by members of the armed forces of Japan.

"BB (8)"

0135



However, as I have pointed out in my objections to the charges and specifications, the first charge, murder, and this specification of the second charge, violation of the law and customs of war, are clearly duplication, because an utterly identical fact is alleged in them from two different points of view, namely, commission and omission. Acts constituting a crime of murder are ordinarily commission. The murder in this case is also constituted of commission, i.e. the shooting of Charlie Smith with a pistol. Whereas neglect of duty to protect is constituted by omission of the fact that a person who has a legal duty of protection fails to discharge this duty. And, the unlawfulness of commission is graver than that of omission as far as they concern the same fact. For instance, in the following example, the death of a child viewed from the point of commission of his mother, will constitute murder, while viewed from the point of omission, it may constitute another crime, neglect of duty of protection. In such a case, however, the latter should naturally be included in the former. Suppose here is a mother who strangled her child to death. If we see this fact as commission, then it is a crime of murder, but if we see it as omission, then it is neglect of duty of protection that she, as the mother, failed to discharge her duty to protect her child. However, in this case, the established theory of criminal jurisprudence does not admit the constitution of the two crimes. The mother will not doubt be guilty only as to the charge of murder. In the Japanese Criminal Code, it is provided:

Article 217. - Every person who has deserted another person in need of assistance by reason of old age, juvenility, deformity, or illness shall be punished with penal servitude not exceeding one year.

Article 218. - Every person who has deserted an aged person, juvenile, or deformed or sick person whom he (she) is liable to protect, or failed to give such person necessary protection for existence, shall be punished with penal servitude for not less than three months nor more than 5 years.

When the crime has been committed against a lineal ascendant of the offender or a lineal ascendant of the offender's spouse, he (she) shall be punished with penal servitude for not less than six months nor more than seven years.

Article 219. - Every person who has killed or injured another person by committing a crime of the two preceding Articles shall, by comparing the above punishments and the punishment for wounding, be punished with the graver punishment.

When a person who is liable to protect such a person as provided in Articles 217 and 218 deserted or failed to give protection as to the existence of the person with intent to kill or injure him, he is not guilty of both the crime of homicide provided in Article 199 or Article 200 of the same code and the crime of killing or injuring a person by desertion provided in Article 219, but the latter is entirely included in and absorbed by the former. Thus only the crime of murder will be formed. This theory is admitted by almost all the scholars and also corroborated by the judicial precedent of the Supreme Court of Japan (Ref: Decision of the Supreme Court, 10 Feb. 1915; p 514 Lectures on the Criminal Law by ONO, Seichiro, former professor of the Tokyo Imperial University; p 53 Special Treatise on the Criminal Law by KIMURA, Kameji, professor of the Tohoku Imperial University). This is only because the unlawfulness of commission is graver than that of omission. This theory is also recognized in American Jurisprudence. In fact, Section 19 of Naval Courts and Boards provides:

Section 19 Duplication of Charges: "Where the offense falls apparently equally within the scope of two or more articles of the Articles of the Government of the Navy, or where the legal character of the offense cannot be

"BB (9)"

0136

precisely known or defined until developed by the proof, it is quite proper to specify the offense under two or more charges; but there is, of course, no reason for doing this if one charge is lesser than and included in the other. In such case the specification should be laid under more serious charge.

The relation between Charge I, Murder, and specification 2 of Charge II, neglect of duty of protection, seems to be a typical example of the above mentioned exception of the rule; "The law permits as many charges to be preferred as may be necessary to provide for every possible contingency in the evidence." The Judge Advocate tried to maintain the two charges by insisting upon this rule, and the commission announced that the charges and specifications were in due form and technically correct. But if the two charges were served in order "to provide for every possible contingency in the evidence", the accused Ajioke should, in view of the above mentioned theory of jurisprudence, be found not guilty to this specification if the first charge, murder, is proved.

Therefore, I think it is unnecessary to make any further argument on this specification, but I would like to enter my detailed discussion, for I am afraid that he might be found guilty.

Is it an indisputable fact that Ajioke had in his custody Charlie Smith and detained him in the installation of which he was in charge? No! Charlie Smith was there for want of better place. Nakamura and Miyazaki had control of Smith all the time he was in Gasupan.

Then, how did Ajioke come to have Smith in custody? As to this point, the prosecution's witness, Sano, Giichi, testified to the following effect: "He was ordered by Miyazaki to investigate the real circumstances of the desertion of the natives of Garasmao, to arrest an Englishman and a German couple who were living there and to send them to the Gasupan M.P. detachment to be kept there. According to this testimony of Sano, it is evident that Smith, because of the orders of Miyazaki, to whom Nakamura is liable for the custody of Smith. Ajioke was not in charge of Gasupan. He tried to explain on the witness stand just what his status was. How well he did it, will be determined by the findings on these two specifications of Charge II. As far as he was the senior member remaining at Gasupan, he was liable to C.O. Nakamura for the safe-keeping of Smith. If an intruder from outside or anyone of the members of Gasupan had committed violence on Smith while Nakamura was absent, Ajioke would have had to answer to Nakamura.

In this instance, nothing happened to Smith while Nakamura was absent from Gasupan which was under his command. It was only when Nakamura returned and made one of his visits to Gasupan that things began to happen to Smith.

Neglect of duty on the part of Ajioke? No. Ajioke fully carried out his duty to keep Smith safe as long as Nakamura stayed away from Gasupan. Nakamura found Smith safe when he arrived at Gasupan. From there on it was the responsibility of Nakamura, a commissioned officer, to take care of Smith. He is not on trial, but it is he that was responsible.

Now let us look back to this case. This case is very different from the above cited example. The prosecution's witness, Nakamura, according to his testimony, was ordered by commanding officer Miyazaki to go to the Gasupan M.P. detachment and have Smith executed. This testimony of Nakamura has not been verified. He said he was ordered not to leave everything to the detachment, but to be present at the scene and directly supervise the execution. This has never been verified, too. So he went to the Gasupan detach-

"BB (10)"

0137



ment and took Smith together with Ajioka, Yamada and a few others to the scene of the execution where he himself ordered Yamada to shoot Smith. This is his testimony and not verified. That is, according to the testimony of Nakamura, the execution of Smith, even if it might have constituted a crime of murder, was performed under the direct command and supervision of Nakamura who received the orders from commanding officer Miyazaki. If Ajioka was at present at the scene, he already had been exempted from his duty of safe-keeping Smith at the time when Nakamura took Smith out of the detachment. Ajioka's duty of protecting Smith also ceased at the time Nakamura took over. In other words, commanding officer Miyazaki through Nakamura and Sano once ordered Ajioka to keep Smith in custody and Ajioka did this. But when he ordered the execution of Smith through Nakamura, he relieved Ajioka from his duty of safe-keeping Smith by that order, and Ajioka's duty of protecting Smith was over. Nakamura now became responsible. I can not help thinking this way, because "execution or killing" and "protection" are entirely inconsistent conceptions and both of them cannot exist at the same time in regard to the same person. Although the specification alleged that Ajioka permitted the unlawful killing of Smith by members of the armed forces of Japan, such an alleged fact did not exist nor was it proved. If the judge advocate insists that Ajioka failed to protect Smith at the time Nakamura ordered Yamada to shoot, his participation is only that he was at the scene of the execution. His duty of protecting Smith had already ceased long before that time. Therefore, no one can derive Ajioka's neglect of duty of protecting Smith from the fact that he, a warrant officer and subject to Nakamura's orders, was at the scene of the killing. He, a warrant officer, couldn't have any legal duty. No military organization, no international rules of land warfare ever impose upon a junior a legal duty to interfere with the orders of a senior who in this instance happened to be Ajioka's.

You are all military men, so you know how commanding officer is in your own military organization. No junior warrant officer, subject to his commanding officer's orders can legally interfere with senior officer and/or his commanding officer when he, the senior and/or commanding officer, gives a command.

No! It is not in the Japanese organization nor will it be in the American organization that a warrant officer can protect a person who has been ordered to be killed in his presence by a commissioned officer, from being shot by a sergeant. Therefore, I hold that Ajioka is not guilty as to Specification 2 of Charge II.

Respectfully,

KUNATA, Hideo  
Defense counsel.

I certify the foregoing to be a true and complete translation of the original argument, to the best of my ability.

*Eugene E. Kerrick*  
EUGENE E. KERRICK, Junior,  
Lieutenant, U. S. Naval Reserve,  
Interpreter.

"BB (11)"

0138

ARGUMENT FOR THE DEFENSE IN BEHALF OF THE ACCUSED AJIOKA, MISAO AND YAMADA,  
ROYOSHI DELIVERED BY COMMANDER MARTIN E. CARLSON, U.S.N.R., COUNSEL FOR THE  
ACCUSED.

Gentlemen of the Commission:

The precedent for the trial of Warrant Officer Ajioka and Sergeant Yamada is, we believe, primarily based on the trial, the procedure, and rulings in the case of General Tomoyuki Yamashita, Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands. This is particularly so as regards Charge II.

The Yamashita case is the precedent. But what of precedents and what of the Yamashita case?

It was Mr. Justice Rutledge in his dissenting opinion in that case who said: "Precedent is not all-controlling in law. There must be room for growth, since every precedent has an origin. But it is the essence of our tradition for judges, when they stand at the end of the marked way, to go forward with caution keeping sight, so far as they are able, upon the great landmarks left behind and the direction they point ahead. If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice, including this one, both in their own judging and in their new creation. The proceedings in this case veer so far from some of our time-tested road signs that I cannot take the large strides validating them would demand."

So we see that even the Supreme Court of the United States of America was not in full accord with the decision rendered in that case because the motion for leave to file a petition for writs of habeas corpus and prohibition in the Supreme Court and the petition for certiorari to review an order of the Supreme Court of the Commonwealth of the Philippines when set down for oral argument in one case, was only a majority opinion and two famous jurists, Mr. Justice Rutledge, and Mr. Justice Murphy gave dissenting opinions.

Notwithstanding these two dissenting opinions the judge advocates in this case have based Charge II against Ajioka entirely on the precedent of the Yamashita case which they maintain was established when Mr. Chief Justice Stone delivered the opinion of the court on February 4, 1946. This is less than two years and so we will agree that the Yamashita case is indeed new law. It is not only new law but it is a very startling law, a law which every military officer shudders to contemplate.

The question in the Yamashita case was, and I quote from the majority opinion: "The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial."

The majority opinion went on to say:

"It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would

"CC (1)"

0139



almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.

"This is recognized by the Annex to the Fourth Hague Convention of 1907 respecting the laws and customs of war on land. Article I lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be 'commanded by a person responsible for his subordinates.' 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels 'must see that the above articles are properly carried out.' 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it 'the duty of commanders in chief of the belligerent armies to provide for the details of execution of the foregoing articles, (of the convention) as well as for unforeseen cases' and, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'

"These provisions plainly imposed on petitioner, who at the time specified was Military Governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."

That, gentlemen of the Commission is the Yamashita case.

Before I show you how different that case is to this present case and how inapplicable it is to this present case and how different was the position of Ajioke, a warrant officer who was left by his commanding officer to look out for two sick Japanese Kempeis and a few abandoned buildings at Gasupan, to that of General Tomoyoshi Yamashita, the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Island, I want to read to you what a great jurist, Mr. Justice Murphy, said when he dissented from the majority opinion in this case.

Mr. Justice Murphy in his dissenting opinion said among other things that the majority opinion only held that Yamashita "failed to provide effective control of your troops as was required by the circumstances." He explains what he means and why he dissents from the majority opinion. I quote from the dissenting opinion of Mr. Justice Murphy:

"In other words, read against the background of military events in the Philippines subsequent to October 9, 1944, these charges amount to this: 'We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects we have succeeded. We have defeated and crushed your forces. And now we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and

"CC (2)"

and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread we will not bother to charge or prove that you committed, ordered, or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgement are whatever we wish to make them."

"Nothing in all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of the defeated armies bears no resemblance to justice or to military reality.

"International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviation from duty. The probability that vengeance will form the major part of the victor's judgement is an unfortunate but inescapable fact. So great is the probability that international law refuses to recognize such a judgement must be in a particular instance. It is this consideration that underlies the charge against the petitioner in this case. The indictment permits, indeed compels, the military commission of a victorious nation to sit in judgement upon the military strategy and actions of the defeated enemy and to use its conclusions to determine the criminal liability of an enemy commander. Life and liberty are made to depend upon the biased will of the victor rather than upon objective standards of conduct.

"The court's reliance upon vague and indefinite references in certain of the Hague Conventions and the Geneva Red Cross Convention No. IV of October 18, 1907, 36 Stat. 2227, 2295, to the effect that the laws, rights and duties of war apply to military and volunteer corps only if they are 'commanded by a person responsible for his subordinates,' fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated. The phrase has received differing interpretations by authorities on international law. In Oppenheim International Law (6th ed., rev. by Lauterpacht, 1940, vol. 2, p. 204, fn. 3) it is stated that 'The meaning of the word 'responsible' ... is not clear. It probably means 'responsible to some higher authority,' whether the person is appointed from above or elected from below; ...' Another authority has stated that the word 'responsible' in this particular context means 'presumably to a higher authority,' or 'possibly it merely means one who controls his subordinates and who therefore can be called to account for their acts.' Weaton, International Law (14th ed., by Keith, 1944, p. 172, fn. 30). Still another authority, Westlake, International Law (1907, Part II, p. 61), states that 'probably the responsibility intended is nothing more than a capacity of exercising effective control.' Finally, Edwards and Oppenheim, Land Warfare (1912, p. 19, par. 22) state that it is enough 'if the commander of the corps is regularly or temporarily commissioned as an officer or is a person of position and authority.' It seems apparent beyond dispute that the word responsible was not used in this particular Hague Convention to hold the

"cc. (2)"



commander of a defeated army and to any high standard of efficiency when he is under destructive attack; nor was it used to impute to him any criminal responsibility for war crimes committed by troops under his command under such circumstances.

"The provisions of the other convictions referred to by the Court are on their face equally devoid of relevance or significance to the situation here in issue. Neither Article 19 of the Hague Convention No. I, 36 Stat. 2371, 2389, nor Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, refers to circumstances where the troops of a commander commit atrocities while under heavily adverse battle conditions. Reference is also made to the requirement of Article 43 of the Annex to Hague Convention No. IV, 36 Stat. 2295, 2306, that the commander of a force occupying enemy territory 'shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' But the petitioner was more than a commander of a force occupying enemy territory. He was the leader of an army under constant and devastating attacks by a superior re-invading force. This provision is silent as to the responsibilities of a commander under such conditions as that.

"Even the laws of war heretofore recognized by this nation fail to impute responsibility to a fallen commander for excesses committed by his disorganized troops while under attack, Paragraph 347 of the War Department publication, Basic Field Manual, Rules of Land Warfare, FM 27-10(1940), states the principal offenses under the laws of war recognized by the United States. This includes all of the atrocities which the Japanese troops were alleged to have committed in this instance. Originally this paragraph concluded with the statement that 'The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall.' The meaning of the phrase 'under whose authority they are committed' was not clear. On November 15, 1944, however, this sentence was deleted and a new paragraph was added relating to the personal liability of those who violate the laws of war. Change 1, FM 27-10. The new paragraph 345.1 states that 'Individuals and organizations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability, either by way of defense or in mitigation of punishment. The person giving such orders may also be punished.' From this the conclusion seems inescapable that the United States recognized individual criminal responsibility for violations of the laws of war only as to those who commit the offenses or who order or direct their commission. Such was not the allegation here. Cf. Article 67 of the Articles of War, 10 U.S.C. pp 1539."

I hesitate greatly to point out to the learned members of this Commission how this Ajioka case is different from the Yamashita case because the differences are so obvious. I trust you will not think me presumptuous when I point out to you the glaring differences in the two cases.

Yamashita was a Commanding General of all Japanese forces in the Philippines, both Army and Navy and in addition he was the Military Governor of the Philippines.

And what of Warrant Officer Ajioka, Misao? In December 1944 he was an unknown and very unimportant warrant officer. He was sick and of little, if any, importance in the Kempeitai organization so when the Kempeitai moved from Gasupan to Shisui-Zan they didn't even bother to take him along. They

"CC (4)"

told him to stay at Gasupan and with two sick enlisted men look out for the abandoned buildings. Ajioka did what he was told to do never realizing that one day the Americans would compare him to the great Japanese General Tomoyuki Yamashita. All during the trial Ajioka has been likened to Yamashita as regards his responsibility.

Yamashita wouldn't like the comparison if he were alive. And I can assure you Ajioka doesn't like the comparison. Ajioka doesn't like it because his liberty, yes his very life, is made to depend upon what the court did in the Yamashita case and not upon the objective standards of his conduct that day in December of 1944.

Ajioka was a warrant officer and the prosecution have failed to prove what the extent of authority of a warrant officer is in the Japanese Army or what the extent of Ajioka's authority was at Gasupan. The prosecution were content to show that Ajioka was a warrant officer and with that they say to you members of the Commission that his responsibility was like unto that of General Tomoyuki Yamashita, Commanding General of all Japanese forces in the Philippines and Military Governor of the Philippines.

In an attempt to prove their case the judge advocate in his opening argument for the prosecution quoted from Bouvier's Law Dictionary, Vol. 2.

The judge advocate forgot to mention that Bouvier's Law Dictionary was published in 1914 and is so out of date that it is no longer being published. I am sure that the judge advocate will admit that the law is not static. If it were we would not even be trying individuals for war crimes. It is therefore a little inconsistent to quote from an obsolete law dictionary published in 1914 as to what the law in 1947 is and in the same breath quote the Yamashita case. There is an axiom in the law that you cannot blow both hot and cold at the same time.

But the judge advocate has quoted from Bouvier's Law Dictionary and we shall see how far we can go along with that dictionary in this case.

Bouvier's Law Dictionary, the third revision which the judge advocate relies on is the eighth edition and was published in 1914.

We must look under "officers" for a definition of commanding officer. There on pp 2402-2409 we find the following definitions good in 1914.

"Officer. One who is lawfully invested with an office."

"Military officers are those who have command in the army. Non-commissioned officers are not officers in the sense in which that word is generally used; Babbitt v. U.S. 16 Ct.Cls. 214."

Did the prosecution prove Ajioka was an officer with a command. No. They rely on the word warrant officer. We ask that the court find of their knowledge that a warrant officer is not an officer. He receives not a commission but a warrant. And thus when Bouvier says that in 1914 "Non-commissioned officers are not officers in the sense in which that word is generally used" citing Babbitt v. U. S., 16 Ct. Cls. 214, Ajioka not having received a commission must logically be held not to be an officer. At least the prosecution should show what the status of a warrant officer is in the Japanese Army.

Bouvier's Law Dictionary does not define war crimes. Crime however is defined on page 729.

"CC (5)"

0143



"Crime. An act committed or omitted in violation of a public law forbidding or commanding it."

"Crimes are defined and punished by statutes and by the common law."

"There are no common law offenses against the United States; U.S. v. Eaton, 144 U.S. 677, 12 Sup. Ct. 764, 36 L.Ed. 591; Pettibone v. U.S. 148 U.S. 203, 13 Sup. Ct. 542, 37 L. Ed. 419. See Common Law. There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute; U.S. v. Lacher, 134 U.S. 624, 10 Sup. Ct. 625, 33 L. Ed. 1080. Todd v. U.S., 158 U.S. 282, 15 Sup.Ct. 889, 39 L. Ed. 982."

Even Black's Law Dictionary published in 1933 doesn't define a war crime.

Black however does define warrant officer as "one who holds as evidence of right a warrant signed by the Secretary of War or of the Navy. Stephens v. Civil Service Commission of New Jersey, 101 N.J., Law, 192, 127 A. 808, 811."

Black's Law Dictionary, Third Edition published in 1933 p. 1287. On page 1832, warrant officer is defined.

"Warrant officers. In the U.S. Navy these are a class of inferior officers who hold their rank by virtue of a written warrant instead of a commission, including boatswains, gunners, carpenters, etc."

So much for the law as we find it in dictionaries.

We have shown you that Ajioka had no command responsibility. We have proved that both Ajioka and Yamada were under the command of Lt. Nakamura; both were members of the First Kempeitai Detachment.

I should rather say the prosecution proved this because on cross-examination they asked Ajioka, "40. Q. Then what officer was in charge of the Kempeitai Detachment at Gasupan? A. Commanding officer of the First Kempeitai Detachment, Captain Nakamura. 43. Q. Were you not the warrant officer in charge of the Gasupan Kempeitai Detachment? A. I did not command the Gasupan Detachment. I do not have authority to command. It was commanded by Commanding officer of the First Detachment, Captain Nakamura."

As in the Yamashita case the prosecution rely on vague and indefinite references in certain of the Hague conventions and the Geneva Red Cross Convention. So in the specifications all they allege is "this in violation of the law and customs of war."

Even in the Yamashita case as Mr. Justice Murphy pointed out the clause "responsible for his subordinates" fails to state to whom the responsibility is owed or to indicate the type of responsibility contemplated.

Whatever the type of responsibility General Yamashita's was and to whom he owed this responsibility it is an altogether different type of responsibility that a General has than does a Warrant Officer. This follows equally by virtue of difference in rank. So, too, does it follow as to whom this responsibility is owed. Yamashita as the Commanding General of all Japanese Forces in the Philippines and as Governor of the Philippines owed a certain responsibility to higher authority. To whom he owed that responsibility, you can be assured, it was an altogether different authority than the authority that Ajioka, a warrant officer, owed any responsibility. A warrant officer, owed any responsibility he may have had as regards Yamada.

We have shown that both Yamada and Ajioka were subordinates of Captain Nakamura, a commissioned officer. There isn't any question but that Nakamura was there at the shooting, supervising it and issuing the orders.

"CC (6)"

0144

He readily admitted he ordered Yamada to shoot. He said in ordering Yamada to shoot that he was only relaying Miyazaki's orders. Since Nakamura isn't on trial, whether he was relaying orders or actually giving the orders to Yamada himself does not have to be determined. Our question for the moment is did Ajioka have a duty under international law to control Yamada when Nakamura testified he, a commissioned officer, was there and did supervise Yamada. Q. 289 to Nakamura: "Did you see that Miyazaki's orders were carried out that day? A. Yes, I did."

On the first day of the trial Nakamura answered the judge advocate on direct examination to question 14 as to what particular orders did Miyazaki give you by saying among other things: "You too, go along to the scene and directly supervise the execution". This is what he was ordered to do by Miyazaki he said. And again in answer to Q. 291, Nakamura tried to evade his responsibility but not quite able to do so had to admit and he testified: "I was told to supervise the execution on certain points. On these points I supervised but in other points I am not able to give any orders." To question 292 Nakamura thought he clearly avoided incriminating himself when he answered: "Then you were ordered to go to the scene and supervise and direct the execution? Is this true? A. I was told to supervise the execution as I supervised it and I was not ordered to direct the execution."

What does the judge advocate mean therefore when he charges Ajioka with failing to control ... and subject to his control and supervision, namely Yamada.. and puts his chief witness Nakamura on the stand and Nakamura testifies as he did that he, Nakamura, exercised supervision over both Yamada and Ajioka.

Specification 2 of Charge II is fundamentally the same specification. Both specifications are but the same charge. Charge II is but a duplication of Charge I as regards Ajioka and was used to provide for the exigencies of proof.

The judge advocate, relying on the Yamashita case, couldn't and didn't prove any command responsibility on the part of Warrant Officer Ajioka.

Thinking they wouldn't even have to prove the command responsibility of Ajioka if they proved murder of Smith they put Nakamura on the stand to testify as to the murder. Nakamura forgot what he was supposed to testify to and before he knew it, as we have pointed out, he testified unwillingly but nevertheless he testified that he, Nakamura, supervised the shooting and he also said he ordered Yamada to shoot.

In his desire to evade responsibility as a commanding officer he had unwittingly testified that he had exercised supervision over Yamada and was therefore responsible for whatever Yamada did when he Nakamura ordered Yamada to shoot.

It wasn't necessary for Sano or Ajioka or Yamada to testify who the commanding officer of the First Kempeitai Company was and that both Ajioka and Yamada were members of the First Kempeitai Company commanded by Lt. Nakamura even while assigned to Gesupan. Gesupan Detachment in December 1944 was part of Lt. Nakamura's command.

Sano was asked Q. 27 and 28 by the judge advocate, "Q.27 Where was Yamada at this time? Yamada was with the Palau First Detachment or Company." Q. 28. Who was the Commanding Officer of Yamada, then? A. (by Sano, Gilchi, former first lieutenant head of Special Higher Section of South Seas Kempeitai) The commanding officer of the First Detachment or Company, First Lieutenant Nakamura." Sano testified several times to the effect.

"cc (7)"

0145



A Ajioka, when testifying, was asked "Q. 10. Then to whom did the person-  
all that were left belong? A. We belonged to the First Kempeitai Detachment  
or Company and were under the command of Commanding Officer Captain  
Nakamura, Kazuo."

The judge advocate in his cross-examination of Ajioka asked him "Q. 37.  
Then what officer was in charge of the Kempeitai Detachment at Gasupan?  
A. Commanding Officer of the First Kempeitai Detachment, Captain Nakamura."  
Q. 43 by the judge advocate to Ajioka: "Were you not the warrant officer in  
charge of the Gasupan Kempeitai Detachment? A. I did not command the Gasu-  
pan Detachment. I do not have authority to command. It was commanded by  
Commanding Officer of the First Detachment, Captain Nakamura."

Yamada testified that during December of 1944 he was attached to South  
Sea Kempeitai, Palau Kempeitai Detachment. See answer to Q. 5.

Nakamura who was only supposed to testify that Yamada shot Smith went  
further. He wanted to prove Smith dead. The judge advocate maintains  
Nakamura did prove Smith dead. The big mistake however is that Nakamura  
didn't prove that Yamada killed Smith. Nakamura told the truth and testified  
that without even examining Smith he ordered two persons to shovel dirt over  
his body as it lay there in a hole, where the body, he said, had fallen.

So the judge advocate cannot say as he has so often said in previous  
cases: "The man was alive in the morning and he was dead before the sun  
went down that day."

Whether the judge advocate proved it was Smith who was shot or Smith  
who died is beside the point in this case because Nakamura proved that he  
intervened after he had ordered Yamada to shoot and without examining the body  
to see that Smith was dead ordered two persons to shovel dirt on Smith.

The prosecution didn't prove Smith died from the bullet which Yamada  
shot. There is no presumption in law that one bullet will kill a person.  
How a person dies must be proved. In every case of accident or violent  
death there must be a post mortem. So it proves nothing when the judge  
advocate says Smith was alive in the morning and dead at night.

We maintain Smith died because Nakamura buried him alive. Fantastic  
you say? Granted! It was only a few weeks ago that the newspapers carried  
the unbelievable story of an American who was operated upon and a large spike  
removed from his head. He had been a prisoner of war. During the period he  
had been a prisoner of war someone had driven this spike into his head. But  
he didn't die. His head healed and now after more than four years, the med-  
ical profession find it difficult to believe how he could have ever survived  
such torture. I seem to remember that a surgeon removed the spike and the man  
is still alive. That is but another instance of truth that is stranger than  
fiction.

I cannot believe that Smith was deliberately buried alive but there has  
been no proof during this trial that Smith died from the bullet wound from  
the pistol of Yamada. The judge advocates knew they couldn't prove this and  
so they made no attempt.

In their closing argument the prosecution have told us that murder is  
defined in Section 53 of Naval Courts and Boards. But the judge advocate  
forgets to say that under Section 53 there is a sample specification.

"00 (8)"

In part this sample specification reads as follows: "wilfully, feloniously, with malice aforethought, and without justifiable cause assault, shoot at, and strike with a bullet fired by him the said Y\_\_\_\_, from a deadly weapon, to wit from a loaded \_\_\_\_ pistol, caliber \_\_\_\_, one \_\_\_\_, and did therein and thereby then and there inflict a mortal wound in and upon the neck of the said Y\_\_\_\_, of which said mortal wound so inflicted, as aforesaid, the said Y\_\_\_\_ died at or about \_\_\_\_ on \_\_\_\_.

How different this is from what the prosecution have proved. The prosecution only proved that Yamada fired a shot from his pistol. Without looking to see if Smith were dead, dirt was shoveled over his body.

As part of the evidence there are the signed statements of both of the accused admitted into evidence over our objection and warning that these statements were made while the accused were confined at Sugamo prison. We stated that both of the accused were in a mental state of agitation and that in accordance with Selden's Principle (See Hendrickson v. People 10 N.Y. 33) the statements should not be admitted.

We couldn't show by cross-examination of the witness, Commander Ogden, because he knew nothing of the circumstances under which the statements were written and signed. The prosecution insisted however that Commander Ogden was a competent witness even if he had not been present.

The judge advocates cited as their authority Section 856 of Wigmore on Evidence Vol. III. Let us say what Wigmore says because Yamada testified on the witness stand that one of the reasons he took the witness stand was to correct his statement.

Wigmore says: "Every slight probability of untruth, to be sure, is sufficient to exclude (a probability much less than that which supports other testimonial exclusions), and the tests worked out are often more or less artificial; but this principle underlies the whole body of rules. If now a circumstance appears which indicates that the law's fear of untrustworthiness is unfounded, and counteracts the significance of the improper inducement by demonstrating that after all it exercised no sinister influence, the confession should be adopted."

Wigmore continues by saying: "This is the theory of Confirmation by Subsequent Facts..." That theory is that where, in consequence of a confession otherwise inadmissible, search is made and facts are discovered which confirm it in material points, the possible influence which through caution had been attributed to the improper inducement is seen to have been nil, and the confession may be accepted without hesitation."

There is a footnote to all this, footnote number 1 on page 338 to Sec. 856, Wigmore on Evidence, Vol. III, Confessions: Confirmation by Facts which reads: "A subsequent confirmation by the accused's own acknowledgement of the correctness of the confession should also relieve from any inquiry into the influence of the inducement, or into the voluntariness in general of the confession." Two cases only are cited in support of this abstract ruling: 1906, State v. Johnny, 29 Nev. 203, 87 Pac. 3; 1922 Parker v. State, 91 Tex. 68, 238 S.W. 943 (citing the above text with approval, per Lattimore, J.)"

The statement of Yamada introduced and accepted on the basis of these two obscure cases, one a Nevada case and the other a Texas case without even reading the cases clearly shows how dangerous it is to accept an opinion as a dogmatic rule to cover all cases.

Yamada introduced and accepted on the basis of these two obscure cases, one a Nevada case and the other a Texas case without even reading the cases clearly shows how dangerous it is to accept an opinion as a dogmatic rule to cover all cases.

"CC (9)"



But Wigmore is a highly respected authority and as we suspected he also cites Mr. Leach in Crown Law, 3d ed., I 301. In Section 857 Ibid Wigmore says: "It will be observed that, in Mr. Leach's phrase, 'so much of the confession as relates strictly to the fact discovered by it' is to be received; in other words, the confirmation admits the part confirmed and that only."

Did the witness, Commander Ogden, testify that he had made a search and discovered facts which confirmed the statement of Yamada? He did not. In fact Commander Ogden knew, or he should have known because the judge advocates put on as their chief witness Captain Nakamura and he testified that he did not fire a shot. Nakamura only planned the execution, ordered Yamada to shoot and as Smith fell into the hole, hurriedly had his body covered with dirt without even examining the body to see if Smith were already dead.

Every doctor knows the American Crowbar case. We ask that the Commission take notice of this famous case. These are the facts as we remember them. If the details are omitted the doctor can supply more details and verify the facts.

Dynamite was being tamped into a hole for purposes of blasting. A crowbar was being used to tamp the dynamite into the hole. This was considered a safe practice. Without warning the dynamite exploded. The crowbar was driven up through the chin and shattered the entire front of the brains and the head. Did the person die? No. Given medical and surgical attention he lived for many years.

Is there any reason to believe that with only one shot fired at the victim that he would have died as a result of that one shot if Nakamura had not ordered his body covered with dirt. We will never know because Nakamura didn't even examine the body.

Nakamura could only testify on direct examination, "I looked into the hole and saw he was completely dead. Therefore I said to an assistant Kempei, Uemura, to bury the body and they buried the body."

Nakamura didn't care whether he buried Smith alive or not.

When Nakamura was asked "What kind of a skin did he have?" he answered, "It was ordinary. It could not be said he was white or dark but he did not have the skin like a white man."

No, Nakamura paid no attention to what he looked like before Smith was shot or after he was shot. Smith was buried alive and died because he was buried alive. He didn't die because of one shot. This wasn't even homicide by misadventure.

Neither Yamada or Ajioke were responsible for the death of Smith, if that was his name. The chief witness for the prosecution, Nakamura, by his own testimony stands convicted of this crime.

Set both Ajioke and Yamada free. They are not guilty of the crime of murder. On cross-examination Nakamura was asked: "Q.255 Didn't you testify that he rolled into the hole after one shot? A. I did." "Q. 256. So that you never examined the body to see whether he was dead or not? A. I did not inspect the body. I just looked at the body with my eyes for a 'little while.'" "Q. 257. Then you ordered people to begin shoveling dirt over him? A. Yes."

Nakamura has admitted that he didn't even make a pretense to examine the body but that dirt was shoveled upon the body and it was soon covered over, buried alive.

"CC (10)"

You observed Nakamura and you heard his testimony. He is the guilty one. Release these two accused. Set them free once again. Show them that American justice means what we say it does when we say: "If there is a reasonable doubt as to the guilt of the accused, he must be acquitted."

Men don't die in two minutes from one bullet round. It is common knowledge that even when men are hanged that they are not dead for thirteen to fifteen minutes.

There must be a reasonable doubt in the minds of each and every one of you that this man Smith did not die from one bullet only. But for the fact that he was buried alive he would not have died that day.

Since there were only four persons present at the time Yamada fired his pistol and Nakamura allowed no one to examine the body, neither did he examine the body, but ordered one or two persons to shovel dirt over the body of Smith as he lay there helpless in the hole we maintain that death was unintentional on the part of Yamada and death was not collateral to the act of Yamada firing his pistol.

There is still a presumption that Yamada is innocent until the prosecution have proved him guilty, not of shooting Smith, but of murder. Whether death was collateral to the shooting and caused directly by burying Smith alive or collateral to Smith being buried while still alive and directly by the wound inflicted by Yamada is a matter of expert opinion.

There is reasonable doubt that Smith died from the shot inflicted by Yamada.

The shooting of Smith must be proved to have been the proximate cause of the death of Smith. This the prosecution has failed to prove.

The case of State v. Schaefer, 96 Ohio St. 215, 117 N.E. 220, LRA. 1918 B 945, Ann. Cas. 1918 E. 1137 is cited in footnote 15 and 18 to Section 190 Homicide, in 26 Am. Jur. p. 283. That case held that "the unlawful act relied upon as the predicate for manslaughter must be the proximate cause of death and if death results from any other cause or there is reasonable doubt as to the unlawful act being the proximate cause, the jury should acquit."

Whether the death of Smith was or was not consequent to the shooting by Yamada is a question of proof and there was no proof that the death of Smith was so consequent.

Since there was no positive proof as to whether the bullet caused the death of Smith or his death was caused by being buried alive the question need not be settled as there is no proof that Yamada had any criminal intent. If there was a homicide there was only homicide by misadventure. Yamada was ordered to come along. At first he believed Nakamura was going to return Smith to his home. Soon however he realized that he was mistaken. Nakamura ordered the small party to stop along the road. He said he was only carrying out the orders of Miyazaki. Nakamura ordered Yamada to shoot. Yamada was reluctant to do so because he had grown to know and like Smith. There was no reason for Yamada to shoot Smith. Nakamura was insistent, however, and would stand for no delay, and while Yamada was handling his pistol he suddenly fired it.

Yamada is testifying: "I thought Smith was going to be sent home but from the road the group went toward the jungle. I felt queer and I thought and knew definitely for the first time that Smith was going to be executed." Q. "What happened then?" Yamada's answer: "Captain Nakamura said to warrant officer Ajikawa 'Where is the hole?' But the hole could not be found. Near

"00 (11)"



Captain Nakamura there was a hole which looked like an air raid shelter so Captain Nakamura said, 'It will be done here,' and ordered me to bring Smith and make him sit down. I made Smith sit down near the hole." Q. 13. "What happened then?" Answer by Yamada: "Captain Nakamura suddenly ordered 'Yamada shoot!' My yead was in a daze and I was confused. Then Captain Nakamura ordered as if to scold me, 'What are you hesitating about. Hurry up and do it.'" Smith didn't even fall down because he was already sitting down alongside a hole. He fell into the hole and was quickly buried.

The judge advocate forgot to or could not prove the corpus delicti.

Paragraph 6, Homicide, in Am. Jur. page 159 defines corpus delicti in homicide. "The term 'corpus delicti' means the body of the offense; the substance of the crime. As applied in homicide cases it has at least two component elements; the fact of death, and the criminal agency of another person as the cause thereof. Inasmuch as proof that the life of a human being has been taken involves the inquiry as to the identity of the person charged to have been killed, it sometimes has been thought that the identity of the slain person is a third element."

In this case the identity of the person killed is most important. It was alleged that he was a British national. This is a material fact which the prosecution were required to prove. You recall how they did this. Mrs. Smith, a resident of Saipan, took the witness stand and testified that she had lived on Palau from 1905 until 1945 and that she married Charlie Smith in March of 1923.

We objected to the memorandum which the judge advocate introduced into evidence, a writing stating that Charlie Smith had been born in HongKong in 1875. Without even proving the execution of the memorandum it was accepted into evidence for the purpose of proving that Charlie Smith was an Englishman. "The general principal has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness (or execution) of it." Wigmore on Evidence, Vol. 7, Sect. 2130, p. 570.

We maintain that British nationality cannot be acquired by simply producing a paper which states my brother Charlie Smith was born in HongKong, China in 1875 and is therefore a British national. In 1875 and for many years thereafter many an adventurer and soldier of fortune wished he were a British citizen. Britain looked out after her loyal subjects. But that didn't mean that everyone in the Orient and in the South Sea Islands was a British national even if he carried around a piece of paper which stated he was a British national.

Even granted that this so called Charlie Smith might have been born in HongKong in 1875 and presumed therefore to be a British subject it doesn't necessarily follow that in 1944 Charlie Smith was a British national. The judge advocate failed to prove that Charlie Smith was a British national in December, 1944.

The judge advocates, after getting a photograph of Charlie Smith into evidence, tried to connect it up with the person shot at by Yamada. Mrs. Smith testified that Charlie was in confinement from 1941 until October 1944 when someone told her that three soldiers took him away.

Sano said the picture was an Englishman, James, (See answer to Q.), but Sano wasn't at the scene of the shooting of the victim. He couldn't testify

"OC (12)"

that the person shot was the same person in the picture.

Iwamoto, Harukichi also identified the picture. He said it was the Englishman Smith (See answer to Q.14), but he couldn't testify that this was a picture of the victim because he wasn't there when the victim was shot.

Iwamoto, however, testified that in August of 1945 he dug up a body and after almost nine months he easily identified the body and clothes because the corpse had not deteriorated, the features were still very well preserved and even the clothes were only slightly faded. Even the skin of the face still had color. His hair red. Some of these Japanese must think Americans very gullible to believe such testimony.

The pants Smith had on in the picture Iwamoto remembered were white and different from the dark pants the corpse he dug up had on. But he easily identified the corpse.

But Ajioaka and Yamada are charged with murder and what difference does it make who it was that was killed as long as a person was killed. But we maintain that looking at and hearing the evidence offered by the prosecution in this case that they have not proved that Yamada shot and killed Smith. The prosecution have not proved that Yamada shot Smith wilfully, feloniously, and with malice aforethought and struck him with a bullet from his pistol and did thereby, then and there inflict a mortal wound upon Smith of which mortal wound Smith died.

Not having proved this Yamada must be acquitted.

Yamada is not guilty of the murder of Smith.

Ajioaka didn't even pull a gun that day. He pleaded with Nakamura not to kill Smith but Nakamura said it was the Colonel's orders and so he must see that the Colonel's orders were carried out. Even as Ajioaka, we too wonder why Ajioaka was charged with this killing when Nakamura testified he saw to it that Smith was executed. Nakamura ordered Yamada to shoot and Nakamura gave all the orders.

Ajioaka should be acquitted.

This crime, the killing of Smith, is not a crime which either Yamada or Ajioaka should be charged with under the charge of murder. It is another instance of charging two "little men" with some one else crime.

Justice will be done in the case of the acquittal of both Yamada and Ajioaka. We pray that you do acquit them both.

Respectfully,

*Martin E. Carlson*  
Martin E. Carlson,  
Commander, U.S.N.R.

CC (13)

0151



CLOSING ARGUMENT FOR THE PROSECUTION IN THE CASE OF AJIOKA, MISAO AND YAMADA,  
KINOSHI. DELIVERED BY LT. CDR. J. A. REGAN, JUDGE ADVOCATE.

If it please the Commission.

Once again, a War Crimes Trial draws to a close - and once again, the defense speeches have been lengthy - so this one will not be.

Much has been said by defense counsel of the guilt of Nakamura and of the important part played by him in the murder of Charlie Smith. It is not the intention of the Judge Advocate to either agree with defense counsel or to defend Nakamura. The guilt or innocence of Nakamura is not of importance in this case for, as the commission well knows, Nakamura is not an accused in this case. Whether or not the actions of Nakamura also made him guilty of the murder of Charlie Smith may be tested before a Military Commission at some future time - but they are not subject to the decision of this commission - for he is not an accused and the commission, in spite of the statements of defense counsel should withhold any judgement concerning the present witness, Nakamura.

The defense is still arguing the nationality of Charlie Smith and the jurisdiction of this commission even though their previous protests were swept away by the commission when it rendered its prior decision that it did as it does - have jurisdiction. At that time the Judge Advocate advised the commission that in matters of pedigree a member of a family is a competent witness and Mrs. Smith, being the wife of the victim and the mother of his seven children, was competent to testify that Charlie Smith was a British national. The mere presence or absence of a marriage certificate is not controlling as to the question of whether or not Rita Smith was the wife of Charlie Smith. The marriage certificate is merely additional evidence and in the present case it would have been merely corroborative for Mrs. Smith from the stand testified as to her marriage to the victim by a Catholic priest - and there was no evidence presented by the defense to disprove it. Oral testimony is just as valid as documentary evidence and there exists no reason why the commission should doubt the testimony of Mrs. Smith either concerning the marriage or the nationality of her husband.

Japanese counsel say how can anyone guarantee that he did not change his nationality while he was living in a Japanese mandate for over twenty years? Mere residence does not confer nationality and no act of renunciation was performed by the victim. We not only have the statements of his wife to aid us in this point but even the statements of the accused bear out the fact that Charlie Smith was known far and wide as an Englishman - and he was so called by all the Japanese who came in contact with him. The commission may be confident that its decision concerning jurisdiction was a proper one and that the victim was a British national.

As was pointed out by my fellow Judge Advocate in his opening statement to the commission, the legalistic words "wilfully, feloniously, with premeditation and malice aforethought" merely mean intentionally and it is the contention of the prosecution that Yamada's shot was fired intentionally and it did result in the death of the victim. The commission is under no obligation to believe that Yamada lacked a criminal intent merely because he so stated. In fact, all the aspects of the case belie his denial. Yamada knew that Smith was to be executed even before he brought him from the air raid shelter and even before he accompanied him to the scene of the execution. Yamada overheard Nakamura

"END (1)"

0152

telling Ajioka in Ajioka's room that Smith was to be executed. Yamada told of this in the statement which was introduced into evidence and while he, from the stand, admitted that he had lied in some particulars in his statement - it was only concerning Nakamura that he had told untruths. We can better judge Yamada's actions from the other evidence and all the surrounding circumstances rather than from his testimony. Yamada, like most men confronted with a trial for a crime, has no great love for the truth and since he has admitted that he has not told the truth in the past there is no reason to believe that he is now telling the truth when it consists of a denial that he intended the most reasonable and probable result of his acts - namely, that the shot fired from his pistol into the head of the victim would bring about Smith's death. Yamada murdered Smith and he should be found guilty of the murder.

And now we come to a consideration of the other participant, Ajioka. It was never the contention of the prosecution that Ajioka fired into the body of Smith. We hold Ajioka to be responsible under Sec. 590 of Title 18 of the U.S. Code which defines Principals - and says that one who "aids, abets, counsels, commands, induces, or procures" the commission of a crime is a principal and we hold that Ajioka was a principal along with Yamada in the murder of Smith and he should also be found guilty of it. He aided in the commission of the murder by insuring that a grave be prepared - he abetted the commission of the murder by his presence and he counselled the commission of the murder by his cry of "Yamada, do it, do it," - and the commission knows the results of his various actions for Charlie Smith was buried that day.

I doubt that Ajioka in December of 1944 considered himself such an unimportant figure as he would now have us believe. He was a warrant officer and even in the Japanese Army a warrant officer is a figure of some importance. He was the Officer-in-Charge of the Gasupan Military Police Detachment. It matters little whether or not this detachment was officially designated as such on the rolls of the Japanese Army. It was an actual detachment - it had members - and it had an officer in charge, Ajioka. Today, it suits Ajioka to minimize his position but in December of 1944, his position was not quite so unimportant.

Ajioka insists that he did not receive the telephone call from Nakamura. It was never the contention of the prosecution that he had received it - however, he acted upon the instructions given by Nakamura in this telephone call. We have the testimony of Nakamura that Ajioka ordered him to dig a hole and we have the testimony of the witness Uemura that Ajioka told him to accompany the detail so he could subsequently locate the hole. The witnesses were definite that it was Ajioka who had given them these orders. Although to be helpful to Ajioka and also themselves they were hazy on what further instructions they were given - and they must have been given further instructions for it is difficult to believe that one would order men to dig a hole without telling them either the purpose of the hole so they themselves would know how to dig - or else the specific dimension - if the purpose was not disclosed. We have the testimony of Nakagawa and Uemura though Ajioka has of course denied even knowing about the grave - but then Ajioka has denied everything Nakamura has testified that after he talked to Ajioka - Ajioka left, then returned and reported "all preparations have been made" - then the execution party left. When they got to the edge of the jungle, Ajioka gave orders to Uemura to search for the hole - so he must have known that it was dug and who had dug it - though he denies this also. At the scene, we are told that after the order was given "Ajioka shouted "Do it - do it" - though he denies this also.

Ajioka was more than a spectator that day in December. He "aided,

"DD (2)"

0153



abetted, and counselled" - and for his participation he should be found guilty.

Quotes: -

"In almost every war crimes case the defendants have insisted that their actions were the result of orders of a superior officer. And in almost every war crimes trial this argument has been rejected by the court. It was so in the Nuremberg trials and it should be so before this commission. SCAP Regulations, basic letter SCAP 000.5, 5 December 1945, says, "The official position of the accused shall not absolve him from responsibility....further action pursuant to the order of an accused's superior or of his government shall not constitute a defense but may be considered in mitigation of punishment if the commission determines that justice so requires."

On Superior Orders - From the Decision of the Nuremberg Tribunal:

"The charter specifically provides in Article 8: 'The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.' The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible." Mr. Justice Biddle in reading the decision of the High Tribunal at Nuremberg said: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

Grotius, the Father of International Law has said, "There is no danger from prisoners and those who have surrendered or desire to do so. Therefore, in order to warrant their execution it is necessary that a crime shall have been previously committed. Such a crime, moreover, as a just judge would hold punishable by death."

Charlie Smith committed no crime - but he was executed.

These accused have committed a crime and we as the Commission as just judges find them guilty for it.

Respectfully,

*Joseph A. Regan*  
JOSEPH A. REGAN,  
Lieutenant Commander, U. S. Navy,  
Judge Advocate.

"DD (3)"

0154

(C.-32)

MEMORANDUM

(Oval Stamp)	To	
Inspector of Examiners		
CUSTOMS		WHOM IT MAY CONCERN
SHANGHAI		
CUSTOM HOUSE		
Shanghai 17th December 1926		

This is to certify that the bearer of the, Mr. Charles Smith, who is at present in Palao, Caroline Islands, South Seas, is my brother who was born on the 5th of February, 1875 in Victoria, HongKong. My brother, like myself, is a British Subject and was educated at St. Joseph's School at HongKong. He left HongKong about the year 1890 for the Caroline Islands where he has settled ever since. I am perfectly prepared to furnish any further particulars that may be required.

Peter H. Smith.,

/s/ Peter H. Smith  
Chief Appraiser and Inspector of Examiners.

A TRUE COPY. ATTEST:

*Joseph A. Regan*  
JOSEPH A. REGAN,  
Lieutenant Commander, U. S. Navy,  
Judge Advocate.

"Exhibit 1"

0155





"Exhibit 2"

PHOTOGRAPH  
of  
Charlie Smith

CERTIFIED TO BE A TRUE COPY  
*J.P. Kenny* Lt. USN

"Exhibit 2"

0156



"Exhibit 2"

PHOTOGRAPH  
of  
Charlie Smith

"Exhibit 2"

0157



1. In November, 1944, the South Seas Kempeitai (headquarters and detachment) moved from the Misuzu Bridge Barracks to the Shisuiizan Barracks.

At this time those who were sick were left behind to recuperate and, at the same time, to guard the remaining buildings. Those who remained behind are as follows:

The two men, Warrant Officer AJIOKA (tuberculosis) and Sergeant NAGATOME (beriberi fever patient); two auxiliary kempeis who acted as assistants (IWAMOTO and HAYASHI); two employees (UEMURA and one other).

2. In the early part of December of the same year Corporal NAKAGAWA came to MISUZUBASHI from SHISUIZAN to recuperate from illness (swelling all over the body) (beriberi) and Sergeant NAGATOME who had recovered from his illness left for SHISUIZAN as his relief.

3. On the twenty-second of December of the same year (time unknown) there was a telephone call from First Lieutenant SANO of headquarters, the gist of which is as follows: "According to a request of group /TN. headquarters/ three foreigners are to be put in protective custody at the kempeitai. However, as there is no housing at Shisuiizan, they will stay at Misuzu Bridge for a while. Therefore, clean and prepare the auxiliary kempei room at the entrance for the protective custody. Furthermore, as there are many persons who are ill at Misuzu Bridge Sergeant YAMADA will be sent from headquarters and is to be put in charge of guarding the foreigners."

4. The next day, 23 December, Headquarters Special Police Sergeant YAMADA came bringing one Englishman (about sixty years old) with him and said, "It is the order of Head of Special Police SANO that he be kept at MISUZUBASHI for a time." Therefore, they stayed together in the auxiliary kempei barracks which had been prepared the day before in accordance with the order of First Lieutenant SANO.

The next day, 24 December, First Lieutenant SANO and Sergeant Major TAMAMOTO brought two Germans (a couple about forty and thirty-five years of age), gave orders, "Until you get special orders keep them here in protective custody for a while," and returned.

Therefore, during the night these three foreigners were kept in the auxiliary barracks and during the daytime they were evacuated to air raid shelters because of the heavy bombing attacks. During this time a telephone call came from First Lieutenant SANO saying, "Inquire into the personal history of the three persons, write it down and bring it," so I made inquiries and sent /TN. the personal histories/.

AM

5. On the twenty<sup>ninth</sup>-~~eighth~~ of December of the same year an order came from headquarters by telephone (I have forgotten whether it was Captain NAKAMURA or First Lieutenant SANO), "Put one auxiliary kempei on the German couple and send them to their home today." Thereupon, in the evening of the same day, about the time when the bombing attack was over, they were put on a truck which went by on the road in front. Auxiliary Kempei IWAMOTO was sent with them and they were sent home.

AM

6. The ~~next day~~, <sup>31</sup> December, about two o'clock in the afternoon, during a business call on Lieutenant (junior grade) HARADA at the navy branch provisions depot which was about a thousand meters in back and to the west of the barracks, HAYASHI (auxiliary kempei) came and relayed the message, "The

detachment commander (Captain NAKAMURA) came and said, 'Call him FN. AJIOKA.'" I hurriedly returned to Captain NAKAMURA who had brought one or two auxiliary kempeis with him from Shisuizan and, taking the Englishman with him, was about to depart with Sergeant YAMADA. Therefore, I saluted and reported, "Warrant Officer AJIOKA has just returned," and Captain NAKAMURA became excited and scolded me saying, "Where did you go? Didn't you know I was coming? You probably went to some girl's place to amuse yourself." Then he said, "I have borrowed YAMADA and am taking him along." He started off four or five steps with the party described above, stopped again and said, "You come along with us." However, I said, "I don't feel very well. Then, because he gave me the order, 'As it isn't far, come along!' I went with them. When I asked him ~~immediately~~ <sup>where</sup> ~~where~~ <sup>are you taking him and for what purpose,</sup>" Captain NAKAMURA said, "We are going to dispose of the Englishman by orders of the unit commander." When I inquired after a little while, "How would it be to send the Englishman home?" he scolded me saying, "It's none of your business." When we came to a place where an air raid shelter had been destroyed in the middle of a mountain grove which was about three thousand meters east of Misuzu Bridge, Captain NAKAMURA said, "Do it here." The Englishman was made to kneel down in front of the above mentioned air raid shelter and Captain NAKAMURA ordered Sergeant YAMADA, "YAMADA, shoot!" Therefore, Sergeant YAMADA killed the Englishman with one shot from about four meters behind and the auxiliary kempei, who accompanied Captain NAKAMURA from Shisuizan, covered him over with dirt and buried him in front of the above mentioned air raid shelter.

As for this case, Captain NAKAMURA was ordered by Lieutenant Colonel MIYAZAKI, "Put him to death by shooting him," but I believe Captain NAKAMURA coerced the members of the Misuzu Bridge Unit. As I wrote before, I proposed to "save his life" but the execution was inevitable and, as ordered, I only accompanied the party.

I hereby swear to the above.

26 June 1947.

AJIOKA, Misao.

I hereby certify the foregoing to be a true and complete translation, to the best of my ability, of the original document in Japanese.

*Frederick F. Tremayne*  
FREDERICK F. TREMAYNE,  
Lieutenant (junior grade),  
United States Naval Reserve,  
Interpreter.

"Exhibit 3 (2)"



I Missao AJIOKA being duly sworn on oath, state that I have had read to me and understand the translation of the foregoing transcription of my statement dated the 16th day of June 1947 and consisting of six pages, and that it is the truth to the best of my knowledge and belief.

AJIOKA. MISSAO

味足 操

Subscribed and sworn to before me this the 9th day of December 1947.

W. L. Egdien  
Comdr., U.S.N.

Guar. H.I.

I, Frederick A. Savory, civilian interpreter, being duly sworn on oath, state that I truly translated the above statement and oath to the witness and that the witness thereupon in my presence affixed his signature thereto.

Frederick A. Savory  
Interpreter.

Subscribed and sworn to before me this the 9th day of December 1947.

W. L. Egdien  
Comdr., U.S.N.

"Exhibit 3 (3)"

0160

昭和 年 月 日

No. 二  
昭和十九年十一月(日不詳) 南洋軍兵隊  
本部 会派共(全員) 美鈴橋宿舎ヨリ  
鶏端山宿舎ニ移轉セリ  
此際疾病者ハ病氣静養ヲ兼ねテ残置  
建揚保護ノ為残置シ命セラレタリ  
残置者ハ記ノ如シ  
味田准尉(肺病) 永留軍曹(肺氣炎熱患  
者)ノニ名ニシテ之レが援助者トシテ補助  
兵ニ名(岩本・林) 傳人ニ名(上村外一名)  
ナリヤ  
今年十二月初旬中川伍長(病氣) 全身膨張  
脚氣ニヨリ鶏端山ヲ静養ノ為美鈴橋

"Exhibit 4 (1)"



2

No.

昭和 年 月 日

ニ来リ交代トシテ永留軍曹病氣快ナリシ  
ニヨリ瑞山ニ赴任ヤリ  
三、同年十二月二十二日(時階不詳)本部佐野中尉  
殿ヨリ要旨凡ノ電話アリ  
日集團ノ依頼ニヨリ瑞山ニ依テ外國人三名ヲ  
保護スルコトニナリシモ瑞山ニハ家屋ナキ為美  
鈴橋ニテ暫日クダカラ保護スルコト依テ入口ノ補  
助金兵ノ部屋ヲ増設セヨ 尚美鈴  
橋ハ病人多キ為外人保護係トシテ山田軍  
曹ヲ本部ヨリ派遣セシム  
四、翌十二月二十三日本部持高課山田軍曹ハ  
英人一名(年六十六歳位)ヲ同伴 日暫時  
美鈴橋ニテ十人ヲ預ル 橋佐野課長ノ命

"Exhibit 4 (2)"

0162

ナリト来レリ依テ前日佐野中尉故ノ命ニ  
ヨリ準備セル補遺金告ニ同居セリ  
翌十二月二十四日佐野中尉玉本曹長ハ独  
逸人ニ名(夫婦年齡四十、戈位ト三十五、戈位)ヲ  
同伴別ニ命令合スル迄暫ク保護スル様  
ニト命ジ退去セリ  
依テ以上外國人三名ハ夜間ハ補助遺金告  
合ニ書目間ハ標取テ金告シキ有防犯之虞  
ニ退避シアリタリ此間佐野中尉殿ヨリ  
三名ノ後歴ヲ聞イテ書イテ持込セヨトノ電  
報アリ聞キテ送付セリ  
而シテ同年十二月二十日日本部(中村大尉又  
ハ佐野中尉カセヒレタルカ)ヨリ電報ヲミテ

No. 五  
昭和 年 月 日

"Exhibit 4 (3)"



4

No.

昭和 年 月 日

「供逸人夫婦ハ補助官ニ名ヲ附シ、本日より  
 宅ニ送ラレメヨルトノ命令アリ、依テ同日夕方爆  
 撃ノ終リタル頃、表道路疾走、トラスクニ便乗、老  
 ナキ補助官ヲ附シ、歸宅セシメタリ  
 六月十一日二十日、午後二時頃、所ノ所用、爲  
 宿舎、西才裏、一千米ヲ隔タル海軍糧秣倉  
 庫、ニ石田中尉、出シ、訪問、面接中、林（補  
 佐）来リ  
 「合隊長、敵中村大尉」が来ラレテ、呼ンデ来、イ  
 トラシマシノ、ト取次ギタルヨリ、自、ガ歸ヘリ  
 タルニ、中村大尉、敵ハ補助官、一名、ニ名、ヲ、  
 端、ヨリ、連、来、リ、英人、ノ、同、伴、山、内、軍、曹、ト、其  
 ニ、出、向、セ、ン、ト、シ、ア、リ、タル、ヨリ

"Exhibit 4 (4)"

0164

No.

昭和 年 月 日

味岡准尉唯今ヲ歸ハリマシタレト敘禮臣報告  
セルニ中村大尉數ハ「オノ前ハ何處ニ行ツデイタカ  
儀」東テイルガワカラサカツタカ女ノ處ニ遊ビニ行ツテ  
屋タダラウレト叱言在田敷コ山田ヲ借リテ運シテ行  
ク「ト言ハレ」刑部一行ト共ニ西ニ歩ン則進又之戻  
リ「私ニオノ前モ」諸ニ来イ「ト云ハレタルモ」私サシ体  
ノ「誰子カ」要イ「ニ」カトホ「タルニ」遠クナイカラ来イ  
ト命セ「ル」タルヲテ同行途中「何」為ニ「何處迄」送ル  
ノ「デ」カ「ト」問ヒタル中村大尉ハ「隊長ノ命ヨリ」英人ヲ  
處死スル「ト」言ハレタルヨリ暫時シテ「私ハ」英人モ  
衆ヘ「送」ツテ「ヤ」ツテ「ハ」ドウ「デ」スカ「ト」所見シタルニ「コ」ノ前ノ知  
ツタコト「デ」ナイ「ト」叱言「美」鈴橋「東」オ「約」三「千」米ノ  
山林中ニ他隊ノ跡ヲ「見」タル處迄「来」リ

Exhibit 4 (5)

0165



No.

昭和 年 月 日

スルニ中村大尉ハ「此處デヤルト言ハレ右防兵之壕  
前ニ英人ヲ扼生セシメ山田軍曹日ニ對シ中村大尉ハ  
山田軍曹テレート命ゼラセタルヨリ山田軍曹ハ英人ノ後方  
約四米ヨリ一発ニテ銃殺右防兵之壕ニ中村大尉ニ  
對シ山田ヨリ隨行セル補助富田ハ土ヲ掩蔽ヒ埋設セリ  
尚本陣ハ宮崎中佐數ヨリ中村大尉數ニ銃殺スベ  
シト命ゼラセタルニ美鈴橋隊員ヲ誘行シタルニ非  
ラスヤト田中考セラル、私ハ前記ノ如ク「英人助命  
ヲ進言セル外何處テノ處置且モ不可能ニシ  
テ命令ノ儘唯隨行セルノミ  
右折言書ス

昭和二十二年六月二十六日

味岡 操

"Exhibit 4 (6)"

I will relate in detail concerning the affair in which, by the order of superior officers and in the presence and under the supervision of superior officers, I, together with the said superior officers, did kill with a pistol an Englishman (Smith).

1. Around November, 1944, the Chamorro natives fled in a group. As the wife of Smith (a Chamorro native) was included among them, unit headquarters ordered three persons, a German couple and the Englishman (Smith) who were to be investigated as having had something to do with this incident, to be committed to the Gasupan Detachment (commanding officer - Warrant Officer AJIOKA). I recall that the time of confinement was approximately eight days beginning on the twentieth of December of that year. It seems to me that during that time the unit commander (Lieutenant Colonel MIYAZAKI) came twice.

2. The German couple was sent home around the twenty-seventh of December but the Englishman was put to death with a pistol the previous day, that is to say the twenty-sixth of December, under the direction of Captain NAKAMURA by orders from the unit commander (I believe Captain NAKAMURA conveyed the orders). The circumstances are as follows:

3. About ten-thirty in the morning around the twenty-sixth of October, 1944, Captain NAKAMURA of unit headquarters came to the Gasupan Detachment and talked over various matters with Warrant Officer AJIOKA. I was also nearby (as there was only one room natural conversation could be heard). At that time Captain NAKAMURA gave orders saying something like, "It is the order of the unit commander. Execute the Englishman (Smith). As for carrying it out, it will be done today." Warrant Officer AJIOKA made a wry face and said something like, "I don't know whether it's such a good idea to kill him." I also thought, "What a shame. We are doing a foolish thing, aren't we," and actually had an unpleasant feeling. (Because the orders of the unit commander and our superior officers were the same as orders from the Emperor, we were compelled to obey absolutely.

4. During this time it became time to eat the noon meal (about eleven-thirty) and everyone ate. After resting for a little while, Captain NAKAMURA and Warrant Officer AJIOKA put on their shoes to go. At this time, as if he had suddenly remembered, Captain NAKAMURA gave orders to me, "Sergeant YAMADA, you also bring a pistol." Therefore, I obeyed as ordered.

5. Bringing the Englishman (Smith), who had taken refuge in the air raid shelter, I followed along behind Captain NAKAMURA and Warrant Officer AJIOKA. From the detachment (MISUZUBASHI) I believe we walked about two kilometers to the northeast. When we came to place which seemed to be a hole in a depression in a mountain grove which we had entered by turning to the right about ten meters from the road (mountain road), Captain NAKAMURA ordered me, "This way! Have him squat down." Therefore, I had the Englishman (Smith) do this. Right after that Captain NAKAMURA shot the Englishman (Smith) with his own pistol. At that moment, Smith's head dropped and he seemed to have died.

6. Then he gave orders to Warrant Officer AJIOKA, "AJIOKA, you shoot, too," but as Warrant Officer AJIOKA was bewildered and his pistol was not brought out, ~~he~~ <sup>he</sup> shouted the order to me, "YAMADA, shoot!" I thought to myself that I didn't want to do it, but it would be awful to be punished for the crime of opposing orders or something. Therefore, as there was nothing else to do, in accordance with the orders of Captain NAKAMURA, I drew my pistol from the holster and performed the operation of putting in a full cartridge clip for an empty cartridge clip, but, as the bullets became jammed, I became slightly impatient because the bullet would not come out. When I tried to fix it I accidentally pointed the muzzle at Captain NAKAMURA who was standing on my left. At this Captain NAKAMURA scolded me, "That's dangerous! Watch out!" Therefore, with a start I unconsciously pointed the front of the



pistol to the right (pointed it in front). At this moment the bullet fired. During this time I was being hurried along by Captain NAKAMURA who said, "Quickly, quickly," and added to that, being inexperienced in the method of operating pistols, I became all the more flustered. Even at the time I was at a loss to know whether the bullet fired at that moment hit Smith or went into the ground.

7. Then, covering him over with dirt and making a grave, I thought that the person who had died was now a spirit, and folded my hands in prayer. Then, as Captain NAKAMURA said to Warrant Officer AJIOKA, "Well, that's that. Thank you for your trouble. You can return now," I returned to the detachment with Warrant Officer AJIOKA. I think after that Captain NAKAMURA returned to unit headquarters.

8. In the manner related above I fired the pistol according to orders. However, before I shot Captain NAKAMURA had already fired one shot and it is my opinion that the Englishman (Smith) died on this account.

9. Furthermore, we non-commissioned officers were absolutely not allowed to use guns on our own authority. The rule was that it was all right to use them only when we had orders or had received permission from superior officers.

10. The next thing concerning the incident of the murder of the Englishman (Smith) was after the war when the unit commander assembled us, even the non-commissioned officers and enlisted men, in front of the unit commander's office and, summing up the other three incidents, gave orders to us as follows; that is to say, he ordered us in an intimidating manner to "say that Sergeant YAMADA accompanied the Englishman (Smith) to NGARDMAU. If it happens that you expose the truth you will be executed." He ordered us in such a fashion as to prevent our telling the truth by saying, "If these things become known to the authorities you will lose your heads." After that those who were connected with (TN. any of the affairs) were ordered to assemble separately. I went before Captain NAKAMURA with Warrant Officer AJIOKA, and Captain NAKAMURA said, "As the unit commander said just now, you absolutely must not say anything. Sergeant YAMADA must make a special effort because he is young. If the truth becomes known, you will lose your heads." What I have related above is everything I remember concerning the case of the Englishman (Smith).

Written on 24 June 1947  
YAMADA, Kiyoshi.

I hereby certify the foregoing to be a true and complete translation, to the best of my ability, of the original document in Japanese.

*Frederick F. Tremayne*  
FREDERICK F. TREMAYNE,  
Lieutenant (junior grade)  
U. S. Naval Reserve  
Interpreter.

I, Kiyoshi YAMADA being duly sworn on oath, state that I have had read to me and understand the translation of the foregoing transcription of my statement dated the 24th day of June 1947 and consisting of two pages, and that it is the truth to the best of my knowledge and belief.

YAMADA, Kiyoshi.  
山田 清

Subscribed and sworn to before me this the 9th day of December, 1947.

W. H. Caden  
Comd., U.S.N.

Guar., M.I.

I, Frederick A. Savory, civilian interpreter, being duly sworn on oath, state that I truly translated the above statement and oath to the witness and that the witness thereupon in my presence affixed his signature thereto.

Frederick A. Savory  
Interpreter.

Subscribed and sworn to before me this the 9th day of December, 1947.

W. H. Caden  
Comd., U.S.N.

"Exhibit 5 (3)"

0170





一、二、三、四、五、六、七、八、九、十、十一、十二、十三、十四、十五、十六、十七、十八、十九、二十、二十一、二十二、二十三、二十四、二十五、二十六、二十七、二十八、二十九、三十、三十一、三十二、三十三、三十四、三十五、三十六、三十七、三十八、三十九、四十、四十一、四十二、四十三、四十四、四十五、四十六、四十七、四十八、四十九、五十、五十一、五十二、五十三、五十四、五十五、五十六、五十七、五十八、五十九、六十、六十一、六十二、六十三、六十四、六十五、六十六、六十七、六十八、六十九、七十、七十一、七十二、七十三、七十四、七十五、七十六、七十七、七十八、七十九、八十、八十一、八十二、八十三、八十四、八十五、八十六、八十七、八十八、八十九、九十、九十一、九十二、九十三、九十四、九十五、九十六、九十七、九十八、九十九、一百。

0172



(3) 射サレタ訳デス。此、間私ハ中村大尉カラ早クノト急  
ガサレ拳銃ノ操法ノ未熟カ加ハツテヨクイニ「アセリ」無  
我無中ノツタノデス。其、瞬間ニ拳射シタ彈ハ「スミス」  
ニ当ツタモ、カエ地ニ当ツタモ、カ當時デモ私ハ判断  
ニ迷ヒテ居リマシタ。

ソニテエラカムセテ墓ヲ作り私ハ「死ニヌ者ハ神タト  
思」ツテ合掌シマシタ。中村大尉ハ「ソレデヨシ御苦  
勞ヌツタ」取ツテヨロシイ「ト味岡大尉ニ「エサマシタ」  
「テ私ハ味岡大尉ト共ニ分遣隊ニ取リマシタ  
中村大尉ハ其、修隊本部ニ取ツタ」存デス。

以上申エマシタ通り私ハ命令ニ依ツテ拳銃ヲ射  
マシタガ私、射ツタ前ニハ既ニ中村大尉ハ一撃  
撃ツテ居リマシテ其、爲ニ英人(スミス)ハ絶命シ  
マシタト判断シマス。

尚私達下士官、銃ノ使用ハ「絶対」ニ強断ニ使  
フト亦出秉ズ士官、命令或ハ許可アル時ニ限リ  
使用シテ良イ規則ニナツテイマシタ。

次ニ此、英人(スミス)殺害事件ニ就イニ終戦後  
防々、私達下士官ハ兵隊立モ防々室ノ前ニ集  
合セシナレ他ノミツノ事件ト合ハセマシタ。存ニ命  
令シマシタ。即チ「英人(スミス)ハ山田軍曹カ「カラス  
ア」ニ送ツテ行ク事ニスルモシ御前達ガ真相

④ラ爾多スル村ノ事ナレバ、昨前達ハ死刑ニアツト  
ト恐喝スル村ニ命令シ「コレガ当局ニ知レバ、昨  
前達ハ首ガナイド」ト私達、真相ヲ露シテ防  
止スル村ニ命令ヲシタ後、各関係者ヲ別  
々ニ集合シ命セラレ私ハ中村大尉、下ニ味岡  
大尉ト共ニ行キ中村大尉ハ「今隊長ガ云ハ  
レタ村ニ絶シニ云フテハ、イタナク山田軍曹  
ハ若インヌカラ充分ト腹ヲスエテ、レバ、イ  
タナク、モシ真相ガ知レタラ御前ハ首ガナイド  
ト云イマシタ。

以上申上コシテ、英人(スミス)ノ事件ニ関スル  
事、記憶ミテイル總テスアリマス。

一九四七年六月二十四日記ス

右 山田 靖



FF12/A17-10(2)  
02-JDM-fsk

UNITED STATES PACIFIC FLEET  
COMMANDER MARIANAS

Serial: 3546(a)

31 March 1948

The military commission, composed of Army, Navy, and Marine Corps officers, in the foregoing case, by precept dated November 8, 1947, was ordered convened November 20, 1947, or as soon thereafter as practicable by the Commander Marianas Area pursuant to his inherent authority as a military commander and the specific authorization of the Commander in Chief, U. S. Pacific Fleet and High Commissioner of the Trust Territory of the Pacific Islands (CinC U.S. PacFlt serial 0558 of 8 Mar. '46; ComMarianas Desp. 292336Z Sept. '47; CinCPacFlt Desp. 020103Z Oct. '47; SecNav Desp. 081946Z Oct. '47; CinCPacFlt Desp. 092353Z Oct. '47). The commission was authorized to take up this case as indicated in the precept. The order for trial (charges and specifications) was issued 6 December 1947 and served on the accused on 9 December 1947. The trial was held under authority of Naval Courts and Boards except that the commission was authorized by the precept to relax the rules of naval courts to meet the necessities of the trial and to use the rules of evidence and procedure promulgated 5 December 1945 by the Supreme Commander for the Allied Powers in his Regulations Governing the Trials of Accused War Criminals and modifications thereof, as necessary to obtain justice.

On page 1 of the record it is noted that the commission, before its members were sworn, approved a stipulation, concerning the security of classified matter, entered into by the judge advocate and the defense counsel. It does not appear from the record that the stipulation was made with the specific consent of the accused. "Until a court is duly sworn (organized) according to law, it is incompetent to perform any judicial act except to hear and determine challenges against its members." (Sect. 394, N.C.&B.). Accordingly the action of the commission in approving the stipulation was erroneous. Further when a stipulation is made it should be followed by an affirmative statement in the record to the effect that the accused acquiesced in the agreement made by his counsel (CMO 1-1942 p. 290). However, here the stipulation accepted related only to matters pertaining to the security of classified material and did in no way involve the issues of the case. It is the opinion of the convening authority that the substantial rights of the accused were not prejudiced. (CMO 2-1943, p. 183).

The attached certified copy of death certificate in the case of AJIOKA, Misao is hereby made a part of this action. AJIOKA now being deceased, the sentence as to him can not be executed.

Subject to the above remarks, the proceedings, findings on Charge I and the specification thereunder and sentences in the foregoing case of AJIOKA, Misao and YAMADA, Kiyoshi are approved.

YAMADA, Kiyoshi will be transferred to the custody of the Commanding General of the 8th U. S. Army, via the first available United States ship, to serve his sentence of confinement in Sugamo Prison.

The remains of AJIOKA, Misao are buried in plot #45, lot 426 of the Japanese cemetery, Asan, Guam.

*C. A. Pownall*  
C. A. POWNALL,  
Rear Admiral, U.S. Navy,  
The Commander Marianas Area.

0176

INTERNATIONAL RED CROSS  
CENTRAL BUREAU FOR AMERICA

DEATH CERTIFICATE

1. SURNAME		2. FIRST NAME	
3. MIDDLE NAME		4. INITIALS	
5. GRADE OR RANK		6. BRANCH	
7. SERVICE NUMBER		8. NUMBER OF REGISTRATION	
9. PLACE OF BIRTH		10. DATE OF BIRTH	
11. PLACE OF DEATH		12. DATE OF DEATH	
13. CAUSE OF DEATH		14. PLACE OF BURIAL	
15. NAME OF BURIAL PLACE		16. DATE OF BURIAL	
17. NAME OF WITNESS		18. SIGNATURE	
19. NAME OF OFFICIAL		20. SIGNATURE	
21. NAME OF OFFICIAL		22. SIGNATURE	
23. NAME OF OFFICIAL		24. SIGNATURE	
25. NAME OF OFFICIAL		26. SIGNATURE	
27. NAME OF OFFICIAL		28. SIGNATURE	
29. NAME OF OFFICIAL		30. SIGNATURE	
31. NAME OF OFFICIAL		32. SIGNATURE	
33. NAME OF OFFICIAL		34. SIGNATURE	
35. NAME OF OFFICIAL		36. SIGNATURE	
37. NAME OF OFFICIAL		38. SIGNATURE	
39. NAME OF OFFICIAL		40. SIGNATURE	
41. NAME OF OFFICIAL		42. SIGNATURE	
43. NAME OF OFFICIAL		44. SIGNATURE	
45. NAME OF OFFICIAL		46. SIGNATURE	
47. NAME OF OFFICIAL		48. SIGNATURE	
49. NAME OF OFFICIAL		50. SIGNATURE	
51. NAME OF OFFICIAL		52. SIGNATURE	
53. NAME OF OFFICIAL		54. SIGNATURE	
55. NAME OF OFFICIAL		56. SIGNATURE	
57. NAME OF OFFICIAL		58. SIGNATURE	
59. NAME OF OFFICIAL		60. SIGNATURE	
61. NAME OF OFFICIAL		62. SIGNATURE	
63. NAME OF OFFICIAL		64. SIGNATURE	
65. NAME OF OFFICIAL		66. SIGNATURE	
67. NAME OF OFFICIAL		68. SIGNATURE	
69. NAME OF OFFICIAL		70. SIGNATURE	
71. NAME OF OFFICIAL		72. SIGNATURE	
73. NAME OF OFFICIAL		74. SIGNATURE	
75. NAME OF OFFICIAL		76. SIGNATURE	
77. NAME OF OFFICIAL		78. SIGNATURE	
79. NAME OF OFFICIAL		80. SIGNATURE	
81. NAME OF OFFICIAL		82. SIGNATURE	
83. NAME OF OFFICIAL		84. SIGNATURE	
85. NAME OF OFFICIAL		86. SIGNATURE	
87. NAME OF OFFICIAL		88. SIGNATURE	
89. NAME OF OFFICIAL		90. SIGNATURE	
91. NAME OF OFFICIAL		92. SIGNATURE	
93. NAME OF OFFICIAL		94. SIGNATURE	
95. NAME OF OFFICIAL		96. SIGNATURE	
97. NAME OF OFFICIAL		98. SIGNATURE	
99. NAME OF OFFICIAL		100. SIGNATURE	

0177



THE PACIFIC COMMAND  
AND UNITED STATES PACIFIC FLEET  
Headquarters of the Commander in Chief

Cincpacflt File  
A17-25

c/o Fleet Post Office,  
San Francisco, California.

18 APR 1948

Serial: 1847

The proceedings, findings on Charge I and the specification thereunder, and sentences in the foregoing case of AJIOKA, Misao, and YAMADA, Kiyoshi, and the action of the convening authority thereon, are approved.

As the accused AJIOKA, Misao, is now deceased, the sentence as to him cannot be executed.

The record is in conformity with Appendix D-14, Naval Courts and Boards, 1937, and Chief of Naval Operations serial 01P22 of 28 November 1945, transmitted to the Judge Advocate General of the Navy to be revised and recorded.

*Devitt C. Ramsey*  
Devitt C. Ramsey  
Admiral, U. S. Navy,  
Commander in Chief Pacific  
and United States Pacific Fleet.

To: Secretary of the Navy (Office of the Judge Advocate General).  
Re: Record of Proceedings of a Trial by a Military Commission of former  
Warrant Officer AJIOKA, Misao, I.J.A., et al.

Copies to:  
ComMarianas  
Cincpacflt War Crimes Officer, Guam

0178